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The Punitive Coma

J.C. Oleson

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The Punitive Coma

J.C. Oleson†

TABLE OF CONTENTS

Introduction ......................................................................................................................... 831
I. The Evolution of the American Prison ........................................................................... 833
   A. The Circular Transformation of Punishment ......................................................... 836
   B. The Economics of Celling America ........................................................................ 844
   C. Bursting at the Seams: The Tenacious Problem of Prison Crowding ................. 846
   D. Animal Factories: The Antisocial World of the Modern Prison ......................... 849
II. The Punitive Coma ....................................................................................................... 861
   A. Methods of Inducing the Punitive Coma ............................................................... 863
      1. Pharmacology of the Punitive Coma ................................................................. 865
      2. Minimizing the Risks Associated with Punitive Comas ......................................... 867
      3. The Economic Viability of the Coma-bay Prison ................................................ 870
   B. Legal Obstacles to the Implementation of the Punitive Coma ................................ 877
      1. The Punitive Coma and General Constitutional Challenges .............................. 878
      2. The Punitive Coma and Eighth Amendment Challenges ...................................... 886
      3. The Punitive Coma and Medicine as Legal Punishment .................................... 891
III. Hesitating at the Threshold: Reductio Ad Absurdum? ............................................ 897
Conclusion ......................................................................................................................... 900

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The Punitive Coma

J.C. Oleson

Throughout the last twenty years, the American rate of incarceration has grown dramatically. More than two million people are currently held in American prisons and jails. This Swiftian Comment argues that the prison is no longer an acceptable solution to the crime problem. It first identifies several serious defects with the American prison. Prisons have lost their mooring in penological theory and no longer retain a coherent theory of punishment. They are also prohibitively expensive and remain unacceptably crowded despite aggressive construction efforts. But American prisons are not merely cramped and expensive; they are affirmatively harmful to their inhabitants. The Comment then advances its modest proposal, suggesting that many of the prison’s deficiencies can be avoided by simply placing prisoners into narcotic (punitive) comas. Drawing from real therapeutic techniques, it describes the pharmacology of inducing the punitive coma, discusses the risks associated with the punitive coma, and discusses the cost-savings that punitive-coma prisons might enjoy. It considers various constitutional challenges that the punitive coma might face in American courts and concludes that the punitive coma must be a constitutional form of punishment. Although the idea of distributing punishment from the barrel of a syringe may seem monstrous and unthinkable, the punitive coma is actually less cruel and less unusual than the conditions throughout many of America’s prisons.

To be, or not to be, that is the question—
Whether 'tis nobler in the mind to suffer
The slings and arrows of outrageous fortune
Or to take arms against a sea of troubles,
And by opposing, end them? To die, to sleep—
No more; and by a sleep to say we end
The heart-ache, and the thousand natural shocks
That flesh is heir to - 'tis a consummation
Devoutly to be wished. To die; to sleep—
To sleep, perchance to dream. Ay, there's the rub . . . .

—William Shakespeare

INTRODUCTION

For several decades, the United States of America has been waging an aggressive war against crime. But ever since President Richard Nixon declared war on drugs in 1971, characterizing drug abuse as America's "public enemy number one," the real battleground of America's war against crime has been its campaign against drugs. The war on drugs has been a brutal one, and has altered the American sociolegal landscape. Discretionary sentencing has been replaced with rigid sentencing guidelines, correctional institutions have multiplied across the country like cancer cells, and although the rate of serious crimes has decreased in America


3. President Nixon told a group of media executives, "Drug traffic is public enemy number one domestically in the United States today and we must wage a total offensive, worldwide, nationwide, government-wide, and, if I might say so, media-wide." E.J. Epstein, AGENCY OF FEAR 178 (1977), available at http://www.druglibrary.org/schaffer/History/aof/AOF22.html (last visited Jan. 14, 2002). The war on drugs did not end with Nixon's resignation. In 1982, President Ronald Reagan was perfectly clear about his continued commitment to the war against drugs: "The mood towards drugs is changing in this country and the momentum is with us. We are making no excuses for drugs—hard, soft, or otherwise. Drugs are bad and we are going after them." President's Radio Address to the Nation, in 18 WKLY. COMPILATION PRESIDENTIAL DOCS. 1249 (Oct. 2, 1982). Seven years later, President George Bush reaffirmed President Reagan's commitment to the war. In a televised speech, President Bush told America's schoolchildren: "Drugs have no conscience.... They just murder people. Young and old, good and bad, innocent and guilty—it doesn't matter." Bush Gives Anti-Drug Talk to Kids, MIAMI HERALD, Sept. 13, 1989, at 1A.


5. Even before President Reagan committed his administration to a sustained war on drugs, the Supreme Court observed the consequences of the legislature's clampdown on narcotics use: "The history of the narcotics legislation in this country 'reveals the determination of Congress to turn the screw of the criminal machinery—detection, prosecution and punishment—tighter and tighter.'" Albernaz v. United States, 450 U.S. 333, 343 (1981).


American penology ... is in shambles. ... The law predetermines to hold responsible and punish any should they transgress the law. For most, the punishment is prison. Few question why. Society seems somehow to think collectively that we must only imprison. It is a seemingly fitting epilogue to a criminal trial. Prison [however] is systemically unsuccessful except as a temporary human warehouse, a social bandaid. ... Is it not time we recognize the hard fact that our system is not correcting significant numbers of malefactors? Not preventing crimes? Not deterring criminals? Not assuring anyone's safety? ... Our penological system stumbles uncertainly in darkness, clinging to antiquated and ineffective notions. The American prison is like a cathedral to a false god. Our response—build more of them.

Id. at 4-9.
since 1992, the prison population continues to swell to unprecedented levels.9

The incarcerated population has reached dizzying new levels in the last few years, but the rapid growth of the American prison system is nothing new. Social scientists have been calling attention to the American prison crisis for years, alarmed penologists have been publishing thoughtful papers on the topic for more than a decade, and well-respected human rights organizations have been disseminating damning reports on the subject. To argue that American prisons are expensive and crowded is to beat a long-dead horse.

This Comment does not lament the state of American prisons. The time for such puerile academic arguments has passed. Instead, this Comment presents a very real solution to the American prison crisis. It explains that, with existing technologies, it is possible to place incarcerated

---


Never before have we incarcerated more or held more prisoners longer than we now do, and never before have we expended a greater share of wealth on doing so. . . . It is controversial and as yet not demonstrable whether the increase in penal severity has been a major factor in falling crime rates. If it turns out to be so, we should be left with the baleful reality that we live in a society that can't keep the peace without keeping huge segments of its population incarcerated. If it turns out not to be so, we should be faced with the equally baleful reality that we live in a society that misguidedly diverts shocking amounts of its wealth to imprisoning its people in the futile pursuit of its greater security.

Id. at 982; see Eric Schlosser, The Prison-Industrial Complex, 282 THE ATLANTIC MONTHLY 51 (1998), available at http://www.theatlantic.com/issues/98dec/prisons.htm (last visited Jan. 14, 2002). “During the past two decades roughly a thousand new prisons and jails have been built in the United States.” Id. at 52. But this explosive growth has not kept pace with the number of incarcerated Americans. Thus, “America’s prisons are more overcrowded now than when the building spree began, and the inmate population continues to increase by 50,000 to 80,000 people a year.” Id. It is a bold social experiment. “No other society in human history has ever imprisoned so many of its own citizens for the purpose of crime control.” Id. (citations omitted). The State of California is at the fore of this social experiment. “The state [of California] holds more inmates in its jails and prisons than do France, Great Britain, Germany, Japan, Singapore, and the Netherlands combined.” Id.

10. See infra Part I.


THE PUNITIVE COMA

offenders into induced comas and to safely maintain them there for sustained sentences.\textsuperscript{14} It might be possible to suspend prisoner consciousness for weeks, months, years, even for decades. Such a regime would allow the dense packing of offenders into limited space, with none of the undesirable side effects typically associated with prison crowding. For where there is no waking consciousness, there can be neither depression nor aggression, neither suicide nor rape.\textsuperscript{15}

This Comment unfolds in three Parts. Part I traces the development of the American prison-industrial complex, considering in particular the triumph of the warehouse prison as our dominant means of punishment. It arrives at four unified conclusions: (1) the warehouse prison has lost its mooring in penological theory and no longer retains a coherent theory of punishment, (2) the warehouse prison is prohibitively expensive, (3) our warehouse prisons remain dangerously crowded despite aggressive construction efforts, and (4) the warehouse prison,\textsuperscript{16} while expensive and widespread, is not merely ineffective—it is affirmatively harmful. Part I therefore concludes that the warehouse prison is an inadequate solution to the American crime problem. Part II proposes a new solution: the punitive coma. Part II.A briefly outlines the medical and logistical challenges of inducing the punitive coma, as well as sketching out the possible cost savings of implementing the technique in coma-bay prisons. Part II.B identifies some of the legal challenges that the punitive coma might face, but suggests that, under contemporary Eighth Amendment jurisprudence, the punitive coma should pass constitutional scrutiny of the American courts. Part III reconsiders the coma-bay prison and concludes that the punitive coma is an enlightened form of punishment, as it is more efficient and compassionate than the legitimized methods of punishment currently in use.

I

THE EVOLUTION OF THE AMERICAN PRISON

Due in large part to the contemporary war on drugs, the American prison population has exploded during the last twenty years. The U.S. imprisonment rate, which steadily averaged about 109 persons per 100,000 between 1925 and 1980, began to grow exponentially in the 1980s, rising annually from a level of 139 per 100,000 citizens in 1980 to a level of 481 per 100,000 in 2000.\textsuperscript{17} More than two million Americans are currently

\begin{itemize}
  \item \textsuperscript{14}See infra Part II.
  \item \textsuperscript{15}See infra Part I.D.
  \item \textsuperscript{16}See supra note 12.
\end{itemize}
incarcerated in our jails and prisons. Table 1 below illustrates this runaway growth of the imprisoned population.

**Table 1: Year and American Prison Population**  
(rate per 100,000 resident population)

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate</th>
<th>Year</th>
<th>Rate</th>
<th>Year</th>
<th>Rate</th>
<th>Year</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1925</td>
<td>79</td>
<td>1944</td>
<td>100</td>
<td>1963</td>
<td>114</td>
<td>1982</td>
<td>171</td>
</tr>
<tr>
<td>1926</td>
<td>83</td>
<td>1945</td>
<td>98</td>
<td>1964</td>
<td>111</td>
<td>1983</td>
<td>179</td>
</tr>
<tr>
<td>1927</td>
<td>91</td>
<td>1946</td>
<td>99</td>
<td>1965</td>
<td>108</td>
<td>1984</td>
<td>188</td>
</tr>
<tr>
<td>1928</td>
<td>96</td>
<td>1947</td>
<td>105</td>
<td>1966</td>
<td>102</td>
<td>1985</td>
<td>202</td>
</tr>
<tr>
<td>1929</td>
<td>98</td>
<td>1948</td>
<td>106</td>
<td>1967</td>
<td>98</td>
<td>1986</td>
<td>217</td>
</tr>
<tr>
<td>1930</td>
<td>104</td>
<td>1949</td>
<td>109</td>
<td>1968</td>
<td>94</td>
<td>1987</td>
<td>231</td>
</tr>
<tr>
<td>1932</td>
<td>110</td>
<td>1951</td>
<td>107</td>
<td>1970</td>
<td>96</td>
<td>1989</td>
<td>276</td>
</tr>
<tr>
<td>1933</td>
<td>109</td>
<td>1952</td>
<td>107</td>
<td>1971</td>
<td>95</td>
<td>1990</td>
<td>297</td>
</tr>
<tr>
<td>1934</td>
<td>109</td>
<td>1953</td>
<td>108</td>
<td>1972</td>
<td>93</td>
<td>1991</td>
<td>313</td>
</tr>
<tr>
<td>1936</td>
<td>113</td>
<td>1955</td>
<td>112</td>
<td>1974</td>
<td>102</td>
<td>1993</td>
<td>359</td>
</tr>
<tr>
<td>1937</td>
<td>118</td>
<td>1956</td>
<td>112</td>
<td>1975</td>
<td>111</td>
<td>1994</td>
<td>389</td>
</tr>
<tr>
<td>1938</td>
<td>123</td>
<td>1957</td>
<td>113</td>
<td>1976</td>
<td>120</td>
<td>1995</td>
<td>411</td>
</tr>
<tr>
<td>1939</td>
<td>137</td>
<td>1958</td>
<td>117</td>
<td>1977</td>
<td>126</td>
<td>1996</td>
<td>427</td>
</tr>
<tr>
<td>1940</td>
<td>131</td>
<td>1959</td>
<td>117</td>
<td>1978</td>
<td>132</td>
<td>1997</td>
<td>444</td>
</tr>
<tr>
<td>1941</td>
<td>124</td>
<td>1960</td>
<td>117</td>
<td>1979</td>
<td>133</td>
<td>1998</td>
<td>461</td>
</tr>
<tr>
<td>1942</td>
<td>112</td>
<td>1961</td>
<td>119</td>
<td>1980</td>
<td>139</td>
<td>1999</td>
<td>476</td>
</tr>
</tbody>
</table>

The incarceration rates described in Table 1 represent only those incarcerated in state and federal prisons. They do not account for individuals who are incarcerated in local jails. When one includes the local jail population, the current rate of incarceration leaps to more than 700 per 100,000 persons. Graphic representations of the swelling incarceration rate resemble an asymptotic curve, a line struggling to leap vertically from the page.

---


Table 2 describes the jail and prison populations between 1990 and 2000, as well as the overall incarceration rate.

**Table 2: Inmates in Prisons and Local Jails 1990-2000 (Midyear)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Inmates in Custody</th>
<th>Federal Prisoners</th>
<th>State Prisoners</th>
<th>Local Jail Inmates</th>
<th>Incarceration Rate (per 100,000 general population)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>1,148,702</td>
<td>58,838</td>
<td>684,544</td>
<td>405,320</td>
<td>458</td>
</tr>
<tr>
<td>1991</td>
<td>1,219,014</td>
<td>63,930</td>
<td>728,605</td>
<td>426,479</td>
<td>481</td>
</tr>
<tr>
<td>1992</td>
<td>1,295,150</td>
<td>72,071</td>
<td>778,495</td>
<td>444,584</td>
<td>505</td>
</tr>
<tr>
<td>1993</td>
<td>1,369,185</td>
<td>80,815</td>
<td>828,566</td>
<td>459,804</td>
<td>528</td>
</tr>
<tr>
<td>1994</td>
<td>1,476,621</td>
<td>85,500</td>
<td>904,647</td>
<td>486,474</td>
<td>564</td>
</tr>
<tr>
<td>1995</td>
<td>1,585,586</td>
<td>89,538</td>
<td>989,004</td>
<td>507,044</td>
<td>601</td>
</tr>
<tr>
<td>1996</td>
<td>1,646,020</td>
<td>95,088</td>
<td>1,032,440</td>
<td>518,492</td>
<td>618</td>
</tr>
<tr>
<td>1997</td>
<td>1,743,643</td>
<td>101,755</td>
<td>1,074,809</td>
<td>567,079</td>
<td>648</td>
</tr>
<tr>
<td>1998</td>
<td>1,816,931</td>
<td>110,793</td>
<td>1,113,676</td>
<td>592,462</td>
<td>669</td>
</tr>
<tr>
<td>1999</td>
<td>1,875,199</td>
<td>117,995</td>
<td>1,151,261</td>
<td>605,943</td>
<td>687</td>
</tr>
<tr>
<td>2000</td>
<td>1,931,859</td>
<td>131,496</td>
<td>1,179,214</td>
<td>621,149</td>
<td>702</td>
</tr>
</tbody>
</table>

An incarceration rate of 702 per 100,000 residents means that one person in every 142 is currently incarcerated in a local jail or a state or federal prison. These are the official numbers at mid-year 2000; others have estimated higher rates of incarceration. Wray reported an incarceration rate of 724 inmates per 100,000 population at the end of 2000 and suggested that at the current rates of increase, the "rate will reach nearly 1,900 per 100,000 by the end of the first quarter of this new century." An
incarceration rate of 1,900 per 100,000 would mean that one in every fifty-two people would be incarcerated.  

Confronted by such a teeming incarcerated population, four related questions must be asked. First, why are we incarcerating these people? Second, what are the economic costs (at least the direct costs) of incarcerating so many? Third, why are our prisons and jails so crowded and what are the consequences of this crowding? Fourth, do the social gains justify the economic costs? Even if incarceration is expensive, prison costs may be justified if the prison is an effective means of controlling an otherwise intractable social ill. Is the prison, then, an effective means of controlling crime? Part I.A answers the first question, indicating that the modem warehouse prison does not operate under any coherent theory of punishment. Part I.B answers the second question, indicating that the modem prison is extremely expensive and without meaningful economic benefit. Part I.C answers the third question, noting that the rate of prison construction has been aggressive, but has failed to meet America’s runaway incarceration rate. Our prisons therefore continue to operate beyond capacity, with deleterious consequences for prisoners and guards alike. Part I.D answers the fourth question, noting that the modem prison is an inefficient and ineffective means of controlling crime. In reality, it is worse than ineffective: the modem prison is positively harmful, creating a serious risk of physical and psychological damage to inmates and prison guards alike.

A. The Circular Transformation of Punishment

Punishment, defined as “the infliction by state authority of a consequence normally regarded as an evil (for example, death or imprisonment) on an individual found to be legally guilty of a crime,” has a long history. Indeed, the use of punishment appears to extend as far back in time as law itself. For example, severe corporal punishments were visited upon the guilty under the Code of Hammurabi in about 1700 B.C.

25. These figures do not reflect the American probation or parole populations (which grow symmetrically with the incarcerated population). By the end of year 2000, there were approximately 3,839,532 Americans on probation and another 725,527 on parole. See U.S. DEP’T OF JUSTICE, NATIONAL CORRECTIONAL POPULATION REACHES NEW HIGH: GROWS BY 126,400 DURING 2000 TO TOTAL 6.5 MILLION ADULTS tbl.1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus00.pdf (last visited Jan. 14, 2002). This figure represents “3.1 percent of the country’s total adult population, or one in every 32 adults.” Id. at 1.

26. JEFFRIE G. MURPHY & JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 117 (2d ed. 1990). Because this definition defines punishment as acts inflicted under state authority for legally ascertained guilt, it is a narrow definition and excludes behaviors that are often referred to as “punishment” in common parlance (for example, when we say that a parent has punished his child). See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 9 (1993).

27. See Edward M. Peters, Prison Before the Prison: Ancient and Medieval Worlds, in THE OXFORD HISTORY OF THE PRISON 10 (Norval Morris & David J. Rothman eds., 1995). There are legal codes older than that of the Code of Hammurabi. The Code of Urnagina, for example, has been dated
Punishments have existed for more than four thousand years, but for the majority of this period, they were generally public and corporal in nature. The most serious offenses were punished with various forms of execution.\(^\text{28}\) For less serious offenses, nonlethal punishments were employed.\(^\text{29}\) Individuals were sometimes banished,\(^\text{30}\) and fines and other forms of restitution were also very common.\(^\text{31}\) But the prison, the menacing gray institution that is most synonymous with the idea of punishment in the modern mind, is a relatively recent innovation.\(^\text{32}\)

The widespread use of incarceration as punishment is a relatively new phenomenon. It is scarcely more than two hundred years old.\(^\text{33}\) Catalyzed by a movement of the Quaker reformers between 1750 and 1850, prisons remarkably transformed from places where accused men and debtors were taken. While never discovered, it is mentioned in other documents as a consolidation of existing laws created by Mesopotamian kings. See A World’s Eye View of the Law, at http://www.unesco.org/courier/1999_11/uk/dossier/txt14.htm (last visited Jan. 14, 2002).

\(^{28}\) These include, *inter alia*, burning, boiling, crucifixion, decapitation, drawing and quartering, hanging, poisoning, and stoning. For a chilling account, see MICHEL FOUCAULT, DISCIPLINE AND PUNISH (1977), particularly the opening description of the execution of the regicide Damiens. *Id.* at 3-6; see also FRIEDMAN, supra note 26, at 41-44; Pieter Spierenburg, *The Body and the State: Early Modern Europe, in The Oxford History of the Prison* 53-61 (Norval Morris & David J. Rothman eds., 1995). The most creative form of execution, however, may be the Roman practice of the culleus: confining the offender in a sack with an ape, a dog, and a serpent, and then throwing the sack into the sea. See Peters, supra note 27, at 15 (noting that the practice was used to execute those who had killed their close relatives).

\(^{29}\) Many techniques have been used: amputation of various extremities, branding, tattooing, whipping, or the use of mechanical devices such as ducking stools, stockades, and pillories. See FRIEDMAN, supra note 26, at 36-41; Spierenburg, supra note 28, at 51, 53.

\(^{30}\) See Spierenburg, supra note 28, at 62-64.

\(^{31}\) See FRIEDMAN, supra note 26, at 38 ("Shaming punishments were colorful; they were certainly used with great frequency. But the workaday fine, the drudge horse of criminal justice, was probably the most common form of punishment.").

\(^{32}\) Imprisonment, as mere confinement, probably extends as far back in time as punishment itself. For example, records show that prisons were used as early as the ninth century in England. See Hans Mattick, *The Contemporary Jails of the United States: An Unknown and Neglected Area of Justice, in Handbook of Criminology* 782, 782 (Daniel Glaser ed., 1974). Historically, however, the prison was not used to punish. See generally GEORGE RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE (1939) (detailing the history of the prison). Rusche and Kirchheimer reported a historic commitment to the maxim: *Carcer enim ad continendos homines non ad punitendos haberti debet* (prisons exist only in order to keep men, not to punish them). *Id.* at 62. The early prison was used to detain individuals for trial who could not post bail, and to contain debtors who could not pay their debts. The prison was custodial and coercive, but it was not punitive. See RALPH B. PUGH, *IMPRISONMENT IN MEDIEVAL ENGLAND* 20 (1968) (indicating that imprisonment was, in fact, occasionally used to punish minor offenses in medieval times). Pugh notes that under Henry II’s charter of the forest, “the man who chased wild beasts by night whether within the forest or without with the object of capturing them was to be imprisoned for a year and also to pay a fine and ‘ransom’ to the crown.” *Id.*

\(^{33}\) See FOUCAULT, supra note 28, at 16 (describing the transition from a system of corporal punishment that punished the body, to one of carceral punishment that punished the human soul, acting “on the heart, the thoughts, the will, the inclinations”); see generally GUSTAVE DE BEAUMONT & ALEXIS DE TOUCHEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (Southern Illinois University Press 1964) (1833) (describing the early American system of prisons).
merely detained into well-organized institutions designed to actively re-form the character of the penitent convict.34

Interestingly, the modern prison was ushered in at about the same time that philosophers began to publish a number of seminal (if not wholly unified) works of penology.35 Four of these works are particularly noteworthy because they laid the foundations for the four cornerstones of penal philosophy. The writings of Beccaria, Bentham, Lombroso, and Kant established the early foundations for the four cornerstones of penology: retribution, rehabilitation, deterrence, and incapacitation.36 In 1764, Beccaria wrote On Crimes and Punishments, a treatise that assumed a rational actor and, from this assumption, extrapolated the logical means of reducing crime.37 Bentham wrote An Introduction to the Principles of Morals and Legislation in 1789, expanding on Beccaria’s concepts and articulating the utilitarian calculus of punishment, in which pleasure is maximized for the greatest number of individuals.38 Modern interpretations of deterrence and incapacitation can be traced to both of these pioneering works. In 1876, Cesare Lombroso wrote L’Uomo Delinquente (The

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34. See Rod Morgan, Imprisonment: Current Concerns and a Brief History since 1945, in THE OXFORD HANDBOOK OF CRIMINOLOGY 1137 (Mike Maguire et al. eds., 2d ed. 1997); FOUCAULT, supra note 28, at 128-31 (describing the penitentiary’s goal of reforming the character of the convict).


36. First, a popular text on jurisprudence describes retribution:

The retributive theory of punishment, then, should be understood as a theory that seeks to justify punishment, not in terms of social utility, but in terms of this cluster of moral concepts: rights, desert, merit, moral responsibility, and justice. . . . Thus the retributivist seeks, not primarily for the socially useful punishment, but for the just punishment, the punishment that the criminal (given his wrongdoing) deserves or merits, the punishment that the society has a right to inflict and the criminal a right to demand.

MURPHY & COLEMAN, supra note 26, at 121. Second, Murphy and Coleman characterize rehabilitation as suggesting that “[c]riminals are sick persons who should be treated, . . . not wrongdoers who should be punished. This will be good for them (they will be made well) and good for society (since we will be better protected).” Id. at 129. Third, Murphy and Coleman indicate that deterrence can be subdivided into two types: specific deterrence (the inhibition of future criminal conduct by the punished offender) and general deterrence (the inhibition of future criminal conduct of others, accomplished by making an example of the punished offender). See id. at 118. Fourth and finally, incapacitation is defined as a means of reducing the crime rate by removing the offender from the general population. When a felon is locked away in prison, he cannot burgle houses or rob banks.

Recognition that imprisonment’s distinctive feature as a penal method is its incapacitative effect has implications for criminal justice policy. The contribution of prisons to crime control by way of rehabilitation programs or individual and general deterrence is problematic. But there can be no doubt that an offender cannot commit crimes in the general community while incarcerated.

FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 89 (1991). There are, of course, other functions of punishment. At least one historian of punishment suggests that “[t]here is another, more subtle, function of criminal justice: symbolic, ideological, hortatory.” FRIEDMAN, supra note 26, at 10.

37. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963) (1764).

38. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).
Criminal Man), in which he suggested that criminals were atavistic throwbacks to an earlier stage of evolution and that crime was the product of an attenuated form of epilepsy. The penological concept of rehabilitation thus had its early roots in this model of crime-as-disease. And in The Philosophy of Law, Immanuel Kant laid the foundations of modern retributive penology.

In practice, the four bases of punishment do not always harmonize. For example, while capital punishment is quite effective at incapacitating the offender (truly, dead convicts almost never reoffend), it is a much-disputed matter how much it deters the conduct of others, and it is no good at all at rehabilitating the dead convict. There is an inherent tension between these competing justifications and modern punishment might be understood as a struggle between them. The shift from corporal to carceral punishments reflected a commitment to the rehabilitative ideal,

39. See Gina Lombroso-Ferrero, Criminal Man: According to the Classification of Cesare Lombroso (1911).
40. In an offquoted passage, Kant wrote:
   Even if a Civil Society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last Murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of Justice.
41. In 1993, David McCord made a similar observation:
   Death is the surest incapacitation: it eliminates the possibility of the defendant murdering again while inside prison walls, and in the outside world should the defendant ever be on the loose again due to parole, executive clemency, or escape. LWOP [life imprisonment without the possibility of parole] is a potent, but not perfect substitute for death: LWOP negates the possibility of parole, but cannot assure against the defendant's murdering while inside the prison, or after receiving executive clemency, or escaping.
42. See Rudolph J. Gerber, Death Is Not Worth It, 28 Ariz. St. L.J. 335, 350 (1996) ("As of 1996, no proof exists that general deterrence results from capital punishment as opposed to life imprisonment.").
43. But see C.S. Lewis, The Humanitarian Theory of Punishment, in Contemporary Punishment: Views, Explanations, and Justifications 194, 197-98 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972) (arguing that one has the right to be held accountable and punished for one's actions). Under such a view of punishment, execution is arguably a necessary act of expiation, required in order to rehabilitate a soul that has been stained by a grave and serious crime.
44. Debates over the passage of California's Proposition Thirty-Six, which diverts first-time drug offenders into treatment programs instead of sending them to jail, reflect these competing visions of punishment. See Nonpartisan Pros & Cons of Proposition 36: Drugs, Probation, and Treatment Program, at http://ca.lwv.org/lwv/files/Nov00/pc/proG36.html (last visited Jan. 14, 2002). Those who believed that drug crime should be "treated" (rehabilitation) tended to support the proposition, while those who believed that drug crime should be "punished" (retribution) tended to oppose it. The proposition was passed on Nov. 7, 2000, by 61% of California voters. See California Proposition 36: The Substance Abuse and Crime Prevention Act, available at http://www.prop.36.org (last visited Jan. 14, 2002).
and this view dominated penology from the early nineteenth century through the mid-1970s. Crime was often understood as a disease, and we told ourselves that with enough dedication and hard work it could be cured.  

But twenty-eight years ago, the battle between penal viewpoints turned, and a new age of retributivism dawned. In 1974, Robert Martinson published an article about the efficacy of rehabilitative prison regimes entitled "What Works?" Martinson's conclusion was that nothing works. The Martinson article was sweeping in its criticisms; it not only suggested that prior efforts to rehabilitate offenders had failed, it also intimated that the whole notion of reforming prisoners was irrevocably flawed.

45. See Karl Menninger, The Crime of Punishment 257 (1968) (suggesting that some forms of crime are indications of an underlying illness that can be healed and that progressive individuals recognize this fact); Patrick R. Kane, Rehabilitation—The Prison System: "Warehouse Rehabilitation" Federal Bureau of Prisons, 34 How. L.J. 496 (1991). Kane writes:

In the 1960's and up to the mid-1970's, we were absolutely convinced that we could cure criminality. This was a classic physical science paradigm where social scientists engaged in the examination of offenders by a diagnosis of the "problem" of criminality. This model was supposed to implement intervention, treatment, and prognosis, in order to aid offenders' rehabilitation so they could be released into society.

Id. at 497.

46. Graham Hughes suggests that three interrelated factors led to the "sudden and massive" abandonment of rehabilitation theory that characterized the mid-1970s:

First, it became less and less possible to ignore the fact that rehabilitation did not work very well. Crime, especially violent crime, increased at a disturbing rate after 1960 and recidivism among violent offenders remained high. In addition, many "rehabilitative" practices came under careful scrutiny and were judged to be unconvincing euphemisms for vengeful punishment or simple restraint. Finally, the moral roots of rehabilitation theory were themselves challenged. Penal philosophers argued that society may have warrant to lock someone up for reasons of retribution or even simply to protect others, but that there is no justification for locking people up until they became better people. The advocates of rehabilitation reeled under this triple assault of meager success, critical analysis, and philosophical doubt.


[A] curious philosophical alliance sprang up in the 1970s between liberal theorists and populist law-and-order advocates. Disgusted with rehabilitation for very different reasons, they combined in an attack on the indeterminate sentence and the discretion of the parole board. . . . As a substitute theory, the concept of retribution was hauled out of the back room to which it had so long been consigned, and after a quick paint job was presented to the public under its new title, "desert."

Id. at 1324-25.

47. See Robert Martinson, What Works? Questions and Answers about Prison Reform, 35 PUB. INT. 22 (1974). Martinson reviewed the success rates of various rehabilitative programs ("success" was measured in recidivism rates) and used a very stringent standard to evaluate the efficacy of the programs; but see Robert Martinson, New Findings, New Views: A Note of Caution Regarding Sentencing Reform, 7 HOFSTRA L. REV. 243 (1979). Here, Martinson concluded that "contrary to my previous position, some treatment programs do have an appreciable effect on recidivism." Id. at 244. He wrote that new evidence "leads me to reject my original conclusion." Id. at 252. Martinson went on to state that "I have often said that treatment added to the network of criminal justice is 'impotent,' and I withdraw this characterization as well." Id. at 254. For a thoughtful review of the Martinson study, see Ted Palmer, Martinson Revisited, 12 J. RES. CRIME & DELINO. 133 (1975).
Penologists, legislators, and judges immediately began to abandon the ideal of curing the criminal.\textsuperscript{48} In a very brief period of time, rehabilitation was dead,\textsuperscript{49} and American penology was dominated by an increasingly draconian zeitgeist. Prisons were no longer designed to cure; they were intended to be aversive and unpleasant. Rehabilitation was renounced as a legitimate penal objective, and American corrections were increasingly shaped by theories of retribution and incapacitation.\textsuperscript{50} Locking millions of American citizens away in warehouse prisons was the manner in which America decided to respond to its crime problem.\textsuperscript{51}

Americans are the forsaken progeny of Robert Martinson.\textsuperscript{52} Because "nothing works," we have given up on rehabilitation. Our goals are no longer so lofty. Instead, we have settled for declaring war on crime, fighting it like an enemy.\textsuperscript{53} Contemporary prison policy, freed of its commitment to rehabilitation, either emphasizes retribution, reinvigorating such archaic practices as chain gangs\textsuperscript{54} and public shaming,\textsuperscript{55} or emphasizes

\begin{itemize}
\item \textsuperscript{48} E.g., United States v. Bergman, 416 F. Supp. 496 (S.D.N.Y. 1976).

[The] court shares the growing understanding that no one should ever be sent to prison for rehabilitation. That is to say, nobody who would not otherwise be locked up should suffer that fate on the incongruous premise that it will be good for him or her. Imprisonment is punishment. Facing the simple reality should help us to be civilized. It is less agreeable to confine someone when we deem it an affliction rather than a benefaction.

Id.


\item \textsuperscript{50} See Kadish, supra note 9, at 980.

California...had been at the forefront of states committed to individualized and rehabilitative punishment. In 1976, the legislature replaced its elaborate system of indeterminate sentencing with a determinate sentencing law [Cal. Penal Code § 1170(a)(1) (1998)] that opened with this ringing commitment: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment."

Id. at 980; Schlosser, supra note 9, at 73-74. Ironically, the Supreme Court had itself, less than fifty years before, pronounced, "Retribution is no longer the dominant objective of the criminal law." Williams v. New York, 337 U.S. 241, 248 (1949).

\item \textsuperscript{51} See Toch, supra note 12, at 58 (describing America's firm commitment to the warehouse prison).

\item \textsuperscript{52} See supra note 47 and accompanying text.

\item \textsuperscript{53} In many respects, the corrections industry serves as a surrogate for the now-fractionated Soviet Union, filling the vacuum left behind by the waning American military-industrial complex in a post-Cold War era. See, e.g., Wray, supra note 24; Schlosser, supra note 9.


\item \textsuperscript{55} In some jurisdictions, newspapers publish the names of individuals who have been arrested for criminal offenses. See, e.g., American Civil Liberties Union, \textit{Public Humiliation for Crimes Ain't that a Shame} (June 25, 1996) (describing numerous shaming penalties such as a New Hampshire child molester who was ordered to take out an ad in two newspapers that included his photograph, his apology, and a plea for other molesters to seek help), \textit{available at http://www.aclu.org/news/vo062596c.html} (last visited Feb. 25, 2002). The practice of using newspapers to publicize criminal offenders may raise serious ethical questions, however. See Diane Lewis, \textit{Naming "Johns,"} 2 \textit{FINELINE} 3 (Sept. 1990) (discussing the link between a forty-seven-year-old man's suicide and the
no-frills incapacitation. Thus, unsure of how to restore a sense of safety and community to our crime-ridden streets and uninterested in rehabilitating the convict, we simply warehouse our incarcerated population.

The warehouse prison brings us full-circle in the evolution of the prison. It is a construction without a clear theoretical mandate. Unlike the penitentiaries of the Quaker reformers, the warehouse prison does not seek to rehabilitate its prisoners. It is neither built to deter in any strategic manner (punishment occurs behind closed institutional doors, where the public eye does not extend, limiting the efficacy of deterrence), nor even to mete out justice through any systematic form of retribution. Instead, the warehouse prison is an institution essentially founded on a crude implementation of incapacitation. The warehouse prison does not even

 newspaper article linking him to a twenty-five-year-old prostitute and suggesting that while some journalists believe that prostitution is a legitimate subject for the media, others suggest that making a newspaper into an arm of the police is an inappropriate function of the media), available at http://www.journalism.indiana.edu/ethics/johns.html (last visited Feb. 25, 2002). For a thoughtful discussion of shaming as a sanction, see JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION (1989).

56. Conservative scholars have emphasized the role that incapacitation plays in a modern system of punishment:

[W]e would view the correctional system as having [this] function—namely, to isolate and to punish...[S]ociety at a minimum must be able to protect itself from dangerous offenders... The purpose of isolating—or, more accurately, closely supervising—offenders is obvious: Whatever they may do when they are released, they cannot harm society while confined or closely supervised.

JAMES Q. WILSON, THINKING ABOUT CRIME 193-94 (1975). Founded upon a belief that a relatively small number of individuals are responsible for a disproportionate volume of offenses, the theory of selective incapacitation postulates that removing the offending members of that hard core from the general population will dramatically reduce crime. The practical dilemma of selective incapacitation is how to distinguish this hard core from everyone else. See infra note 60.

57. See Mike Davis, Beyond Blade Runner, in ECOLOGY OF FEAR 359 (1999) (describing the combat-zone atmosphere of the inner-city districts of Los Angeles).

58. See, e.g., FOUCAULT, supra note 28, at 124-25 (describing the change in the Walnut Street Prison from punishing offenders in public, such as in the stocks or on the scaffold, to punishing offenders in private, behind prison walls).

59. One of the governing principles of retribution ("just deserts" theory) is proportionality, making sure that the punishment fits the crime. "Proportionality is the key concept in desert theory." Andrew Ashworth, Sentencing, in THE OXFORD HANDBOOK OF CRIMINOLOGY 1095, 1097 (Mike Maguire et al. eds., 2d ed. 1997). Yet there is little constitutional assurance of proportionality in the American prison system. The American judiciary has repeatedly declined the invitation to strike down popularly enacted legislation on proportionality grounds. See Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding a mandatory sentence of life in prison without possibility of parole for the possession of 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 373 (1982) (per curiam) (upholding a forty-year sentence for possession of marijuana with intent to distribute); Rummel v. Estelle, 445 U.S. 263 (1980) (holding that it was not cruel and unusual punishment to impose a life sentence upon a defendant who had been successively convicted of $80 worth of credit card fraud, passing a forged check for $28.36, and obtaining $120.75 by false pretenses); see also 21 U.S.C. § 841 (1998) (requiring mandatory sentences that are 100 times more severe for the possession of crack cocaine than for the possession of an equal weight of powdered cocaine, although they are pharmacologically identical).

60. Proponents of incapacitation theory note that selectively incarcerating those offenders who are responsible for a disproportionate number of crimes could dramatically reduce the amount of crime in society. Criminologists have discovered that a small fraction of chronic offenders appear to be
truly succeed at incapacitating. While it is true that prison and jail inmates cannot commit crimes against the general public while incarcerated, this by no means implies that they are not committing crimes throughout their sentences. The warehouse prison doesn’t incapacitate prisoners from committing further offenses; it merely insulates them from the respectable taxpaying public. Like its medieval predecessors, the modern warehouse prison is built to contain society’s unwanted souls. Nothing more.

One of the most famous results obtained by Wolfgang et al. was that a small proportion of their cohort (the chronic offenders, defined as those with five or more arrests) accounted for a large proportion of the offenses. In their first cohort, the 6% of the sample who were chronics accounted for 52% of all juvenile arrests. In their second cohort, the 7% who were chronics accounted for 61% of all juvenile arrests. Similar results have been obtained by other researchers. For example, Shannon reported that 6% of his third cohort were responsible for 51% of all police contacts up to age 21. In England, Farrington found that 6% of his sample accounted not only for 49% of all the convictions up to the twenty-fifth birthday, but also for substantial proportions of the self-reported offenses.

David P. Farrington et al., UNDERSTANDING AND CONTROLLING CRIME: TOWARD A NEW RESEARCH STRATEGY 50-51 (1986) (citations omitted). Efforts to effectively separate the criminally “dangerous” from the rest of the population, however, have failed. Throughout the late 1960s and early 1970s, rates of false-positives (individuals who are mistakenly classified as dangerous and would therefore be sentenced to enhanced penalties under a selective incapacitation model) ranged between 54% and 99%. See Note, Selective Incapacitation: Reducing Crime through Predictions of Recidivism, 96 Harv. L. Rev. 511, 515 (1982). Recent efforts to predict recidivism have focused on high-rate crimes, but as Nagin notes, “[S]elective incapacitation has proved to be a policy chimera.” Daniel S. Nagin, Deterrence and Incapacitation, in THE HANDBOOK OF CRIME AND PUNISHMENT 345, 364 (Michael Tonry ed., 1998). In addition to the philosophical problem of incarcerating people for what they might do instead of what they have done, it has proven to be very difficult to identify chronic offenders based upon legally-permissible factors. He writes:

Convicts could not be expected honestly to divulge to the court their future crime-committing intentions even if they knew them. Other potential predictors are legally impermissible (e.g., race or sex), highly unreliable in their predictive capacity (e.g., age or employment), or both.

Id. And while a policy of indiscriminate incapacitation would probably have some effect on the crime rate, the social and economic costs of incarcerating all of these people in warehouse prisons would be enormous. One 1977 study concluded that if every person convicted of a felony were imprisoned for one year, crime rates could be reduced by about 15%. But the practice of incarcerating all convicted felons would increase the prison population by 50%. See Joan Petersilia and Peter W. Greenwood, Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations, 69 J. Crim. L. & Criminology 604, 615 (1978).

61. See ZIMING & HAWKINS, supra note 36, at 89.

62. Substance abuse and theft are rampant in many warehouse prisons. Inmate Dannie M. Martin describes the invisible culture of crime that exists within the modern prison: “Some convicts like to drink, and four or five of them will get together and make wine regularly. Others gamble and run betting pools. Stolen food and government merchandise are bought and sold. Drug users band together in schemes to obtain their drug of choice.” Dannie M. Martin & Peter Y. Sussman, Report from an Overcrowded Maze, in CORRECTIONAL PERSPECTIVES 19 (Leanne Fifial Alarid & Paul F. Croniwell eds., 2002). Prison assault and rape are also relatively commonplace in warehouse prisons. See infra Part I.D.

63. ROBERT JOHNSON, HARD TIME: UNDERSTANDING AND REFORMING THE PRISON 8 (3d ed. 2002). Johnson observed:

Warehouse prisons, with or without occasional creature comforts, are empty enterprises. . . . Their inhabitants survive rather than live. Warehouse prisons are our modern-day houses of the dead, to draw on Dostoyevsky, not because of brutality but because of
B. The Economics of Ceiling America

The costs of incapacitating more than two million of America's unwanted are enormous. The maintenance of the justice and corrections systems has always been expensive, but as the prison population grows arithmetically, the costs increase geometrically. Randall Wray observed:

Given exploding incarceration rates over the past two decades, costs are rising quickly. In 1982, total justice expenditure (including federal, state, and local spending on police protection, the judicial and legal systems, and corrections) was under $36 billion, but reached nearly $120 billion by 1996. Corrections spending is growing faster than other components of the justice system, rising from well under half of the amount spent on police protection in the early 1980s, to more than three quarters as much by the mid-1990s. About $39 billion was spent in 1999 to operate the nation's prisons and jails. Per capita justice spending increased from about $150 per year in 1982 to nearly $450 per capita per year in 1995, with expenditures on corrections alone amounting to $150 per capita per year in 1995.

Prison costs are increasing dramatically because two expensive factors must simultaneously occur to manage the two million incarcerated Americans. First, new jails and prisons must be built to contain all those who cannot fit into existing penal facilities, and second, all of those inmates must be housed, fed, and guarded. Because the incarceration rate has increased dramatically in the last twenty years, new facilities have been constructed at a very rapid rate. Indeed, "during the last two decades, roughly a thousand new prisons and jails have been built in the United States." The construction of these prisons and jails has been an expensive undertaking. Between the years 1980 and 1994 alone (before the corrections boom became truly expensive), more than $25 billion was spent on the capital construction costs of new state and federal prisons, an increase

64. The title of Part I.B is borrowed from a recent anthology about the U.S. Prison Industry. See THE CEILING OF AMERICA (Daniel Burton-Rose et al. eds., 1998).

65. Wray, supra note 24, at 37 (citations omitted).

66. In 1990, there were 1,287 state and federal correctional facilities in the United States. By 1995, the number had increased to 1,500. Federal facilities grew especially quickly: in 1990, there were only eighty federal correctional institutions. By 1995, there were 125 of them. U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995, at tbl.4.2 (1997), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cplus95.pdf (last visited Jan 14, 2002); see U.S. GEN. ACCOUNTING OFFICE, FEDERAL AND STATE PRISONS: INMATE POPULATIONS, COSTS, AND PROJECTION MODELS 11-12, 31 tbl.III.2 (1996) (indicating that between 1980 and 1994, more than $25 billion was spent on prison capital costs, an increase of about 141% over the level in fiscal year 1980).

67. Schlosser, supra note 9, at 52.
of about 141% over the level in fiscal year 1980. The operating costs of the prison system are even larger than the construction costs. It costs between $30,000 and $50,000 per inmate per year to maintain federal and state correctional systems. In fiscal year 1980, the total operating costs of U.S. prisons were measured at $3.1 billion. In 1994, operating costs totaled $17.7 billion, reflecting an increase of 224% based on inflation-adjusted dollars. Between the years 1980 and 1994, more than $163 billion were spent on the capital and operating costs of state and federal prisons. These numbers have increased over time, and in 1996, the Bureau of Prisons estimated that the operating costs of the 2006 fiscal year would nearly double those of the 1996 level.

Vast sums are spent on the construction and maintenance of correctional facilities. The incarceration industry has become so lucrative that numerous private corporations have entered the corrections market around the country, confining inmates for a fee. Crime has become big business, and indeed, some firms are profiting through the corrections industry, and some communities are reaping tidy profits from the construction of new prisons in their region. There is money to be made in the corrections

68. See U.S. GEN. ACCOUNTING OFFICE, supra note 66, at 11-12, 31 tbl.III.2.


70. See U.S. GEN. ACCOUNTING OFFICE, supra note 66, at 11, 30 tbl.III.1.

71. See id. at 31 tbl.III.3.

72. See id. at 32 tbl.III.4.


74. Wray, supra note 24. Wray suggests that in some specific cases, prison labor will be used in a profitable manner—to the benefit of the firms hiring them, the prisons that garnish some of their wages, and the prisoners themselves. Michael Moore’s film The Big One documents some of the more unusual uses of prison labor in private industry. For example, TWA now employs inmates to handle telephone reservations. Other employers include Microsoft, Honda, Kaiser Steel, Shelby-Cobra, Boeing, Victoria’s Secret, and Lee Jeans. Uses of prison labor already include telephone solicitation for long-distance phone companies, commercial laundry, computer assembly, automobile manufacture, designer rug production, saddle making and other leather goods production, eyeglass manufacture, potato processing, data entry, and athletic shoe manufacture.

Id. at 41. Wray also suggests that the profitability of private prisons and prison labor could create perverse incentives to maintain incarceration rates at their stratospheric levels. Id. at 41-42; see also supra note 73 (describing the value of CCA shares).

75. Put bluntly, prisons equal jobs. “[E]vidently, prison building qualifies as good news in Malone, New York (Pop. 14,297), where concrete cages are not merely houses for criminals. To locals, they are also an answer to chronic unemployment, a magnet for luring new retail stores, and the best hope of recapturing Malone’s boom years.” Jennifer Gonnerman, The Supermax Solution, The
industry, but the growth of the prison system is unlikely to create real wealth for the country. Many prisoners do not work, and of those who do, nearly all work prison jobs that do not generate revenue. In practice, the American prison experiment has proven to be a terribly expensive exercise in social control.

C. Bursting at the Seams: The Tenacious Problem of Prison Crowding

Although the construction of American jail and prison facilities has occurred at an impressive rate, it has failed to keep pace with the phenomenal incarceration rate. Schlosser noted that about a thousand new


76. See Wray, supra note 24, at 49-53. Wray suggests that the military traditionally served as an effective conduit to employment for low-skilled young men in the workforce. With the collapse of the Soviet Union and the end of the Cold War, however, military jobs disappeared and a new generation of low-skilled young men who would have turned to the armed forces for employment were (at least those on the margins) driven to crime.

[W]e fear that increased employment of prisoners will inevitably displace low-skilled nonprison labor. We also fear that private employment of prisoners could generate adverse incentives and potentials for abuse. Most important, however, we believe that focusing on employment of prisoners misses the main problem, which is lack of employment opportunities for young males without a high school degree. Indeed, we suspect that falling labor market participation by such males was a driving force behind rising crime rates. We have identified the attenuation of "military Keynesianism" as a contributing factor in the reduction of opportunities for the lowly educated, because approximately 2 million "jobs" were eliminated for young males with mainly lower educational attainment.

Id. at 55-56. Wray claims that because imprisonment does not build character, discipline, or teamwork in the same way as military training, and because many prison facilities are old and their job-training programs functionally obsolete, most prisoners will leave prison without being truly prepared for employment. Id. at 51. He suggests that, in the big picture, the effect of prison industry is negligible (and possibly negative in some ways):

While prison construction and operation provides an important stimulus to aggregate demand in many areas, it is still too small to add much to our nation's GDP [gross domestic product]. Indeed, it is not clear that prisons add net demand at all. As discussed, most spending is at the state level and may simply displace other spending. Further, because prisoners cost society $25,000 per year while incarcerated but $80,000 per year when released (primarily due to costs of crime), they may add more to demand [stimulating the economy] when they are out of prison and busy committing crimes.

Id. at 51.

77. By the close of the 1980s, the employment rate was estimated at less than 10%. See Timothy J. Flanagan & Kathleen Maguire, A Full Employment Policy for Prisons in the United States: Some Arguments, Estimates, and Implications, 21 J. CRIM. JUST. 117 (1993). A 1991 survey indicated that employment rates varied between a low of 0.04% in Hawaii and a high of 23% in the Federal Bureau of Prisons. See Gregory A. Clark, Work Programs, in ENCYCLOPEDIA OF AMERICAN PRISONS 508, 509 (Marilyn D. McShane & Frank P. Williams III eds., 1996). Things have not improved much.

By 1997, only 6.2 percent of U.S. prisoners worked in jobs other than those directly related to prison support (custodial, food preparation, and so on, within the prison for the benefit of other prisoners). Thus, today fewer than 75,000 prisoners produce goods for use in the public sector while another 2,500 work for the private sector producing marketable goods and services (in contrast, 600,000 work in prison support—significantly lowering costs of the penal system, but generating no revenue . . . .

Wray, supra note 24, at 37.

78. See supra Part I.A and tbls.1, 2.
jails and prisons have been built during the last twenty years, but "[n]evertheless, America's prisons are more overcrowded now than when the building spree began, and the inmate population continues to increase by 50,000 to 80,000 people a year." Indeed, most state and federal correctional facilities are strained to their bursting points and beyond.

Prison administrators have tried to manage this problem by following one or more of three basic approaches: construction, diversion, or crowding. The first approach has been to build new prison and jail facilities as quickly as possible, as described above. The second approach has been to shift prison-designated felons to other facilities, where space is sometimes more available. Increasingly, prisoners are being farmed out to private prisons. On December 31, 1999, there were 69,693 inmates in private correctional facilities (5.1% of the total U.S. inmate population). Six months later, on June 30, 2000, the private facility population had increased to 76,010, accounting for 5.5% of the total U.S. inmate population. Private prisons appear to be an increasingly popular way of controlling inmate crowding. Diverting felons to local jails is another related technique. In 1995, there were 27,858 prisoners (2.7% of the total state inmate population) held in local jails because of prison crowding. The number increased to 31,508 (2.9%) in 1996. By 2000, the number of prisoners held in local jails because of crowding had grown to 63,140 (4.6%). The wisdom of housing felons alongside misdemeanants is questionable, but prison

79. Schlosser, supra note 9, at 52.
80. Id.
81. See U.S. Dep't of Justice, Prisoners in 2000, at 1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p00.pdf (last visited Jan. 14, 2002) ("On December 31, 2000, State prisons were operating between full capacity and 15% above capacity, while Federal prisons were operating at 31% above capacity.").
82. The Prisoners in 2000 report indicates that American "states added 351 adult correctional facilities and more than 528,000 prison beds during the [1990-2000] decade." Id. at 9; see also supra Part I.B and notes 66-68.
83. Beck & Karberg, supra note 17, at tbl.3.
84. Id.
86. Id.
87. See U.S. Dep't of Justice, Prisoners in 2000, supra note 81, at 6 tbl.8.
88. Felony offenses are crimes (often serious crimes) punishable by a term of imprisonment of more than one year. Misdemeanors are crimes (typically less serious crimes) punishable by a term of imprisonment of less than one year. See Model Penal Code §§ 6.06, 6.08. Serious offenders (for example, violent felons) put into jail custody with mere misdemeanants could prey upon their less-savvy fellows. See John Irwin, The Jail 64 (1985) ("[Inexperienced prisoners] are justly concerned about being harmed or exploited by other prisoners. Some rapacious experienced prisoners in the tanks will spot inexperienced new prisoners and set out to exploit them."). The idea of incarcerating felons alongside misdemeanants is also dangerous in another sense if there is any validity to Edwin Sutherland's theory of differential association (suggesting that criminal behavior is learned behavior, acquired through association with criminals). See Edwin Sutherland, Principles of Criminology 5-7 (4th ed. 1947). This exposure to felons could transform America's jails into finishing schools of crime. Two well-known criminologists have suggested precisely that:
officials believe that in such epidemic prison crowding, such steps are necessary.\textsuperscript{89}

The third solution to the prison crowding problem is to simply fit more convicts into existing penal facilities.\textsuperscript{90} Prison crowding has been problematic for decades, but appears to be getting worse with time. In 1990, state correctional facilities were operating at an average 101\% of their rated capacities (the number of beds or inmates that a rating official assigns to the institution), and at 122\% of their design capacities (the number of inmates that architects and planners intended for the facility). By 1995, however, state facilities were operating at an average 103\% of their rated capacity and at 133\% of their design capacity.\textsuperscript{91} By 2000, 27 states and the District of Columbia reported that they were operating at or below 99\% of their highest capacity. Twenty-one states and the federal prison system reported operating at 100\% or more of their highest capacity. California, operating at 94\% over its lowest reported capacity, had the highest percent of capacity occupied. By year end 2000 the federal prison system was operating at 31\% over capacity.\textsuperscript{92}

Forcing more inmates into existing jails and prisons is a cheap solution to a thorny problem, and if institutions operating beyond their capacities trouble our legislators, these capacities can always be revised post hoc. In an effort to avoid the appearance of overcrowding, the California legislature considered doubling, on paper, the stated capacities of its correctional facilities, reducing crowding "from 185\% to a more palatable 97\% of capacity without adding an inch of living space, a single

\begin{quote}
Our penal institutions not merely do not reform the criminal—they are training schools of crime. A youngster sent to a correctional institution by some short-sighted judge "to teach him a lesson" and "to get some sense into his head," obtains there his elementary instruction in criminal methods. His secondary school and his undergraduate collegiate career are passed in the state reformatory, where he has been sent "to teach him a trade" to become a useful citizen. ... After dismissal, the individual goes forth as a journeyman criminal, having won his spurs in antisocial conduct. If he is alert and well-endowed by nature, he avoids arrest and continues his career with no important setback. If, however, he is lacking in intelligence and adroitness, or is a victim of bad luck, he comes to state prison to initiate his graduate work in the field of crime in the greatest seminars of the greatest specialists available for his instruction. He leaves prison not only a more competent criminal but an even more embittered man.\textsuperscript{89}

\end{quote}

\textsuperscript{89} It may not matter whether inmates are held in jails or in prisons. Many of those who are incarcerated in jails actually claim to prefer incarceration in prisons. See IRWIN, supra note 88, at 45.

\textsuperscript{90} See Rhodes v. Chapman, 452 U.S. 337, 370-71 (1981) (Marshall, J., dissenting) (explaining the reality of prison crowding in practical terms). "In a doubled cell, each inmate has only some 30-35 square feet of floor space. Most of the windows in the Supreme Court building are larger than that." \textit{Id.} at 371.

\textsuperscript{91} U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995, supra note 66, at 58 tbl.4.7.

\textsuperscript{92} U.S. DEP'T OF JUSTICE, PRISONERS IN 2000, supra note 81, at 9.
prison bed, or releasing a single prisoner from these overcrowded conditions.\textsuperscript{93}

Such an approach is disingenuous. Unless real remedial steps are taken, prison crowding will continue to plague the corrections industry, exacerbating the physical and psychological problems that complicate long-term confinement.\textsuperscript{94}

Unfortunately, no such steps appear to be forthcoming. While jails or private prisons may alleviate some crowding, they are a band-aid on a wound in need of a tourniquet. The modern prison, a pressure cooker of idle men packed into cramped space, is an institution in which awful things regularly happen. The prison no longer attempts to make angels of men. In modern prisons, a transformation of an entirely different kind is taking place: men are becoming animals. Our warehouse prisons are animal factories.\textsuperscript{95}

\textbf{D. Animal Factories: The Antisocial World of the Modern Prison}\textsuperscript{96}

Faced with a war against crime—especially a campaign against drugs—America has struggled for an answer. And "[n]o matter what the question has been in American criminal justice over the last generation, . . . prison has been the answer."\textsuperscript{97} We have locked our offenders up. We have locked two million of them up. We have wrapped them in razor wire, caging them under the watchful gaze of rifle towers, and have packed them into cells that exceed their design capacities. And then we have left them there, idle, for years. We have stored them away in institutions that have been designed to warehouse human bodies.\textsuperscript{98}

Freed of the rehabilitative mandate, with prison sentences stretching far beyond anything conceived during the age of the medieval containment


\textsuperscript{94} See infra Part I.D.

\textsuperscript{95} Judge Richard Nygaard has suggested that it would be difficult to intentionally engineer a more harmful social institution than the modern prison. "Indeed, if one were to design a system specifically to break down cultural skills, social desire, to destroy and corrupt morals and to provide criminal instruction, one would have to give very careful thought to design a better institution for doing so than the American prison." Nygaard, supra note 7, at 5 n.17. At least one social psychologist teaches her course by spending a week examining the social causes of aggression, then asking her students to "imagine a horrible fantasy world which would put together all of these known social/environmental causes of aggression. What would it be? A typical prison." REIMAN, supra note 2, at 10.

\textsuperscript{96} The title of Part I.D is taken from a novel about the horrific socializing effects of the prison. See EDWARD BUNKER, THE ANIMAL FACTORY (1994). The novel has been made into a feature film. See ANIMAL FACTORY (Franchise Pictures 2000).

\textsuperscript{97} See SCHLOSSER, supra note 9, at 52 (quoting Franklin Zimring, the director of the Earl Warren Legal Institute, University of California, Berkeley).

\textsuperscript{98} See JOHNSON, supra note 63.
prison, the warehouse prison has undergone a disturbing metamorphosis. It has evolved into an institution that is not only expensive and ineffective, but affirmatively dehumanizing and brutal.

During the last twenty years, a considerable body of literature has emerged on the issue of prison crowding (or overcrowding, as it is sometimes called). And while the prison crowding research is not without its critics, numerous studies have reported a consistent correlation between crowding, impaired mental and physical health, and behavioral problems. Research has indicated, for example, that in crowded prisons, "the

99. See supra Part I.A.

100. American recidivism rates are astonishingly high. Indeed, it is the unusual individual who does not go on to reoffend after his release from jail or prison. Judge Nygaard claims that the recidivism rate reaches 80% in some institutions. "[I]f your educational system had a 60-70% failure rate, would you not require that something else be done? The American penitentiary system has advanced little in the 200 years since it was conceived and some American prisons have an 80% failure rate." Nygaard, supra note 7, at 9.

101. For an overview of some of this literature, see Nigel Walker, The Unwanted Effects of Long-Term Imprisonment, in PROBLEMS OF LONG-TERM IMPRISONMENT 183 (Anthony E. Bottoms & Roy Light eds., 1987).

102. See Jeff Bleich, The Politics of Prison Crowding, 77 CALIF. L. REV. 1125 (1989). Bleich rightly noted that "there is no active participant in the [crowding] debate with an institutional interest in contesting the perception of crowding." Id. at 1127. To obtain additional funding, to exert greater authority, or to excuse prison mishaps, American courts, legislators, and prison administrators might all collude in creating an appearance of exaggerated prison crowding. Gerald Gaes, Director of Research for the Bureau of Prisons, also is cautious about accepting the prison crowding research, and has recanted some of his earlier findings:

In my review of the research in 1985, I suggested that there were two basic conclusions that could be reached, based on the prison crowding literature. The first was that large, open bay dormitories elicit higher illness reporting rates than single- or double-bunked housing arrangements. The second was that prisons with more inmates than their rated capacity are more likely to have higher assault rates. Based on a reevaluation of the data and new evidence concerning prison violence, I now think that neither of those conclusions is valid.


Although most crowding research focuses on American prisons, crowding is a persistent problem in American jails, as well. In one survey of thirty-five jail administrators and social service providers, crowding was listed as the most serious of twenty-four listed jail problems. See J. Gibbs, Problems and Priorities: Perceptions of Jail Custodians and Social Service Providers, 11 J. OF CRIM. JUST. 327 (1983). Similarly, in another study, 795 of 2452 jails listed crowding as the greatest problem at their facility. See Nat'l Sheriff's Ass'n, The State of Our Nation's Jails (1982). In many cases, those subjected to the evils of jail crowding have not even been convicted of a crime.
rates of suicides, violent deaths, disciplinary incidents, natural deaths for 'elderly' (age 50 or more) inmates, increased beyond statistical expectancies. The sheer population size of a correctional facility may exert a negative influence on inmates, and the measure of square feet allotted per individual (spatial density) is also very important but one key factor appears to be the number of occupants per living unit (social density). Increases in spatial and social density appear to exact a serious mental toll on prisoners subjected to the crowding. Forensic psychologist Craig Haney summarizes the situation when he writes:

The overwhelming press of numbers inside American prisons promises to exact a substantial and long-term psychological price. A large literature on the consequences of overcrowding has documented a range of specific adverse effects on persons confined in prisons and jails, including increases in negative affect, elevated blood pressure, a greater number of illness complaints, higher rates of disciplinary infractions, and increased recidivism.

In its 1980 executive summary on prison crowding, the National Institute of Justice put the matter even more succinctly: "[T]here is a progressive and measurable increase in negative effects with an increase in housing density."

One of those negative effects associated with prison crowding is an elevated rate of psychiatric disorder. Paulus and his colleagues have found compelling links between rates of prison crowding and rates of psychiatric commitment. Psychiatric problems are pervasive throughout our crowded prison system. One prominent researcher has summarized matters by writing that "[t]he mental health of prisoners has been a perennial cause for concern" and suggesting that while psychosis is rare in the prison population, "approximately two-fifths of all males and two-thirds of all females

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Cells intended to hold one or two persons are holding three, four, even five. It is not uncommon for prisoners to sleep in hallways, with or without mattresses. Direct and immediate consequences of overcrowding are violence, rape, and a variety of health disorders. There is some evidence that prolonged exposure to seriously crowded conditions reduces the expected life span of inmates. Certainly tempers flare in close quarters and the vulnerable inmate becomes a more likely victim. What makes these facts even more depressing to contemplate is that many of the persons subjected to these conditions have not yet been tried and must be presumed to be innocent.


105. See id. at vii.
106. See id. at iv.
107. See id. ("[W]hile a decrease in square feet per individual is an important factor, it is the increase in social density that is most important.").
108. Haney, supra note 93, at 543.
109. MCCAIN ET AL., supra note 104, at iv.
110. See Paulus et al., supra note 103.
have pronounced psychiatric or behavioral problems."\textsuperscript{111} Blackburn has noted that while surveys of prisoners have not generally found a high prevalence of psychosis, they have revealed a consistent finding of high levels of anxiety and depression.\textsuperscript{112} And while most studies have not revealed unusual levels of psychosis, at least one study suggests that psychosis may be far more common in some prison subpopulations: "Over two-thirds of London’s life-sentenced men and women appeared to have some form of psychiatric disorder. As many as 10 per cent. of the sample were psychotic, almost certainly schizophrenic."\textsuperscript{113} Psychotic prisoners are not a strictly British problem. Craig Haney reported several cases of "flagrantly psychotic" prisoners at the supermax facility in Pelican Bay, California.\textsuperscript{114} In 1980, Herschel Prins published a comprehensive meta-review of about twenty existing studies, finding that eleven documented the existence of psychosis in prison populations, particularly cases of schizophrenia and depression.\textsuperscript{115} In addition, seven of the studies reported the existence of mental retardation, eight reported psychopathy, and four reported neurosis.\textsuperscript{116} In summary, mental disorder, particularly depression, is common within our crowded prison system.

Perhaps the most troubling aspect of this heightened psychiatric risk in prisons is the correspondingly high risk of suicide. McCain and his colleagues have demonstrated a relationship between prison crowding and risk of suicide and other forms of violent death.\textsuperscript{117} One study reported suicide rates that were 50% higher among American prisoners than among the general population.\textsuperscript{118} In Britain, the suicide rate among prisoners is estimated to be four times that of the general population.\textsuperscript{119} And a 1979 survey of American jails indicated that custodial suicide is not just a prison

\textsuperscript{111} Rod Morgan, \textit{Imprisonment: Current Concerns, in The Oxford Handbook of Criminology} 1137, 1162 (Mike Maguire et al. eds., 2d ed. 1997).
\textsuperscript{112} \textit{See Ronald Blackburn, The Psychology of Criminal Conduct} 278 (1994).
\textsuperscript{113} Pamela J. Taylor, \textit{Psychiatric Disorder in London's Life-Sentenced Offenders}, 26 Brit. J. of Criminology 63, 73 (1986). Depression and personality disorder were the most common diagnoses in this study.
\textsuperscript{114} \textit{See Craig Haney, Infamous Punishment: The Psychological Consequences of Isolation, in Correctional Perspectives} 161, 167 (Leanne Fiftal Alarid & Paul F. Cromwell eds., 2002) (describing one prisoner who boasted of super powers and another prisoner who complained of a brain implant that was connected to the prison’s main computer). Supermax (i.e. super-maximum security) facilities are high-security prison wings that segregate inmates from the warehouse prison’s general population and impose especially severe restrictions.
\textsuperscript{115} \textit{See Herschel Prins, Offenders, Deviants, or Patients? An Introduction to the Study of Socio-Forensic Problems} (1980).
\textsuperscript{116} \textit{See id.}
\textsuperscript{117} \textit{See McCain et al., supra note 104.}
problem: the suicide rate among responding jail facilities was sixteen times higher than that of urban populations.\textsuperscript{120}

Prison crowding also seems to have dangerous consequences in terms of inmate aggression. Gerald Gaes has reported that prisons which are crowded to levels beyond one inmate per sixty square feet are likely to experience elevated rates of assault.\textsuperscript{121} Similarly, Cox and his colleagues have reported a relationship between dormitory-style prison accommodations and rates of inmate assault.\textsuperscript{122} It is difficult to know exactly how prevalent inmate violence actually is, because inmates do not report acts of violence to prison authorities.\textsuperscript{123} But there is some research indicating that the acts of violence are common in prison institutions. In a recent Home Office study, the British government found that thirty percent of adult prisoners reported being assaulted, robbed, or threatened with violence in the previous month.\textsuperscript{124} Because “American prisons are more violent institutions than British prisons,”\textsuperscript{125} rates are almost certainly higher in U.S. warehouse facilities. The situation is even more acute in American supermax prisons, where double-celling means that prisoners have no privacy whatsoever. In one supermax facility, “[p]risoners routinely left their cells only to exercise in small yards with high walls and no facilities, or to bathe, and then only with their cell mate, from whose company there was no relief.”\textsuperscript{126} In some cases, pairing inmates in supermax cells might help overcome the crushing sensory deprivation which afflicts many prisoners.\textsuperscript{127} Sometimes, however, familiarity breeds contempt. And when cell mates confined within a cramped supermax cell declare war on each other, there is nowhere to run and there is nowhere to hide. Violence, sometimes lethal violence, results. “Pelican Bay State Prison in California is in the midst of eliminating this practice [of double-celling] because 10 prisoners have killed their cell mates in the last few years.”\textsuperscript{128}

\textsuperscript{120} See L. M. Hayes, And Darkness Closes In... A National Study of Jail Suicides, 10 CRIM. JUST. & BEHAV. 461 (1983).

\textsuperscript{121} See Gerald G. Gaes, The Effects of Overcrowding in Prison, 6 CRIME & JUST. 95 (1985).

\textsuperscript{122} See Cox et al., supra note 103.


\textsuperscript{124} See HOME OFFICE RESEARCH AND STATISTICS DIRECTORATE, RESEARCH FINDINGS No. 37: VICTIMISATION IN PRISONS 1 (Aug. 1996). The rates were even higher in young offender’s institutions. Forty-six percent of young offenders reported being victimized in the previous month. \textit{Id.} And neither adults nor juveniles reported their victimization to prison authorities. The reason that most inmates (49% of young offenders and 40% of adults) did not report their victimization was because they did not wish to be known as informers. \textit{Id.} at 3. Perhaps wisely, Gilligan, supra note 123, indicated that to be known as a snitch was “dangerous (‘suicidal’ is perhaps not too strong a word).” \textit{Id.} at 203.

\textsuperscript{125} Roy D. King, Prisons, in THE HANDBOOK OF CRIME AND PUNISHMENT 589, 620 (Michael Tonry ed., 1998).

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} See infra note 164.

\textsuperscript{128} Gonneman, supra note 75.
Not all prison violence is caused by inmates, however. Correctional officers have been responsible for many egregious cases, leaving social scientists wrestling with the difficult question of "why?"

In the summer of 1971, Philip Zimbardo conducted the infamous Stanford Prison Experiment. The study was designed to examine the situational effects of the prison setting. The experiment is well known because the infectious apathy of the prisoners and the escalating sadism of the guards forced Zimbardo to terminate his study prematurely. Although the experiment was supposed to last for two weeks, it was stopped after only six days. Under the current canons governing the ethics of human experimental research, the study cannot be replicated. For years, social psychologists wondered what would have happened if the experiment had been allowed to continue, if there were no ethical safeguards to stop it.

We no longer need to wonder. Within the walls of Corcoran Prison, the California Department of Corrections has conducted the forbidden experiment for us. With their supervisors willfully turning a blind eye, Corcoran guards staged gladiator-style fights for years. The fights, between members of rival gangs or ethnic factions, were "staged for the amusement of correctional officers." Inmates fought, even if they did not want to, because they knew that the guards were watching, and that they might be shot if they did not put on a

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130. The Stanford researchers screened and hired a group of students for an experiment in prison behavior, randomly sorting them into small groups of "guards" and "prisoners." See id. at 55. Those students who were assigned to the prisoner group were taken into custody from their homes by local police, transported to the basement of the Stanford psychology building, and held there in fabricated cells. See id. at 58-59. Their possessions were confiscated and they were dressed in loose prison smocks. Those assigned to the guard group were dressed in khaki-colored uniforms and scheduled to shifts of supervision. See id. at 58. At once, the students began to live out their roles. The students assigned to the prisoner group quickly became withdrawn and resentful. Several had initially tried to organize themselves, but when it became clear that collective behavior was not functional, the prisoners turned on each other, each individual protecting his own interests. See id. at 64. This is an interesting real-world manifestation of the "prisoner's dilemma" from game theory so often used in law and economics scholarship. See ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 34-38 (3d ed. 2000). Many prisoners expressed a willingness to surrender all of the money that had been paid for participation if they could only leave, yet the increasingly passive and docile prisoners did not demand to be released from the experiment. See Haney et al., supra note 129, at 60. Simultaneously, the guards began to exhibit authoritarian personality traits. They became abusive with the prisoners, taunting, jeering, and threatening them. See id. at 63-64. Within days, entitlements that had been rights were treated as "privileges" by the guards, and entitlements that had been privileges were forbidden. Guards treated prisoners according to their caprice and whim. In one moment, a request would be granted; in the next, it would be sneered down. See id.

131. See id. at 60.


good show. Even a valiant fight was no guarantee that one would not be shot. On April 4, 1994, inmate "Preston Tate was shot dead by a Corcoran guard at close range with a nine-millimeter assault rifle." The shooting was not spontaneous. Moments before the shot was fired, one guard reportedly said, "It's going to be duck-hunting season." Preston Tate was not the only dead duck to come out of Corcoran, however. Between 1989 and 1995, fifty Corcoran prisoners were shot under a variety of circumstances. Seven were killed.

In Corcoran, correctional officers also coordinated a system of inmate rape. When twenty-three-year-old, 120-pound Eddie Dillard was transferred to Corcoran for kicking a female guard at Calipatria Prison, Corcoran guards decided to teach him a lesson: you don't kick guards and you don't kick women. Dillard was assigned to a cell with Wayne Robertson, even though Robertson was listed in prison records as Dillard's enemy. Robertson, also known as the "Booty Bandit," was well known for beating and raping black prisoners as a favor for Corcoran guards. In return for this service, he was provided with extra food and tennis shoes. Another prisoner from Corcoran described the situation, "[f]he lights went out and Robertson grabbed Dillard. They struggled, Dillard pounded on the cell door, but no one came. Eventually, Robertson overpowered and raped him. Guards walked by two hours later, but just laughed at Dillard. Over the next two days, he was repeatedly raped."

Unfortunately, Corcoran is not an anomaly. Prison rape occurs with the tacit approval of criminal justice officials (if not with their active orchestration) on a regular basis. In the modern correctional facility,
brutality is the custom and convention. It is difficult to determine just how often prison administrators and officers turn a blind eye to the problem of prison rape. The inmate code of silence, as well as the stigma and shame associated with sexual assault, suggest that victimization is dramatically underreported, and until recently, there has been a "conspicuous" lack of research on the subject of prison rape.

The existing research on the prevalence of prison rape is inconclusive. Some researchers have concluded that rape in prison is "rampant" and that sexual assaults are "epidemic". On the other hand, some researchers have found consensual sex in prison to be relatively infrequent, and sexual assaults are purported to be extremely rare. Studies report proportions of males admitting to being raped in prison to range from less than 1% to 41%.

Christine Saum and her colleagues interviewed 106 medium-security prisoners and found that only two individuals reported attempted rapes in the previous year and no inmates reported actual rapes in the previous year. Similarly, Daniel Lockwood found that only one inmate out of 157 interviewed prisoners reported being the victim of a sexual assault, although 28% reported that they had been targeted for sexual assault at some time.

143. See, e.g., Dan Pens, Insanity, Brutality and Fatality: Florida's X-Wing Marks the End of the Line, Prison Legal News, Oct. 1999, at 1 (describing the beating death of Frank Valdes, savage enough that it was classified as a homicide). King, supra note 125, at 621 ("[I]n one of Maricopa County's jails it is alleged that officers used an electrical stun gun on the testicles of an offender and pushed his head so far down onto his chest while he was strapped into a restraint chair that he died of 'positional asphyxia'.")

144. At least one scholar suggests that correctional officers sometimes use rape as a "collateral, unofficial supplement to the publicly acknowledged repertoire of punishments that the prison metes out." See Gilligan, supra note 123, at 203. Gilligan argues that many correctional officers have "not only tolerated but actually encouraged" homosexual rape in prisons, on the theory that it allows correctional officers to control otherwise intractable prisoners. Sometimes, Gilligan reports, correctional officers will hand vulnerable inmates over to favored prisoners in return for their cooperation in maintaining prison order. Id.


Prisoners may underestimate the incidence of sex because they are concerned with possible repercussions from inmates and correctional officers. They may be embarrassed to admit engaging in sex with others males for fear of being labeled as weak or gay, and they may fear the possibility of punitive measures. Even worse, admitting to having been raped in prison goes against the inmate code whereby status and power are based on domination and gratification.

Id. at 418.


147. Saum et al., supra note 145, at 414.

148. Id. at 427.

Other researchers, however, have found widespread sexual assault in prison. Wooden and Parker's study of sexual activity in a California prison indicated that 65% of the prisoners had had at least one sexual encounter while in prison. Fourteen percent of the sample reported having been victimized. More recently, Struckman-Johnson's research indicates that sexual coercion is indeed quite common in American prisons. She found that 22% of male inmates had been coerced or persuaded into some form of sexual contact in prison, and about half of those (13% of the total prison population) had been persuaded or forced into having actual intercourse.\textsuperscript{150} Interestingly, it is not always other inmates who initiated this coerced prison sex: correctional officers were responsible for one-fifth (18%) of the sexual victimization.\textsuperscript{151} The Struckman-Johnson study is supported by other research on prison rape. Cheryl Bell and her colleagues wrote:

The Struckman-Johnson study is a reliable measure of the extent of male prison rape for several reasons. First, its results are similar to the findings in two other contemporary studies. Don Lockwood's 1986 study of New York state prison inmates revealed that 22% of these maximum-security prisoners had been the victims of attempts to coerce them into a sexual act, compared to 23% in the Struckman-Johnson study. Further, the 14% sexual assault rate documented by Wayne S. Wooden and Jay Parker in their 1982 study is similar to the Struckman-Johnson rate of 12% for forced penetration.\textsuperscript{152}

The organization, Stop Prison Rape, estimates that there may be as many as 364,000 inmates raped in prison each year.\textsuperscript{153} The research also indicates that prison rapists will repeatedly assault their victims. The victims in the Struckman-Johnson study reported having experienced an average of nine assaults.\textsuperscript{154} There is one more reason why the research on prison rape should be sobering: HIV.

After the first few times he was raped, Michael Blucker got up the courage to get an HIV test. Fortunately for the married 24-year-old, he tested negative. But the assaults didn’t stop. Locked inside the Menard Correctional Center, the maximum-security prison in Illinois where he had been sent for car theft in 1993, Blucker says that he was turned into a sex slave, traded by gang members for cigarettes and drugs. According to a lawsuit he filed later, he was raped by 10 men in the showers, by his cellmate while in

\textsuperscript{150} See Struckman-Johnson, supra note 146, at 71.

\textsuperscript{151} Id.


\textsuperscript{154} See Struckman-Johnson, supra note 146, at 75.
“protective custody,” and on dozens of other occasions. In March 1994, he was again tested for HIV. This time, he was positive. Michael Blucker, sentenced to seven years, had contracted a death sentence.\textsuperscript{155}

Blucker took the State of Illinois to court, alleging that Menard prison guards helped gang members to rape him, but the jury did not find the staff members liable for what had happened.\textsuperscript{156} While it is difficult to prove that prison administrators are responsible for prison rape under existing legal doctrine,\textsuperscript{157} it is an issue that probably will continue to appear in America’s courts. Why? Because according to some studies, more than 10\% of state prisoners report being forcibly raped, and because the rate of HIV and AIDS is four to five times higher in prisons than among the general U.S. population.\textsuperscript{158}

Sally Mann Romano recounted one especially graphic story of prison abuses in the security housing unit (“SHU”) of California’s Pelican Bay State Prison:

It was in this unit that Vaughn Dortch, a prisoner with a life-long history of mental problems, was confined after a conviction for grand theft. There, the stark conditions of isolation caused his mental condition to “dramatically deteriorate,” to the point that he “smeared himself repeatedly with feces and urine.” Prison officials took Vaughn to the infirmary to bathe him and asked a medical technician, Irven McMillan, if he “wanted a part of this bath.” McMillan responded that “he would take some of the ‘brush end,’ referring to a hard bristle brush which is wrapped in a towel and used to clean an inmate.” McMillan asked a supervisor for help, but she refused. Ultimately, six guards wearing rubber gloves held Vaughn, with his hands cuffed behind his back, in a tub of scalding water. His attorney later estimated the temperature to be about 125 degrees. McMillan proceeded with the bath while one officer

\textsuperscript{155} See Weed, supra note 153.
\textsuperscript{156} Id.
\textsuperscript{158} In 1999, the rate of HIV infection was about four times higher in prison than among the U.S. population. See HIV InSite North America, at http://hivinsite.ucsf.edu/InSite.jsp?page=cr-02-04 (last visited Feb. 20, 2002) (reporting the adult prevalence rate of the HIV virus as being 0.61% in the United States); SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, at 546 tbl.6.75, available at http://www.albany.edu/sourcebook/1995/pdf/t675.pdf (last visited Feb. 22, 2002) (reporting 2.1% of the population in custody having the HIV virus or a confirmed case of AIDS). In 1999, the rate of confirmed AIDS cases was five times higher in the prison population than in the general U.S. population. See LAURA M. MARUSCHAK, HIV IN PRISONS AND JAILS, 1999, at 4, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/hivpj99.pdf (last visited Feb. 22, 2002) (“At the end of 1999, the rate of confirmed AIDS in state and federal prisons was 5 times higher than in the total U.S. population. About 60 in 10,000 prison inmates had confirmed AIDS, compared to 12 in 10,000 persons in the U.S. population.”).
pushed down on Vaughn's shoulder and held his arms in place. After about fifteen minutes, when Vaughn was finally allowed to stand, his skin peeled off in sheets, "hanging in large clumps around his legs." Nurse Barbara Kuroda later testified without rebuttal that she heard a guard say about the black inmate that it "looks like we're going to have a white boy before this is through, . . . his skin is so dirty and so rotten, it's all fallen off." Vaughn received no anesthetic for more than forty-five minutes, eventually collapsed from weakness, and was taken to the emergency room. There he went into shock and almost died.\footnote{159. Sally Mann Romano, Comment, \textit{If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison}, 45 Emory L.J. 1089, 1089-90 (1996).}

The account of Vaughn Dortch's brutal treatment reads like the transcription of a nightmare. It seems almost impossible that six guards would hold a man down in scalding water and scour him with a hard bristle brush until his skin peeled in sheets and hung in clumps. This is a level of sadism that is difficult to understand. Perhaps there is a lesson to be learned from the Stanford Prison Experiment. Perhaps there is something about the prison environment itself that is dehumanizing and that breeds despair, hostility, and malevolence.\footnote{160. \textit{See supra} note 130 (describing the Stanford Prison Experiment). In the study, "prisoners" and "guards" were randomly assigned from a common pool, suggesting that it is not "something about the disposition of guards" that leads to sadism among correctional officers, and that it is not "something about the disposition of prisoners" that leads to desperation and viciousness. The study implies that there may be something about the situation that creates conflict and antisocial behavior.}

Security housing units, like the SHU at Pelican Bay where Vaughn Dortch was tortured, are also sometimes called "disciplinary control units," "special management units," or other such names. They are high-security prison wings that segregate inmates from the warehouse prison's general population and impose especially severe restrictions. When an entire facility is operated as a SHU, it's often referred to as a super-maximum security ("supermax") prison.\footnote{161. In supermax facilities, inmates are entombed within solitary cells of about seven by twelve feet (slightly larger than a king-sized bed) bound by seven layers of steel and cement. The spartan furniture (for example, a stool, a writing desk, and a mattress pedestal) is made of poured concrete in order to prevent prisoners from fashioning weapons out of metal parts. \textit{See} Mark Johnson, \textit{Colorado Facility Is Pacesetter of Newest 'Supermax' Prisons}, Houston Chron., June 20, 1999, at A8; Bob Unruh, \textit{Latest in Incarceration Outdoes Alcatraz; Prisons: Super Max Facility About to Open in Colorado Will House the Very Worst Federal Convicts, the Kind Once Sent to Island in San Francisco Bay. There'll Be No Coddling Here}, L.A. Times, Dec. 11, 1994, at A18. Inmates are often confined within their tiny one-man cells for twenty-three hours per day; they only get one hour of exercise (in an even-smaller outdoor cage that is attached to the rear of their cell). This hour is also spent in solitude. Gonnerman, \textit{ supra} note 75. The costs associated with super-maximum facilities are even higher than those associated with warehouse prisons. It costs an average of $50,000 or more per year to maintain one prisoner in supermax conditions. \textit{See} James Brooke, \textit{In 'Super Max,' Terms of Endurance}, N.Y. Times, June 13, 1999, at A38 (stating that the cost per inmate in super-maximum conditions is $50,000 per year, compared to a cost of $20,000 per inmate per year for incarceration in general population).}
Supermax facilities strip inmates of the vestiges of humanity enjoyed by warehouse prisoners. They treat human inmates like caged animals.62 Currently, more than 10,000 prisoners languish in supermax facilities in the United States.163 Even the idle desperation and ever-looming violence of the warehouse prison cannot match the sheer sensory deprivation of the supermax prison.164 The silence and the lack of human contact are dehumanizing. Indeed, the Madrid v. Gomez court concluded that the conditions in supermax facilities “may press the outer bounds of what most humans can psychologically tolerate.”165 Thus, the modern prison, whether a warehouse prison (full of caged men left idle) or a supermax prison (consisting of men confined in tiny, isolated cells) is an ineffective social band-aid on an unstaunchable social problem.166 Worse, the modern prison is affirmatively harmful—it is a breeding ground for violence, rape, and escalating criminality.

Part I has shown that warehouse prisons are a failed experiment in corrections. They fail for four different reasons. First, they are theoretically unsophisticated. They do not successfully advance the penological objectives of retribution, deterrence, or rehabilitation in any systematic way. And while warehouse prisons may incapacitate offenders inasmuch as they cannot offend against the general public while incarcerated, inmates are not prevented from committing crimes while in prison. Second, they

62. Kevin Johnson, American Journal: New Prisons Isolate Worst Criminals, USA TODAY, Aug. 4, 1997, at A1 (“Don Poston, who will preside over the daily operation of the new Texas prison [Estelle], says, ‘It’s sad to say, but there are some people who deserve to be treated like animals.’”).
63. Brooke, supra note 161.
64. See Woodburn Heron, The Pathology of Boredom, 196 Sci. Am. 52 (1957) (finding that subjects confined to an experimental cubicle under conditions of confinement analogous to those in supermax facilities suffered from cognitive impairment, visual and auditory hallucinations, and exhibited measurable changes in brain wave activity after only ninety-six hours). If four days can cause measurable changes in brain wave activity, what might the effects of a week in equivalent isolation be? Or a month? Or perhaps a year? What about thirty-six years of isolation? The average sentence for prisoners in Colorado’s ADX supermax prison is thirty-six years. See Michael Taylor, Colorado’s ADX Supermax Prison: The Last Worst Place, S.F. CHRON. A3 (Dec. 28, 1998), available at http://www.tgorski.com/courses/PICS%20-%20Post%20Incarceration%20Syndrome/PICS%20Reading%20Assignment%2020%20Colorado’s%20ADX%20Supermax%20Prison%2010831.htm (last visited Feb. 20, 2002).
66. Lawrence Friedman describes the skepticism with which some prison officials regarded the American prison:

The prison story, in general, was a story of failure. . . . Yet there was no going back. Imprisonment was and remained the basic way to punish men and women convicted of serious crimes. The great penitentiaries were not pulled down. There they stood—corrupt and brutal; warehouses for convicts. Prisons did not seem to end crime, or cure criminals. A warden at the Auburn prison in New York told Zebulon Brockway, the penologist and prison reformer, “that in his opinion 60 per cent of his prisoners were as sure to resume crimes as they were sure to be discharged from prison; that another 30 per cent would in all probability do the same; and as to the remainder he could not form a confident opinion.”
Friedman, supra note 26, at 159; see also Nygsard, supra note 109 (criticizing recidivism rates of 60% to 80%).
are expensive, and their costs increase each year. Third, even a prison construction boom has been incapable of containing the incarcerated population, and crowding continues to be a serious problem. Fourth, whether due to crowding or to other subtle effects, modern prisons are savage and brutal institutions. The modern prison must be abolished. It is simply too expensive, too crowded, and too violent to warrant continued operation. Surely, as we enter the twenty-first century, America can do better.

II

THE PUNITIVE COMA

What if it was possible to avoid all of the evils of the modern prison while simultaneously incapacitating our incarcerated population more effectively than either the warehouse or the supermax prison can incapacitate them?

What if we could quickly, painlessly, and economically put inmates into some type of suspended animation? The idea of suspending human consciousness, once fantastic, has become familiar. From the classic fairy tales of Sleeping Beauty and Rip Van Winkle to more recent films like Woody Allen's Sleeper and Cameron Crowe's Vanilla Sky, we have been exposed to the idea of putting people to sleep for unnatural lengths of time. But what if this was not just science fiction, but a viable technique for suspending consciousness?

Let us suppose that it were possible to punish offenders by giving them an injection that would instantly induce a state of coma. Let us further suppose that it were possible, perhaps by administering additional injections on a regular schedule, to maintain them in such an unconscious state for a period of months, years, or even decades. This presents interesting possibilities. If prisoners could be placed into comas, they could be packed tightly into a very limited space, with none of the deleterious side effects that are currently associated with prison overcrowding. For where there is no consciousness, there can be neither inmate stress nor disciplinary infractions. Drugs and gangs and rape and assault, indeed, most or all of the ongoing problems that plague the staff of warehouse prisons, would immediately disappear. It might even be possible to warehouse unconscious prisoners in coma bays more cheaply than containing them in warehouse and supermax prisons. Even if the drugs used to induce and maintain the comas were not cheap, these coma-bay prisons could be

169. SLEEPER (United Artists 1973).
170. VANILLA SKY (Paramount Pictures 2001).
171. E.g., PHILIP KERR, A PHILOSOPHICAL INVESTIGATION 197-98, 322 (1993) (describing the use of punitive coma in a fascinating near-future murder mystery, characterizing the punitive coma as a punishment that is cheaper, kinder, and safer than prison warehousing).
operated with a reduced staff of medical and security personnel. Indeed, if such an injection were available, it would be a humane and rational solution to the nightmarish social problem of an uncontrollable prison population.

The injection is quite real. It is no longer science fiction. Physicians pioneered the procedures for inducing states of coma in rudimentary form decades ago. Indeed, there may be several induction techniques available for use in a correctional setting, including cryonics and insulin coma. Cryonics and insulin coma are too experimental to presently consider their use for penological objectives. At this time, cryonics can only be used with subjects who are already dead by medical definition, and the sustained manipulation of the glucose-insulin balance is a risky endeavor. However, one technique can be implemented as a viable solution to the prison problem: the narcotic coma.

There are few comprehensive books on the viability of the cryonic storage of human beings. But see K. Eric Drexler, Engines of Creation (1986), available at http://www.foresight.org/EOC/ (last visited Jan. 14, 2002); Felix Franks, Biophysics and Biochemistry at Low Temperatures (1985). The objective of cryonics is to preserve the body, head, or brain of a legally dead person for resuscitation at a later time. The Alcor Life Extension Foundation is an institute operating a cryonics system in Scottsdale, Arizona. The current cost of whole body CryoTransport is listed as $120,000. The cost of head-only treatment is $50,000. Alcor Life Extension Foundation, What We Do, at http://www.alcor.org/01b.html (last visited Jan. 14, 2002). The American Cryonics Society operates a similar program based in Rancho Cucamonga, California. American Cryonics Society, at http://pweb.jps.net/cryonics/#what (last visited Jan. 14, 2002). The Cryonics Institute, in Clinton Township, Michigan, offers the lowest prices in the world. Whole-body suspension can cost as little as $28,000. See Robert C.W. Ettinger, Welcome to the Cryonics Institute, at http://www.cryonics.org (last visited Feb. 23, 2002). Other groups are focusing upon the social implications of this technology. See The Full Life Society, at http://morelife.org (last visited Sept. 30, 2000) (listing, for example, "vastly reducing the cost of reducing violent criminals from our society without recourse to the savagery of the death penalty" as a goal of the society). Yet, because cryonic suspension can only be used on those who are legally dead, it is not currently a viable technique of regulating our penal population. But cryogenic science is developing at a rapid rate, and within a few decades, it might be possible to freeze and revive convicts on a regular basis.

It is possible to induce a state of diabetic coma by increasing glucose levels while holding insulin levels constant, or to induce insulin shock by introducing large volumes of insulin while holding glucose levels constant. See American Acad. of Orthopaedic Surgeons, Emergency Care and Transportation of the Sick and Wounded 240 (3d ed. 1981). Therapeutic use of short term insulin comas has a long history. Starting in about 1935, and developed by the Viennese doctor, Manfred Sakel, insulin comas were used as a form of somatic therapy. See J.P. Slattery, Report of the Royal Commission into Deep Sleep Therapy, 3 DST & ECT 1 (1991) [hereinafter DST]. Patients were given large doses of insulin, which was said to have "inhibited what was functioning (the psychosis) and it activated what was latent, viz, normality. If the psychosis can be interrupted, normality may temporarily, at least, break through the psychosis. If the restoration is complete enough, normal reactions may be sufficiently deeply entrenched to endure more and more permanently." Id. at 13.

See, e.g., Cryonics: A Basic Introduction, at http://www.cryonics.org/prod.html (last visited Feb. 23, 2002) (answering the question of whether cryonics can be performed on living people by stating, "Legally, not yet. Obviously, it would be better to cool a patient before illness causes so much physical damage that it results in death. But it's not presently allowed by law, even for someone in great suffering or with a terminal illness.").

One of Dr. Bailey's colleagues, Dr. Evan Davies, described insulin coma as being more risky than DST. He stated:
A. Methods of Inducing the Punitive Coma

The use of narcotics in deep sleep therapy ("DST") has been traced to about 1920, when it was first used in Zurich. It was practiced there as a "first rank therapy at least until 1953, and thereafter, until the early 1960s." Although DST had fallen out of favor in therapeutic circles by the early 1960s (it was said that the modest benefits did not warrant the hazards), the procedure remained a legitimate treatment method into the late 1960s and early 1970s. Even into the late 1970s the technique had at least one adherent. Between 1963 and 1979, Australian physician Harry Bailey was using an extreme form of DST in Sydney's Chelmsford hospital, coupling large doses of barbiturates with electro-convulsive therapy ("ECT"), pressing the known boundaries of the narcotic coma.

It is important to be clear about what happened at Chelmsford. Although Bailey claimed a success rate of 85% for a broad range of disorders, including depression, schizophrenia, anorexia, alcoholism, and drug addiction, the model of DST employed at Chelmsford hospital was extremely dangerous. It was not a triumph of modern medicine, but a black spot on modern psychiatry, a human rights violation that was hushed up for [Insulin coma] had its hazards as a treatment, and that is why it was replaced. Once the barbiturates were available for what was perceived as a much safer way of sedating people, the barbiturate therapy became the standard method for sedation therapy rather than using insulin. All those insulin clinics went out of fashion about 1955 or 1956.

DST, supra note 173, at 32. Davies indicated that the insulin therapy causes the vascular system to contract, making the reversal of the insulin coma by injecting glucose difficult. Consequently, the great risk of insulin coma was "irreversible coma." Id.; see also id. (describing Dr. Sakel's version of insulin therapy).

Before implementing a system of DST treatment, Dr. Bailey had also used insulin therapies. Bailey "described the full story of insulin treatment as "fascinating" and described his development of a treatment called full coma insulin. Id. at 35. Bailey "described it as 'quite a horrifying procedure. To see it, you just wouldn't believe that it was done.'" Id.

176. See infra Part II.A.
177. DST, supra note 173, at 9.
178. Id.
179. The Australian Government concluded:
Although sleep treatment . . . may have had some adherents by 1960, it seems those adherents supported the use of the therapy not because of contemporary research or understanding but rather because of their early training. In such circumstances the only reasonable conclusion is that by 1963 when the programme started at Chelmsford, it was well known the benefits were minimal, what benefits there were were the result of other matters such as ECT and the nature of the drugs themselves and the risks were grave.

Id. at 21.
182. Paul Greguric, Chelmsford's Dark Secrets Still Buried; Questions Remain Unanswered in a Tragic Chapter of Medical History Involving Deep-Sleep Therapy, Canberra Times, Sept. 4, 1999, at A5 (providing an excellent overview, detailing Harry Bailey's deterioration as a physician and a man, up to the point of his Sept. 8, 1985, suicide).
decades. At Chelmsford, Harry Bailey placed his subjects into a state of true coma (they were no longer responsive to painful stimuli) for periods of up to thirty-nine days. Such prolonged states of DST coma were highly unorthodox, and it was even more unusual to couple the intensive DST regimen with ECT treatments. The program entailed serious risks. Between 1963 and 1979, 1127 patients were treated with DST at Chelmsford. Twenty-four of them died in the hospital and twenty-four others committed suicide after being discharged. In all, 183 DST patients died at Chelmsford or within one year of their discharge. A torrent of tort-based lawsuits were filed. A government inquiry into Chelmsford hospital concluded that by 1967, Bailey must have known that DST was dangerous.

Clearly, Bailey's version of DST was dangerous, and it would be irresponsible to pattern a system of punitive coma too closely on the Chelmsford therapy. But Bailey accomplished one crucial thing: he demonstrated that it was possible to dramatically increase the depth and the duration of narcotic comas.

We know a great deal about Bailey's method. The New South Wales government inquiry filled four thousand pages. A vast body of data was collected in the course of the investigation, much of it medical in nature, and modern penologists could make valuable use of this research data. We can utilize Bailey's DST research. We can build upon his successes, learn from his mistakes and, armed with the advances of twenty years of medical innovation, can adapt the narcotic coma to solve the prison problem of the twenty-first century.

183. DST, supra note 173, at 51. Bailey claimed to have extended comas to eight, ten, and even twelve weeks with DST sedation. Id. at 38.
184. Ian Anderson, Nightmare in Chelmsford, Sydney: Treatment in Australian Hospital, New Scientist, Jan. 5, 1991, at 12 (“Bailey's combination of deep-sleep and electroconvulsive therapy was even more bizarre than using deep-sleep therapy on its own.”).
185. Id.
187. Id.
190. Anderson, supra note 184.
1. Pharmacology of the Punitive Coma

Bailey’s patients were placed into an initial state of sedation with an intramuscular injection of 500mg of Sodium Amytal, a long-lasting barbiturate that acts for several hours. After the initial sedation, patients received a “lytic cocktail,” a mixture of various drugs that combined to yield a synergistic effect of deep sedation.

Food and lytic cocktails were administered to patients via a Ryles tube (a rubber tube inserted through the nose into the stomach). The normal diet consisted of Sustagen and milk alternated with feedings of fruit juice. Patients were fed and medicated every four hours. Additional drugs, usually Sodium Amytal, were administered by the nursing staff as needed; this typically occurred when the staff saw that one of the patients appeared to be in need of additional sedation.

Worried by the possibilities of renal infection created by the insertion of catheters, Bailey allowed patients’ urine to overflow onto their beds. Initially, rubber sheets were used to manage the situation, and later, absorbent Kylie sheets were used. Although he did not implement the procedure, Bailey recognized that prophylactic doses of antibiotics (or “antibiotic cover”) would enable him to catheterize patients without unnecessary risk of infection. The regulation of patient feces was a non-issue at Chelmsford. DST patients did not have their bowels opened during the period of sedation, as Bailey claimed that the diet he prescribed did not require it.

Recent innovations in science and medicine will allow us to adapt Bailey’s DST work to our penal purposes. Since the narcotic comas to be effectuated in coma-bay prisons will last much longer than those used at

192. DST, supra note 173, at 190, 192.
193. Id. at 45. An early version of the lytic cocktail included Pethidine, Largactil, and Phenergan. It was administered intramuscularly, and profoundly depressed the central nervous system. Id. at 31. Bailey’s version of the lytic cocktail included about 400mg of Tuinal (a pharmaceutical that contained both Sodium Amytal and a shorter acting barbiturate, Sodium Seconal) and two benzodiazapene drugs that extended and maximized the effect of the Tuinal: Neulactil and Serenace. Id. at 190-91. When Neulactil was combined with Tuinal, the effect was to put patients into a very deep state of sedation. See id. at 85. This sedated condition could properly be considered a coma (as it was much deeper than mere sleep). Bailey suggested that, armed with benzodiazapenes to potentiate barbiturate drugs, it was possible to maintain a coma for as long as two months. See id. at 62.
194. Id. at 191, 193.
195. Id.
196. Id.
197. Id. at 191.
198. Id. at 194
199. Id.
200. Id. Bailey “suggested the stage had been reached in 1977 where perhaps it could be more practical to catheterize patients because antibiotics, catheters and equipment were good enough.” Id. at 40.
201. Id. at 195. There were incidents where patients’ bowels did open, however. Id. There were also reports of severe constipation or impacted feces that required physical unpacking. Id.
Chelmsford, great care must be taken to regulate the physical function of our subjects. Dramatic developments in medicine and pharmacology will allow us to extend the horizon of the narcotic coma, maintaining prisoners in a neutralized but safe state of coma for years.

The development of new generation antibiotics, for example, has dramatically lowered the market costs of older antibiotic pharmaceuticals. The use of such antibiotic cover will be necessary in order to minimize the risks of streptococcus and staphylococcus infections during long-term catheterization. Yet if a coma-bay prison purchases its antibiotics in bulk, the costs can be reduced to near-wholesale levels. It will, for example, cost less than $220,000 to maintain 1000 coma-bay prisoners on a continuous prophylactic dose of the antibiotic Metronidazole for ten years.

The available range of sedatives has improved with time, as well. As is true of antibiotics, the appearance of new and sophisticated anesthetics has a two-fold effect: it expands the possibilities of what can be achieved with medication (in terms of precision and duration), and it reduces the market cost of older but still quite serviceable anesthetics. These low cost anesthetics, when purchased in bulk and at wholesale cost, will allow coma-bay prisons to operate with minimal overhead.

A plastic Ryles tube into the stomach can be used for feeding, as at Chelmsford. If regurgitation is common, the stomach can be bypassed and a nasoenteric tube can be placed directly into the prisoner’s duodenum.

202. Bailey used potentiated Sodium Amytal, and Amytal might still be used. But recently developed central-nervous-system depressants expand the possibilities of sustainable comas. See Nimal Joshi, Oral Antibiotics: Are the Old Still Gold?, 34 Hosp. Prac. 117 (1999) (indicating that the wholesale cost of a ten-day run of the new antibiotic, Ciprofloxacin, is $72.40, the equivalent cost of Doxycycline is only $1.80, and the wholesale cost of ten days of Metronidazole is only $0.60), available at http://www.hosppract.com/issues/1999/10/joshi.htm (last visited Jan. 14, 2002).

203. These microorganisms were particularly troublesome at Chelmsford. DST, supra note 173, at 48. And as Bailey explained, “Catheterization provides a highway straight into the bladder for everybody’s bugs and germs, and it’s a dicey business.” Id. at 40. But see supra note 200 (indicating that catheterization already was becoming viable in 1977).

204. See Joshi, supra note 202.


206. The use of Etomidate (an induction agent often used in general anesthesia to provide sedation and amnesia) or Ketamine (an induction agent that produces amnesia, unconsciousness, and analgesia) will allow for greater central nervous system regulation in coma-bay prisoners. The use of inhalation agents such as Isoflurane, Enflurane, Desflurane, and Fluothane are now commonplace in surgical procedures. See Arsenault, supra note 205.

207. “Patients were fed at Chelmsford with a Ryles tube. Initially this was a rubber tube, later a plastic tube, inserted through the nose into the stomach.” DST, supra note 173, at 193. The nasogastric tube is still a common method of feeding patients who are unable to chew or swallow. See BARBARA LAURITSEN CHRISTENSEN & ELAINE ODEN KOCKROW, FOUNDATIONS OF NURSING 459 (3d ed. 1999). A number of liquid formulas for liquid tube feedings are commercially available. See GRACE COLE, FUNDAMENTAL NURSING 482 (2d ed. 1996).
or the jejunum.\textsuperscript{208} Ostomies (surgical openings) can also be made into the esophagus, stomach, or jejunum if this is required to ensure effective feeding.\textsuperscript{209} Even if the prisoner's gastrointestinal tract does not function properly, intravenous feedings will allow the continued maintenance of the coma-bay prisoner.\textsuperscript{210} Medication, however, should be delivered intravenously, as this is more efficient than the oral delivery employed at Chelmsford,\textsuperscript{211} and can be regulated with a computer monitor and automatic administration system.\textsuperscript{212} Thus, effective use of developments in medical technology will minimize the risks and side effects that were so problematic at Chelmsford hospital.

2. Minimizing the Risks Associated with Punitive Comas

Even the effective use of new tools and procedures will not solve all of the logistical problems of maintaining long-term comas: the human body is not designed to function in a passive state for such a prolonged period of time. Inmates in coma-bay prisons will be comatose for much longer periods than were the Chelmsford patients. Maintaining a patient in DST for a month was difficult; maintaining a coma-bay prison inmate for ten years presents a problem of a different magnitude.\textsuperscript{213}

\textsuperscript{208} See CHRISTENSEN & KOCKROW, supra note 207, at 459.

\textsuperscript{209} Id.

\textsuperscript{210} Inserting nutritionally complete solutions directly into the bloodstream through a central vein (typically the subclavian vein) is known as total parenteral nutrition (TPN). See Cole, supra note 207, at 483-84 (describing procedures for TPN and indicating potential complications after TPN catheter insertion); Christensen & Kockrow, supra note 207, at 459-60 (describing TPN procedures and identifying potential nursing risks).

\textsuperscript{211} DST, supra note 173, at 191 ("[T]he drugs were normally administered orally through a Ryles tube.").

\textsuperscript{212} By monitoring the prisoner's brain waves and blood-borne medication levels, we can maintain him at an optimal level of sedation. Monitors of this kind have improved dramatically in recent years. See Robert Davis, Safely Sleep Through Surgery, USA TODAY, Apr. 27, 2000, at 7D (describing the new ability to observe a patient's level of consciousness with anesthetic monitoring using a $5000 monitor). If the level of medication in a prisoner's blood falls and if his cerebral activity increases to a level beyond our specified setpoints, the computer will administer a small dose of sedative (for example, Ketamine) on a regular basis until the desired level is established. As soon as that level is reached, the computer will cease delivery of the drug. This will be a great improvement over the Chelmsford method of medicating patients. There, patients were given a fairly large dose of barbiturate every four hours, plunging them into a dangerously deep state of sedation that gradually wore off until they began to lighten to a state near waking consciousness, requiring another massive dose of central-nervous-system depressants. The use of an automated monitoring-and-delivery system will allow greater precision in the medicating of prisoners. Instead of updating medication levels every four hours, such a system could update levels every thirty seconds, correcting even tiny deviations in levels of sedation or arousal. It will allow prisoners to be maintained at a near-constant and optimal level of sedation, just medicated enough to prevent any risk of their waking, but using no more sedative than is necessary to realize that objective.

\textsuperscript{213} See PAMELA MOUNTJOY & BARBARA WYTHE, NURSING CARE OF THE UNCONSCIOUS PATIENT 2 (1970) (noting that the unconscious patient's life depends on "the care he receives until he regains normal health").
The coma-bay prisoner should be thought of as a (living) machine, with inputs and outputs. He could be intubated, providing a sustainable airway to the lungs and a reliable means of automatically pumping semisolid food to the stomach. A standing intravenous line will allow saline or electrolyte-rich Ringers solution to be added to the bloodstream, facilitating precise maintenance of antibiotics and narcotics levels. These drug levels will be continuously monitored and adjusted by a low-cost automated system. Currently available sedatives will enable physicians to place prisoners into deep levels of coma without the complications of myocardial depression. The use of urine catheters will also mean that excoriation and pressure sores would be less likely to develop. Placing prisoners on adjustable beds with flotation mattresses will further minimize the risks of pressure sore formation.

The coma-bay prison will minimize or eliminate most of the health risks that interfered with DST treatment at Chelmsford. The use of modern sedative combinations will eliminate the depressive effect on pulse rate and blood pressure. Respiratory problems will be eliminated by using a standing nasopharyngeal airway, and by a constant drip of broad-spectrum antibiotics. The prophylactic use of antibiotics will also eliminate the

214. See supra note 207 (describing use of nasogastric tubes in feeding). Semisolid food will be used to maintain a positive volume in the digestive tract and to eliminate the risk of intestinal collapse. Feces will be cleared from the digestive system by regularly administered enemas. See MOUNTJOY AND WYTHE, supra note 213, at 42.

215. See KOCKROW, supra note 207, at 526 (describing the use of the intermittent peripheral infusion device, making “IV drug therapies readily accessible without causing the unnecessary pain of a restick with every dose”).

216. Thus, surveillance of the prisoner’s level of conscious arousal is made possible. See supra note 212. A prison employee will be able to check the brain waves of any prisoner with the touch of a button, and fluctuations outside of the anticipated range of arousal can trigger an alarm, automatic dispensation (or cessation) of additional sedatives, or both.

217. See ARSENAULT, supra note 205.

218. After Kylie sheets were introduced at Chelmsford, providing for drier patient beds, patients “did not get the pressure areas like they used to get in the old days.” Id. at 46.

219. The ROHO cushion was designed to reduce pressure sore (ischemic ulcer) formation. The cushion uses air-fluid interconnected cells to mimic the supportive properties of water and reduce the incidence of pressure sores. The technology employs four key principles to achieve this end: six degrees of freedom (cells are independent and can adapt to the anatomy of the patient), low surface tension (permits immersion into the cushion without deforming tissue), constant restoring force (forces and pressures pushing back against the patient are kept constant at all points of contact), and low friction and shear (the slick surface prevents friction between the cushion and the patient’s skin). See ROHO Dry Floatation Technology, at http://www.rohoinc.com/dryfloat.asp (last visited Feb. 23, 2002). Dry floatation technology has been appropriated for other uses, as well. See Ray Jutkins, Let’s Sit Down (Sept. 5, 2001) (describing the expansion of ROHO dry floatation technology to make more comfortable motorcycle seats for road-weary bikers and for long-distance truck drivers), at http://www.rayjutkins.com/ezine/20010905.html (last visited Feb. 23, 2002).

220. See supra note 212 (describing automated delivery of anesthesia for greater precision).

221. Respiratory problems were a serious complication associated with narcotic sedation. See DST, supra note 173, at 20 (describing one death in a previous study due to pulmonary embolism and the “outstanding complication” of bronchopneumonia). Chelmsford staff routinely had to clear the
risks of streptococcus and staphylococcus infection. Small doses of anticoagulant will reduce the risk of venous thrombosis, and precise doses of narcotic anesthetics will eliminate the problem of hallucination and the need for physical restraints. Muscle weakness can be treated with electrolyte supplements, passive exercise of the prisoner’s limbs, and electrical stimulation of muscle tissue.

...
3. The Economic Viability of the Coma-bay Prison

The coma-bay prison is economically viable. Already, Americans are spending vast sums of money on warehouse and supermax prisons. The 1999 operating costs of American jails and prisons exceeded $39 billion. Some of this money was spent on the tangible goods required to maintain a prison: clothing, food, and supplies. Some was spent on utilities: heat, water, electricity, and sewage. And some was spent on what might be designated “supplementary services”: library books, medical treatment, psychological counseling, educational services, religious services, and materials for games and exercise. But a great deal of the prison system’s expenditures was spent on security. This seems reasonable; secure incapacitation is, after all, the raison d’etre of the warehouse prison. But under the contemporary approach, prisons are neither secure nor effective at incapacitating offenders.

The Bureau of Labor Statistics indicates that correctional officers in America’s jails and prisons held about 457,000 jobs in 2000, generally earning between $24,650 and $40,100 per year (with a 2000 median

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supra note 213, at 32-33 (noting that regular movement of the patient’s limbs is a crucial element of nursing care); DST, supra note 173, at 195 ("Nurses speak of giving passive leg exercises to sedation patients at four hourly intervals.")

Today, however, it is possible to electrically stimulate muscle tissue, maintaining tone even in incapacitated patients. RS Medical describes itself as America’s “premier electrotherapy provider” and leases high-end electrical muscle stimulation (“EMS”) equipment to care providers and patients. See RS Medical, at http://www.rsmedical.com/home/main.htm (last visited Feb. 23, 2002). Consumer versions of EMS apparatus also have become available. See Tracy Mack, Belly Aches: Belts Hurt, Don’t Work, Experts Say, SEATTLE TIMES (Feb. 24, 2002) (“TV is humming with infomercials pushing electrical muscle stimulators, gadgets such as Fast Abs, Abtronic and Ab Energizer, that purport to help tone, tighten and strengthen the body without ‘exercise.’”), available at http://seattletimes.nwsource.com/html/healthscience/134408474_fatbelts24.html (last visited Feb. 24, 2002). While “EMS machines do have legitimate medical uses,” Mack notes, the machines have little or no effect on firming the abdominal muscles of healthy people. See id. But the devices are widely sold. For the martial artist looking to build up muscle tissue through passive exercise, Bill Wallace’s Superfoot’s Martial Arts Superstore sells a range of EMS equipment with 4, 6, or 8 pads for prices ranging between $199 and $699. See Electric—Muscle Building Machines, at http://www.superfoots.com/musclebuilder.html (last visited Feb. 23, 2002). For those who don’t have $200 to spend, but still want the benefits of EMS exercise, the abtronic system is available online for $86.97, including shipping and handling. See Abtronic Fitness System, at http://www.fitnessforless.com/us/abtronic.asp (last visited Feb. 23, 2002). The super ab belt device (“as seen on TV”) is actually free. Recipients pay only between $12.95 and $17.95 per month for shipping and handling. See Super Ab Belt, at http://www.electronic-ab-belt.com/ (last visited Feb. 23, 2002).

226. See supra Part I.B.

227. See supra note 21, at 37; text accompanying supra note 65.

228. See, e.g., Florida Department of Corrections Budget Summary (FY 2000-01) (noting that more than 63% of budget expenditures were spent on “custody and control” while less than 4% were spent on “programs”), available at http://www.dc.state.fl.us/pub/annual/0001/budget.html (last visited Feb. 25, 2002).

229. See supra Part I.D for a discussion of the dangers faced by modern inmates. See supra note 62 and accompanying text for problems with successful incapacitation due to prison overcrowding.
THE PUNITIVE COMA

preovertime salary of $31,170). These figures were confirmed by a 1997 *U.S. News and World Report* article, identifying correctional officer as one of its twenty “hot-track jobs.” According to that article, entry level correctional officers earn an annual salary of $20,000, while top-tier line officers earn an average salary of about $32,000 per year. Administrators and supervisory personnel earn more, and prison wardens earn more still.

Consider the costs of policing our inmates. In fiscal year 1999, about $49 billion was spent on corrections in America. Approximately $25.2 million of that spending were spent on correctional employees. The sum of correctional salaries makes up more than half of the corrections budget. And it does not include tangible goods, construction, or supplementary services. Coma-bay prisons will eliminate the need for such overpolicing. Liberal use of video surveillance will enable one or two individuals to monitor a whole wing of comatose prisoners. One security officer should be able to oversee about 150 prisoners. Ten or twelve correctional officers, operating on rotating shifts, will be able to effectively staff an entire coma-bay prison of 1000 inmates around the clock for a cost of $200,000 per year.

Of course, it would be inefficient to put all incarcerated persons into narcotic comas. Although significant economies of scale can be realized, the costs of preparing an individual for narcotic coma may exceed the utility of utilizing the procedure. Jail inmates, for example, are generally held for brief periods of time, and sometimes for very short sentences (for example, those cited and released, or held overnight). In such cases, the cost of inducing the coma would clearly exceed the advantage of using it.

Similarly, it may not be appropriate to chemically incapacitate non-violent inmates. If a principal objective of the punitive coma is to reduce the deleterious side effects of prison crowding (such as mental disorder,


234. See id. at 6 tbl.5 (indicating that $2.104 million were spent on corrections payrolls in March 1999).

235. Because these officers will not face the stresses and hazards of the contemporary warehouse prison, they can be paid at a significantly lower rate. In 2000, private security guards typically earned between $14,930 and $21,950 per year, with a median income of $17,570. U.S. DEP’T OF LABOR, Security Guards, in 2002-03 OCCUPATIONAL OUTLOOK HANDBOOK, at http://stats.bls.gov/oco/ocos159.htm (last visited Jan. 15, 2002). A full-time salary of $20,000 would seem to be reasonable.

236. See, e.g., IRWIN, supra note 88, at 18 (noting that many jail inmates are released within hours).
aggression, and disciplinary infractions), those who are resistant to these side effects should be left conscious. Indeed, these offenders could probably be used efficiently by prison administration: they could serve as “tenders” and maintain the inmates who are held in a state of punitive coma. They could function as nursing aides, allowing the prison to operate with a further reduced medical staff, thereby driving operating costs even lower. Ideally, a small jail could be managed alongside a coma-bay prison, and inmates from the jail could attend to the cleaning and feeding of the prison inmates.

The most likely candidates for punitive coma will be those offenders who are currently held in supermax facilities or on death row. Today, when an incarcerated convict continues to commit acts of violence in prison, attacking other inmates or prison guards, there is little that can be done with him. He might be put into solitary confinement for a period of time. If he reoffends after coming out of solitary, he might be sent to a supermax facility. But such a prisoner remains a constant security risk. Although contacts between prisoners and guards are minimized in supermax units, there is always the possibility that such an individual will harm someone else. Or perhaps the prisoner is not assaultive, but an escape risk. The security conditions in supermax units are very strict, but such a prisoner has twenty-four hours a day, seven days a week, for years on end, to plot his escape.

These high-risk prisoners can be effectively incapacitated with narcotic coma in a way that mere incarceration cannot hope to realize. While unconscious, the recalcitrant prisoner poses no threat to prison guards, and cannot conceive of escape, much less act on an escape plan. In the warehouse-style containment prison, such improvements in security come at great cost to the prisoners, generally in the form of uncomfortable shackles, dangerous guns, and dehumanizing gates. But in the coma-bay prison, security does not entail any additional hardships. To leave an individual in supermax conditions for months or years may be justifiable if there is no

\[237. \text{See supra Part I.D.}\]
\[238. \text{See infra note 248. This would also provide tender inmates with valuable job-skills training.}\]
\[239. \text{Prison administrators must have some means of managing prisoners who violate prison regulations. Palmer and Palmer suggest that one means of dealing with misbehaving prisoners is the use of punitive isolation. They report that “[a]lmost every correctional institution includes a special confinement unit for those who misbehave seriously after they are incarcerated” and suggest that these isolation units are usually “accompanied by a reduced diet and limited access to reading materials and other diversions, and occasionally without any kind of light.” John W. Palmer & Stephen E. Palmer, Constitutional Rights of Prisoners 77 (6th ed. 1999) (citation omitted).}\]
\[240. \text{See supra notes 161-65 and accompanying text.}\]
\[241. \text{See Gounnerman, supra note 128 (noting that ten double-celled Pelican Bay prisoners killed their cell mates in the last few years).}\]
\[242. \text{See David J. Rothman, The Discovery of the Asylum 95 (1971) (describing the practice of teaching nineteenth-century prisoners at Sing-Sing to consider themselves dead for the duration of their sentences). “It is true... that while confined here [Sing-Sing] you can have no intelligence concerning relatives or friends... You are to be literally buried from the world.” Id.}\]
other means to establish equivalent security, but with the development of
the punitive coma, there is no longer any need to subject prisoners to such
inhuman levels of isolation.243

The argument for using narcotic coma in the case of death-row in-
mates is even more compelling. Capital punishment is already a sensitive
issue in society: criminologists, lawyers, and laymen alike debate its faults
and its merits.244 Although executing an offender is a very effective form of

243. "The overwhelming press of numbers inside American prisons promises to exact a substantial
and long-term psychological price." See Haney, supra note 93, at 543. It is possible to avoid paying
that price through intelligent use of the punitive coma. Indeed, there could even be advantages to
waking up to the novelty of a brave new world.

244. See infra note 349. The fact that America effectively banned capital punishment in 1972 and
then brought it back just four years later may say something about America's tempestuous relationship
with capital punishment. Many criminologists oppose the death penalty on a number of philosophical
and practical grounds. In 1987, for example, the American Society of Criminology announced its
position against the death penalty:

Be it resolved that because social science research has demonstrated the death penalty to be
racist in application and social science research has found no consistent evidence of crime
deterrence through execution, the ASC publicly condemns this form of punishment and urges
its members to use their professional skills in legislatures and the courts to seek a speedy
abolition of this form of punishment.

ASC Resolution on the Death Penalty, at http://www.soci.niu.edu/~critcrim/dp/dp.html (last visited
Jan. 15, 2002). There are, however, scholars who support capital punishment. Perhaps the
best known of these supporters is Ernest van den Haag. See Ernest van den Haag, The
http://www.pbs.org/wgbb/pages/frontline/angel/procon/haagarticle.html (last visited Jan. 15, 2002);
see also Pro-death penalty.com, at http://www.prodeathpenalty.com/ (last visited Jan. 15, 2002)
(providing pro-death-penalty materials, and citing academics such as John McAdams). McAdams
states:

If we execute murderers and there is in fact no deterrent effect, we have killed a bunch of
murderers. If we fail to execute murderers, and doing so would in fact have deterred other
murders, we have allowed the killing of a bunch of innocent victims. I would much rather risk
the former. This, to me, is not a tough call.

Pro-death penalty.com, at http://www.prodeathpenalty.com/ (last visited Jan. 15, 2002). Attorneys, too,
split across the debate. There are some who believe adamantly in the moral rectitude of the death
penalty. See, e.g., Dashka Slater, The Death Squad, EAST BAY EXPRESS (Sept. 25, 1992) (describing the
framed photographs of men that Senior District Attorney Jim Anderson has convinced juries to
sentence to death, displayed on his office wall "like trophy heads hanging over the mantel of a big
game hunter"). Others ardently oppose the death penalty, and crusade relentlessly for its abolition. See,

, e.g., Stephen B. Bright, The Death Penalty as the Answer to Crime: Costly, Counterproductive and

In 1997, the American Bar Association called for a moratorium on the death penalty, until a
number of issues can be addressed, including provision of counsel to defendants in capital cases,
federal habeas corpus proceedings, elimination of racial discrimination in capital sentencing, and
preventing the execution of mentally retarded persons or persons who were juveniles at the time of the
offense. See ABA Recommendation No. 107, available at http://www.abanet.org/irr/rec107.html (last
visited Jan. 15, 2002).

The general public is also divided on the matter. According to the Harris Poll, in 2001,
67% of Americans favored the death penalty and 26% opposed it. See U.S. DEP'T OF JUSTICE,
SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, at 142 tbl.2.61, available at
estimates that 77% of Americans favor the death penalty in the abstract, but when provided
with meaningful alternatives (for example, life imprisonment without the possibility of parole),
support for capital punishment drops. See Richard C. Dieter, Sentencing for Life, at
incapacitation, it is a terribly final and drastic solution to the problem of punishment. Sometimes innocent men are put to death.\textsuperscript{245} Within the coma-bay prison, we can put the capital criminal into a state of coma and sustain him there, indefinitely, without needing to kill him. If evidence is later obtained that exonerates the prisoner, he can be awakened and released with some form of financial compensation. If that evidence never materializes, the prisoner can be allowed to age and to die within the comatose state. He is entirely incapacitated, at reasonable cost, and the state never needs to bloody its hands. Under a punitive coma regime, the criminal justice system only sedates the capital convict; it does not kill. For those troubled by the hypocrisy of a state that punishes its murderers by taking their lives,\textsuperscript{246} the narcotic coma is a welcome solution to an enduring problem. Furthermore, because a terminal sentence will not be irrevocable under a punitive coma regime, the defense bar might not fight as fiercely against these sentences. If defense attorneys come to accept a sentence of terminal coma in the way that they now view prison time, then pleas and settlements can be negotiated efficiently, and our congested criminal courts can be freed from this burden.

Regardless of which populations are confined in coma-bay prisons, few correctional officers will be required. It may seem implausible that one officer could successfully oversee 150 supermax convicts, but this is because we are accustomed to thinking of prisoners as conscious agents (who have nothing better to do with their time than to ponder the logistics of smuggling, escape, and assault). Yet in the coma-bay facility, the prisoners will all be comatose. In the highly unlikely event that one prisoner should lighten to a state of waking consciousness before his narcotic dose is increased, a single correctional officer would be capable of maintaining order. There should never be a situation where more than one or two officers will be needed in the facility. The likelihood that multiple prisoners might regain consciousness simultaneously is so remote that it can be dismissed as a statistical impossibility.\textsuperscript{247}

http://www.deathpenaltyinfo.org/dpic.r07.html (last visited Jan. 15, 2002). When given the alternative of life without parole plus restitution, public support falls to 41%. \textit{Id.} This suggests that public support for the punitive coma might be considerable.


\textsuperscript{246} See, e.g., Sherry F. Colb, \textit{What Is, and Is Not, Wrong with the Death Penalty}, at http://writ.news.findlaw.com/colb/20001122.html (last visited Jan. 15, 2002) (considering the question of whether "the government behaves barbarically and hypocritically when it first condemns a person for deliberately killing another, and then deliberately kills the person as an expression of that condemnation").

\textsuperscript{247} The exception to this rule, of course, would be in the event of a power loss that stopped the monitoring and drug dispensation equipment. For this reason, all coma-bay prisons will be equipped
Because so many of the coma-bay prison’s operations will be automated, the small staff of correctional officers will be able to manage most of the prison’s safety and security operations themselves. A coma-bay prison with 1000 inmates will keep a physician or a physician’s assistant on call, and will maintain a small staff of licensed practical nurses and nursing aides. Once again, working with rough numbers, the maintenance of a medical staff of this scale would only cost about $469,000 per year (eight nursing aides, two full-time licensed practical nurses, a physician’s assistant, and an anesthesiologist). Even this small staff would be able to keep 1000 comatose prisoners fed, cleaned, medicated, and otherwise free of the side effects associated with narcotic comas.

Because coma-bay prisons can be operated with small staffs, the administrative costs would be low. The 1000-man facility hypothesized above could be run with an annual personnel budget of less than $700,000. As prisoner counts increase, economies of scale are created. It is costly to hire additional physicians, but is relatively cheap to add more security officers, licensed practical nurses, or nursing aides. A facility of 10,000 comatose prisoners could probably be operated with an annual personnel budget of less than $1.5 million.

with redundant backup generators. Similar design safeguards are used in nuclear reactors (which, in terms of engineering, would serve as excellent models for coma-bay prisons).

248. The routine medical maintenance of coma-bay prisoners would be an excellent employment opportunity for licensed practical nurses (“LPNs”) and nursing assistants. The 2002-03 Occupational Outlook Handbook states that LPNs care for the sick, injured, convalescent, and disabled under the direction of physicians and registered nurses. See U.S. Dep’t of Labor, Licensed Practical and Licensed Vocational Nurses, in 2002-03 Occupational Outlook Handbook, at http://stats.bls.gov/oco/ocos102.htm (last visited Jan. 15, 2002). The Handbook describes the range of LPN responsibilities:

Most LPNs provide basic bedside care. They take vital signs such as temperature, blood pressure, pulse, and respiration. They also treat bedsores, prepare and give injections and enemas, apply dressings, give alcohol rubs and massages, apply ice packs and hot water bottles, and monitor catheters. . . . In States where the law allows, they may administer prescribed medicines or start intravenous fluids. Some LPNs help deliver, care for, and feed infants. Experienced LPNs may supervise nursing assistants and aides.

Id. For these responsibilities, LPNs earned a median income of $29,440 in 2000. But just one LPN could oversee a subordinate staff of nursing aides. U.S. Dep’t of Labor, Nursing, Psychiatric, and Home Health Aides, in 2002-03 Occupational Outlook Handbook, at http://stats.bls.gov/oco/ocos165.htm (last visited Jan. 15, 2002). And nursing aides can be hired for relatively little money. In 2000, the median hourly earnings for nursing aides were $8.89 per hour or about $17,780 per year.

Other aspects of the coma-bay prison that may sound expensive are in reality quite cheap. For example, the cost of widespread video surveillance may seem prohibitive in the abstract. Web-based digital cameras, however, can be purchased for less than forty dollars per unit.\footnote{249} It would be possible, then, to wire our 1000-man prison for less than $1000. The apparatus used to electrically stimulate muscle tissue in unconscious persons sounds as if it would be prohibitively expensive, but consumer versions of this equipment are available for less than $100 per unit.\footnote{250} It might also seem prohibitively expensive to monitor 1000 prisoners' levels of consciousness, but these units are commercially available today for about $5000 each.\footnote{251}

Coma-bay prisons, however, will incur significant costs. The cost of pharmaceuticals administered on the penal scale will be considerable. But the emergence of new pharmaceuticals (whether antibiotics or sedatives) depresses the current market prices of the older drugs, and increases the possible levels of precision in treatment as well.\footnote{252} By using older-generation antibiotics and "lyctic cocktails" developed from established anesthetic agents, the narcotic coma can be sustained at a modest pharmaceutical cost.\footnote{253} Furthermore, if a state or federal prison system bought the necessary drugs in bulk, the narcotics and antibiotics needed for punitive coma could be purchased at near-wholesale prices.\footnote{254} Depending on the drugs used, and the requisite dosages of these pharmaceuticals, it will actually be cheaper to keep prisoners in a sustained state of coma than to leave them conscious and under continuous and heavy guard.

\footnote{249}Office Depot Sale Catalog 50 (Feb. 28, 2000).
\footnote{250}See supra note 225. Contrary to the stereotype of prisoners who lift weights on a daily basis, prisoners in coma-bay facilities will require this electrical muscle stimulation to prevent serious muscle atrophy.
\footnote{251}See supra note 212.
\footnote{252}See supra notes 205-06 and accompanying text.
\footnote{253}See supra note 202 and accompanying text.
\footnote{254}Politicians are already urging the federal government to use its formidable purchasing power to negotiate more-competitive prices for large-volume pharmaceuticals. See Sanders Leads Progressive Coalition in Proposing Alternative Medicare Prescription Drug Plan, available at http://www.house.gov/bernie/press/2000/06-21-2000.html (last visited Jan. 15, 2002) (reporting details of Vermont Congressman Bernard Sanders' plan to reduce the cost of prescription drugs for Americans, including "provisions to maximize the federal government's bulk purchasing power by consolidating the purchase of prescription drugs for all government uses" and requirements for the National Institute of Health to "enter into reasonable pricing agreements with pharmaceutical companies who are manufacturing prescription drugs developed with federally funded research"). Pharmaceutical companies may be willing to reduce the prices of (or even donate) their anesthetic agents and antibiotics to the government if they believed that the operation of coma-bay prisons was an important means of protecting public safety and welfare (and of improving their company's public relations). In response to the American anthrax scare, Bayer Corporation offered to donate two million tablets of the anthrax treatment, Cipro, while simultaneously running full-page newspaper ads entitled "A Message from Bayer Corporation to the American People: Our Commitment to You." See Bayer Confirms Cipro Talks with HHS and Reaffirms Offer of Donation of 2 MM Cipro Tablets for Emergency Responders, available at http://www.ciprousa.com/news/press_releases_10_20_01.asp (last visited Jan. 15, 2002).
Ancillary savings will be realized, of course. Although rehabilitation is dead in American corrections, its vestiges linger and consume a significant fraction of our resources. Since coma-bay prisoners will remain unconscious, supplementary services like counseling, libraries, or education can be eliminated from corrections budgets. Space-inefficient features such as weight rooms, exercise yards, and visiting facilities can be eliminated entirely, allowing the coma-bay prison administration to fit additional inmates into each facility.\textsuperscript{255} By concentrating strictly upon the efficient warehousing of coma-bay prisoners, and by maximizing the economies of scale that this singular focus will provide, coma-bay wardens will achieve astonishing reductions in the operating costs of the American prison system.

Part II.A has shown that, far from being a hypothetical possibility out of science fiction, the narcotic coma is a well-established fact, and can be implemented in a correctional setting. Part II.A.1 surveyed the basic procedures for implementing a narcotic coma. Part II.A.2 reviewed several of the risk factors that plagued Chelmsford DST, and suggested that innovations in medicine would alleviate most of these. Part II.A.3 considered the economics of the punitive coma, and concluded that while the requisite pharmaceuticals and medical staffing would be expensive, the savings in administration and correctional officer salaries would be profound, and that it might actually be less expensive to place prisoners into a state of narcotic coma than to incarcerate them in warehouse or supermax prisons. The punitive coma is logistically viable.

\textbf{B. Legal Obstacles to the Implementation of the Punitive Coma}

In recent years, lawmakers have made aggressive efforts to restrict the tides of prison litigation that have filled the courts during the last twenty years.\textsuperscript{256} Although penological jurisprudence has shifted dramatically, from embracing prisoners' rights to endorsing "hard time,"\textsuperscript{257} American prisoners still retain vestigial constitutional rights. Committing a criminal offense—breaching the social contract—does not automatically forfeit all of one's rights as a citizen. "There is no iron curtain drawn between the Constitution and the prisons of this country."\textsuperscript{258}

\footnotesize
\textsuperscript{255.} Elimination of rehabilitation-oriented programs will yield immediate and considerable fiscal gains. More importantly, though, it will streamline prison operation and eliminate the significant security risks that must be faced when prisoners congregate in exercise yards or when prisoners visit with (contraband smuggling) family and friends.


\textsuperscript{257.} \textsc{Palmer & Palmer, supra} note 239, at v.

Sentenced prisoners still retain (limited) rights under the Constitution, and precisely because American prisoners do retain some rights, it must be determined whether the punitive coma will withstand legal attacks raised in U.S. courts. Part II.B.1 considers the challenges that might be raised on general constitutional grounds such as the rights to speech, religion, or counsel. Part II.B.2 considers the legal challenges that might be marshaled on Eighth Amendment grounds, such as the claim that use of the punitive coma constitutes cruel and unusual punishment. Part II.B.3 then considers the legitimacy of medicalized punishments such as the punitive coma.

1. The Punitive Coma and General Constitutional Challenges

While American prisoners do not enjoy the broad legal protections that they were afforded during the peak of the civil rights movement,259 sentenced prisoners still retain many constitutional freedoms. For individuals who are incarcerated, among the most important constitutional rights are the rights to speech, association, religion, and legal representation. Each of these will be considered in turn.

The First Amendment affords, in part, a right to the freedom of speech.260 But the right to speech is necessarily restricted in a correctional setting. Prisoners only enjoy free speech inasmuch as it does not conflict with their status as prisoners.261 Indeed, many courts historically took a hands-off approach to freedom of speech questions and refused to substitute their judgment for that of prison administrators.262 Even when they did not take a completely hands-off approach, many courts certainly showed great deference to the managerial expertise of correctional officials. In Brooks v. Wainwright, for example, the court reasoned:

[Pr]isons are not motels or resorts where inmates can check in or out at their liberty. Neither is a prison a public forum providing open access to citizens to freely express their beliefs. The full range of Constitutional freedoms that ordinary members of society enjoy must be curtailed in order to achieve the legitimate purposes of imprisonment. So long as the restrictions and limitations are not

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259. See supra notes 256-57 (noting efforts to restrict prisoner entitlements).
260. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.
262. See, e.g., Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) (noting that "courts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases"); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) (noting that "courts have no supervisory jurisdiction over the conduct of the various institutions"); United States ex rel. Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) (noting that "it is unthinkable that the judiciary should take over the operation of... prisons").
patently unreasonable, the discretionary decisions of prison officials will be given deference by the courts.\textsuperscript{263}

This deference afforded to prison administrators has a number of important free speech implications for American prisoners.

For one thing, it grants wide discretion to prison officials to regulate, restrict, or even obstruct communication by mail. In \textit{Procunier v. Martinez},\textsuperscript{264} the Court reviewed a California prison’s mail regulation that allowed prison officials to refuse to send inmates’ mails and to refuse to deliver mails to inmates. The Court voided the regulation, and articulated a two-prong test for the censorship of prison mail. Prison censorship is justified when: (1) the regulation furthers a substantial government interest unrelated to the suppression of expression, and (2) the limitation of First Amendment freedoms must be no greater than is necessary to protect the government interest.\textsuperscript{265} But in 1987, the Court announced that constitutional questions did not require the strict scrutiny that some courts had understood \textit{Martinez} as requiring. In \textit{Turner v. Safley},\textsuperscript{266} a case about prison correspondence regulations, the Court established an important test, asking whether a regulation that restricts prisoners’ constitutional rights is “reasonably related” to legitimate penological interests. In determining reasonableness, several factors can be considered: (1) whether there is a “valid, rational connection” between the regulation and the legitimate governmental interest advanced to justify it, (2) whether there are alternative means of exercising the asserted constitutional rights open to inmates, (3) whether accommodation of the asserted right will have an effect on prison staff, inmates’ liberty, or the allocation of prison resources, and (4) whether there are alternatives that would accommodate the prisoners’ rights at de minimis costs. Courts defer to the judgment of correctional experts in evaluating many of these factors. In \textit{Thornburgh v. Abbott},\textsuperscript{267} the Court applied the \textit{Turner} test to Federal Bureau of Prison regulations that authorized wardens to censor incoming publications and to reject those deemed “detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.”\textsuperscript{268} These regulations were upheld because under the \textit{Turner} test the regulations were rationally related to the legitimate goal of maintaining prison security. The regulations were generally content-neutral, permitted a broad range of publications to be sent and received, and no viable alternative was presented.\textsuperscript{269}

Thus, while American prisoners retain a right to free speech, \textit{Turner}

\textsuperscript{263} 439 F. Supp. 1335, 1340 (M.D. Fla 1977) (citations omitted).
\textsuperscript{264} 416 U.S. 396 (1974).
\textsuperscript{265} \textit{Id.} at 413.
\textsuperscript{266} 482 U.S. 78 (1987).
\textsuperscript{267} 490 U.S. 401 (1989).
\textsuperscript{268} \textit{Id.} at 403 n.1.
\textsuperscript{269} \textit{Id.} at 414-18.
and Abbott stand for the proposition that speech in prison is not altogether free. If a prison regulation abridges prisoners' speech but is reasonably related to a legitimate penological objective (typically the security of the prison), the regulation will usually trump the right to speech. In one case, a court upheld a prison policy of completely prohibiting correspondence between inmates at different institutions; in another case, another court upheld regulations that excluded pornographic material from a prison because it had a tendency to incite homosexuality, which in turn sometimes leads to violence.

But it is not only postal correspondence that is subject to prison regulation under Turner. While most courts acknowledge that prisoners have some First Amendment right to some degree of telephone access to the outside world, the U.S. Supreme Court has never held that this is a constitutional right. Prisoners do not have an unlimited right to telephone access, and access may be limited because of legitimate security concerns of prison administrators. Here, too, the courts have deferred to the managerial decisions of prison officials. One district court held, "The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators, subject to court scrutiny . . . ."

And while Americans enjoy a First Amendment right to communicate with the press, this right is truncated in U.S. correctional facilities, as well. In Seattle-Tacoma Newspaper Guild v. Parker, the Ninth Circuit upheld the Federal Bureau of Prison's policy of completely denying press interviews with individual prisoners. The court noted that there were sufficient alternative means to ensure that any real complaint about the prison would be redressed. Because individual interviews can lead to disciplinary problems or the emergence of "big-wheel" inmates, the court stated that any restriction on the flow of information to the public was justified. Similar reasoning was invoked to uphold a California Department of Corrections prohibition against personal inmate interviews in Pell v. Procunier. In Pell, the Court held that neither the four inmates nor the

272. See Washington v. Reno, 35 F.3d 1093, 1099-1100 (6th Cir. 1994) (reviewing lower federal court holdings and concluding that most have concluded a First Amendment right of telephone access).
273. See McCord, supra note 41, at 124 n.462.
275. See Strandberg v. City of Helena, 791 F.2d 744 (9th Cir. 1986).
276. See supra note 263 and accompanying text.
278. 480 F.2d 1062 (9th Cir. 1973).
279. Id. at 1066.
280. Id. at 1064-65.
three journalists who brought the claim had a First Amendment right to specific personal interviews.\textsuperscript{282} The Court indicated that alternative channels of communication were open to the prisoners,\textsuperscript{283} and held that as long as it was enacted in a neutral manner, the prohibition against interviews fell within the scope of legitimate regulations to which prisoners are subject.\textsuperscript{284} Reasoning that the media is not entitled to a privileged right to interviews that the general public does not enjoy, the Court also held that the journalists were not entitled to the interviews either.\textsuperscript{285}

While the right of assembly is also guaranteed by the First Amendment, it also is significantly restricted in a correctional setting. It nearly goes without saying that prison administrators have the authority to separate and segregate prisoners to maintain order and safeguard the security of the institution.\textsuperscript{286} Accordingly, rules against communication between prisoners at certain times or in certain places have been upheld as reasonable.\textsuperscript{287} What is perhaps less obvious is that prison officials also have the authority to prohibit prison associations. In \textit{Brooks v. Wainwright},\textsuperscript{288} the court accepted the prison officials' argument that the formation of a prisoner's union entailed a threat to the security of the prison, and held that preventing the formation of the union did not deprive prisoners of their constitutional rights.\textsuperscript{289}

Limitations placed on prison visits are another example of prisoners' restricted right to assembly. "Traditionally, the right of inmates to have visitors while incarcerated has been severely limited by prison officials."\textsuperscript{290} Indeed, the Supreme Court has not even determined whether visitation is a constitutional right, but has determined that there is no right to "unfettered visitation."\textsuperscript{291} And once again, the American courts have been very deferential to correctional administrators. "Cases concerning inmates' rights to have visitors generally hold that controlling this activity is within the prison officials' discretion and that such control is not subject to judicial reversal unless a clear abuse of discretion is shown."\textsuperscript{292} To justify a

\begin{footnotes}
\item[282.] Id. at 828, 835.
\item[283.] Id. at 824-25.
\item[284.] Id. at 828.
\item[285.] Id. at 835. The Court reached a similar outcome in \textit{Houchins v. KOED}, 438 U.S. 1 (1978). In \textit{Houchins}, the Court held that the news media has no constitutional right of access to a county jail beyond that of the general public to interview inmates and gather information. \textit{Id.} There is no requirement that correctional officials provide the press with information. See \textit{id}.
\item[286.] \textit{See Brooks v. Wainwright}, 439 F. Supp. 1335, 1340 (M.D. Fla 1977) (stating that "prisons are not motels or resorts where inmates can check in or out at their liberty").
\item[287.] \textit{See United States v. Dawson}, 516 F.2d 796 (9th Cir. 1975).
\item[288.] 439 F. Supp. 1335 (M.D. Fla. 1977).
\item[289.] Id. at 1340.
\item[290.] PALMER & PALMER, \textit{supra} note 239, at 37.
\item[291.] Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989).
\item[292.] PALMER & PALMER, \textit{supra} note 239, at 37.
\end{footnotes}
restrictive visitation policy, prison officials merely need to show that the restriction is reasonably related to a legitimate penological interest.\(^{293}\)

Contact and conjugal visits are particularly vulnerable to limitation. In *Block v. Rutherford*,\(^ {294}\) California jail inmates and potential jail visitors challenged a regulation that restricted visits (consisting of innocent-only contact). Prison administrators cited problems with weapons, drugs, and other contraband, and noted that a policy of contact visits increased prison costs.\(^ {295}\) The U.S. Supreme Court held that contact visitation can be prohibited if prison officials have reasonably determined that the visits compromise legitimate penological goals.\(^ {296}\) Since *Block*, courts "have indicated an almost mechanical unwillingness to examine bans on contact visiting whether in a jail or a prison setting."\(^ {297}\) Conjugal visits are also subject to restriction. In *Payne v. District of Columbia*,\(^ {298}\) the court held that conjugal visitation is not constitutionally protected, and this holding was echoed in the Fifth Circuit's case of *McCray v. Sullivan*.\(^ {299}\)

Then there is religion. The First Amendment also affords, in part, a right to the free exercise of religion.\(^ {300}\) While American prisoners have a right to the free exercise of religion, they are not entitled to the near-total right of free exercise that nonprisoners enjoy. As McCord notes, "To what degree prisoners' rights of free exercise may be restricted is a question that has evoked significant constitutional ferment in the recent past."\(^ {301}\) Some courts have held that the free exercise of religion should be permitted whenever possible, and should be subordinated only when penological objectives are crucial.\(^ {302}\) Other courts, however, have applied the *Turner* reasonable-relation test,\(^ {303}\) and have justified imposing upon religious practice when the restriction is reasonably linked to the interest of prison

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\(^{295}\) Id. at 588 n.9.

\(^{296}\) Id. at 589.

\(^{297}\) McCord, supra note 41, at 124 n.462 (quoting 2 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 104-05 (Donald T. Kramer ed., 2d ed. 1993)).

\(^{298}\) 253 F.2d 867 (D.C. Cir. 1958).

\(^{299}\) 509 F.2d 1332 (5th Cir. 1975), cert denied, 423 U.S. 859 (1975).

\(^{300}\) Of course, in prison, there are managerial limitations that restrict the Free Exercise Clause. And for a state to not only furnish the opportunity to practice, but also supply the clergyman, is a concept that may come dangerously close to the frontiers of the Establishment Clause. See PALMER & PALMER, supra note 239, at 91.

\(^{301}\) McCord, supra note 41, at 126 n.463.

\(^{302}\) See Montoya v. Tanksley, 446 F. Supp. 226 (D. Colo. 1978) (noting that religious observation should only be overridden by state interests of the highest order); Knuckles v. Prasse, 302 F. Supp. 1036, 1049 (E.D. Pa. 1969) (quoting Long v. Parker, 390 F.2d 816, 822 and suggesting that religious freedoms can be encroached upon when they represent a "clear and present danger of a breach of prison security or discipline"), aff'd, 435 F.2d 1255 (3d Cir. 1970).

security.\textsuperscript{304} In \textit{O'Lone v. Estate of Shabazz},\textsuperscript{305} the Court cited \textit{Turner}\textsuperscript{306} and reasoned that the same test used to determine other constitutional claims should be employed in deciding matters of religious exercise.\textsuperscript{307} The Court also emphasized the importance of deferring to the decision making of correctional officials:

We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to 'substitute our judgment on... difficult and sensitive matters of institutional administration,' for the determinations of those charged with the formidable task of running a prison. Here the District Court decided that the regulations alleged to infringe constitutional rights were reasonably related to legitimate penological objectives.\textsuperscript{308}

In 1993, Congress passed the Religious Freedom Restoration Act\textsuperscript{309} and thereby granted broad protections to the free exercise of religion. Under the Act, the government could infringe upon a person's religious exercise only if it was to further a compelling government interest and only if it was the least restrictive means of furthering that interest. But in 1997, in \textit{City of Boerne v. Flores},\textsuperscript{310} the Court held that Congress did not have the power to impose the Religious Freedom Restoration Act upon the states under the Fourteenth Amendment.\textsuperscript{311} After \textit{Boerne}, the free exercise of religion has been cropped back, and in a correctional setting, is likely governed by the deferential standards of \textit{Turner} and \textit{O'Lone}.

Finally, there is the issue of legal representation. Under the Sixth Amendment,\textsuperscript{312} individuals who have been accused of a crime enjoy a right

\textsuperscript{304} See, e.g., Jones v. Bradley, 590 F.2d 294 (9th Cir. 1979) (noting that the free exercise of religion is not absolute and may be restricted in correctional facilities if justified by legitimate policies).
\textsuperscript{305} 482 U.S. 342 (1987).
\textsuperscript{306} 482 U.S. 78 (1987).
\textsuperscript{307} \textit{O'Lone}, 482 U.S. at 349 (stating that a regulation that impinges on an inmate's constitutional rights is "valid if it is reasonably related to legitimate penological interests").
\textsuperscript{308} Id. at 353.
\textsuperscript{309} 42 U.S.C. 2000bb.-1. The Act was, in part, a reaction against the Court's holding in \textit{Employment Division, Department of Human Resources v. Smith}, 494 U.S. 872 (1990), a case in which two Native American counselors were fired from a drug rehabilitation organization because they ingested the hallucinogen peyote as a sacrament during religious ceremonies within the Native American Church. The Supreme Court held that the free exercise clause allowed the states to prohibit sacramental peyote use, and therefore to deny unemployment benefits to those who had been terminated for using it.
\textsuperscript{310} 521 U.S. 507 (1997).
\textsuperscript{311} Id. at 511 (holding that the case "calls into question the authority of Congress to enact RFRA [the Act]" and concluding that "the statute exceeds Congress' power").
\textsuperscript{312} The Sixth Amendment states:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.
to counsel, even if they are indigent and cannot afford to retain legal counsel. This is true whether the offense is a misdemeanor or a felony. But once an individual is convicted and sentenced, there is no absolute right to appellate counsel.

All inmates are presumed to be confined under valid judgments and sentences. If an inmate believes he has a meritorious reason for attacking his, he must be given an opportunity to do so. But he has no due process right to spend his prison time or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment.

In *Ross v. Moffitt*, the Court held that the government is only required to appoint appellate counsel when such representation is necessary for adequate access to court relief. Of course, if a prisoner has retained counsel, the prison cannot interfere with communication between the attorney and his or her client, but *Moffitt* means that once in prison, it is not counsel that is constitutionally protected, but access to the courts. In *Bounds v. Smith*, the Court stated that prisoners are entitled to meaningful access to the courts, although—here, too—great deference to prison administrators is the rule, and officials are afforded enormous discretion in deciding how meaningful access will be established. The case of *Johnson v. Avery* filled the gap between *Bounds* (providing a right to meaningful court access) and *Moffitt* (establishing that there is no right to counsel in discretionary appeals). In *Johnson v. Avery*, the Court reasoned

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U.S. CONST. amend. VI.

313. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that absent legitimate waiver, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

314. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that "the right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours"); *see also* Anthony Lewis, *Gideon's Trumpet* (Vintage ed. 1964) (1964) (recounting the story of the Gideon case).


317. The Court held that there was no duty to provide counsel for discretionary appeals. *Id.* at 616. "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly . . ." *Id.* In another case, the Court has also held that there is no right to counsel in postconviction habeas corpus proceedings, either. *See* Pennsylvania v. Finley, 481 U.S. 551 (1987).

318. *See* Palmer & Palmer, *supra* note 239, at 60-61 (noting that "[t]he right of an inmate to communicate with his or her attorney is concerning pending or contemplated legal action is recognized by all courts today" and suggesting that prison censorship policies can impair that right).

319. *See* Ex parte Hull, 312 U.S. 546, 549 (1941) (holding that "the state and its officers may not abridge or impair . . . [an inmate's] right to apply to a federal court for a writ of habeas corpus").


321. *Id.*


that because no other legal assistance was available, Tennessee’s prohibition against inmates providing legal assistance for other inmates was functionally a denial of access to the courts, and struck down the prohibition.\textsuperscript{324}

Other courts have adopted similar reasoning, balancing the prisoner’s right to meaningful access of the courts against the legitimate exercise of control by prison administrators. In the case of \textit{In re Harrell},\textsuperscript{325} the California Supreme Court established a three-prong analysis for regulations that impeded inmates from providing legal assistance to each other: (1) Do regulations impede mutual inmate legal assistance? (2) How undesirable is the conduct prohibited by the regulation, in terms of legitimate penological objectives? (3) Are there alternative means to regulate the undesirable conduct that will not restrict inmate mutual aid? In many ways, it resembles a more stringent version of the reasonable relation test articulated in \textit{Safley v. Turner}.\textsuperscript{326} Even in the case of \textit{In re Harrell}, which is far less deferential than some tests of prison regulations,\textsuperscript{327} there is a tacit acknowledgement that internal security is the paramount consideration of the prison,\textsuperscript{328} and that some deference must be shown to prison officials.

American prisoners do retain constitutional rights. They have limited rights to free speech, to association, to the free exercise of religion, and to meaningful access to the courts. But in the brave new world of the modern prison, these rights are weighed against the regulations of the penal institution, and are restricted accordingly. “Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”\textsuperscript{329} And courts are reluctant to substitute their judgment for that of correctional experts.\textsuperscript{330} In an oft-cited passage, the Supreme Court reasoned:

\begin{itemize}
  \item 324. \textit{Id.}
  \item 325. 470 P.2d 640 (Cal. 1970).
  \item 326. 482 U.S. 78 (1987).
  \item 327. Palmer and Palmer note that with the \textit{In re Harrell} analysis, “the court stated that where an irreconcilable conflict exists, the prison officials, rather than the inmate, must alter their practices.” PALMER & PALMER, supra note 239, at 129. \textit{But see supra} note 266 and accompanying text (noting that under \textit{Turner}, regulations only need to be reasonably related to a legitimate penological objective).
  \item 330. \textit{See supra} notes 262-63 (describing the deference of the courts to prison officials). \textit{But see} Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995) (showing a willingness to intervene in administration of California’s Pelican Bay State Prison where the administration does not appear to show genuine interest in correcting violations).
\end{itemize}
[The] problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.331

Judicial deference, shown to the methods and objectives of prison administrators, will probably extend to coma-bay prisons. This is not only because the administrator is thought to have a “better grasp of his domain than the reviewing judge,” but also because the administration of the prison is a task that has been allocated to the legislative and executive branches of government, not the judiciary.332 Thus, especially to ensure the safety of inmates and security personnel while preventing escape or unauthorized entry, prison officials have been granted an astonishing discretion in the operations of their prisons.

Because the punitive coma will be so effective at enhancing the safety of both prisoners and correctional officers, the courts may very well defer to prison officials, sanctioning the continued operation of coma-bay prisons under the test articulated in Safley v. Turner.333 As long as reasonable attention is paid to the overall conditions of confinement (that is, as long as comatose prisoners are physically well cared for), administrative encroachments upon secondary entitlements—for example, the right to free speech, the right to assembly, or the right to practice one’s religion—will not warrant judicial intervention. Already, these rights are dramatically truncated. The additional gains in safety and security realized by using the punitive coma will certainly outweigh any additional losses to inmate liberty. It is simply a matter of calculating the logistical issues, and ensuring that prisoners are not unnecessarily stripped of their limited rights to speech, assembly, religion, and legal representation.334

2. The Punitive Coma and Eighth Amendment Challenges

Assuming, arguendo, that all general constitutional challenges can be overcome, a second question must be answered: can the punitive coma be legally implemented, or is it barred as “cruel and unusual” punishment

334. The logistics of safeguarding a prisoner’s rights would not be too difficult to coordinate. Certainly, a comatose prisoner could be periodically awakened to participate in legal proceedings or parole hearings. The rights to religion and speech are less tractable, but because constitutional rights may be waived, this may not be an actual problem for the coma-bay prison administration. See infra note 404.
under the Eighth Amendment? First, it must be determined whether the punitive coma is actually a form of punishment. The U.S. Supreme Court has defined the term:

Punishment, from the time of the Founding through the present day, has always meant a fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.

The punitive coma is a penalty imposed by the authority of law for the commission of an offense, and therefore qualifies as punishment. But with its reliance on anesthesia and antibiotics and monitoring of vital signs, there is something about the punitive coma that intuitively seems more like medical treatment than punishment.

The case of Rennie v. Klein, a dispute about the right to refuse medical treatment, established a four-prong test to determine whether a medical procedure is a treatment or a punishment. The first prong asks whether the drug or medical procedure has therapeutic value, the second whether the procedure is accepted as a medical practice, the third whether the procedure is part of an ongoing therapeutic program, and the fourth whether the effects of the procedure are unreasonably harsh.

Under a Rennie analysis, the punitive coma is punishment. First, while many experts agree that there is something inherently rehabilitative about sleep, there is no evidence that the deep sleep therapy employed at Chelmsford hospital (and adapted for use in coma-bay prisons) had therapeutic value. Second, narcotic coma (as employed at Chelmsford and as

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335. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend.VIII.

336. Punishment has been variously defined. See BLACK'S LAW DICTIONARY (6th ed. 1990) ("Any fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime . . . or for his omission of a duty enjoined by law."); MURPHY & COLEMAN, supra note 27 ([T]he infliction by state authority of a consequence normally regarded as an evil (for example, death or imprisonment) on an individual found to be legally guilty of a crime);


338. This, of course, could be due to the therapeutic origins of deep sleep therapy. See supra note 173 and accompanying text (describing the origins and evolution of DST).


340. Id.

341. See DST, supra note 173, at 1 (suggesting that "the association of sleep and healing has ancient origins" and that rest "has been and is accepted by all as a way to recover from a variety of illnesses and problems").

342. The doctor in charge of DST claimed remarkable successes. See id. at 38 (noting that Dr. Bailey claimed a success rate of 85% for a range of disorders when using DST in conjunction with electroconvulsive therapy). But Bailey's testimony is highly suspect. See id. at 43 ("Dr. Bailey's descriptions of his practice of DST are unreliable. They became more so as he neared the end of his life."). And the unfortunate consequences of his "therapy" have come to light. See text accompanying supra note 187 (reporting 183 DST-associated deaths).
it will be employed in coma-bay prisons) has been uniformly rejected as a legitimate medical practice by a panel of qualified experts. Third, narcotic coma is not part of an ongoing therapeutic program. At Chelmsford, DST procedures were used on an acute basis, and were not part of an ongoing post-release system of treatment. In coma-bay prisons, prisoners will be sedated for the incapacitating effects of the narcotic coma, and will be free to go as soon as their sentences have been served. Fourth, the procedure is not unreasonably harsh. While the narcotic comas induced at Chelmsford were plagued by a number of side effects, improvements in anesthesia and high-tech nursing will transform the punitive coma into a relatively benign procedure. Thus, under the four-prong test articulated in Rennie v. Klein, the punitive coma (as it will be implemented in American coma-bay prisons) is punishment. A benign form of punishment, admittedly, but punishment nonetheless.

Because the punitive coma is punishment and not treatment, it falls under the purview of the Eighth Amendment. This means that punitive coma must survive the constitutional prohibition against cruel and unusual punishments.

In contemporary Eighth Amendment jurisprudence, punishments are rarely struck down as cruel and unusual. The United States, after all, abolished the death penalty and then resurrected it again, authorizes capital punishment at the federal level for nonhomicide, nonreational

343. See DST, supra note 173, at 66 (reporting that experts dismissed DST as “a dubious therapy,” “unproven and controversial,” and “a risky procedure without proven benefit”). The government inquiry concluded that “none of the experts thought the procedures worth the risks and dangers encountered.” Id. at 67.

344. Indeed, there was little aftercare associated with DST. The government inquiry concluded that patients usually spent “a number of days” in the general section of the hospital after being withdrawn from DST sedation, during which time “they were frequently placed on antidepressants.” Id. at 200. Then they were discharged and usually met with Dr. Bailey about a week later. Id.

345. See supra Part II.A.2.

346. See, e.g., Sherry Williamson, Keeping Our Patients Safe... in the Department of Anesthesiology, INSIDE (Sept. 11, 2000) (reporting that “[a]nesthesia is much safer than in the past, and... it will be even more safe in the future”), available at http://www.inside.mc.duke.edu/archives/2000/20000911/6.html (last visited Feb. 18, 2002). Williamson notes that in 1940, there were only 3 or 4 anesthesia drugs available, while now there are at least 100, and suggests that improvements in anesthesia equipment allow for better patient monitoring and increased safety. Id. See also supra Part II.A.2 (describing the punitive coma’s improvements over the DST comas induced at Chelmsford).


348. But see Weems v. United States, 217 U.S. 349 (1910) (holding that a fine and fifteen years at hard and painful labor were so grossly disproportionate that the sentence violated the Eighth Amendment). Despite the Court’s holding in Weems, few sentences have been overturned for proportionality. See supra note 59 (describing the judiciary’s reluctance to overturn sentences on proportionality grounds).

349. Kadish, supra note 12, at 946; see Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the death penalty per se does not violate the Constitution, thereby validating its use); Furman v. Georgia, 408 U.S. 238 (1972) (setting aside four death sentences because capital punishment was being imposed arbitrarily, thereby ending executions nationwide).
offenses (for example, drug smuggling),\textsuperscript{350} and maintains that hanging, poisoning, electrocuting, or killing a person by shooting him is not "cruel and unusual" in the Eighth Amendment sense of the words.\textsuperscript{351}

Merely excessive penalties will not trigger the Eighth Amendment.\textsuperscript{352} In \textit{Gregg v. Georgia}, the Supreme Court held that only the "unnecessary and wanton infliction of pain" implicated the Eighth Amendment.\textsuperscript{353} Thus to trigger the constitutional protections of the Eighth Amendment, a punishment has to involve torture, unnecessary cruelty, or some conduct that is genuinely inhuman and barbarous.\textsuperscript{354} Merely uncomfortable conditions of confinement, even those rising to the level of pain, but falling short of unconstitutional "unnecessary and wanton infliction of pain" will not invoke the Eighth Amendment.\textsuperscript{355} Indeed, the Court has explicitly held that


\textsuperscript{351} Five methods of execution are available in the United States: lethal injection, lethal gas, hanging, electrocuting, and firing squad. \textit{See} Capital Punishment 2000, at 5, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cp00.pdf (last visited Feb. 18, 2002). The Supreme Court has specifically held that execution by electrocuting and firing squad do not violate the Eighth Amendment's prohibition against cruel and unusual punishment. \textit{See} \textit{In re Kemmler}, 136 U.S. 436 (1880) (holding that electrocution does not constitute cruel and unusual punishment); \textit{Wilkerson v. Utah}, 99 U.S. 150 (1878) (holding that execution by firing squad does not constitute cruel and unusual punishment). The Court has also denied certiorari on claims that lethal injection, lethal gas, and hanging are unconstitutional. \textit{See} \textit{Heckler v. Chaney}, 470 U.S. 821 (1985) (upholding the FDA decision not to ban unapproved drugs used in lethal injections and holding that the FDA decision was not subject to judicial review); \textit{Stewart v. LaGrand (Walter)}, 526 U.S. 115 (1999) (per curiam) (holding that petitioner waived right to challenge constitutionality of execution by lethal gas by opting for execution by lethal gas); \textit{Rupe v. Wood}, 863 F. Supp. 1315 (W.D. Wash. 1994) (holding that while hanging is not itself unconstitutional, hanging violates the Eighth Amendment where there is significant risk of decapitation in hanging of obese inmate), \textit{aff'd}, 93 F.3d 1434 (9th Cir. 1996) (finding the issue moot because of change in Washington statute), \textit{cert. denied}, 519 U.S. 1142 (1997). In addition, many law review articles have considered the uncertain relationship between the Eighth Amendment and various forms of capital punishment. \textit{See}, e.g., Kristina E. Beard, \textit{Comment, Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause}, 51 MIAmI L. REv. 445 (1997) (reviewing American methods of execution under Supreme Court standards in deciding constitutionality of punishments under the Eighth Amendment).

\textsuperscript{352} But see Anthony F. Gennuci, "Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning, 57 CALIF. L. REv. 839 (1969) (indicating that the English Bill of Rights prohibited excessive penalties as well as barbarous forms of punishment, and claiming that our Eighth Amendment jurisprudence is founded upon a fundamental misinterpretation of the framers' intent).

\textsuperscript{353} 428 U.S. 153, 173 (1976).

\textsuperscript{354} \textit{See} \textit{In re Kemmler}, 136 U.S. 436, 446 (1890) (noting that punishments such as "burning at the stake, crucifixion, [and] breaking on the wheel" are the kind of punishments that are prohibited by the Eighth Amendment); \textit{id.} at 447 (stating that "[p]unishments are cruel when they involve torture or a lingering death"); \textit{Wilkerson}, 99 U.S. at 135-36 (1878) (noting that punishments like drawing and quartering or "public dissection" would violate the Eighth Amendment). The Corcoran gladiator fights might qualify as cruel and unusual, for example, but only if it can be established that prison officials condoned the fights or were guilty of "deliberate indifference." \textit{See} Wilson v. Seiter, 501 U.S. 294, 297 (1991) (holding that the deliberate indifference standard is applicable to claims of cruel and unusual punishment).

\textsuperscript{355} \textit{Seiter}, 501 U.S. at 297.
the Constitution "does not mandate comfortable prisons." On the contrary, hard time is understood as part and parcel of punishment:

[T]he denial of medical care is cruel and unusual because, in the worst case, it can result in physical torture, and, even in less serious cases, it can result in pain without any penological purpose. . . . [T]he conditions of confinement in [other prisons have] constituted cruel and unusual punishment because they resulted in unquestioned and serious deprivations of basic human needs. Conditions other than . . . [these], alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual. . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.357

Thus, the punitive coma may be unusual inasmuch as it is innovative, but it is neither cruel nor unusual in the constitutionally forbidden sense. It does not involve torture or barbarism. If anything, the punitive coma is less cruel and less unusual than crowded warehouse prisons or supermax facilities. Penologically, the punitive coma is not so different from the modern prison. The coma-bay prison incapacitates its prisoners more effectively than the warehouse prison or the supermax unit. And like the modern warehouse and supermax facilities, the coma-bay prison also simultaneously serves the same goals of deterrence and retribution.358 It is unusual only in that it accomplishes these legitimate ends through new means. Nothing prevents society from developing new mechanisms of punishment over time; if penal innovations were prohibited by the Constitution, we would be restricted to those primitive methods of punishment used by the framers.359 The Supreme Court has not read the Eighth Amendment as locking the methods and standards of punishment in time. On the contrary: "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."360

The punitive coma, therefore, is probably not "unusual" in the constitutionally prohibited sense of the term. It is unusual, to say the least, to punish people by depriving them of consciousness. It may even be an upsetting and an unsettling idea. Indeed, the law typically shows great

357. Id. at 347 (citation omitted).
358. See supra note 36 (describing the four penological bases of punishment).
359. See supra notes 27-31 and accompanying text (describing early corporal punishments).
360. Trop v. Dulles, 356 U.S. 86, 101 (1958); see also PALMER & PALMER, supra note 239, at 326 (quoting Winston Churchill's famous observation that "the treatment of crime and criminals is one of the most unfailing tests of civilization of any country").
deference to the values of individual dignity and bodily autonomy, even in
the arena of criminal jurisprudence.\textsuperscript{361} Therefore, despite the fiscal
advantages to be gained through use of the punitive coma, there may be some-
thing about using chemicals to fundamentally alter human behavior that
leads us to hesitate before embracing the punitive coma as a panacea to our
prison problem.

3. The Punitive Coma and Medicine as Legal Punishment

We may remain squeamish about punishing people with hypodermic
needles and we may cringe at the idea of distributing "punishment in a
pill," but the medicalization of punishment has a long and widespread his-
tory.\textsuperscript{362}

In \textit{Buck v. Bell},\textsuperscript{363} the Court considered a Virginia law that warranted
the involuntary sterilization of mental defectives housed in state institu-
tions. Suggesting that "her welfare and that of society will be promoted by
her sterilization," the Court upheld the law.\textsuperscript{364} Oliver Wendell Holmes jus-
tified this on the basis of safeguarding the common good:

We have seen more than once that the public welfare may call upon
the best citizens for their lives. It would be strange if it could not
call upon those who already sap the strength of the State for these
lesser sacrifices, often not felt to be such by those concerned, in
order to prevent our being swamped with incompetence.\textsuperscript{365}

\begin{itemize}
\item \textsuperscript{361} See \textit{Rochin v. California}, 342 U.S. 165 (1952) (holding that the forcible pumping of a
suspect's stomach was a flagrant violation of Fourteenth Amendment due process); \textit{AM. CORRECTIONAL ASS'N, A MANUAL OF CORRECTIONAL STANDARDS} 417 (3d ed. 1966) (stating in very
clear terms that "corporal punishment should never be used under any circumstances").
\item \textsuperscript{362} Perhaps the best-known examples of medicalized "punishment" are the eugenic policies of
Nazi Germany, which included sterilization, or the recently-reported policy of forced sterilization
employed in Sweden between 1935 and 1976. See Paul Lombardo, \textit{Eugenic Sterilization Laws}
(indicating that 350,000 people were sterilized under a 1933 Nazi law), at
http://www.eugenicsarchive.org/html/eugenics/essay8text.html (last visited Feb. 25, 2002); James
Walsh, \textit{Unnatural Selection}, \textit{TIme} (Sept. 11, 1997) (describing the sterilization of
int/970922/europe.unatural_sel.e.html (last visited Feb. 25, 2002).
\item What is somewhat less well known is that America pioneered the policy of eugenic involuntary
sterilization. See Lombardo, supra \textsuperscript{362} (noting that the State of Indiana enacted the first sterilization
legislation in 1907, that by 1914 twelve states had enacted sterilization laws, and that by 1924,
approximately 3000 Americans had undergone forced sterilization—2500 of them in California). At
one time or another, thirty-three American states had sterilization laws and 60,000 people were
sterilized under their authority. \textit{Id}. The 1933 Nazi law responsible for the sterilization of 350,000 was
actually based on an American model law from 1914. \textit{Id}. While many of those who were sterilized
were "feebleminded" and not criminals, sterilization laws were also applied to criminal offenders. The
1914 model law warranted sterilization of the "feebleminded, insane, criminalistic, epileptic, inebriate,
diseased, blind, deaf; deformed; and dependent"—including 'orphans, ne'er-do-wells, tramps, the
homeless and paupers.'\textit{Id}.
\item \textsuperscript{363} 274 U.S. 200 (1927).
\item \textsuperscript{364} \textit{Id}. at 207.
\item \textsuperscript{365} \textit{Id}.
\end{itemize}
Admittedly, *Buck v. Bell* was not a case about punishment per se, but in writing for the Court, Holmes did cite the prophylactic effect of involuntary sterilization on crime as one justification for upholding the law. In a famous passage, he wrote:

It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.  

Other laws did specifically sanction the involuntary sterilization of criminal offenders. By the time the Court struck down Oklahoma’s Habitual Criminal Sterilization Act in *Skinner v. Oklahoma*, thirteen American states had legislation specifically authorizing the involuntary sterilization of criminals. Jack Skinner was eligible for forced sterilization because he had two convictions for armed robbery and a prior conviction for stealing chickens, but as the Court noted, someone with three or more convictions for embezzlement would not be eligible for sterilization under the Act. Thus, the Court struck down the legislation.

Today, of course, the forced sterilization of criminals conjures memories of Nazi Germany and “the final solution,” and would probably be rejected as violating the Eighth Amendment. But the tide is quickly turning. While the surgical castration of offenders might be struck down as unconstitutional, a kinder, gentler variety of eugenics is enjoying a modest renaissance.

Already, medical punishment has been legitimized in the United States and is being utilized (with quite satisfactory results) on a regular basis. In 1983, Joseph Frank Smith was “the first convicted rapist to receive chemically castrating injections as a condition of probation in the

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366. *Id.* Interestingly, *Buck v. Bell* has never been overruled.
367. 316 U.S. 535 (1942). Under the Oklahoma law, a habitual offender was defined as “a person who, having been convicted two or more times for crimes ‘amounting to felonies involving moral turpitude’ either in an Oklahoma court or in a court of any other State.” *Id.* at 536.
369. *See* Skinner, 316 U.S. at 537.
370. Then again, perhaps it would not be. *See* Laura I. Bauer, *Petitioner’s Brief*, Steven Baylor v. State of Tennessee (raising a legal argument against the plea bargain agreement made by the fifteen-year-old petitioner after his conviction for the rape of an eleven-year-old girl, in which the petitioner agreed to surgical castration in exchange for probation and no prison time), available at www.rhodes.edu/public/2.0-Academics/2.1_Spoliticalscience/pdfs/BriefforConstitutionalLaw_LauraBauer.pdf (last visited Feb. 28, 2002).
371. *See* Children Requiring a Caring Kommunity (C.R.A.C.K.) (Feb. 19, 2002) (offering a $200 cash incentive to men or women who are addicted to drugs and/or alcohol to obtain long-term or permanent birth control), at http://www.cashforbirthcontrol.com (last visited Feb. 25, 2002). Sherman Block, the former Los Angeles County Sheriff praises the program, stating that “I believe you are addressing a significant problem.” *Id.*
United States.”372 Today, the California Department of Corrections, for example, routinely administers a regimen of chemical castration as a required element of parole for sex offenders.

On September 18, 1996, AB 3339 became law, amending section 645 of the Penal Code. The amended statute provides that any person guilty of a first conviction of specified sex offenses, where the victim is under 13 years of age, may be required to receive medroxy progesterone acetate [MPA] treatment upon parole, and any person convicted of two such offenses must receive the treatment during parole. This medication is administered by injection and has the effect of lowering the testosterone level, blunting the sex drive. The parolee begins the treatments prior to his release on parole and the treatments continue until the Department of Corrections demonstrates to the Board of Prison Terms that this treatment is no longer necessary.373

California was the first state to pass a chemical castration law, but it was not the last. Immediately after California authorized the use of chemical castration in treating its pedophile offenders, other states began to follow California’s example.374 Several legislatures quickly introduced chemical castration bills375 and the use of chemicals to blunt the sex drive has had tremendous appeal with the public.376

Whether chemical castration is an effective and legal form of...


(a) Any person guilty of a first conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, may, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law, at the discretion of the court.

(b) Any person guilty of a second conviction of any offense specified in subdivision (c), where the victim has not attained 13 years of age, shall, upon parole, undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any other punishment prescribed for that offense or any other provision of law.


374. Similar legislation was subsequently adopted by Florida, Georgia, Louisiana, Montana, Oregon, Texas, and Wisconsin. See Jones, supra note 372, at 913 n.292.

375. At least twenty-two other state legislatures have considered bills allowing chemical castration. See id. at 913 n.293.

376. An online poll asked the question: “Should convicted rapists be castrated using chemical castration?” While 12% said that chemical castration is cruel and unusual punishment and should never be used, 55% supported its use at a judge’s discretion, and 33% said that they preferred to see surgical castration used. See Poll: Should Convicted Rapists Be Castrated Using Chemical Castration?, at http://www.sexcriminals.com/polls/1003 (last visited Feb. 25, 2002).
punishment is a question that has been hotly contested for several years. The American Civil Liberties Union condemned the 1996 passage of the chemical castration law, arguing that it violates the individual's right to bodily integrity and violates the ban on cruel and unusual punishment. Analyzing the matter under the four-prong test established in Rennie v. Klein, chemical castration more resembles punishment than treatment. First, the administration of MPA reduces the production of serum testosterone, which may reduce the sex drive, and which in turn may reduce sex offense recidivism, but it would be inaccurate to state that there is always therapeutic value in a regimen of MPA injections. Second, the use of MPA therapy is an accepted medical practice, but it is widely accepted when used to treat pedophiles who have voluntarily submitted to MPA treatment in conjunction with counseling. As a coerced procedure, many practitioners are far less confident about its success and it is

377. See Jones, supra note 372, at 912.
380. But see Christopher Meisenkothen, Chemical Castration—Breaking the Cycle of Paraphiliac Recidivism, 26 Soc. Just. 139, 143 (1999) (stating that under the Rennie test, chemical castration is a treatment).
381. Some chemical castration advocates compare the effects of MPA drugs to a nicotine patch or an appetite suppressant. See 'Chemical Castration' OK'd for Montana Inmates (Apr. 27, 1997) ("It's like a nicotine patch.... It takes the edge off and allows people to quit."). available at http://www.s-t.com/daily/04-97/04-27-97/a09wn032.htm (last visited Feb. 18, 2002); Giordano, supra note 373 (quoting psychiatrist Fred Berlin as stating that "[i]n layman's terms, with chemical castration you are providing people with a sexual appetite suppressant"). One convicted offender who had begged for testosterone-reduction treatment and later received MPA injections reported remarkable results. "My sex drive is zero.... It works. It really works." Id.
382. It has been reported that weekly Depo Provera injections can reduce recidivism among paraphiliacs (pedophiles) from "upwards of 90%" to less than 2%. See Meisenkothen, supra note 380. One study with the drug triptorelin (a monthly injection with fewer side effects than most MPA drugs) reported 100% effectiveness. See Elaine A. Lisko, Recently Reported Medical Study Fuels Debate on Advisability of Mandatory Chemical Castration of Criminal Sex Offenders (Feb. 25, 1998), available at http://www.law.uh.edu/healthlawperspectives/bioethics/980225Pedophil.htm (last visited Feb. 18, 2002).
383. Commenting on California's 1996 chemical castration law, Dr. Mark Graff of the California Psychiatric Association noted that the law "gives an illusion of protection because its punitive 'castrate'em and hang-'em-up model' attracts legislators.... This was no attempt to rehabilitate people." Giordano, supra note 373.
384. In the 100% successful study described by Lisko, drug therapy was used in combination with ongoing psychotherapy. See Lisko, supra note 382. Similarly, Dr. Richard Krueger, director of the sexual behavior clinic at New York State Psychiatric Institute, has prescribed testosterone-reducing drugs to patients, but only at the patient's request. Giordano, supra note 373. And the founder of the sexual disorders clinic at Johns Hopkins University, Fred Berlin, has stated "that counseling is key to determining who appropriately qualifies for drug treatment." Id.
385. The American Medical Association has taken a stand against chemical castration as a form of criminal punishment. See American Medical Association, Court-Initiated Medical Treatments in
unlikely to reduce offending in sexual sadists.\textsuperscript{366} Third, the California program is ongoing (indeed, it continues until the paroled offender can demonstrate that the drugs are no longer necessary),\textsuperscript{387} but does not necessarily incorporate an element of counseling. Finally, the administration of MPA drugs is sometimes "unreasonably harsh." In addition to the medical side effects of the drugs,\textsuperscript{388} the administration of testosterone-reducing medications undermines a number of valuable liberty interests such as the right to procreate, the right to privacy, and the right to refuse treatment.\textsuperscript{389} Given the limited therapeutic value of MPA programs, the grave concern about compulsory MPA administration (especially without accompanying counseling), and the rather harsh consequences of an MPA drug regimen, chemical castration appears to be a punishment under the four-prong analysis articulated in \textit{Rennie v. Klein}.\textsuperscript{390} Despite this fact, chemical castration is a very popular solution to the sex offender problem.\textsuperscript{391} More than one half of the American states have either considered or have passed chemical castration legislation.\textsuperscript{392}

The lesson to be inferred from California’s experiment with chemical castration is clear: it is constitutionally permissible to punish offenders with medical procedures. This is punishment, after all, not treatment.\textsuperscript{393} The California chemical castration law is neither part of the state’s health and safety code, nor part of its welfare and institutions code, but exists as Section 645 of its penal code.\textsuperscript{394} The injections are coordinated by the

\textsuperscript{366} Liz Schroeder, associate director of the ACLU in Southern California, noted that "[n]ot all sex offenders are pedophiles. The drug may work on a pedophile, but it's unlikely to work against sadists." Giordano, \textit{supra} note 373. Meisenkothen reports that while Depo Provera injections have proven to be effective in paraphiliac populations, "[i]t is important to note that this form of chemical castration is theoretically only useful on this one particular type of sex offender—the paraphiliac." Meisenkothen, \textit{supra} note 380, at 139.

\textsuperscript{367} See \textit{supra} note 373.

\textsuperscript{368} The side effects include weight gain, cold sweats, nightmares, muscle weakness, acne, testicular atrophy, diabetes, hypoglycemia, leg cramps, loss of body hair, insomnia, and phlebitis. See Meisenkothen, \textit{supra} note 380, at 147 n.5.

\textsuperscript{369} See \textit{id.} at 145 (describing liberty interests that Depo Provera treatment may impose upon).

\textsuperscript{370} 462 F. Supp 1131 (D.N.J. 1978).

\textsuperscript{371} See \textit{supra} note 376.

\textsuperscript{372} See \textit{supra} notes 374-75.

\textsuperscript{373} Remember, this is the same state that struck the word "rehabilitation" from its penal code and replaced it with the term "punishment" when describing the goals of the prison. See Kadish, \textit{supra} note 12, at 980.

\textsuperscript{374} See \textit{supra} note 373 (describing some of the provisions of California Penal Code § 645). The Court has stated that the categorization of a proceeding as civil (such as medical "treatment") or criminal (such as "punishment") is a question of statutory construction. See \textit{Allen v. Illinois}, 478 U.S. 364, 368 (1986). That the chemical castration regulations are part of the penal code suggest that MPA injections are a punishment, not a treatment. California Penal Code § 645(b) states that certain parolees must "undergo medroxyprogesterone acetate treatment or its chemical equivalent, in addition to any
California Department of Corrections, not by a public health agency. 395 California does not condition parole upon the medroxyprogesterone acetate treatment for the pedophile's benefit; rather, this is done to ensure the safety of the community. 396 If medical procedures can be used for punitive purposes, if we can punish sex offenders by chemically castrating them, then we can probably also incapacitate our most serious prisoners by placing them into narcotic comas.

We may feel uncomfortable with punishing our offenders by treating them with medical therapies (especially in the absence of any penological commitment to rehabilitation), but we would shed these scruples with time. In fact, once the coma-bay prison had proven itself to be a reliable and cost-effective remedy to the penal crisis, the idea of using chemical incapacitation will not seem so very Orwellian at all. 397

395. See CAL. PENAL CODE § 645 (f) (stating that "[t]he Department of Corrections shall administer this section and implement the protocols required by this section").

396. A similar rationale is at work in the nation's various sexual predator laws. Under sexual predator laws, an incarcerated offender who has served the entirety of his sentence can be civilly committed rather than being released into the community. The U.S. Supreme Court has held that "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." Kansas v. Hendricks, 521 U.S. 346, 357 (1997); United States v. Salerno, 481 U.S. 739, 747 (1987) (holding that the restraint of dangerous mentally ill persons is a legitimate nonpunitive objective). More recently, the Court has explained just how certain the danger of antisocial behavior must be in order to justify civil commitment:

[T]here must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.


Similar reasoning may also justify the practice of quarantine. For example, the "danger to public health and safety" rationale justifies depriving the liberty of potentially infectious individuals under U.S. quarantine law, even if they are not guilty of wrongdoing. See 42 U.S.C. 42, § 264b-264d (2000) (authorizing the apprehension, examination, and detention of individuals who may be infected with communicable diseases), available at http://www4.law.cornell.edu/uscode/42/264.html (last visited Feb. 18, 2002); 42 CFR 71.32 (2000) (authorizing the "detention, dissection, disinfection, disinfestation, fumigation, or other related measures" deemed "necessary to prevent the introduction, transmission, or spread of communicable diseases"). Whether a public-safety justification could justify the use of the punitive coma remains an open question.

397. Indeed, in 1984, the character of O'Brien explains that Winston Smith has been brought to the Ministry of Love "not merely to extract your confession, nor to punish you. Shall I tell you why we have brought you here? To cure you! To make you sane!" GEORGE ORWELL, 1984, at 265 (Alfred A. Knopf, Inc., 1992) (1949). Similarly, even if it cannot cure them, the punitive coma will relieve its recipients of the symptoms of the disease of crime.
III

HESITATING AT THE THRESHOLD: Reductio Ad Absurdum?

The exploding prison population is at an all-time high. America incarcerates more of its citizens than any other country in the world, and does so at great social and economic cost. Despite an agenda of rapid prison construction, American correctional facilities are operating beyond their capacities, and crowding remains a serious problem. In warehouse prisons, violence by inmates or guards is an ever-present threat. In supermax prisons, isolation and sensory deprivation push the limits of human endurance. There is a solution to the prison problem, however. It is possible to place offenders into a state of induced narcotic coma and to maintain them in a state of unconsciousness for the duration of their sentences. The technique was pioneered decades ago, and recent developments in medicine and pharmacology would effectively eliminate most of the risks and side effects that plagued early DST efforts. Because we can operate a coma-bay prison with a much-reduced security staff, it may be possible to maintain prisoners in punitive coma states at a lower cost than maintaining them in warehouse prisons or supermax facilities. Although the novelty of the punitive coma would invite prison litigation, the punitive coma would probably withstand constitutional challenges. The threshold to a brave new world of penology stands wide open.

Some may remain troubled by this bold vision of the future. Yes, the constitutional scholars might be satisfied. The judiciary might be satisfied. And the populist legislatures would be delighted with the humane cost-cutting qualities of the punitive coma. Still, there would be those who say that whether or not the punitive coma is barred by the Court's reading of the Eighth Amendment, it is both a cruel punishment and a highly unusual means of depriving an inmate of his liberty.

A simple thought experiment may answer these individuals. Imagine that you are a public defender. You have just tried and lost a case in which your client, a diminutive twenty-year-old with an IQ of about ninety and a history of mental problems, was found guilty on five counts of felony arson. At sentencing, your client is given two options: he can either serve fifteen years in a state prison or serve an equivalent sentence in a punitive coma. Your state prison, like many other state prisons, is plagued by a number of problems. It is crowded and sharply divided by racial gangs. Your client, being a first-timer, intellectually slow, and physically small, will almost certainly be raped upon arrival. This possibility is especially troubling to you because you know that inmates in your state prison have

398. See supra note 165 and accompanying text.
399. Gilligan quoted a correctional officer on a young inmate's chances of avoiding rape: "Almost zero . . . [H]e'll get raped within the first twenty-four to forty-eight hours. That's almost standard." Gilligan, supra note 123, at 205.
elevated HIV rates. You do not think that the prison guards could protect your client, even if they so wished. In fact, your client may have reason to fear the guards, for there have been reports of random attacks upon vulnerable prisoners at the state prison. The outlook for your client is not good, but you are also profoundly troubled by the idea of the punitive coma.

Eclipsing your client’s waking consciousness will allow him to avoid the many evils of the state prison, but he will completely lose fifteen years of life. He will not be able to reason or plan, to reflect or pray. And when your client awakens at age thirty-five, he will not even have memories from those prison years. It will be as if the prison had taken him in at sentencing, immediately carved fifteen years away from the middle of his life, and then sent him on his way. You are troubled by this Hobson’s choice; you would spare your client the horrors of the state prison, but sacrificing his consciousness seems a dreadful price to pay. Yet when you explain the choice to your client, the philosophical concerns do not seem to trouble him. Nor is he troubled by the prospect of waiving his constitutional rights to freedom of the press or religion. Instead, he is relieved by the idea. It is analogous to taking a general anesthesia instead of suffering through a painful procedure with a local anesthetic. Now, considering the lawyer’s

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400. See supra note 158 (reporting the rate of confirmed AIDS cases in prison is five times the rate of the general population).

401. See supra notes 133-43 and accompanying text.

402. Indeed, in a Cartesian way, thought seems inextricably linked to being. Cogito ergo sum (“I think, therefore I am”), so the saying goes. The punitive coma is, in a very real sense, like a temporary death penalty. While one is anesthetized, the prisoner, or at least some essential aspect of the prisoner, ceases to be. Yet maybe this is less valuable to people than we think. Psychologist Abraham Maslow argued that “basic needs” (such as hunger, thirst, and sex) must be satisfied before “growth needs” (such as status and dominance) can become relevant. Maslow also claimed that safety needs (freedom from fear, anxiety, and chaos) must be met before needs for belongingness or self-esteem can become relevant. See Abraham H. Maslow, Motivation and Personality (2d ed. 1970).

The basic needs arrange themselves in a fairly definite hierarchy on the basis of the principle of relative potency. Thus the safety need is stronger than the love need, because it dominates the organism in various demonstrable ways when both needs are frustrated. In this sense, the physiological needs (which are themselves ordered in a hierarchy) are stronger than the safety needs, which are stronger than the love needs, which in turn are stronger than the esteem needs, which are stronger than those idiosyncratic needs we have called the need for self-actualization.

Id. at 97-98. For many people, then, the safety of the punitive coma would be more important than the chance to cultivate oneself or to develop relationships in a warehouse prison.


404. As long as the consequences of surrendering these rights are fully explained, an inmate is free to waive his rights. See Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (stating that a waiver of a constitutional right is not legitimate unless there is “an intentional relinquishment or abandonment of a known right or privilege”).
solemn duties of diligence and loyalty, ask yourself how you should advise your client in this situation. Then, having done that, ask yourself if the punitive coma is really so cruel and unusual.

Still, there seems to be something inherently sinister about punishing offenders by putting them into comas, and there are at least three reasons to hesitate at the threshold before doing so. First, a great deal of the DST literature emerged during the New South Wales government’s investigation into the human rights violations that took place at Chelmsford Hospital. Ethicists may debate whether it is defensible to use scientific information obtained from morally tainted sources, but regardless we should be very careful about basing our new penology on a system of treatment that is widely regarded as a human rights violation. Second, even if we are not troubled by the ethically compromised origins of the punitive coma, there may be something fundamentally inappropriate about the idea of punishing people by stripping them of consciousness. It denies a fundamental value of Anglo-American jurisprudence: the physical integrity of the individual. It compromises human dignity. Third, even if we are not troubled by the invasiveness of the procedure, it conjures a host of deeply disturbing images. The practice smacks of putting down unwanted pets. It is reminiscent of raising veal calves in cramped stalls, fattened on hormones and antibiotics. There is something chilling about the image of hundreds of unconscious convicts, so drugged that they are unresponsive to pain, packed densely into a coma bay where the silence is broken only by the hum of the anesthesia monitors. This may seem like an ugly vision of the future of punishment. We may want to recoil from it as a penological abomination, as a form of punishment that looks too much like Nazi experimentation to be tolerated in our society. But we can no longer allow our squeamishness to hold us back from what is actually sensible and compassionate action. While the image of unconscious convicts may offend our sensibilities, we can no longer in good conscience leave these men to endure the hardships of the warehouse prison and the horrors of the supermax facility. There are plenty of good reasons to shake off our residual hesitation and to implement the punitive coma. Right now, filling America’s jails and prisons, there are about two million good reasons to establish coma-bay prisons as soon as possible.

405. MODEL RULES OF PROF’L CONDUCT RR. 1.3 (diligence), 1.7 (conflict of interest) (1983).
406. It also may be worth reflecting upon the following observation, made by a recently paroled felon: “Consider that in prison, it’s understood that you never wake your cellmate when he’s having a bad dream. Whatever he’s dreaming can’t be as bad as waking him to the realization that he’s still in prison.” Interview with Alex Friedmann (Jan. 16, 2000) (on file with author).
407. See Part I.A.
408. See supra note 191.
409. See supra note 402 and accompanying text.
410. See supra note 361 and accompanying text.
CONCLUSION

We currently incarcerate two million Americans in our jails and prisons. When we include those people in the probation and parole populations, there are about 6.5 million people now enmeshed in the American corrections system. This counts only those who are currently part of the corrections system. It does not account for those who have been part of the corrections system or those who will be part of the corrections system. The grand irony of it all is that this immense correctional system does not work. Recidivism is the norm, and our prisons actively breed violence and hopelessness. Our warehouse prisons are crowded, violent, and dangerous places. Our supermax prisons are isolating, dehumanizing, and inefficient. The costs of maintaining such a failed prison infrastructure are exorbitant. We spend billions each year on prison operating costs, and spend additional billions in our frantic efforts to build more prisons, trying vainly to house all our prisoners. Yet we cannot build them quickly enough. Our prisons are packed to the gills, and even farming prisoners out to local jails or privately managed facilities has not relieved the pressure.

The corrections bubble is ready to burst.

The punitive coma provides a timely and sensible alternative. By placing our offenders into narcotic comas, we can manage the prison population in a manner that is both fiscally efficient and compassionate. The punitive coma must be a constitutional form of punishment. Although the punitive coma is innovative, it faithfully serves the traditional penological objectives of incapacitation (and to some extent) retribution and deterrence. The medicalization of punishment has already been legitimized, and the punitive coma will not violate the Eighth Amendment since the procedure is far less "cruel and unusual" than the starkly unsafe conditions that exist in many state prisons. The punitive coma is less cruel than a penology that breeds gladiator fights and guard-sanctioned rapes. The punitive coma is less unusual than a penology that boils and flays mentally disordered inmates. And the punitive coma is kinder and more humane than a penology that locks prisoners in overcrowded warehouse facilities and dehumanizing supermax prisons.

The image of the punitive coma may strike us as a deeply disturbing one. It may seem repuguant to envision distributing punishment from the barrel of a syringe. But the punitive coma must be a constitutionally permissible form of punishment, for it is less cruel and unusual than what is

411. See Part II.B.3.
412. See Part I.D.
413. See supra note 133.
414. See supra notes 144 and 151.
415. See supra note 159 and accompanying text.
happening right now in prisons across America. For if the punitive coma violates the Eighth Amendment, then warehouse prisons (plagued by endemic crowding, rape, and violence by inmates and guards) and supermax prisons (characterized by dehumanizing isolation and sensory deprivation that push the bounds of human endurance) are violating the Eighth Amendment. And surely that cannot be right. It is positively unthinkable to suggest that two million inmates in American jails and prisons regularly endure unconstitutional conditions of confinement that are worse than those we would reject as violating the Eighth Amendment. Surely, we could not be so misguided as that. Surely, we could never subject our prisoners to conditions that are worse than those we would dismiss as violating the Eighth Amendment. Surely, that is an impossibility. Surely.

We may retain some vestigial squeamishness about using medical procedures to punish people, but it is high time to put such squeamishness behind ourselves, and to take the next bold step in the evolution of penology.

It is cruel and unusual to do anything else.

416. There might even be an affirmative Eighth Amendment duty to provide inmates with the punitive coma where it is available. See Farmer v. Brennan, 511 U.S. 825 (1994) (holding that a failure to protect inmates from attack is cruel and unusual punishment under some circumstances).