

## JUST PUNISHMENT AND AMERICA'S PRISON EXPERIMENT

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*[In less than three decades, wars on crime and drugs in the United States have resulted in a sixfold increase of the prison population and the construction of the world's largest prison system. As a way of evaluating the morality of this "prison experiment," the author applies several criteria from the just-war theory to the American government's prosecution of wars on crime and drugs that has led to the incarceration of two million people.]*

ELLIOTT CURRIE IN HIS STUDY *Crime and Punishment in America* has argued that since 1972 the United States has been engaged in an unprecedented, unparalleled, and largely unnoticed social experiment, "testing the degree to which a modern industrial society can maintain public order through the threat of punishment" or, more specifically, imprisonment.<sup>1</sup> Marc Mauer of the Sentencing Project makes a similar point in *Race to Incarcerate*, noting that "during this period public policy in the U.S. has resulted in . . . a second wave of the great 'experiment' in the use of incarceration as a means of controlling crime."<sup>2</sup> As Mauer's quote implies and David Rothman convincingly established in *The Discovery of the Asylum*, America's fascination with penitentiaries and stiff sentences is not new but reaches back to the early days of the Republic.<sup>3</sup> Still, this most

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<sup>1</sup> Elliott Currie, *Crime and Punishment in America* (New York: Metropolitan, 1998) 21.

<sup>2</sup> Marc Mauer, *Race to Incarcerate* (New York: New Press, 1999) 7, 19.

<sup>3</sup> David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in The New Republic* (Boston: Little, Brown, 1971). Briefer and more recent discussions of America's attachment to and reliance on imprisonment and stiff penalties can be found in Rothman's "Perfecting the Prison: U.S., 1789–1865," and Edgardo Rotman's "The Failure of Reform: United States, 1865–1965," both in *The Oxford*

recent prison experiment, which has sought to determine “whether a massive and unprecedented use of imprisonment would effectively control crime,” has generated a corrections boom which is extraordinary even by U.S. standards and has led to the construction of the largest prison system in human history aimed at controlling crime.<sup>4</sup>

The scope and impact of this experiment, the flip side of our nation’s long-running wars on crime and drugs, may be measured in a variety of ways. Between 1972 and 1998 the population of our state and federal prisons more than sextupled, growing from less than 200,000 to over 1.2 million. By mid-1999 the total U.S. prison and jail populations was 1,860,520 (not counting an additional 161,014 prisoners or offenders held or supervised elsewhere, nor the nearly 4 million others on parole or probation) and was projected to reach 2 million by the end of 2001. This means that one out of every 147 persons in this country is behind bars and that our national incarceration rate (682 per 100,000) is 5 to 8 times that of other industrialized democracies and only fractionally smaller than that of Russia (685 per 100,000), the world’s leading jailer.<sup>5</sup> As a result, the U.S., with about half a million more prisoners than China, not only imprisons many more people than any other nation, but has about a quarter of all the prisoners in the world behind its bars.<sup>6</sup>

Although some of this growth has no doubt been related to fluctuations both in crime—especially violent crime—rates and in shifting demographics, noted criminologist Norval Morris sides with Currie and a number of other commentators in arguing that most increases in our prison population have been the result of policy changes regarding sentencing, in particular for drug offenders.<sup>7</sup> Beginning with New York’s Rockefeller Drug Laws (1973), Massachusetts Bartley-Fox Amendment (1975), and Michigan’s Felony Firearms Statute (1977), a wave of “tough-on-crime” bills in

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*History of the Prison: The Practice of Punishment in Western Society*, ed. Norval Morris and David J. Rothman (New York: Oxford University, 1995) 111–130 and 169–97.

<sup>4</sup> Mauer, *Race to Incarcerate* 19, 3–11, 15–41; Currie, *Crime and Punishment* 12–21.

<sup>5</sup> Allen J. Beck, “Prison and Jail Inmates at Midyear 1999,” *Bureau of Justice Statistics Bulletin* (April 2000, NCJ 181643) <<http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim99.pdf>>; Mauer, *Race to Incarcerate* 19; *The Sentencing Project*, “Facts About Prisons and Prisoners,” <<http://www.sentencingproject.org/brief/1035.htm>>.

<sup>6</sup> Currie, *Crime and Punishment* 14–21; Mauer, *Race to Incarcerate* 19–23; Lewis, “Punishing the Country” 31.

<sup>7</sup> Norval Morris, “The Contemporary Prison: 1965–Present,” in *The Oxford History of the Prison* 227–62, at 236, 242–45; Currie, *Crime and Punishment* 14; Eric Schlosser, “The Prison-Industrial Complex,” *Atlantic Monthly*, December 1998, 51–77, at 52; Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* (New York: Oxford University, 1995) 4.

state legislatures has replaced indeterminate sentences with so-called “truth-in-sentencing” laws calling for mandatory minimums, stiff sentencing guidelines, and the more recent “three-strikes” rule.<sup>8</sup> On the federal level, the Sentencing Reform Act (1984), the Anti-Drug Abuse Act (1988), and the Omnibus Crime Control Bill (1994) have all moved in similar directions.<sup>9</sup> The results have been more and significantly stiffer prison sentences being handed down for a broad array of crimes, the sextupling of our prison population, and a noticeably disproportionate increase in the numbers of non-violent criminals, particularly drug offenders, being sent to and kept in prison. Indeed, the greatest increases in our prison population over the past three decades have been the result of jailing low-level non-violent drug offenders who would not previously have been incarcerated.<sup>10</sup>

The financial costs of this prison experiment have been staggering. In order to keep up with an inmate population that grows by 50,000 to 80,000 a year, approximately, 1,000 new jails and prisons have been built since 1980, and about one new 1,000 bed facility will need to be added every week through most of the upcoming decade.<sup>11</sup> Meanwhile, with the cost of imprisoning adult offenders ranging from \$25,000 to \$70,000 a year, and the total bill for constructing each new cell climbing to \$100,000, the annual budget for constructing and maintaining prisons has jumped in the last two decades from seven to nearly forty billion dollars.<sup>12</sup> As Stephen Donziger notes, “prisons are the largest public works program in America, providing housing, food, (and only sometimes) education, mental health services, and drug treatment.”<sup>13</sup> One should not be surprised, then, at reports that since 1980 “spending on crime control increased at twice the rate of defense spending,” or that “spending on corrections on the state level has increased faster than any other spending category.”<sup>14</sup> In spite of this building and spending spree, however, three quarters of all prisoners are housed in

<sup>8</sup> Mauer, *Race to Incarcerate* 57–59; Tonry, *Malign Neglect* 165; Alexis M. Durham III, “Then and Now: The Fruits of Late 20th Century Penal Reform,” *Federal Probation* 55 (September 1991) 28–36, at 30.

<sup>9</sup> Mauer, *Race to Incarcerate* 61–78; Tonry, *Malign Neglect* 165–66; *The Real War on Crime: The Report of the National Criminal Justice Commission*, ed. Steven Donziger (New York: HarperCollins, 1996) 13–15.

<sup>10</sup> Editorial, “The Case for Empty Prisons,” *The Economist*, 9 December 1995, 25–26, at 26; Donziger, *Real War on Crime* 15–19; Mauer, *Race to Incarcerate* 32–37.

<sup>11</sup> Schlosser, “The Prison-Industrial Complex” 52; Timothy Egan, “Les Crime, More Criminals,” *New York Times*, 9 March 1999, 4.1, 16.

<sup>12</sup> Schlosser, “The Prison-Industrial Complex,” 52; Kathryn Casa, “Prisons: The New Growth Industry,” *National Catholic Reporter*, 2 July 1999, 16.

<sup>13</sup> Steven R. Donziger, “Fear, Crime, and Punishment in the United States,” *Tikkun* 12 (November/December, 1997) 24–27.

<sup>14</sup> Donziger, “Fear, Crime, and Punishment in the United States” 25; Donziger, *Real War on Crime* 48.

overcrowded facilities, and in 1995 forty states, two territories, and the District of Columbia were under court orders to address overcrowding in their systems.<sup>15</sup>

Moreover, the human costs of this prison boom and America's wars on crime and drugs have been particularly devastating for African-Americans. In *Malign Neglect: Race, Crime and Punishment in America*, Michael Tonry argues that although criminal behavior by blacks has not been getting worse since the mid-1970s, America's war on drugs has resulted in a steady and disproportionate increase in the numbers and percentages of black inmates.

Since 1980 the number of blacks in prison has tripled. Between 1979 and 1992 the number of blacks among those admitted to state and federal prison grew from 39 to 54 percent. Incarceration rates for blacks in 1991 (1,895 per 100,000) were nearly seven times higher than those for whites (293 per 100,000). Widely publicized studies in 1990 showed that 23% of black males aged 20 to 29 in the United States were under criminal justice system control.<sup>16</sup>

Subsequent studies by the National Center on Institutions and Alternatives and the Sentencing Project found that in 1991 on an average day 42% of young black males in Washington, D.C., and 56% of those in Baltimore were in the criminal justice system, and that by 1995 this was the case nationwide for one out of every three young African-American males.<sup>17</sup> Mauer notes that as a result of these trends half of all current prison inmates are African-American, and that "a black boy born in 1991 stood a 29% chance of being imprisoned at some point in his life, compared to . . . a 4% chance for a white boy."<sup>18</sup>

Nor have women, historically a very small proportion of prison inmates, been immune to the effects of the recent corrections boom. As Currie notes: "In 1970 there were slightly more than 5,600 women in state and federal prisons across the United States. By 1996 there were nearly 75,000—a thirteenfold increase."<sup>19</sup> At this rate of growth the number of women in U.S. prisons at the beginning of the new millennium will exceed America's entire inmate population in 1970. Not too surprisingly, the majority of this increase has consisted of women arrested for non-violent crimes, and African-American women are the fastest growing demographic group among the newly incarcerated.<sup>20</sup>

<sup>15</sup> David B. Kopel, "Sentencing Policies Endanger Public Safety," *USA Today Magazine*, November 1995, 65; Donziger, *Real War on Crime* 45.

<sup>16</sup> Tonry, *Malign Neglect* 4, 65, 107–16; see also Donziger, *Real War on Crime* 99–122 and Mauer, *Race to Incarcerate* 118–61.

<sup>17</sup> Donziger, *Real War on Crime* 104–5.

<sup>18</sup> Mauer, *Race to Incarcerate* 118–19, 124–25.

<sup>19</sup> Currie, *Crime and Punishment* 14.

<sup>20</sup> Donziger, *Real War on Crime* 148–49; Casa, "Prisons" 15.

## EVALUATING THE EXPERIMENT

Several approaches might be taken in critiquing the morality of America's prison experiment. We could ask about the effectiveness, appropriateness or justice of locking up millions of our citizens in order to control or deter crime or drug use. Are we winning the wars on crime and drugs? Can they be won? Are we waging them in a proportionate manner? Are these wars we should even be waging? Or we might raise questions about the wisdom or humanity of spending \$40 billion a year on corrections, or about the impact of this corrections boom on our society—particularly on our poor and marginalized. What are these wars costing us in dollars, missed opportunities, and human suffering? Another possibility would be to inquire about other, more humane or effective options we might have chosen. What are the alternatives to this prison experiment? Or, finally, we might inquire about the fairness of any war that continues to round up all the usual suspects, giving us swelling prisons overcrowded with minorities, the poor, the homeless, the unemployed, the illiterate, the mentally ill, and the drug addicted. Are these just wars?

This final question suggests a novel, but possibly useful approach, namely using the just-war theory to evaluate America's prison experiment. Admittedly, this theory has traditionally been employed to critique the moral rightness of overt military campaigns or interventions.<sup>21</sup> Still, recent uses of just-war criteria have not been so restrictive. Along with many other critics of the Cold War, the United States Catholic Conference of Bishops (USCC) relied upon just-war principles (right intent, proportionality, and discrimination) to evaluate the structural violence of nuclear deterrence and the arms race in their 1983 pastoral *The Challenge of Peace*.<sup>22</sup> More recently there have been essays by Albert Pierce and Joy Gordon applying just-war criteria to the use of economic sanctions, while

<sup>21</sup> For treatments of the history and application of the just-war theory see Richard J. Regan, *Just War: Principles and Cases* (Washington: Catholic University of America, 1996); Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed. (New York: HarperCollins, 1992; original ed. 1977). For more recent applications of this theory to the question of humanitarian intervention, see Kenneth R. Himes, "Just War, Pacifism, and Humanitarian Intervention," *America* 169 (August 14, 1993) 10–15, 28–31, and Himes, "The Morality of Humanitarian Intervention," *Theological Studies* 55 (1994) 82–105.

<sup>22</sup> USCC, *The Challenge of Peace: God's Promise and Our Response* (Washington: USCC, 1983) no. 167–99. The document was published in *Origins* 13 (May 19, 1983) 1–32. Other examples of the use of just-war criteria to evaluate nuclear deterrence and the arms race include Regan, *Just War* 100–23; Walzer, *Just and Unjust Wars* 269–74; William V. O'Brien, "Just War Doctrine in a Nuclear Context," *TS* 44 (1983) 191–220; James Turner Johnson, *Can Modern War be Just?* (New Haven: Yale University, 1984).

two pieces, one by Robert Sweet and Edward Harris, and another by Eva Bertram and Robin Crawford applied the just-war theory to America's war on drugs.<sup>23</sup>

A justification for this more expansive use of the just-war theory can be found in John Langan's study in 1985 on "Violence and Injustice in Society: Recent Catholic Teaching" in which he makes two points. First, he acknowledges the wide range of forms that violence takes in modern societies, paying particular attention to those political and social structures that have come to be seen as types of "institutional violence."<sup>24</sup> Second, he suggests that the just-war theory "provides a useful starting point" for addressing "the different forms of violence in society" because this theory "provides an analogical framework for assessing justifications for the voluntary infliction or imposition of evils on others, particularly when this results from social and political actions."<sup>25</sup> In other words, the theory might be usefully applied to critique a wide range of political or social actions using force and/or inflicting harm, even when these actions have traditionally been viewed as quite different or separate from the violence of war. Pierce makes a similar point in his essay applying just-war principles to the use of economic sanctions. "If those principles are an established and accepted means of evaluating the use of one instrument of statecraft that can cause great pain, suffering and physical harm, then they might well be appropriate in evaluating another instrument that can produce similar effects."<sup>26</sup>

Given this expansive understanding of the usefulness of the just-war theory, it does not seem unreasonable then to suggest its employment as a tool for evaluating the morality of America's recent and unparalleled prison experiment. Thus, this article seeks to apply six criteria or principles of the just-war theory to the U.S.'s prosecution of its wars on crime and drugs, asking if these wars (and the concomitant incarceration of nearly two million persons) have been waged: (1) for a just cause, (2) with a right

<sup>23</sup> Albert C. Pierce, "Just War Principles and Economic Sanctions," *Ethics and International Affairs* 10 (1996) 99–113; Joy Gordon, "Economic Sanctions, Just War Doctrine, and the 'Fearful Spectacle of the Civilian Dead,'" *Cross Currents* 49 (Fall/Winter 1999) 387–400; Robert Sweet and Edward Harris, "Just and Unjust Wars: The War on the War on Drugs—Some Moral and Constitutional Dimensions of the War on Drugs," *Northwestern University Law Review* 87 (Summer 1993) 1302–79; Eva Bertram and Robin Crawford, "Is the Drug War a Just War: Drug Abuse, Drug Wars, and the Church," *Church and Society* 82 (May/June 1992) 46–77.

<sup>24</sup> John Langan, "Violence and Injustice in Society: Recent Catholic Teaching," *Theological Studies* 46 (1985) 685–93.

<sup>25</sup> *Ibid.* 694.

<sup>26</sup> Pierce, "Economic Sanctions" 100.

intent, (3) in a proportionate manner, (4) as a last resort, (5) with some real probability of success, and (6) in a discriminate manner<sup>27</sup>

### Just Cause

In *The Challenge of Peace* the American Catholic bishops argue that “war is permissible only to confront ‘a real and certain danger,’ i.e., to protect innocent life, to preserve conditions necessary for decent human existence, and to secure basic human rights.”<sup>28</sup> James Childress echoes these sentiments when he notes that “because war involves overriding important prima facie obligations not to injure or kill others, it demands the most weighty and significant reasons.”<sup>29</sup>

In general, defenders of America’s prison experiment and supporters of successive waves of “tough-on-crime” legislation over the past three decades have argued that our present corrections boom and its accompanying harms are justified by the “real and certain danger” of exceptional and escalating crime (particularly violent) rates and skyrocketing drug use.<sup>30</sup> This sentiment is well expressed by a quote from criminal scholar James Q. Wilson: “We’re on a new higher plateau of crime, which means a new, higher, and I think, permanent prison population. It is very hard for a free society to figure out how effectively to deal with crime rates other than by imprisonment.”<sup>31</sup>

Three points can be made in support of this position: First, both overall and violent crime rates rose significantly during the 1960s (although some of the reported increases were due to improved record keeping) and continued to climb through the 1970s, the decade in which America’s prison experiment was initiated.<sup>32</sup> Second, compared with other industrialized nations, the U.S. has intolerably high rates of violent crime, largely the result of homicides committed with firearms. Indeed, in 1996 the U.S.

<sup>27</sup> The specific criteria used in this essay are drawn from a fuller list (including legitimate authority and comparative justice) offered in USCC, *The Challenge of Peace* no. 80–110. Slightly different lists are offered in Reagan, *Just War* 17–18, and James F. Childress, “Just War Criteria,” in *War or Peace? The Search for New Answers*, ed. Thomas A. Shannon (Maryknoll, N.Y.: Orbis, 1980) 40–58, at 46–50.

<sup>28</sup> USCC, *The Challenge of Peace* no. 86. Interestingly enough for our analysis of America’s prison experiment, although both Augustine and Thomas Aquinas see the punishment or avenging of past wrongs as the primary example of just cause, the bishops (and recent popes) reject retribution as moral grounds for going to war. See *Summa theologiae* 2-2, q. 40, a. 1.

<sup>29</sup> Childress, “Just War Criteria” 46. <sup>30</sup> Durham, “Then and Now” 28–30.

<sup>31</sup> Interview with James Q. Wilson in *Criminal Justice Matters* (Autumn 1996) 4, cited in Mauer, *Race to Incarcerate* 1.

<sup>32</sup> Mauer, *Race to Incarcerate* 27–32, 82–84.

murder rate (which was at a 30-year low) was five to seven times that of most industrialized countries.<sup>33</sup> And third, during the second half of the 1980s there were unprecedented rises in the rates of violent crime, particularly among the young and poor.<sup>34</sup>

Still, there are at least three reasons to question the assertion that America's prison experiment is justified because of escalating and exceptional crime rates, or in particular that this long-running corrections boom has been in response to a growth in violent crime. To begin with, there is no evidence that stiffening penalties or tougher sentences have consistently been in response to increases in crime rates. In "Politics, Public Policy, and Street Crime," Stuart Scheingold notes that over the past three decades "anticrime legislation has . . . been churned out in erratic fits and starts that have little if any relationship to the rate of serious street crime, which has stabilized or perhaps declined slightly over the past couple of decades."<sup>35</sup> Both Morris and Mauer make a similar point when they note that America's prison experiment has been largely unaffected by major fluctuations in the nation's overall or violent crime rates. In spite of the fact that there were significant reductions in crime throughout the first half of the 1980s and for most of the past decade, prison growth has gone on unabated, and promises to do so well into the foreseeable future.<sup>36</sup>

Furthermore, the idea that a sextupling of our prison population was required by extraordinary and escalating crime rates is undercut by two facts. First, overall crime rates in the U.S. are not significantly out of line with other industrialized democracies, even though our incarceration rates are about 5 to 8 times that of those nations. Relying on international victimization surveys, Mauer and the Report of the National Criminal Justice Commission (1996), a project of the National Center on Institutions and Alternatives, note that except for homicide U.S. crime rates are about average for industrialized nations.<sup>37</sup> Second, in spite of the fact that many or even most Americans continue to believe that crime is on the increase, in most categories crime rates have not changed a great deal since the mid-70s.<sup>38</sup> Even with the increases in violent crime during the second half of the 1980s, the U.S. murder rate dropped nine percent between 1980 and

<sup>33</sup> Ibid. 29.

<sup>34</sup> Currie, *Crime and Punishment* 21–22.

<sup>35</sup> Stuart A. Scheingold, "Politics, Public Policy, and Street Crime," *Annals of the American Academy of Political and Social Sciences* 539 (May, 1995) 155–68, at 155.

<sup>36</sup> Morris, "The Contemporary Prison" 236; Egan, "Less Crime, More Criminals" 4.1; Mauer, *Race to Incarcerate* 82.

<sup>37</sup> Donziger, *Real War on Crime* 10–15; Mauer, *Race to Incarcerate* 25–30.

<sup>38</sup> Donziger, *Real War on Crime* 3–11, 67–78.

1990, and is about the same as it was in 1970, while the serious violent crime rate stands at sixteen percent below its mid-1970s peak.<sup>39</sup>

Regarding the notion that America's prison experiment can be justified as a response to our nation's admittedly horrific and occasionally escalating rates of violent crime, two points should be noted. To begin with, in the first two decades of this corrections boom, the nation's prison population rose "almost ten times faster than the rate of violent crime."<sup>40</sup> Indeed, as Eric Schlosser reports in a recent study on the prison-industrial complex, "since 1991 the rate of violent crime in the United States has fallen by about 20 percent, while the number of people in prison or jail has risen by 50 percent."<sup>41</sup> It is hardly believable, then, that the need to deal with escalating rates of violent crime justifies the present corrections boom. This is further born out by evidence offered by Mauer, Currie, Morris, and a number of other critics that the explosive growth of America's prisons since the mid-1970s was largely due to policy changes which have significantly increased the percentage of non-violent offenders sent to and kept in prison.<sup>42</sup> Again, given the fact that U.S. crime rates for such offenses are not significantly out of line with other industrialized democracies, nations having incarceration rates of one-fifth to one-eighth of the U.S., it is hard to see the justification for our corrections boom."<sup>43</sup>

Still, one might argue that America's massive prison expansion is a justifiable response to the "real and certain danger" posed by illegal drugs and the international drug trade. A problem with that position, however, is that while "Americans do not use more drugs, on average, than people in other nations . . . the United States, virtually alone among Western democracies, has chosen a path of incarceration for drug offenders." How are we, then, to justify this exceptional response, which has involved incarcerating more than 400,000 persons for drug offenses and constructing what Gen. Barry McCaffrey, the nation's own drug czar, has referred to as "America's internal gulag"?<sup>44</sup> Furthermore, Tonry and Mauer argue that numerous studies conducted by or for the National Institute on Drug Abuse (NIDA) showed illegal drug use in the U.S. had already begun to decline several years before President Reagan declared America's war on drugs, and that

<sup>39</sup> Ibid. 2–3.

<sup>40</sup> Editorial, "The Case for Emptier Prisons" 25. See also Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (New York: Cambridge University, 1996) 26–30, 37–47.

<sup>41</sup> Schlosser, "The Prison-Industrial Complex" 54.

<sup>42</sup> Morris, "The Contemporary Prison" 236; Currie, *Crime and Punishment* 14; Donziger, *Real War on Crime* 15–19.

<sup>43</sup> Mauer, *Race to Incarcerate* 25–27. <sup>44</sup> Egan, "Less Crime, More Time" 4.1.

it had never been necessary (or useful) to wage such a punitive campaign against this social ill.<sup>45</sup>

### Right Intent

Again in *The Challenge of Peace*, the U.S. bishops note that “right intention is related to just cause—war can legitimately be intended only for the reasons set forth as a just cause.”<sup>46</sup> Childress makes a similar point when he argues that right intent demands that wars be waged in pursuit of a just cause.<sup>47</sup> However, since America’s unprecedented corrections boom has continued unabated while overall and violent crime rates have stabilized or declined, it seems unlikely that the nation’s prison experiment is being waged for the just cause of addressing “the real and certain danger” of extraordinary and escalating crime rates. Rather, critics of America’s wars on crime and drugs have suggested four other and more troubling reasons behind our ongoing corrections boom.

One argument has been that America’s prison experiment is part of our society’s retreat from a social compact with the poor and working classes, and of a shift from a war on poverty to a war on the poor.<sup>48</sup> This is clearly Currie’s contention when he argues that:

while we were busily jamming our prisons to the rafters with young, poor men, we were simultaneously generating the fastest rise in income inequality in recent history . . . tolerating the descent of several millions of Americans, most of them children, into . . . a kind of poverty that . . . became both deeper and more difficult to escape as time went on. . . . At the same time, successive administrations cut many of the public supports . . . that could have cushioned the impact of worsening economic deprivation . . . and removed some of the rungs on our already wobbly ladders out of poverty.<sup>49</sup>

<sup>45</sup> Tonry, *Malign Neglect* 83–91; Mauer, *Race to Incarcerate* 145.

<sup>46</sup> USCC, *The Challenge of Peace* no. 95.

<sup>47</sup> Childress, “Just War Criteria” 48.

<sup>48</sup> The timing and extent of this retreat from a social compact with the poor are treated in Stephanie Coontz, *The Way We Really Are: Coming to Terms with America’s Changing Families* (New York: HarperCollins, 1997) 44–50; Frances Fox Piven and Richard A. Cloward, *The Breaking of the American Social Compact* (New York: New Press, 1997) 59–82; 173–242; Christopher Lasch, “The Revolt of Elites: Have They Canceled Their Allegiance to America?” *Harper’s* November 1994, 39–49; Michael Lind, “To Have and Have Not: Notes on the Progress of the American Class War,” *Harper’s* June 1995, 35–47. See also, Lasch, *The Revolt of the Elites and the Betrayal of Democracy* (New York: W. W. Norton, 1995). Also, a number of recent texts have treated America’s shift from Johnson’s war on poverty to a “war on the poor.” See Ruth Sidel, *Keeping Women and Children Last: America’s War on the Poor* (New York: Penguin, 1996); Herbert J. Gans, *The War Against the Poor: The Underclass and Antipoverty Policy* (New York: HarperCollins, 1995).

<sup>49</sup> Currie, *Crime and Punishment* 32–33.

According to Currie, prisons have “become America’s social agency of first resort for coping with the deepening problems of a society in perpetual crisis . . . a substitute for the more constructive social policies we were avoiding.”<sup>50</sup> Scheingold offers a distinct but similar analysis when arguing that America’s highly punitive wars on crime and drugs have allowed “both the public and politicians to evade more intractable and more unwelcome problems.”<sup>51</sup> His point is that focusing on street crime offers elected officials and their constituencies a distraction from and scapegoats for the larger social ills facing our society. The authors of the previously mentioned Report of the National Criminal Justice Commission (NCJC) put it even more starkly when they note that America’s “massive prison construction [has] represented a commitment by our nation to plan for social failure by spending billions of dollars to lock up hundreds of thousands of people while at the same time cutting billions of dollars for programs that would provide opportunity to young Americans.”<sup>52</sup>

A parallel suggestion to the notion that the current corrections boom has been part of a war against the poor has been made by Tonry and Mauer. They argue that for a variety of reasons America’s war on drugs, which has provided so many of the growing ranks of inmates filling our prisons and jails, has largely targeted inner-city neighborhoods where the poor and minorities are over represented.<sup>53</sup> They further argue that because of this choice the war on drugs and America’s corrections boom have had a foreseeable and disastrous impact on African-Americans and their communities. According to Tonry, “anyone with knowledge of drug-trafficking patterns and of police arrest policies could have foreseen that the enemy troops in the War on Drugs would consist largely of young, inner city, minority males.”<sup>54</sup> Senator Daniel Patrick Moynihan echoes this sentiment when he notes that by choosing to fight the drug problem through prohibition, “we are choosing to have an intense crime problem concentrated among minorities.”<sup>55</sup>

Indeed, Tonry goes even further, arguing that in the present drug war “the lives of black and Hispanic ghetto kids have been sacrificed in order to reinforce white kids’ norms against drug use,” and that minority scapegoating has been a consistent part of America’s ongoing wars with drugs.<sup>56</sup>

<sup>50</sup> Ibid. 33–35.

<sup>51</sup> Scheingold, “Politics, Public Policy, and Street Crime” 159.

<sup>52</sup> Donziger, *Real War on Crime* 29.

<sup>53</sup> Tonry, *Malign Neglect* 101–10; Mauer, *Race to Incarcerate* 143–51.

<sup>54</sup> Tonry, *Malign Neglect* 4, 104–16; Mauer, *Race to Incarcerate* 118–60; Donziger, *Real War on Crime* 99–120.

<sup>55</sup> Daniel Patrick Moynihan, “Iatrogenic Government—Social Policy and Drug Research,” *American Scholar* 62 (1993) 351–62.

<sup>56</sup> Tonry, *Malign Neglect* 97.

Citing National Institute on Drug Abuse studies showing that America's current drug war was begun at a point when drug use by the majority of Americans was in decline, but remained high in inner city neighborhoods, and noting police admissions that it is noticeably easier to make drug arrests in highly disorganized and impoverished neighborhoods, Tonry argues that the war on drugs has "destroyed the lives of young, principally minority people in order to reinforce existing norms of young, mostly majority people."<sup>57</sup> Moreover, citing drug historian David Musto's *The American Disease: Origins of Narcotic Control*, Tonry notes that throughout this past century America's drug wars have regularly scapegoated minority groups, like the Chinese (opium), Mexicans (marijuana), and blacks (cocaine).<sup>58</sup>

A third and equally disturbing possibility regarding intent is that our corrections boom is being driven at least partially by an inordinate desire to punish, and by a particular willingness to use punishment as a means for dealing with the poor. For although Currie believes that Americans generally see themselves as "soft on crime," he argues that international comparisons of attitudes and practices regarding punishments indicate that "no matter how we approach the question, the U.S. does turn out to be relatively punitive in its treatment of offenders, and very much so for less serious crimes."<sup>59</sup> This corresponds with Rothman's report that very long prisons terms have been part of America's penal legacy for more than two centuries.<sup>60</sup>

Mauer has two points to make about Americans' readiness to punish, noting first a recent study indicating that a "society's penal climate or its relative punitiveness is linked to its relative egalitarianism: the greater a society's tolerance of inequality, the more extreme the scale of punishment utilized."<sup>61</sup> So it is perhaps not too surprising that as the Western democracy with the greatest gap between rich and poor, the U.S. is also the nation with the severest penalties for a wide array of offenses, and the only such country which continues to make significant (and increasing) use of the death penalty. Furthermore, he notes that our "criminal justice system in general and prison in particular have long served as the principal arena for responding to the crimes of lower-income people."<sup>62</sup> And indeed, any serious study of America's prison population over the past two centuries

<sup>57</sup> Ibid. 95–104.

<sup>58</sup> David Musto, *The American Disease: Origins of Narcotics Control*, rev. ed. (New York: Oxford University, 1987); see also John Helmer, *Drugs and Minority Oppression* (New York: Seabury, 1975).

<sup>59</sup> Currie, *Crime and Punishment* 20.

<sup>60</sup> Rothman's "Perfecting the Prison" 114–15.

<sup>61</sup> Mauer, *Race to Incarcerate* 39. <sup>62</sup> Ibid. 164.

could hardly fail to discover a particular willingness to turn to imprisonment when the offenders were poor, illiterate, homeless, or immigrants and minorities.”<sup>63</sup>

Finally, when looking for an underlying reason for America’s ongoing corrections boom, Schlosser points to a “prison-industrial complex,” which he describes as “a set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need.”<sup>64</sup> Without using this specific language, Mauer also notes “the virtual institutionalization of a societal commitment to the use of a massive prison system,” and argues that “the growth of the system itself serves to create an institutional set of lobbying forces that perpetuate a societal commitment to imprisonment through the expansion of vested economic interests.”<sup>65</sup>

According to Schlosser, Mauer, and others this burgeoning prison-industrial complex is “not a conspiracy, guiding the nation’s criminal-justice policy behind closed doors,” but rather “a confluence of special interests that has given prison construction in the United States a seemingly unstoppable momentum.”<sup>66</sup> It consists of a broad array of liberal and conservative politicians who rely on “tough-on-crime” rhetoric to get and stay in office, as well as a growing number of rural communities that see prison construction as a boon to their local economy and employment rates. At the same time it also includes the swelling ranks of correctional officers, whose unions support tough anti-crime measures that will guarantee more and more prison jobs, and an increasing number of major corporations profiting from the nearly \$40 billion a year corrections boom, and a private prison industry that has gone from 11,000 to 140,000 beds in the last decade and is projected to be worth \$4 billion within the next two years.<sup>67</sup>

### Proportionality

Paul Ramsey argued that “it can never be right to resort to war, no matter how just the cause, unless a proportionality can be established between military/political objectives and their price, or unless one has reason to believe that in the end more good will be done than undone or

<sup>63</sup> Rothman, “Perfecting the Prison” 124; Rotman, “The Failure of Reform” 175.

<sup>64</sup> Schlosser, “The Prison-Industrial Complex” 54.

<sup>65</sup> Mauer, *Race to Incarcerate* 9–10.

<sup>66</sup> Schlosser, “The Prison-Industrial Complex” 54; Mauer, *Race to Incarcerate* 9–10; Donziger, *Real War on Crime* 85–98.

<sup>67</sup> Schlosser, “The Prison-Industrial Complex” 54; Donziger, *Real War on Crime* 85–97; Casa, “Prisons” 15.

a greater measure of evil prevented.”<sup>68</sup> The U.S. bishops say much the same thing when they note that “proportionality means that the damage incurred by war must be proportionate to the good expected by taking up arms.”<sup>69</sup> In determining the proportionality of America’s prison experiment, then, two questions need to be asked. First, just how effective has the corrections boom been in controlling crime: has it achieved its stated goals? And second, have the goods achieved by this experiment outweighed the harms involved in incarcerating nearly two million persons, a disproportionate percentage of whom are African-Americans and/or non-violent offenders?

In 1973 the National Advisory Commission on Criminal Justice Standards and Goals reported that “the prison, the reformatory and the jail have achieved only a shocking record of failure. There is overwhelming evidence that these institutions create crime rather than prevent it.”<sup>70</sup> In spite of that conclusion, however, during the next two decades state and federal legislatures implemented increasingly stiffer penalties and mandatory minimums on the grounds that prisons were an effective tool for crime control and that longer prison terms would reduce crime by deterring or at least incapacitating criminals. At the end of this period—after the average prison time per violent crime had tripled, and the U.S. prison population had more than quadrupled—a National Academy of Sciences report commissioned by the Reagan administration’s Department of Justice asked: “What effect has increasing the prison population had on levels of violent crime? Apparently, very little.”<sup>71</sup>

Indeed, after reviewing a number of national and international reports on the topic Tonry argues that “the clear weight of the evidence in every Western country indicates that tough penalties have little effect on crime rates.”<sup>72</sup> Similarly, Currie reports on studies comparing the relative punitiveness of different states, and on those tracking the effect of longer prison terms on crime rates, and his conclusion is that these studies “tell us that to the extent that prison ‘works,’ it works only in dismayingly uneven and inefficient ways.” It is not that the sextupling of our prison population has had no effect on crime rates, for there is some evidence that longer prison

<sup>68</sup> Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Scribner’s, 1968) 195.

<sup>69</sup> USCC, *The Challenge of Peace* no. 99.

<sup>70</sup> National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report on Corrections* (Washington: Government Printing Office, 1973) 597.

<sup>71</sup> Tonry, *Malign Neglect* 17.

<sup>72</sup> *Ibid.* 17–24; Mauer, *Race to Incarcerate* 81–117. Similar points about the failure of America’s prison experiment are made in Durham, “Fruits of Late 20th Century Penal Reform” 28–31, and Scheingold, “Politics, Public Policy, and Street Crime” 155–56.

sentences have a modest impact on a number of property crimes and perhaps on one sort of violent crime (robbery). Still, as he notes elsewhere, since the early-1970s “the incarceration rate has risen much more than anyone imagined. But there has been no overall decrease in serious criminal violence, and there have been sharp increases in many places—including many of the places that incarcerated the most or increased their rates of imprisonment the fastest.”<sup>73</sup> As Mauer notes, “the best that can be said about changes in homicide is that these rates were no worse in 1995 than in 1970 despite the addition of nearly one million prison inmates.”<sup>74</sup>

And if the effects on overall and violent crime rates have been modest or negligible, the picture for drugs is even less hopeful. Indeed, the overwhelming evidence is that criminal justice efforts to control the drug trade through interdiction and “drug busts” have been singularly ineffective, and that with more than 400,000 persons behind bars for drug offenses, illegal drugs remain as or more available and inexpensive as they were two decades ago.<sup>75</sup>

Moreover, along with critics like Mauer and Scheingold, Jerome Miller in his *Search and Destroy: African American Males in the Criminal Justice System* argues that America’s prison experiment is not only ineffective, but decidedly counterproductive and criminogenic.<sup>76</sup> This argument has three elements. First, citing a number of recent studies, Mauer suggests that an “increased emphasis on apprehending drug offenders is harmful to overall crime control efforts” as it shifts needed resources from other important law enforcement efforts. He also contends that an increasing reliance on incarceration has helped overwhelm critical parole and probation programs geared to the reintegration of offenders into society.<sup>77</sup> Second, it has been reported that flooding America’s prisons with low-level drug offenders required to serve out mandatory minimums has meant the early release of violent criminals back into the community. Indeed, “a 1992 Illinois study linked the huge increase in drug law enforcement in the state to a sharp rise in violent crime. One reason was that greater numbers of violent criminals were released from prison early to make room for the

<sup>73</sup> Currie, *Crime and Punishment* 21–23, 28–31, 53–66.

<sup>74</sup> Mauer, *Race to Incarcerate* 84. A similar point is made in Donziger, *Real War on Crime* 2–11.

<sup>75</sup> Tonry, *Malign Neglect* 117–23; Donziger, *Real War on Crime* 200–4; Mauer, *Race to Incarcerate* 114–15.

<sup>76</sup> Scheingold, “Politics, Public Policy, and Street Crime” 155–60; Miller, *Search and Destroy* 95–107, 117–36. Indeed, in Miller’s discussion of the “unintended consequences” of America’s wars on crime and drugs he suggests a variety of ways in which the criminal justice system’s interventions in America’s inner cities have contributed to rising levels of crime and violence.

<sup>77</sup> Mauer, *Race to Incarcerate* 179–80.

surge of drug offenders.”<sup>78</sup> And third, Miller, Mauer, and others contend that in many inner city and African-American neighborhoods where the imprisonment of young men has become frighteningly routine, incarceration ceases to serve as a deterrent, but is instead increasingly seen as a “rite of passage” into adulthood, and a training ground for a life of crime. Indeed, Miller argues that America’s stepped up wars on drugs and crime have raised the levels of violence in the inner city and created an “oppositional culture.”<sup>79</sup>

Still, even if the prison experiment had been noticeably more successful at controlling crime, we would still need to measure that success against the financial and human costs of this corrections boom. Critics of America’s wars on crime and drugs offer four arguments against the proportionality of our massive prison expansion. First, like the arms race, the race to incarcerate has “robbed the poor” by diverting funding from the very social programs that might have helped them escape from poverty and made their lives and neighborhoods safer and less crime-ridden. Second, our prison experiment has cost the African-American community a vastly disproportionate amount of suffering and contributed to a deepening racial divide in this country. Third, the bill for America’s wars on crime and especially drugs includes unacceptable losses in civil liberties and human rights. And fourth, in very short order our society will begin experiencing a sort of “toxic shock” as hundreds of thousands and then millions of warehoused and often hardened convicts are dumped back on the streets, with little chance of gainful employment or successful reintegration.

As Currie already noted, America’s massive prison experiment has coincided with significant reductions in the nation’s social safety net, and a weakening of the country’s social compact with the very people and neighborhoods most threatened by crime and violence. During the nearly three decades of this corrections boom the financial and physical divide between America’s rich and poor has steadily increased, resulting in the largest income inequality of any industrialized democracy and the doubling of both the number and population of high-poverty neighborhoods in this country.<sup>80</sup> Meanwhile, the doubling of the prison population in the 1980s was accompanied by significant cuts in Aid to Families with Dependent Children (AFDC), in the Food Stamp program, and in child-nutrition programs, as well as reductions in maternal- and child-health programs, in

<sup>78</sup> Kopel, “Sentencing Policies Endanger Public Safety” 68–69.

<sup>79</sup> Mauer, *Race to Incarcerate* 182–87; Donziger, *Real War on Crime* 124–28; Miller, *Search and Destroy* 95–107, 112–36.

<sup>80</sup> Currie, *Crime and Punishment* 30–36; Sidel, *Keeping Women and Children Last* xii–xiv; Andrew Hacker, *Money: Who Has How Much and Why* (New York: Scribner, 1997) 10–11, 52–53; Paul A. Jargowsky, *Poverty and Place: Ghettos, Barrios, and the American City* (New York: Russell Sage, 1997) 31–33.

federal funds for day-care, and for training and employment programs.<sup>81</sup> And while state spending on corrections grew by 95% between 1976 and 1989, higher education declined by 6%, and welfare dropped 41%. Furthermore, “in 1991, for the first time in American history, several major cities spent more on law enforcement than on secondary education.”<sup>82</sup> “The result,” as noted in the National Criminal Justice Commission’s 1996 report, “is that today among developed countries, the United States has the highest rates of incarceration, the widest spread of economic inequality, and the highest levels of poverty.”<sup>83</sup>

As for the disproportionate costs paid by African-Americans for our prison experiment, it has already been noted that incarceration rates for African-Americans have skyrocketed over the past two decades, a fact that Tonry argues is not explained by increasing crime rates or drug use in the black community, but rather by the way in which America’s war on drugs has been prosecuted.<sup>84</sup> Indeed, “African American arrest rates for drugs during the height of the ‘drug war’ in 1989 were five times higher than arrest rates for whites, *even though whites and African Americans were using drugs at the same rate*. African Americans make up 12 percent of the U.S. population and constitute 13 percent of all monthly drug users but represent 35 percent of those arrested for drug possession, 55 percent of those convicted of drug possession, and 74 percent of those sentenced to prison for drug possession.”<sup>85</sup>

The result, as previously pointed out by Mauer, is that at present African-Americans make up half of all prison inmates and more than half of all new admissions. One in three (32%) young African-American males is under some type of criminal justice supervision, and at some point in 2000 the number of African-American adults behind bars is expected to reach one million, meaning that roughly one in ten black men will be in prison.<sup>86</sup>

Mauer and others point to several harms suffered by African-American and inner-city communities devastated by these astronomical incarceration rates. To begin with, the young men incarcerated have fewer prospects for future employment, and millions of such men and women have temporarily or permanently lost their franchise to vote. Furthermore, high rates of imprisonment contribute to a significant loss of marriageable young men,

<sup>81</sup> Miller, *Search and Destroy* 1–2; Jason DeParle, “Welfare As We’ve Known It,” *New York Times*, 19 June 1994, 44.

<sup>82</sup> Donziger, *Real War on Crime* 48, 204. <sup>83</sup> *Ibid.* 29.

<sup>84</sup> Tonry, *Malign Neglect* 4, 79, 108. <sup>85</sup> Donziger, *Real War on Crime* 115.

<sup>86</sup> Louise D. Palmer, “Number of Blacks in Prison Nears 1 Million: ‘We’re Incarcerating an Entire Generation of People,’” *Seattle Post Intelligencer*, 12 March 1999, A1; Mauer, *Race to Incarcerate* 118–19.

men capable of providing for and parenting their children and contributing to their community. And finally, the present level of incarceration means that there are millions of young people growing up with a parent in prison, a factor known to contribute to an intergenerational cycle of crime and violence.<sup>87</sup>

Still another criticism of the disproportionate nature of America's prison experiment is seen in complaints about increasing disregard for civil liberties and human rights shown in the prosecution of our wars on crime and (especially) drugs. In David Cole's *No Equal Justice: Race and Class in the American Criminal Justice System*, the Georgetown law professor argues that our present policy of mass incarceration is only acceptable to middle- and upper-class Americans because it depends on a double standard of justice, with significantly weaker constitutional protections being offered to minorities and the poor.<sup>88</sup> At the same time a recent *New York Times* report by Fran Bruni contends that America's war on crime has created a siege mentality encouraging "invasive and belligerent policing" and tolerating the weakening of civil liberties, especially for the poor and minorities.<sup>89</sup>

Similarly, Steven Wisotsky of the Drug Policy Foundation argues that America's war on drugs has seriously encroached on the legal rights of individual citizens. Pointing to court decisions upholding drug testing in the workplace, as well as those granting law enforcement officials increased powers of search and seizure, wiretapping, and other sorts of surveillance, Wisotsky complains about significant losses in the area of personal privacy and freedom from unwarranted search and seizure. At the same time he argues that the excessive penalties associated with mandatory minimums constitute "cruel and unusual" punishment for largely victimless crimes.<sup>90</sup> In a similar fashion Coletta Youngers of the North American Congress on Latin America and Robin Kirk have complained about the ways in which our nation's drug war has resulted in the support of governments and military and police forces with deeply troubling human rights records.<sup>91</sup>

Finally, in "When They Get Out," a recent study on the rising tide of

<sup>87</sup> Mauer, *Race to Incarcerate* 183–87; Tonry, *Malign Neglect* 6; Donziger, *The Real War on Crime* 124–28.

<sup>88</sup> David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: New Press, 1999) 5.

<sup>89</sup> Frank Bruni, "Behind Police Brutality: Public Assent," *New York Times*, 21 February 1999, 4.1.

<sup>90</sup> Steven Wisotsky, "A Society of Suspects: The War on Drugs and Civil Liberties," *USA Today Magazine*, July 1993, 17–22.

<sup>91</sup> Coletta Youngers, "The Only War We've Got," *NACLA Report on the Americas* 31 (September/October 1997) 13–18; Robin Kirk, "Oh! What a Lovely Drug War in Peru," *Nation*, 30 September 1991, 357–61.

ex-convicts being released into society, Sasha Abramsky points out some of the long-term consequences of seeking to control crime through mass incarceration. Arguing that we can anticipate an annual flood of better than half a million returning prisoners for at least the next decade, Abramsky warns that most of these ex-convicts will be the products of a prison system committed to warehousing and punishment, not rehabilitation or job training. Furthermore, thanks to mandatory minimums and the elimination of parole boards in fifteen states, a growing number of these prisoners will have little or no supervision during their reintegration into society, and a large percentage will have few prospects for gainful employment. As Abramsky puts it, “that is an awful lot of rage coming out of prison to haunt our future.”<sup>92</sup>

### Last Resort

The U.S. bishops in *The Challenge of Peace* note further that “for resort to war to be justified, all peaceful alternatives must have been exhausted.”<sup>93</sup> Childress is somewhat less demanding when he suggests that “the requirement that war be the last resort does not mean that all possible measures have to be attempted and exhausted if there is no reasonable expectation that they will be successful.”<sup>94</sup> Thus, the question facing us at present is whether there is (or was) any reasonable hope that less drastic, costly, or harmful alternatives to America’s prison experiment might have fared as well or better in controlling crime and/or drugs.<sup>95</sup> If so, it is hard to see how our present corrections boom and all its attending harms can be justified.

Along with Mauer and Currie, the National Criminal Justice Commission report notes that most Western industrialized democracies have overall crime rates that are comparable to our own, while maintaining incarceration and violent crime rates that are but a small fraction of those of the U.S. This evidence at least suggests that building the largest prison system in the world was not the only (or most effective) way to control crime.

How have these other nations achieved such favorable results in their significantly less punitive “wars” on crime? According to the authors of the National Criminal Justice Commission report, “they have highly developed social safety nets that protect children from poverty. They have severe

<sup>92</sup> Sasha Abramsky, “When They Get Out,” *Atlantic Monthly*, June 1999, 30–36, at 34–35.

<sup>93</sup> USCC, *The Challenge of Peace* no. 96.

<sup>94</sup> Childress, “Just-War Criteria” 46.

<sup>95</sup> It is possible, of course, that less harmful measures would not have been as successful at inflicting pain or suffering, but such an avenging purpose would not seem to be justified by present understandings of the just-war theory.

restrictions on the availability of firearms. They have much shorter prison sentences for nonviolent crimes, and their prisons have a much greater emphasis on rehabilitation.<sup>96</sup> In other words, as alternatives to a massive corrections boom, these countries have (1) focused more attention on addressing the underlying social and economic causes of criminal activity, while (2) seeking to limit the deadly consequences of violent behavior by restricting access to firearms. Indeed, given so many studies linking poverty and street crime, as well as firearm accessibility and exceptionally high national homicide rates, it hardly seems surprising that numerous critics of America's prison experiment should argue that instead of spending nearly \$40 billion a year on corrections, we ought to make our society safer by lifting more of our children and families out of poverty and restricting access to firearms.<sup>97</sup> To reverse the order of Currie's comment, most critics argue that instead of the largest prison system in the world, America needs better anti-poverty, employment, mental health and drug policies.

There also seem to be good reasons to believe that other, more humane alternatives to incarceration would have proven as or more effective in dealing with the problems of drug abuse, and that any final resolution of this problem will need to include a much greater reliance on prevention and treatment than is presently the case. As Tonry notes, "a program built around education, drug abuse treatment, and social programs designed to address the social and economic conditions that lead to crime and drug abuse would have much less destructive impact . . . than a program whose primary tactics were the arrest, prosecution, and lengthy incarceration of street level sellers who are disproportionately black and Hispanic."<sup>98</sup> Furthermore, a number of recent studies, including an oft-cited report by the RAND corporation, indicate that treatment programs are significantly more effective than incarceration at reducing the demand for and use of illegal drugs.<sup>99</sup> No wonder, then, that in 1999 U.S. Attorney General Janet Reno, national drug czar General Barry McCaffrey, and the White House

<sup>96</sup> Donziger, *Real War on Crime* 196.

<sup>97</sup> Ibid. 27–30, 210–217; USCC, "Community and Crime: A Statement of the Committee on Social Development and World Peace," in *Quest For Justice: A Compendium of Statements of the United States Catholic Bishops on the Political and Social Order 1966–1980*, ed. J. Brian Benestad and Francis J. Butler (Washington: USCC, 1981) 226–51, at 227; Mauer, *Race to Incarcerate* 29–30; Tonry, *Malign Neglect* 200–1, 205–8; Connecticut Christian Conference, "Gun Violence Against Children and Youth," *Origins* 25 (May 25, 1995) 17–19.

<sup>98</sup> Tonry, *Malign Neglect* 123.

<sup>99</sup> Jonathan P. Caulkins et al., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* (Santa Monica, Calif.: RAND, 1997) xv–xxv; Dion Haynes, "Study Backs Treatment, Not Prison, for Addicts—Drug Habits Broken, Money Saved Through Arizona Law," *Seattle Times*, 21 April 1999, 5; Judy Jones, "Drug Treatment Beats Prison for Cutting Crime and Addiction

acknowledged the need to abandon the government's disproportionate reliance on incarceration as a solution to America's drug woes.<sup>100</sup>

### Probability of Success

The U.S. Catholic bishops acknowledge in *The Challenge of Peace* that "this is a difficult criterion to apply, but its purpose is to prevent irrational resort to force or hopeless resistance when the outcome of either will clearly be disproportionate or futile."<sup>101</sup> The question here, then, is whether, after nearly three decades of steady growth, America's prison experiment offers any reasonable hope of winning our society's wars on crime and drugs.

In a recent study on "The Contemporary Prison," Norval Morris wrote that "wars on crime and wars on drugs are regularly declared in powerful rhetoric promising the enemy's surrender. But success never attends these efforts; there is no victory and no armistice. Instead, a new war is declared, as if the previous war had never taken place—and not even the rhetoric changes."<sup>102</sup> And indeed, as has already been noted, there is ample evidence to suggest that the current wars on crime and drugs fueling America's corrections boom are no closer to being won today than they were when they began. First, neither overall nor violent crime rates are significantly different than they were at the start of the nation's prison experiment.<sup>103</sup> Second, there is no convincing evidence that increased penalties were the major cause of periodic downturns in these rates during the second half of the 1980s and throughout the 1990s. And, third, the country's leading drug enforcement officer recently acknowledged that cocaine, heroin, and marijuana are more available than they were a decade ago, and that building more prisons will not solve the problem of drug-driven crime.<sup>104</sup> "It is clear," national drug czar McCaffrey admitted, "that we

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Rates," *British Medical Journal* 319 (August 21, 1999) 470; Mauer, *Race to Incarcerate* 158–60.

<sup>100</sup> Christopher Wren, "White House Drug Official Fights Mandatory Sentences," *New York Times*, 29 June 1999, 5; Eric Lichtbau, "Reno Wants to Restructure Courts—Idea Seeks to Ensure Rehabilitation and Monitoring of Convicts," *Seattle Times*, 11 August 1999, A10; Sonya A. Ross, "A Plan to Treat Inmates for Drug Use: Clinton Budget Will Request \$215 Million," *Seattle Post Intelligencer*, 6 January 1999, A3.

<sup>101</sup> USCC, *The Challenge of Peace* no. 98.

<sup>102</sup> Morris, "The Contemporary Prison: 1965–Present" 258.

<sup>103</sup> Donziger, *Real War on Crime* 3; Currie, *Crime and Punishment* 27–30; Mauer, *Race to Incarcerate* 91–92.

<sup>104</sup> Mauer, *Race to Incarcerate* 191.

cannot arrest our way out of the problem of chronic drug abuse and drug-driven crime.”<sup>105</sup>

Along with Morris, commentators such as Mauer, Tonry, and Currie offer two reasons for the continuing failure of the criminal justice system to solve the crime or drug problem. The first is that, as already noted, increasing penalties has little or no effect on crime rates. “Neither the lash nor the executioner, neither the psychiatrist nor the psychologist—and certainly not the prison—has been shown to provide measurable increments of crime control. Despite the long history of punishment, scholarship has so far failed to provide a link between punishment and crime control.”<sup>106</sup> The second is that the criminal justice system is not equipped to address the underlying causes of crime and drug use in our society. Again, as Morris notes: “In the United States, the criminal justice systems, federal and state, are overwhelmed, swamped beyond bailout, by the criminogenic consequences of an entrenched culture of violence and, perhaps more significant, by the existence of a locked-in underclass, denied the minimum conditions necessary for a productive and peaceful life, with race, ethnicity, and class interlocking in a unique way. Booming crime rates are one important cost of the creation and continued toleration of these evil conditions.”<sup>107</sup>

In analyzing the failure of America’s prison experiment Currie and Mauer suggest several reasons why skyrocketing incarceration rates have little chance of succeeding as a crime control policy. To begin with, the criminal justice system (through no fault of its own) misses most crimes. For a variety of reasons the majority of crimes, violent and otherwise, do not come to the attention of the police or courts, and of those that do only a small fraction result in conviction and punishment.<sup>108</sup> Second, “as the prison population has escalated, the offenders who are locked up are ever less serious offenders on average than in previous years. The result: diminishing returns in crime control.”<sup>109</sup> And, third, there is the “replacement effect.” As Currie notes “putting a drug dealer or gang leader in prison may simply open up a position for someone else in an ongoing enterprise. The

<sup>105</sup> Wren, “White House Drug Official Fights Mandatory Sentences” 5.

<sup>106</sup> Morris, “The Contemporary Prison” 258.

<sup>107</sup> *Ibid.* 257.

<sup>108</sup> In 1994, for example, there were approximately 3.9 million victimizations for violent offenses (rape, robbery, aggravated assault, and homicide), 1.9 million of which were reported to the police, leading to 779,000, arrests, 143,000 felony convictions, and 117,000 persons being incarcerated. As Mauer notes, “even if the (criminal justice) system could somehow manage to double or triple these rates, the overall impact (of incarceration) is obviously limited.” Mauer, *Race to Incarcerate* 105; Currie, *Crime and Punishment* 40–47.

<sup>109</sup> Mauer, *Race to Incarcerate* 107; Currie, *Crime and Punishment* 60–61.

replacement effect is especially strong for drug offenses, but is also important in the case of much juvenile crime, which often takes place in groups.”<sup>110</sup>

Still, the real problem may be the mistaken belief that the criminal justice system is capable of addressing the underlying social, economic, political, and cultural causes of crime and drug use. As Tonry argues: “No war against crime will ever be won. If crime rates in America are to decline in the long term, the causes will lie in major changes in social policies toward job creation, income maintenance, medical care, housing, education, drugs, and firearms.”<sup>111</sup> So too in their 1978 statement on “Community and Crime,” the U.S. Catholic bishops argued that the factors contributing to crime include, among other things, “economic and social deprivation, toleration of injustice and discrimination,” and “until these basic concerns are addressed, the nation will not make significant progress against crime.”<sup>112</sup>

#### In a Discriminate Manner

Finally, the U.S. Catholic bishops note in *The Challenge of Peace* that a “just response to aggression must be discriminate; it must be directed against unjust aggressors, not against innocent people caught up in a war not of their making.”<sup>113</sup> Without arguing that America’s prison experiment is comparable to the sort of total warfare condemned by the bishops and Christian reflections on just war, there are at least two reasons to suggest that there is something deeply “indiscriminate” about the way the nation’s wars on crime and drugs are being waged.

First, supporters of America’s prison experiment regularly defend our wars on crime and drugs as campaigns targeting the nation’s violent criminals and drug kingpins. Still, study after study indicates that the majority of the casualties of these crusades are the hundreds of thousands of nonviolent and low-level (largely drug) offenders filling the ranks of our swelling and overcrowded prisons.<sup>114</sup> According to the authors of the National Criminal Justice Commission report, politicians and their campaign managers engage in a “bait and switch” rhetoric, promising to fight violent crime by stiffening sentences and building more prisons, while knowing that these institutions will ultimately be largely filled with non-violent of-

<sup>110</sup> Currie, *Crime and Punishment* 30. <sup>111</sup> Tonry, *Malign Neglect* 39–40.

<sup>112</sup> USCC, “Community and Crime” 227.

<sup>113</sup> USCC, *The Challenge of Peace* no. 103.

<sup>114</sup> Mauer, *The Race to Incarcerate* 32–37; Scheingold, “Politics, Public Policy, and Street Crime” 156–57.

fenders.<sup>115</sup> Not too surprisingly, the vast majority of these offenders are also poor, illiterate, homeless, and drug involved, as well as disproportionately black and Hispanic.

Second, as already noted, America's prison experiment has had particularly devastating effects on the nation's most impoverished inner city and minority neighborhoods, and has contributed to the further destabilization and deterioration of these communities. High incarceration rates are seen as contributing to increased unemployment and fewer marriageable men, as well as more illegitimacy, single-parent families, family disruption, political disenfranchisement, and increased violence.<sup>116</sup> Moreover, the wars on crime and drugs are increasingly being waged in ways that negatively impact women and children. Between 1980 and 1995 the number of women in prison jumped by 417 percent, and the vast majority of these inmates (who tended overwhelmingly to be poor and minorities) were nonviolent offenders with children.<sup>117</sup> And, as one might have suspected, the more than 1.5 million children in this country who currently have parents in prison undergo a wide range of personal, social and economic hardships, and are themselves disproportionately more likely to become involved in crime and violence as adults.<sup>118</sup>

#### CONCLUSION

It is not always easy to discern at the beginning of a conflict whether one is engaged in a just war. Indeed, it was not until 1971 that the U.S. Catholic bishops, who had previously "ventured a tentative judgment that, on balance, the U.S. presence in Vietnam was useful and justified," admitted that "at this point in history it seems clear to us that whatever good we hope to achieve through continued involvement in this war is now outweighed by the destruction of human life and of moral values which it inflicts."<sup>119</sup>

It may be that we are at a similar point of recognition in the story of America's domestic wars on crime and drugs. In the past few years a growing chorus of voices, including a number of conservative academics and policy-makers such as William Buckley, Milton Friedman, Joseph Califano, John Di Iulio, and former Attorney General Edwin Meese under the Reagan administration, have expressed concerns and criticisms of the pres-

<sup>115</sup> Donziger, *Real War on Crime* 15–21.

<sup>116</sup> Mauer, *Race to Incarcerate* 181–87.

<sup>117</sup> Currie, *Crime and Punishment* 12; Donziger, *Real War on Crime* 146–50; Marc Mauer, Cathy Potler, and Richard Wolf, "Gender and Justice: Women, Drugs, and Sentencing Policy," A Report of Sentencing Project, November 1999.

<sup>118</sup> Miller, *Search and Destroy* 112–15; Donziger, *Real War on Crime* 152–54.

<sup>119</sup> USCC, "Peace and Vietnam," in *Quest For Justice*, ed. Benestad and Butler, 51–55, at 53; USCC, "Resolution on Southeast Asia," *ibid.* 77–79, at 78.

ent (and seemingly permanent) corrections boom, and of the injustice, ineffectiveness, and disproportionate character of the nation's wars on crime and drugs.<sup>120</sup> Moreover, the New York State Catholic Conference recently called upon the state legislature to repeal the Rockefeller "Drug Laws," which many credit as having inaugurated America's prison experiment. The American bishops are currently at work on their first major statement on prison reform since the present corrections boom began.<sup>121</sup>

This may be the point, then, to ask, as the U.S. bishops once did about our involvement in Vietnam, whether we "have already reached, or passed the point where the principle of proportionality becomes decisive?" Indeed, as nearly two million Americans sit behind bars, this seems to be a good time to ask if the present corrections boom has not already "provoked inhuman dimension of suffering?" It certainly seems as though there are now good reasons to wonder about the morality of America's prison experiment, and about the justice, intent, proportionality, probability of success, alternatives to, and discriminate character of our nation's wars on crime and drugs. If the assessment of the critics and commentators reported on in this essay are correct, it is time for an armistice. Once again, turning to the National Criminal Justice Commission report, it is important to remember that: "A war against the American people is a war that nobody can win. It brings hostility and division; it exhausts our resources and saps our moral strength. The goal is not to declare a war and win it, but to declare a peace and bring with it the terms for lasting reconciliation. . . . When we shift to a rhetoric of peace, we pave the way for the reform of the criminal justice system and what we hope will be a safer America."<sup>122</sup>

<sup>120</sup> Casa, "Prisons" 17–18; Jacob Sullum, "Prison Conversion," *Reason* 33 (August/September 1999) 40–48.

<sup>121</sup> New York State Catholic Conference, "Statement on Drug Sentencing Reform" 14 June 1999.

<sup>122</sup> Donziger, *Real War on Crime* 218–19.