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"The Mess We're In": Five Steps Towards  
The Transformation of Prison Cultures

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## “THE MESS WE’RE IN”\*: FIVE STEPS TOWARDS THE TRANSFORMATION OF PRISON CULTURES

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Whether working with correctional officials, policy makers, victims’ advocates, prisoners’ advocates, researchers, or others concerned about the efficacy and costs, both tangible and intangible, of incarceration, a question I commonly hear is: “How can and should prison conditions be improved?” But I think that this question misses the mark. Of course prison conditions can and should be improved to produce what perhaps appropriately, but impersonally, are referred to as “better outcomes.” Few of those who are familiar with prisons and the persons confined within them would argue that the status quo is acceptable: that, for example, the vast numbers of prisoners with substance abuse and mental health problems should continue to never have those problems addressed, and addressed effectively, while they are incarcerated;<sup>1</sup> that prisoners who are

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\* See President Ronald Reagan, Remarks at a Reception for Members of the Associated General Contractors of America (Mar. 16, 1981), *available at* <http://www.reagan.utexas.edu/archives/speeches/1981/31681c.htm> [hereinafter Reagan Remarks].

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1. In 2006, 65% of the prisoners in state prisons and 55% of federal prisoners met the medical criteria delineated in the *Diagnostic and Statistical Manual for Mental Disorders* (DSM) for having a “substance use disorder.” NAT’L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA’S PRISON POPULATION 23, 25 (2010), *available at* <http://www.casacolumbia.org/articlefiles/575-report2010behindbars2.pdf>. However, less than one in five of these inmates with the disorder—14% of the state prisoners and 16% of the federal prisoners—received some form of substance-abuse treatment. *Id.* at 40.

Even when prisoners with a substance abuse problem do receive treatment, much of that treatment is deficient in quality. In a national study on the extent to which correctional substance abuse treatment programs comport with the thirteen evidence-based practices considered necessary for effective treatment, prison administrators reported that the treatment programs in their prisons incorporated an average of only 5.9 of the prescribed evidence-based practices. Peter D. Friedmann et al., *Evidence-Based Treatment Practices for Drug-Involved Adults in the Criminal Justice System*, 32 J. SUBSTANCE ABUSE TREATMENT 267, 267-68, 272 (2007). Although the assessments of these treatment programs by their directors differed somewhat from those of the prison administrators, the directors also reported significant departures from basic treatment protocols. According to these treatment providers, the substance abuse treatment programs in the prisons adhered to, on average, only 7.8 of the thirteen evidence-based practices. *Id.* at 272.

A high percentage of prisoners—in 2005, 56% of state inmates and 45% of federal inmates—also have mental health problems. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3 (2006), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=789>. Yet the majority of these ill prisoners receive no mental health treatment while in prison. *See id.* at 9 (reporting that in 2005, only 34% of the state prisoners and 24% of the federal prisoners who were mentally ill had received mental health treatment since their incarceration). For an in-depth discussion of the failure to meet the healthcare needs of mentally ill prisoners, see HUMAN RIGHTS

functionally illiterate or otherwise uneducated should continue to leave prison without concerted efforts to rectify those educational deficits;<sup>2</sup> and that inmates with few, if any, job skills should continue to sit idly in their cells or dorms rather than participate in vocational training or work programs that might facilitate their successful reentry into our communities.<sup>3</sup>

The more fundamental question though, one that is raised with rarity, is: “Can prisons be not just changed and improved, but transformed?” This question can, in turn, spark a debate about what “transformation” means in the abstract and what it might mean, or could mean, in the prison context. While the lure of entering into this debate is inviting, suffice it to say that for the purposes of this Article and the ideas propounded within it, transformation entails changes that are not merely at the periphery or even solely external. Transformation instead refers to deeper, sustained, and indeed radical changes—changes in the ethos of those who work and live in prisons.

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WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003), *available at* <http://www.hrw.org/en/node/12252/section1>.

2. In 2003, 57% of prisoners had not received a high school diploma or GED. *See* ELIZABETH GREENBERG ET AL., U.S. DEP’T OF EDUC., LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 48 (2007), *available at* <http://nces.ed.gov/pubsearch/pubinfo.asp?pubid=2007473> [hereinafter PRISON LITERACY SURVEY]. Half, or more than half, of them functioned at the two lowest literacy levels, with the exact figure depending on the type of literacy being measured. *Id.* at 13 (reporting that 56% of prisoners were at the basic, or below basic, literacy level in “prose” literacy, 50% fell within one of these two lowest literacy levels in “document” literacy, and 78% measured at the basic or below basic level on the “quantitative” literacy scale). Many prisoners’ literacy skills are so deficient that they would be unable to locate an intersection on a straightforward street map or determine the time of an appointment from an appointment slip. *See id.* at 5-7, 13.

Most prisons offer some educational programming to a segment of their prison populations. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1, 4 (2003), *available at* [http://www.policyalmanac.org/crime/archive/education\\_prisons.pdf](http://www.policyalmanac.org/crime/archive/education_prisons.pdf). But relatively few prisoners are enrolled in an academic program at any one time. In 2003, only 5% of prisoners were enrolled in an academic class, though an additional 19% of prisoners had received their high school diploma or GED while serving their current prison sentences. PRISON LITERACY SURVEY, *supra*, at 48.

3. The majority of prisoners surveyed in 2003 had received no vocational training since their incarceration, and most of those who had were trained for a relatively short period of time. PRISON LITERACY SURVEY, *supra* note 2, at 51 (reporting that 71% of the prisoners had received no vocational training, 11% participated in a vocational training program lasting less than six months, and 8% participated in a vocational training program lasting six to twelve months). And while a little over half of the prisoners eligible to work in prison—some are foreclosed from working for security or medical reasons—have job assignments, the vast majority of these inmates work in positions geared toward facility operations, such as janitorial and laundry work, rather than jobs specifically tailored to prepare them for reentry. AMY L. SOLOMON ET AL., URBAN INST., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY 16 (2004), *available at* [http://www.urban.org/uploadedPDF/411097\\_From\\_Prison\\_to\\_work.pdf](http://www.urban.org/uploadedPDF/411097_From_Prison_to_work.pdf).

That altered ethos would be far different than the antiquated mindset that continues to pervade correctional institutions in this country—the mindset of “captor and caged.” That ethos would embody at least four precepts: (1) hope as an imperative; (2) the viability of renewal; (3) the catharsis that attends personal responsibility and accountability; and (4) the duty and call to respect human dignity, an obligation that encompasses both correctional employees and prisoners. While some might describe this ethos as “new,” it would, in fact, not be new at all but would rather reflect what are considered ancient truths, though truths long ignored behind prison walls.<sup>4</sup>

Naysayers will immediately counter that talk of such transformation occurring in the environs of a prison reflects pollyannaish yearnings disconnected from political realities and betraying a lack of understanding of what life is really like, for prisoners and correctional employees alike, in the hidden confines of prisons. But parsing through these naysayers’ remonstrations reveals that what they are actually saying is that deep-seated cultural norms cannot be changed. And as history, including recent history, confirms, that assertion is utterly false. The memories are still vivid in the minds of many people, for example, of a time when African-Americans had to drink from separate water fountains, when female teachers had to quit their jobs after getting married, and when married women who were able to retain their jobs were forced to resign from them when they became pregnant.

There are some correctional leaders, though not nearly enough, who have publicly espoused the need for, and the feasibility of, what has been aptly termed “culture busting” in prisons.<sup>5</sup> But in the end, the question is not whether culture

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4. To give but one example of the age-old origins of these precepts, they are propounded in the Bible, though sometimes in different nomenclature. As for the first precept—the need for each individual to retain hope—what Oliver Wendell Holmes, Sr. said in secular terms when cautioning, “Beware how you take away *hope* from any human being,” has its own biblical iterations. Oliver Wendell Holmes, Sr., *Valedictory Address to the Medical Graduates at Harvard University (March 10, 1958)*, LVIII BOS. MED. & SURGICAL J. 149, 158 (1858); see, e.g., *Proverbs* 13:12 (“Hope deferred makes the heart sick.”). The second precept regarding the promise of renewal—the affirmation that people can change and, as individuals, be transformed—is also articulated in Scripture, including in the story of the life of Saul, a murderer, who became the Apostle Paul. See *Acts* 9:1-21. The Bible is replete with examples of, and exhortations regarding, the third precept—the redemptive effects of acknowledging and atoning for one’s wrongdoing. See, e.g., *Proverbs* 28:13 (“He who conceals his transgressions will not prosper, but he who confesses and forsakes them will obtain mercy.”); *Matthew* 5:23-25 (“So if you are offering your gift at the altar, and there remember that your brother has something against you, leave your gift there before the altar and go; first be reconciled to your brother, and then come and offer your gift.”). The Bible also extols the value of the fourth precept, expounding on the dignity (and love) with which each individual—even those considered the least of the least—is to be treated. See, e.g., *Luke* 6:31 (“And as you wish that men would do to you, do so to them.”); *Matthew* 25:39-40 (“‘And when did we see thee sick or in prison and visit thee?’ And the King will answer them, ‘Truly, I say to you, as you did it for one of the least of these my brethren, you did it to me.’”).

5. See, e.g., Dora B. Schriro, *Reducing Inmate Litigation: Missouri’s Constituent Services*

busting, in the sense of a transformation in prisons and the people working and living within them, can be realized; the question, the one on which this Article focuses, is how the transformation can be effectuated.

There are innumerable steps—some big, some small—that need to be taken if hope, renewal, personal responsibility, accountability, and a shared commitment to human dignity are to become hallmarks of U.S. prisons, as well as of the larger sentencing and correctional systems of which they are a part. This Article describes five key steps that are integral to this transformative mission:

Step One: Each state and the federal government should establish a maximal limit on the per-capita imprisonment rate that is at least 50% lower than the current national rate and should adopt mechanisms to responsibly implement and enforce the limit.

Step Two: Each state and the federal government should develop and implement a comprehensive plan to ensure that the public is aware of conditions and operations in that jurisdiction's prisons. The plan should include, among other components, the establishment of an independent public entity to monitor, and report publicly on, conditions in the prisons. These monitoring entities should meet the "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities" promulgated by the American Bar Association.<sup>6</sup>

Step Three: Each state and the federal government should modify prison policies, practices, and programs to reflect and inculcate a restorative-justice ethos within prisons.

Step Four: Each state and the federal government should adopt and implement policies requiring that each prisoner be assigned a trained and

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*Office Proves Value of Communication*, CORR. TODAY, Aug. 1998, at 74-78. Stratagems are also being developed to create a more positive culture in prisons through strategic planning, strategic management, and staff training, with the National Institute of Corrections playing a leadership role in that endeavor. See, e.g., CAROL FLAHERTY-ZONIS ASSOCS., BUILDING CULTURE STRATEGICALLY: A TEAM APPROACH FOR CORRECTIONS (2007), available at <http://nicic.gov/library/files/021749.pdf>; James Byrne et al., Examining the Impact of Institutional Culture (and Culture Change) on Prison Violence and Disorder: A Review of the Evidence on Both Causes and Solutions, Paper Presented at the 14th World Congress of Criminology (Aug. 11, 2005), available at [http://faculty.uml.edu/jbyrne/44.327/institutional\\_cultureUpdateworldcongressrevised.doc](http://faculty.uml.edu/jbyrne/44.327/institutional_cultureUpdateworldcongressrevised.doc).

6. These requirements are part of a resolution approved by the American Bar Association in 2008 calling on jurisdictions to develop comprehensive plans to bring transparency and accountability into the operations of correctional and detention facilities. AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 9-10 (2008), available at [http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_policy\\_am08104b.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf) [hereinafter REPORT TO THE HOUSE OF DELEGATES] (listing the "Key Requirements for the Effective Monitoring of Correctional and Detention Facilities").

dedicated mentor at the outset of his or her incarceration.

Step Five: Each state and the federal government should implement procedures to accord prisoners a central role in the development of an individualized reentry plan. This planning process should commence, at the latest, upon the prisoner's incarceration and would encompass his or her involvement in prison programs and other constructive activities.

The taking of these steps would not only catalyze the transformation of prison cultures but also, if the steps were implemented correctly, yield significant cost savings and public-safety and prison-safety benefits. These five pivotal steps, which are capsulized below, are discussed in greater depth in the succeeding parts of this Article.

#### I. STEP ONE: CAPPING THE PER-CAPITA IMPRISONMENT RATE

The threshold step to be taken by each state and the federal government to transform prison cultures is to place a firm cap on the per-capita imprisonment rate in the jurisdiction, one which limits the per-capita imprisonment rate to a level far below the inflated national rate of recent years. The imprisonment rate climbed from 94 out of every 100,000 residents in 1968 to 504 per 100,000 in 2008, though the crime rate remained the same.<sup>7</sup>

Many trees have been cut down to produce the writings that explain all too clearly why this nation not only should, but must, escape from what has become an obsessive-compulsive drive to incarcerate, often reflexively, individuals who commit the wrongs denominated as crimes.<sup>8</sup> These reasons for discarding the

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7. James Austin, *Reducing America's Correctional Populations: A Strategic Plan*, 12 JUST. RES. & POL'Y 1, 14 (2010). Considering imprisonment statistics in a bit different light, one out of every 198 U.S. residents was incarcerated in a state or federal prison at the end of 2008. WILLIAM J. SABOLET ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2008, at 1, 6 (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1763>. But the officially reported data on imprisonment rates understate the level of imprisonment in this country because the figures include children. Cf. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5, 24 (2008) [hereinafter ONE IN 100], available at [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FORWEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf) (reporting that when only adults are factored into the calculus, the incarceration rate, a rate that includes confinement in local jails as well as in prisons, exceeds one in every hundred adults).

8. To give a few examples of these writings, see JAMES AUSTIN ET AL., JFA INST., UNLOCKING AMERICA: WHY AND HOW TO REDUCE AMERICA'S PRISON POPULATION (2007); JAMES AUSTIN & TONY FABELO, JFA INST., THE DIMINISHING RETURNS OF INCREASED INCARCERATION (2004); LYNN S. BRANHAM, AM. BAR ASS'N, THE USE OF INCARCERATION IN THE UNITED STATES: A LOOK AT THE PRESENT AND THE FUTURE (1992); WILLIAM M. DIMASCIO, SEEKING JUSTICE: CRIME AND PUNISHMENT IN AMERICA (1995); JENNI GAINSBOROUGH & MARC MAUER, SENTENCING PROJECT, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s (2000); RYAN S. KING ET AL., SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP (2005); ONE IN 100, *supra* note 7; PEW CTR. ON THE STATES, ONE IN 31: THE LONG

view that incarceration is the preferred sanction (or at a minimum, a generally acceptable sanction) range from the humanitarian to the pragmatic.

The ideas, which are grounded in research, for the responsible, safe, and cost-effective decarceration of America have also been widely disseminated—for years. These ideas include, among many others: (1) enhancing the use of civil penalties in lieu of criminal sanctions for some of the aberrant conduct that currently is addressed through criminal justice systems;<sup>9</sup> (2) supplanting incarceration, though certainly not always, with community sanctions, particularly fines, restitution, and community service through which those who have committed crimes are held accountable, in a productive and meaningful way, for the harm they have caused the community and others through their criminal behavior;<sup>10</sup> (3) employing technology, when safety reasons dictate, to more closely monitor certain convicted criminal offenders serving their sentences in the community;<sup>11</sup> (4) substantially decreasing the length of sentences, both incarcerative and those, such as probation, that entail community supervision;<sup>12</sup>

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REACH OF AMERICAN CORRECTIONS (2009) [hereinafter ONE IN 31]; DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME (2007).

9. See AM. BAR ASS'N, HOUSE OF DELEGATES RESOLUTION 102C, at 2, 8 (2010), available at [http://www.abanet.org/leadership/2010/midyear/daily\\_journal/102C.pdf](http://www.abanet.org/leadership/2010/midyear/daily_journal/102C.pdf).

10. See CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, BLUEPRINT FOR COST-EFFECTIVE PRETRIAL DETENTION, SENTENCING, AND CORRECTIONS SYSTEMS 2-4 (2002), available at [http://www.americanbar.org/content/dam/aba/migrated/leadership/recommendations02/107.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/recommendations02/107.auth_checkdam.pdf) [hereinafter BLUEPRINT FOR COST-EFFECTIVE CORRECTIONS SYSTEMS] (calling on states and the federal government to enact comprehensive community corrections acts to facilitate the sanctioning of nonviolent offenders in their communities; to utilize means-based fines and other community sanctions in a way that averts unnecessary incarceration and community supervision; and to implement, through sentencing statutes and sentencing and parole guidelines, the presumption that a community-based penalty is the appropriate penalty for a convicted offender unless the person poses a “substantial danger to the community”).

11. See, e.g., Tony Fabelo, “Technocorrections”: *The Promises, the Uncertain Threats*, 5 SENT'G & CORR.: ISSUES FOR THE 21ST CENTURY 1-2 (2000); Darren Gowen, *Remote Location Monitoring—A Supervision Strategy to Enhance Risk Control*, 65 FED. PROBATION 38 (2001); Cecil E. Greek, *Tracking Probationers in Space and Time: The Convergence of GIS and GPS Systems*, 66 FED. PROBATION 51 (2002); Isaac B. Rosenberg, *Involuntary Endogenous RFID Compliance Monitoring as a Condition of Federal Supervised Release—Chips Ahoy?*, 10 YALE J.L. & TECH. 331, 333-44 (2008).

12. When espousing this policy reform, Al Bronstein, the former director of the National Prison Project, wrote: “Faced with the decision of how to use one prison bed over a three-year period, I would rather use it to sentence 12 burglars to three months each than to sentence one burglar for all 36 months.” Alvin J. Bronstein, *America's Overcrowded Prisons*, 7 GAO J. 29, 30 (1989). The American Bar Association also has urged states and the federal government to reexamine the length of sentences in their jurisdictions, both those served in confinement as well as those served within the community, to ensure that they comport with funding priorities and research findings that generally refute the cost-effectiveness of long sentences. See BLUEPRINT FOR COST-EFFECTIVE CORRECTIONS SYSTEMS, *supra* note 10, at 2. Researchers, for example, have

and (5) limiting the grounds for which, and length of time for which, a convicted offender can be sent to prison for violating a condition of probation, parole, or supervised release.<sup>13</sup>

The reason why imprisonment so often remains the top-choice penalty in this country is therefore due not to a lack of better options, but to a lack of political will to pursue those options. It is true that prison officials frequently lament, though often behind the scenes, that their prisons are filled with many people who do not need to be incarcerated and whose presence makes the officials' jobs of running safe and humane prisons so much more difficult, and sometimes impossible.<sup>14</sup> But for an array of reasons, including the fact that the people at the helm of correctional departments are themselves political appointees, prison officials have failed to afford elected officials the political cover they believe they need to take the steps to make imprisonment the penalty of last resort. So the best way, and perhaps the only feasible way, to effectuate a dramatic and sustained reduction in imprisonment in the near future is to establish mechanisms that provide elected officials with this protective sheath.

The cap, for which this Article calls, on the per-capita imprisonment rate in each jurisdiction is one such mechanism. And, I submit, it is the optimal way, if instituted correctly, to redress responsibly and with dispatch the fiscal, public-safety, and humanitarian problems generated by what has become a robotic adherence to the status quo. Departing from what has become the prevalent

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reported that criminal activity peaks when people are in their "late teens and early twenties" and that most individuals desist from committing crimes by the time they turn forty. Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 135 (1998).

13. California's Little Hoover Commission, which instituted a study on the state's parole system after learning that the state had the highest parole-revocation rate in the country, tendered these and other recommendations to revamp the state's customary responses to parole and probation violations. See LITTLE HOOVER COMM'N, BACK TO THE COMMUNITY: SAFE & SOUND PAROLE POLICIES 1, 75 (2003), available at <http://www.lhc.ca.gov/studies/172/report172.pdf>; see also AUSTIN ET AL., *supra* note 8, at 23; BLUEPRINT FOR COST-EFFECTIVE CORRECTIONS SYSTEMS, *supra* note 10, at 2-3.

14. Some correctional officials, however, have been refreshingly outspoken in protesting the overutilization of incarceration and profiling its damaging effects. When speaking on the prevalence of mental illness in prison and jail inmates, Martin Horn, then commissioner of the City of New York's Departments of Correction and Probation, stated:

The presence of the mentally ill in prisons and jails is destabilizing. Keeping the mentally ill safe in jail presents challenges prisons and jails were never intended to face.

If we are serious about reducing the American overuse of imprisonment, we must . . . find better means than incarceration to address the needs of the mentally ill.

Martin F. Horn, Commissioner, Departments of Corrections & Probation, City of N.Y., A Decade of Lessons Learned: The Challenge of Reducing Prisoner Numbers, Presentation to the 10th Annual Meeting of the International Corrections and Prisons Association 4 (Oct. 28, 2008) (transcript available at <http://www.icpa.ca/library>).

norm—often unnecessary and deleterious imprisonment<sup>15</sup>—is also the critical first step to be taken if the goal of fundamentally changing prison cultures in a positive way is to be realized.

But what would that cap be? How should it be implemented, and by when? These are meaty questions, each one of which could be the subject of a discrete article. Set forth below are several key facts and points of which policy makers should be aware as they lay the groundwork for the prompt adoption and implementation of the per-capita imprisonment cap in their jurisdictions.

*A. What Should Be the Cap on the Per-Capita Imprisonment Rate?*

As mentioned earlier, the cap on the per-capita imprisonment rate should be—and, I would argue, must be<sup>16</sup>—at least 50% lower than the current national per-capita imprisonment rate. In other words, the per-capita imprisonment rate in each jurisdiction should be, at most, half of the current national rate.

This figure—50%—has not been drawn out of whole cloth. Rather, the 50% cap on the per-capita imprisonment rate is founded on, and supported by, solid and compelling data—specifically, historical data on imprisonment rates in this country, contemporary statistics on those rates, and national and state crime-rate statistics.<sup>17</sup> In other words, the prescribed cap has been empirically validated.

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15. *See infra* note 16.

16. Even if we were to cast aside humanitarian concerns, maintaining the current imprisonment rate is not sustainable from a resource and public-safety perspective, as many jurisdictions are beginning to recognize. *See* JUDITH GREENE & MARC MAUER, SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM FOUR STATES 5-26 (2010), *available at* [http://www.sentencingproject.org/doc/publications/inc\\_DownscalingPrisons2010.pdf](http://www.sentencingproject.org/doc/publications/inc_DownscalingPrisons2010.pdf) (recounting steps undertaken in New York that have decreased the size of its prison population by 20% in ten years). In the 2008 fiscal year, states spent a total of over fifty-two billion dollars on corrections, with almost 90% of that money expended on prisons. ONE IN 31, *supra* note 8, at 11. Additionally, the growth in funding allocated to prisons far eclipsed the growth in budgetary outlays (other than for Medicaid) for even the most basic governmental services, such as elementary, secondary, and higher education. *Id.*

Researchers have also concluded that the exponential growth in the use of incarceration, particularly for property and drug offenders, has reached a point where the costs of incarceration far outweigh any public-safety benefits and may, in fact, harm public safety. *Id.* at 18-20. The damaging impact of overincarceration on public safety is due in part to the debilitating and destabilizing effects of incarceration on prisoners, their families, their neighborhoods, and their communities. *See* KING ET AL., *supra* note 8, at 7-8. Another primary reason for overincarceration's detrimental impact on public safety is that it has led to a diversion of funds from other governmental services, such as drug treatment and programs to increase high school graduation rates, which have been proven to have a greater impact on crime reduction. *See id.* at 8.

17. Although the 50% figure is not drawn from, or its validity dependent on, international practices and statistics, the lessons learned from other countries' sparing use of incarceration provide further confirmation that the 50% cap is appropriate and attainable. For data highlighting the stark contrast between the rate at which the United States incarcerates its populace and the

For example, James Austin, a highly respected criminologist, has tracked and compared national imprisonment and crime rates. As noted earlier, he reported that although the crime rate in the United States in 2008 mirrored the rate in 1968, the imprisonment rate was over five times higher.<sup>18</sup> Furthermore, researchers examining imprisonment and crime statistics at the state level have also concluded that a rise in the level of imprisonment reaches a point of diminishing returns—a point where the costs of imprisonment exceed its benefits in terms of crime reduction.<sup>19</sup> Researchers have also found that an increase in the imprisonment rate can reach a point where it actually augments the level of crime.<sup>20</sup>

It bears emphasizing that the 50% cap on the imprisonment rate in each jurisdiction is not an aspirational goal. Far too timid souls might argue that returning the imprisonment rate to what has been a much lower level historically is a laudable aim that states should formally embrace and strive towards. But that is like saying that a bankrupt or almost bankrupt state should adopt legislation recommending that the state get its fiscal house in order without requiring the concrete steps to allay the fiscal crisis and make fiscal responsibility the operational norm. In short, neither another set of recommendations nor another set of goals that policy makers can promptly and summarily ignore is needed. Rather, each state and the federal government should enact a statutory cap on the imprisonment rate—a codified requirement, not rhetoric.

*B. How Should the Statutory Cap on the Per-Capita Imprisonment Rate Be Implemented, and by When?*

Large-scale changes in the use of finite and expensive resources are not new. For example, women used to always give birth at home or in other nonclinical settings. Americans then moved to a far different norm where women typically gave birth in a hospital and remained hospitalized along with their babies for over a week. Now there has been another paradigmatic shift in the way hospitals are used in the United States for the birthing of children, with most women leaving the hospital within a few days after giving birth. This recent shift, like so many large-scale changes in the utilization of resources, is due to a number of factors. These include, among others, the need to avoid the incursion of unnecessary healthcare costs, an enhanced understanding of postpartum health risks and management of those risks, and the recognition that an extended stay in a hospital can have negative effects on new mothers, their babies, and other family members.

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incarceration rate in the thirty-six European countries with the largest inmate populations, see ONE IN 100, *supra* note 7, at 35.

18. See Austin, *supra* note 7 and accompanying text.

19. See *supra* note 16.

20. See, e.g., Raymond V. Liedka et al., *The Crime-Control Effect of Incarceration: Does Scale Matter?*, 5 CRIMINOLOGY & PUB. POL'Y 245, 262-63 (2006) (reporting that when the imprisonment rate reaches between 325 to 430 per 100,000 residents in a state, imprisonment fails to reduce crime and may even increase it).

Factors that are in many ways similar to those just highlighted—the need to avoid, wherever possible, the high costs of imprisonment, a better understanding of the nature and level of risks posed by different criminal offenders, and the recognition of the harm imprisonment causes those who are incarcerated, their families, and communities—should likewise propel jurisdictions towards a paradigmatic shift in the use of prison resources, a shift facilitated by enactment of the statutory cap on the imprisonment rate. But while large-scale changes are to be expected, and indeed, welcomed when they culminate in a more efficacious and humane expenditure of resources, it is imperative that the changes be planned and implemented in a way that will realize their objectives and maximize their utility. And this need for planning and attention to implementation details will be equally important as jurisdictions put in place the caps that will enable them to return to significantly lower imprisonment rates.

There are a number of steps that jurisdictions can take to implement this cap safely and responsibly. James Austin has propounded four recommendations that, if adopted, would slice in half the size of the nationwide prison population and the national per-capita imprisonment rate, returning the United States to the imprisonment rate that prevailed in 1988—250 per every 100,000 residents (versus 504 per 100,000 in 2008).<sup>21</sup> These policy changes have already been adopted in some states, though singly and not as a whole: reducing the length of prison sentences; reducing the extent to which individuals who have violated a condition of parole or probation but have not been convicted of a new crime are imprisoned; reducing the length of imprisonment of those probation and parole violators who are sent to prison; and imposing penalties other than imprisonment for “victimless crimes,” such as drug possession.<sup>22</sup>

There are additional or alternative steps that a jurisdiction can take to reduce its prison population significantly without compromising the penological objectives of its criminal-justice system and with due regard to public-safety needs. The American Bar Association, for example, has recommended the taking of twenty discrete steps to make pretrial detention, sentencing, and correctional systems more cost-effective.<sup>23</sup> These steps include, among others, adopting a comprehensive community corrections act that will catalyze the integration of a full range of community sanctions into criminal-justice systems to avert unnecessary (and quite costly) incarceration; repealing mandatory-minimum sentencing laws, which foreclose judges from tailoring sentences based on the gravity of a crime and the offender’s culpability; and establishing a structure to facilitate the application of sentencing reforms to individuals already in prison, including reductions in authorized prison sentences.<sup>24</sup>

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21. See Austin, *supra* note 7, at 14, 26-34.

22. See *id.* at 27-34.

23. BLUEPRINT FOR COST-EFFECTIVE CORRECTIONS SYSTEMS, *supra* note 10, at 2-4.

24. *Id.*; see also JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 9-10, 24-34 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> (setting forth recommendations about punishment and incarceration that were approved by the ABA’s House of

Apart from the question of how to implement a jurisdiction's statutory cap on the per-capita imprisonment rate is the question of the timetable for coming into compliance with that cap. The timetable will, of course, vary from jurisdiction to jurisdiction, in part because imprisonment rates vary significantly from state to state.<sup>25</sup> But if a jurisdiction's statute placing a cap on the imprisonment rate leaves open the end date by when the cap must be met, the cap will become, in effect, a goal, not a requirement—a goal whose realization will likely be eluded. Likewise, if the end date is too far in the future, the work needed to ensure compliance with the cap will in all probability be forestalled by those wedded to the status quo.

In order to prevent the skirting of the statutory cap, jurisdictions should set a due date for the cap that is realistic for the jurisdiction yet lends a sense of urgency to take the steps needed to implement the cap with dispatch. James Austin has explained how the four, what he has termed “relatively modest,” adjustments discussed earlier<sup>26</sup> will gradually decrease, by 50%, the size of the nation's prison population as a whole within eight years.<sup>27</sup> At a minimum, then, at least most jurisdictions should set a firm deadline of, at the latest, eight years to come into compliance with the statutory cap on the imprisonment rate. And if jurisdictions are willing, as I believe they should be, to consider the range of additional ways<sup>28</sup> beyond those four steps through which the imprisonment rate can be reduced cost-effectively and with due regard for public safety, policy makers should consider the viability of adopting a shorter maximal timeline of five or six years to implement the imprisonment-rate cap.

Whatever the timeframe adopted—whether eight years, five years, or something in between—jurisdictions should identify the mechanisms to be used to help recalibrate more carefully the length of prison sentences and modulate other practices that have contributed to the explosion in the size of prison populations nationwide. An example of one such mechanism would be an existing sentencing guidelines commission or other entity charged with monitoring the impact of various types and lengths of sentences in the jurisdiction, including their cost-effectiveness.

## II. STEP TWO: DEVELOPING AND IMPLEMENTING A COMPREHENSIVE PLAN TO MONITOR, AND REPORT PUBLICLY ON, PRISON CONDITIONS IN THE JURISDICTION

Another integral step to effectuate the transformation of prison cultures is to bring transparency and accountability into prisons and their operations. It is

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Delegates, making them official ABA policy).

25. At the end of 2009, the imprisonment rate for prisoners sentenced to more than one year ranged from a high of 881 per 100,000 residents in Louisiana to a low of 150 per 100,000 residents in Maine. HEATHER C. WEST ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2009, at 24 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p09.pdf>.

26. See *supra* notes 21-22 and accompanying text.

27. See Austin, *supra* note 7, at 12-13, 26-34.

28. See *supra* notes 9-13, 23-24 and accompanying text.

difficult to envision how such a transformative evolution in the ethos that pervades prisons could otherwise occur. When policy makers and the public are largely ignorant of what transpires in prisons, they become complacent—even indifferent—about this hidden world of which they know little or nothing. The stimulus for progressive changes in prison conditions, much less fundamental alterations in cultural norms within prisons, is, quite simply, absent.

Federal and state governments can and should make transparency and accountability hallmarks of their prisons by developing and then implementing in their respective jurisdictions a comprehensive prison transparency and accountability plan.<sup>29</sup> To ensure that this plan is formulated, followed, and periodically refined, each jurisdiction should enact a statute directing that this comprehensive plan be instituted and, at periodic intervals, reviewed and revised to meet the goals of transparency and accountability.

A comprehensive plan to import transparency and accountability into prison operations would be comprised of multiple components. The plan would need, for example, to address the subject of media access to prisons, since the media is one mechanism for transmitting information to the public about what is happening (and not happening) behind prison walls and fences. But whatever the exact contours of the transparency and accountability plan in a particular jurisdiction, one essential ingredient would be a provision for the establishment of an independent public entity to monitor, and report publicly on, conditions in the jurisdiction's prisons.<sup>30</sup>

Core features of this monitoring process have already been identified and

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29. The American Bar Association has urged federal, state, local, and territorial governments to develop such comprehensive plans. The plans would encompass not only prisons, which are the focus of this Article, but also jails, juvenile training schools, juvenile detention centers, and other correctional and detention facilities within criminal and juvenile justice systems. *See* REPORT TO THE HOUSE OF DELEGATES, *supra* note 6.

30. In addition to the American Bar Association, the National Prison Rape Elimination Commission has endorsed creating such independent public entities. *See* REGGIE B. WALTON ET AL., NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 10 (2009), *available at* <http://www.ncjrs.gov/pdffiles1/226680.pdf>. The Commission on Safety and Abuse in America's Prisons has also advocated that states establish independent oversight entities to monitor and report on the conditions in prisons and jails. *See* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY & ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT 79-81 (2006), *available at* [http://www.prisoncommission.org/pdfs/Confronting\\_Confinement.pdf](http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf). This recommendation was the by-product of the Commission's investigation of, and report on, what it found to be unsafe, inhumane, unproductive, and often sordid conditions of confinement in many prisons and jails. *See id.* at 19-61; *see also* JEREMY TRAVIS, TASK FORCE ON TRANSFORMING JUVENILE JUSTICE, CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE 12, 85-87 (2009), *available at* <http://www.vera.org/download?file=2944/Charting-a-new-course-A-blueprint-for-transforming-juvenile-justice-in-New-York-State.pdf> (recommending "external oversight" of institutional facilities for adjudicated delinquents to redress what the task force found to be "shocking" conditions, including rampant excessive use of force against confined juveniles).

encapsulated in the “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities” promulgated by the American Bar Association.<sup>31</sup> There is no need to replicate the work of the experts in corrections and correctional monitoring that culminated in the recommendations endorsed by the ABA.<sup>32</sup> But because those requirements are not yet well-known and because of the catalytic role that a monitoring entity meeting those requirements can play in rectifying the grave problems that plague our nation’s prisons and stymie fundamental changes in prison cultures, those requirements bear reiterating below:

1. The monitoring entity is independent of the agency operating or utilizing the correctional or detention facility.
2. The monitoring entity is adequately funded and staffed.
3. The head of the monitoring entity is appointed for a fixed term by an elected official, is subject to confirmation by a legislative body, and can be removed only for just cause.
4. Inspection teams have the expertise, training, and requisite number of people to meet the monitoring entity’s purposes.
5. The monitoring entity has the duty to conduct regular inspections of the facility, as well as the authority to examine, and issue reports on, a particular problem at one or more facilities.
6. The monitoring entity is authorized to inspect or examine all aspects of a facility’s operations and conditions including, but not limited to: staff recruitment, training, supervision, and discipline; inmate deaths; medical and mental-health care; use of force; inmate violence; conditions of confinement; inmate disciplinary processes; inmate grievance processes; substance-abuse treatment; educational, vocational, and other programming; and reentry planning.

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31. See REPORT TO THE HOUSE OF DELEGATES, *supra* note 6.

32. I had the privilege to serve as the chair of the ABA’s Subcommittee on Effective Prison Oversight. The other subcommittee members included: Alvin Bronstein, former director of the National Prison Project and president of the board of directors of Penal Reform International—The Americas; Jamie Fellner, who headed the U.S. program of Human Rights Watch; Stephen Gobbo, who has worked in the New York and Michigan prison systems, as well as in the Federal Bureau of Prisons; Michael Hamden, then executive director of North Carolina Prisoner Legal Services, Inc.; Martin Horn, then commissioner of the City of New York’s Departments of Correction and Probation; J. Michael Quinlan, senior vice president of the Quality Assurance Division of Corrections Corporation of America and the former director of the Federal Bureau of Prisons; and Malcolm Young, who was the executive director of the John Howard Association of Illinois, a nonprofit organization that monitors conditions in adult and juvenile correctional facilities in Illinois.

7. The monitoring entity uses an array of means to gather and substantiate facts, including observations, interviews, surveys, document and record reviews, video and tape recordings, reports, statistics, and performance-based outcome measures.
8. Facility and other governmental officials are authorized and required to cooperate fully and promptly with the monitoring entity.
9. To the greatest extent possible consistent with the monitoring entity's purposes, the monitoring entity works collaboratively and constructively with administrators, legislators, and others to improve the facility's operations and conditions.
10. The monitoring entity has the authority to conduct both scheduled and unannounced inspections of any part or all of the facility at any time. The entity must adopt procedures to ensure that unannounced inspections are conducted in a reasonable manner.
11. The monitoring entity has the authority to obtain and inspect any and all records, including inmate and personnel records, bearing on the facility's operations or conditions.
12. The monitoring entity has the authority to conduct confidential interviews with any person, including line staff and inmates, concerning the facility's operations and conditions; to hold public hearings; to subpoena witnesses and documents; and to require that witnesses testify under oath.
13. Procedures are in place to enable facility administrators, line staff, inmates, and others to transmit information confidentially to the monitoring entity about the facility's operations and conditions.
14. Adequate safeguards are in place to protect individuals who transmit information to the monitoring entity from retaliation and threats of retaliation.
15. Facility administrators are provided the opportunity to review monitoring reports and provide feedback about them to the monitoring entity before their dissemination to the public, but the release of the reports is not subject to approval from outside the monitoring entity.
16. Monitoring reports apply legal requirements, best correctional practices, and other criteria to objectively and accurately review and assess a facility's policies, procedures, programs, and practices; identify systemic problems and the reasons for them; and proffer possible solutions to those problems.

17. Subject to reasonable privacy and security requirements as determined by the monitoring entity, the monitoring entity's reports are public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.

18. Facility administrators are required to respond publicly to monitoring reports; to develop and implement in a timely fashion action plans to rectify problems identified in those reports; and to inform the public semi-annually of their progress in implementing these action plans. The jurisdiction vests an administrative entity with the authority to redress noncompliance with these requirements.

19. The monitoring entity continues to assess and report on previously identified problems and the progress made in resolving them until the problems are resolved.

20. The jurisdiction adopts safeguards to ensure that the monitoring entity is meeting its designated purposes, including a requirement that it publish an annual report of its findings and activities that is public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.<sup>33</sup>

The rationales for most of the monitoring prescriptions and protocols set forth above are self-evident. If the monitoring entity were not, for example, independent of the prisons being inspected, its objectivity would be compromised, and the accuracy and completeness of its findings and recommendations would be suspect. The history of corrections is littered with examples of the obfuscation of facts—at times scandalous facts—by non-independent inspectors charged, supposedly, with ferreting out those facts.<sup>34</sup>

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33. REPORT TO THE HOUSE OF DELEGATES, *supra* note 6, at 9-10.

34. A prime example of a non-independent monitoring entity's suppression of facts about the gross mistreatment or neglect of prisoners came to my attention while performing corrections-related work. The inspectors from one such entity had failed to mention in their inspection report, which was considered by the monitoring entity when making decisions about the prison in 2009, that a mentally ill prisoner had starved to death in the prison. (Due to his illness, the prisoner apparently had believed that his food was being poisoned and had refused to eat.) The report given to those who had the authority to take adverse actions against the prison due to this neglect also failed to discuss systemic problems at the prison that, if remedied, would have averted the inmate's death.

In another instance illustrating the lack of candor and accuracy that can ensue when the monitoring entity is not independent of the prison being monitored, I once overheard an inspector tell an official at the prison being inspected: "The best thing that could happen to this prison is that a bomb fall on it." However, the report which recounted the purported findings of the inspection of this prison failed to mention the grave problems at the prison, including an endemic problem of prisoners being raped and threatened with rape, that had prompted the inspector's observation.

The monitoring framework envisioned by the ABA requirements is, for this country, bold and visionary. The independent monitoring entity would have a statutory duty to regularly inspect each prison, as well as certain other correctional and detention facilities in the jurisdiction. To guard against the concealment of negative facts about conditions within a prison, the monitoring entity would have the authority to conduct inspections without any advance notice and at any time, day or night.<sup>35</sup> The monitoring entity would have the authority to inspect all facets of the facility's operations and conditions, as well as conduct confidential interviews with line staff and prisoners, to unearth serious problems of which the prison administrators are unaware, are inured to, or have tried to mask.<sup>36</sup> The reports about a particular prison would be disseminated to the public, accessible through the Internet, and distributed to the media, the legislature, and the top elected official in the jurisdiction, either the governor or President.<sup>37</sup> Also, prison administrators could not just blithely ignore the report of a monitoring entity. The statute establishing this monitoring structure would require the administrators to draft and implement, in a timely fashion, "action plans" to resolve problems identified in a monitoring report.<sup>38</sup> In addition, the administrators would have to report twice a year on the progress of their implementation efforts.<sup>39</sup>

While integrating the external monitoring of prisons into the fabric of corrections would be a significant advancement in the United States, it would be erroneous to perceive or portray this monitoring as some kind of radical intervention that would inhibit prison officials from performing their jobs. To the contrary, these kinds of inspections by an independent body are the custom in Great Britain, where the British Prison Inspectorate has uninhibited access to the country's prisons.<sup>40</sup> In addition, the European Committee for the Prevention of Torture (CPT) conducts independent inspections of prisons in the forty-seven countries that are members of the Council of Europe.<sup>41</sup> Adopting the proposal for external monitoring by the ABA would therefore not be a revolutionary development, but would simply reflect the recognition that it is time for the United States to catch up with much of the rest of the civilized world.

### III. STEP THREE: INTEGRATING A RESTORATIVE-JUSTICE ETHOS INTO PRISONS

True transformation requires not just changes on the outside, but changes on the inside. What this means in the prison setting is that external improvements in prison conditions, however important or imperative those improvements may

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35. REPORT TO THE HOUSE OF DELEGATES, *supra* note 6, at 9.

36. *See id.* at 9-10.

37. *Id.* at 10.

38. *Id.*

39. *Id.*

40. *See* Michele Deitch, *Why You Should Love Watchdogs: The Case for Effective Prison Oversight and the British Experience*, in THE STATE OF CORRECTIONS: PROCEEDINGS, AMERICAN CORRECTIONAL ASSOCIATION ANNUAL CONFERENCES 2005, at 141, 145-47 (2006).

41. *Id.* at 147-48.

be, will not alone effect a transformation in prison cultures. Cramming too many prisoners in spaces too small to house them humanely or guard their safety and the safety of correctional staff can be halted. Dank cells infested with insects and rodents can be demolished and replaced by clean rooms with a natural-light source. Prisoners who sit idly in their cells hour after hour, day after day, and year after year can be put to work. Palpable deficiencies in the delivery of medical services to prisoners can be corrected so that sick inmates receive needed medical care. And other steps can be taken to solve the grave problems in prison conditions of which the public is still largely unaware. Yet even with these necessary changes, prisons, below the surface, will remain the same—places where prisoners are, at best, viewed as inferior human beings and, at worst, as subhuman; places where incarcerated individuals cannot, through positive deeds, make amends for their crimes; and places where the future holds little promise for prisoners.

One of the principal ways in which to effect this deeper change in the people who live and work in prisons is to inculcate the ethos of restorative justice into prison operations, processes, and programs. Restorative justice has age-old, including biblical, roots.<sup>42</sup> Restorative justice is grounded on a number of precepts. One is that those who commit crimes should be held accountable, in a meaningful way, for the harm their crimes have caused.<sup>43</sup> Accountability occurs when these individuals truly comprehend the impact of their crimes on their victims and others, when they assume the responsibility to repair, to the extent possible, the harm caused by their criminal conduct, and when they address the underlying reasons for their aberrant conduct.<sup>44</sup>

Restorative justice also has other key tenets. Examples include:

1. The stigma that attends the commission of a crime can be removed.<sup>45</sup>
2. Offenders should be provided opportunities to express and experience contrition for their crimes.<sup>46</sup>

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42. Mark S. Umbreit et al., *Restorative Justice: An Empirically Grounded Movement Facing Many Opportunities and Pitfalls*, 8 CARDOZO J. CONFLICT RESOL. 511, 515-16 (2007).

43. MARK S. UMBREIT, THE HANDBOOK OF VICTIM OFFENDER MEDIATION, at xxx-xxxii (2001) [hereinafter HANDBOOK OF VICTIM OFFENDER MEDIATION].

44. See MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE 8 (Jennifer Perillo & Peter Rocheleau eds., 2011) [hereinafter RESTORATIVE JUSTICE DIALOGUE].

45. Howard Zehr, *Retributive Justice, Restorative Justice*, 4 NEW PERSP. ON CRIME & JUST. app. (1985).

46. *Id.* At the time of sentencing, offenders are often afforded the opportunity to address the court. See, e.g., FED. R. CRIM. P. 32(i)(4)(A)(ii) (directing courts, before a sentence is imposed, to permit a defendant to speak to the court or present information that might mitigate the sentence). But this abbreviated, and sometimes perfunctory, opportunity to speak to a judge does not, for many reasons, effectuate the aims of restorative justice. The victim, for example, may not even be in the courtroom at the time the defendant exercises what is known as the right of allocution. More fundamentally, the one-sided impartation of information to the judge is neither intended to, nor

3. Victims of crimes should be afforded opportunities for healing through facilitated communications with offenders.<sup>47</sup>

4. The primary focus of the justice system is not on the past—on casting blame for what has been done. The primary focus of the justice system is on the future—on repairing the harm caused by a crime and solving the problems that contributed, and could contribute again, to making the ill-advised decision to commit a crime.<sup>48</sup>

Obviously, restorative aims can be achieved much more readily when individuals remain within the community while being held accountable for their criminal misdeeds. But for those who must be confined in prison, effective structures, processes, and programs should be in place in each prison to make restorative justice a shared and expected norm.

Many different kinds of steps can be taken to reorient the culture and normative values in prisons towards restorative justice. The following are just four examples of multiple programs with a restorative-justice focus that can become common features of all prisons.<sup>49</sup>

The first prototypical restorative-justice program is victim-offender mediation.<sup>50</sup> Victim-offender mediation programs are gradually becoming part of criminal justice systems at the community level and are beginning to appear in a few prisons.<sup>51</sup>

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designed to, promote the healing and other reparative objectives of restorative justice.

47. See DANIEL W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* 31-43 (Ellen S. Boyne & Elizabeth A. Shipp eds., 3d ed. 2010).

48. See Zehr, *supra* note 45, app.

49. For other examples of restorative-justice programs that can be adapted to the prison setting, see generally KAY PRANIS ET AL., *PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY* (2003) (discussing a restorative conferencing modality that also includes community members); MARK S. UMBREIT, U.S. DEP'T OF JUSTICE, *FAMILY GROUP CONFERENCING: IMPLICATIONS FOR CRIME VICTIMS* (2000), available at [http://www.ncjrs.gov/ovc\\_archives/reports/restorative\\_justice/restorative\\_justice\\_ascii\\_pdf/ncj176347.pdf](http://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176347.pdf) (describing a restorative mechanism in which the victim's and offender's friends and family members participate in mediation sessions).

50. The American Bar Association has endorsed victim-offender mediation programs and called on jurisdictions to incorporate them into their criminal justice systems. See AM. BAR ASS'N, *CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 101B* (1994). The ABA also has delineated thirteen requirements that these programs should meet, including that the participation of victims and offenders in mediation sessions be voluntary. For a list of these requirements, see *American Bar Association Endorsement of: Victim-Offender Mediation/Dialogue Programs*, VICTIM-OFFENDER RECONCILIATION PROGRAM INFO. & RES. CTR., <http://www.vorp.com/articles/abaendors.html> (last visited June 15, 2011). For additional information about victim-offender mediation, see *HANDBOOK OF VICTIM OFFENDER MEDIATION*, *supra* note 43; *RESTORATIVE JUSTICE DIALOGUE*, *supra* note 44, at 111-41.

51. While only a few victim-offender mediation programs existed in the country in the 1970s, twenty years later, almost three hundred were in operation. MARK S. UMBREIT ET AL., U.S. DEP'T OF JUSTICE, *NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED*

A victim-offender mediation program affords a victim the opportunity to meet, in the presence of a trained mediator, with the individual who perpetrated a crime against the victim. During the mediation session or sessions, the victim typically asks the offender—in this case, the prisoner—questions about the crime or the offender that may be troubling the victim, and the victim also explains the impact the crime had on him or her. The offender then talks about the crime and the poor choices that contributed to the offender's decision to commit the crime. This discussion often culminates in the offender's expression of remorse for the crime and the harm it has caused.

The last step in the mediation process is the discussion and development of an agreement between the victim and the offender, identifying the steps the offender will take to remedy the harm the crime caused. In the prison setting, devising this agreement will require some creative thinking, in part because most prisoners are impoverished, lacking the means to remunerate the victim for the harm through monetary compensation. But with the assistance of the trained mediator, the victim and prisoner can construct an agreement that satisfies both parties that the prisoner, while confined and perhaps upon release, will take concrete actions to make something good come out of something bad, perhaps even tragic.

The contours of that agreement will vary based on a number of factors, including the victim's needs and the prisoner's circumstances, such as restrictions at the prison that may hinder or preclude the taking of a particular reparative step by the prisoner. The following are but a few examples of agreed-upon steps that a prisoner might take to repair harm caused by his or her criminal wrongdoing and to bring healing to the victim, the prisoner, and others: the prisoner might provide the victim a formal written or verbal apology; might disseminate the apology to others; might report to the victim at specified intervals about progress made in completing actions the prisoner has agreed to take, such as participating in an Alcoholics Anonymous or Narcotics Anonymous program, to diminish the risk that the prisoner will choose to commit a crime in the future; or might meet, along with the victim if he or she so chooses, with first-time offenders or other individuals considered at risk of future criminal or delinquent conduct to discuss the adverse consequences the victim, prisoner, and others have suffered from the ill-advised decision to commit a crime.

Victim-impact panels are a second example of a mechanism that can be

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STATES 3, 5 (2000), available at [http://www.ncjrs.gov/ovc\\_archives/reports/restorative\\_justice/restorative\\_justice\\_ascii\\_pdf/ncj176350.pdf](http://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176350.pdf). In addition, a few prison systems have established restorative-justice programs within their prisons, with Kay Pranis, the former Restorative Justice Planner for the Minnesota Department of Corrections, playing a leadership role in that endeavor. See Jessica A. Focht-Perlberg, *Two Sides of One Coin—Repairing the Harm and Reducing Recidivism: A Case for Restorative Justice in Reentry in Minnesota and Beyond*, 31 *HAMLIN J. PUB. L. & POL'Y* 219, 261-62 (2009); Martha Henderson Hurley, *Restorative Practices in Institutional Settings and at Release: Victim Wrap Around Programs*, 73 *FED. PROBATION* 16, 19 (2009).

employed in each prison to bring restorative justice to the forefront of a prison.<sup>52</sup> A victim-impact panel is comprised of victims of the crime of which a prisoner was convicted. These panel members can impress upon a prisoner the real-life impact of his or her crime. For example, a victim-impact panel comprised of victims of drunk drivers, such as a person maimed in an accident caused by a drunk driver or the family members of someone killed by a drunk driver, can recount to a prisoner incarcerated for a drunk-driving-related crime, such as vehicular homicide, how drunk driving has affected their lives. These panels can be used to complement victim-offender mediation or in lieu of mediation when, for example, a victim is unable or unwilling to participate in the mediative process. One of the benefits of these panels, as is true with victim-offender mediation, is that they humanize victims, making it more difficult for criminal offenders to rationalize their wrongdoing or ignore the harm for which they are responsible.<sup>53</sup>

Prison work programs in which prisoners produce goods and services that benefit the neighborhoods most adversely affected by prisoners' crimes are a third example of restorative-justice programming. Work programs in prisons are not new, although prisons often lack enough jobs to match the number of employable prisoners or, if they are working, to provide many of them anything more than what can charitably be described as make-work.<sup>54</sup> And some of these existing work programs provide direct benefits to people in the outside world. For example, inmates in prisons with canine-training programs train dogs to provide assistance to disabled individuals with whom they later will be paired.<sup>55</sup>

But what is contemplated in this proposal for injecting accountability for one's crime, in a meaningful and productive sense, into the prison milieu is that

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52. See generally VAN NESS & STRONG, *supra* note 47, at 71-76 (providing a general overview of the structuring and beneficial effects of victim-impact panels).

53. Some prisons, including prisons in Minnesota, already utilize victim-impact panels. Focht-Perlberg, *supra* note 51, at 262. For example, the "Bridges to Life" program in Texas is a pre-release program in which participating prisoners meet with surrogate victims two hours a week for twelve weeks. *Id.* at 254-55. During those meetings, a trained volunteer facilitates discussions between the prisoners and the victims that are designed to promote healing, accountability, and remediation of harm by the prisoners. *Id.* at 255. But while the goals of this program are laudable, they are more limited than the goal articulated in this Article of making restorative justice a mainstay of a prison's overall culture. The focus of the Texas program is on preparing prisoners for their return to the community rather than on also transforming prison cultures through the inculcation of restorative-justice norms and values. See *id.* at 254-55.

54. See *supra* note 3 and accompanying text. In *Smith v. Fairman*, 528 F. Supp. 186, 190 (C.D. Ill. 1981), *rev'd*, 690 F.2d 122 (7th Cir. 1982), the district court recited what is considered a classic example of such make-work. When a prisoner was asked to describe his job working on the prison grounds, he said that his work was completed after fifteen minutes and he then pushed dirt back and forth for the rest of the four-hour workday. *Id.* at 190.

55. See generally Nikki S. Currie, A Case Study of Incarcerated Males Participating in a Canine Training Program (2008) (unpublished Ph.D. dissertation, Kansas State University), available at <http://krex.k-state.edu/dspace/bitstream/2097/1028/1/NikkiCurrie2008.pdf>.

work programs would be established to benefit the communities and neighborhoods most ravaged by crime. An example of such a program would be one that produces materials to be used in constructing new houses or refurbishing dilapidated houses in crime-infested neighborhoods marked by urban blight. Another example would combine a horticultural program, in which prisoners plant and harvest fresh produce, with a food-processing program in which prisoners can or otherwise package a portion of the food. The healthy food produced, prepared, and preserved by the prisoners then could be delivered to poor, crime-ridden neighborhoods where fresh fruit and vegetables are often unavailable or unaffordable.

A fourth kind of restorative-justice programming that can be integrated, and in some instances has been integrated,<sup>56</sup> into prisons affords prisoners opportunities to live in faith-based prison units. To avoid Establishment Clause concerns, it is important that only prisoners who want to, and choose to, live in these units do so.<sup>57</sup> In these units in which prisoners may opt to be confined, prisoners constantly examine their lives and actions through a very different lens—from a spiritual or religious perspective.<sup>58</sup>

For some prisoners, living in a faith-based prison unit for a period of time can be not only a way of meeting unmet spiritual needs, but the optimal way to realize the aims of restorative justice. In other words, in order for some prisoners to understand fully the import of their crimes and make amends, to the extent possible, for those crimes, they have found that they need to nurture their faith, understand and experience forgiveness, or atone, in this kind of setting, for their wrongdoing.<sup>59</sup> Consequently, as prison officials and policy makers consider

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56. See generally NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, RESIDENTIAL FAITH-BASED PROGRAMS IN STATE CORRECTIONS, SPECIAL ISSUES IN CORRECTIONS (2005), available at <http://nicic.gov/Library/Files/020820.pdf> (indicating that twenty-one of the fifty-one state and federal correctional departments surveyed reported having, or developing plans for, one or more residential faith-based programs in their prison system).

57. See generally Lynn S. Branham, "The Devil Is in the Details": *A Continued Dissection of the Constitutionality of Faith-Based Prison Units*, 6 AVE MARIA L. REV. 409 (2008) (assessing the constitutionality of faith-based prison units in light of the Establishment Clause); Lynn S. Branham, "Go and Sin No More": *The Constitutionality of Governmentally Funded Faith-Based Prison Units*, 37 U. MICH. J.L. REFORM 291 (2004) (addressing the constitutionality of faith-based prison units and prescribing steps to operate them in conformance with the Establishment Clause).

58. The Life Connections Program (LCP) instituted by the Federal Bureau of Prisons is an example of one such faith-based program. Scott D. Camp et al., *An Exploration into Participation in a Faith-Based Prison Program*, 5 CRIMINOLOGY & PUB. POL'Y 529, 530 (2006). Inmates who participate in this eighteen-month residential program can choose a spiritual guide from an array of faiths, including Buddhism, Catholicism, Islam, Judaism, and Protestantism. *Id.* at 530-31. Inmates in the four or five faith groups represented in the LCP program at a particular prison meet together for some portions of the program, engaging in studies from that faith perspective, and work to grow and develop spiritually. *Id.* at 531. The LCP program also brings the differing faith groups together for joint discussions and other activities. *Id.*

59. The comments of one inmate who lived in a faith-based unit while confined in a Texas

programmatic options for the infusion of restorative justice into prison cultures, religious programming should not be excluded from their consideration.

It would be a mistake, though, to assume that the inculcation of a restorative-justice ethos into prisons would be effectuated only through programs. To the contrary, prison officials and other interested parties, including prisoners, would need to take a range of other steps to make restorative justice a prison trademark. To give just three examples of such steps, prison staff first would need to be trained about restorative justice—its goals, how it is realized, the positive effects that it can have on the overall prison environment, and the ways in which staff can and must meet their responsibility to help imbue the prison culture with a commitment to restorative justice. Second, during their orientation into a prison system or a prison, prisoners would need to be educated about restorative justice, including the integral role they will play in making restorative justice part of the fabric of the institution and their own lives. Finally, restorative-justice principles would need to be integrated into prison disciplinary processes so that prisoners become more cognizant of the harm their misconduct inflicts, both on individuals and the prison community as a whole, and can remedy that harm in a constructive way.

#### IV. STEP FOUR: ASSIGNMENT OF MENTORS TO PRISONERS AT THE OUTSET OF THEIR IMPRISONMENT

The fourth transformative step to be undertaken within prisons is to assign a mentor or accountability partner to a prisoner at the very outset of his or her imprisonment. A mentor can play a significant role in helping a prisoner prepare for his or her return to the community. The mentor can, for example, give encouragement to an inmate, providing the psychic boost needed to surmount the external, as well as internal, obstacles to successful reintegration faced upon release.<sup>60</sup> But the assignment of a mentor to a prisoner at the very beginning of the prisoner's confinement can serve another laudable purpose: mitigating the

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prison illustrate how a faith-based program can be a tool for implementing restorative justice. William R. Mattox, Jr., *Prison Program Uses Faith to Transform Lives*, USA TODAY, Mar. 15, 1999, at 17A. According to the prisoner, his participation in the program eventually prompted him to acknowledge his wrongdoing and strive to make amends for it. *Id.* After writing a letter to his former employer asking to be forgiven for lying to and stealing from him, the prisoner and the employer met at the prison and reconciled. *Id.*

60. Researchers have profiled (and lamented) the daunting challenges prisoners face in attempting to reintegrate successfully into their communities after release from prison. *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 105-37 (2003); JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 25-36 (2001), available at [http://www.urban.org/uploadedpdf/from\\_prison\\_to\\_home.pdf](http://www.urban.org/uploadedpdf/from_prison_to_home.pdf). These challenges include, among others, employment barriers, untreated and unresolved substance-abuse problems, educational deficits, mental illness, and lack of housing. *See id.* The "prisonization" process, which is described later in this paper, can also stymie the reentry goals of inducing and facilitating the making of law-abiding choices by released prisoners. *See infra* notes 64-65, 78-79 and accompanying text.

debilitating isolation from the outside world that attends incarceration. And the support and encouragement mentors provide prisoners can help to eradicate the hopelessness, despair, and bitterness that permeate prisons today.

The assignment of a mentor to a prisoner at the incipiency of his or her incarceration is a common-sense reform and yet . . . not done. It is true, and certainly a welcome development, that more people are beginning to mentor released prisoners, although there are still far fewer mentors than needed.<sup>61</sup> In addition, some people, most often volunteers from churches and other religious groups, are already serving as mentors to at least a fraction of prisoners during some of the time they are incarcerated.<sup>62</sup> But the mentoring of prisoners is still, as a general practice, too little, too late.<sup>63</sup> Most prisoners never have mentors, and those who do are matched with a mentor long after what has been termed “prisonization” has occurred.<sup>64</sup> This prisonization process erodes prisoners’ self-worth, erases their ability to trust others, makes them more willing to exploit others, triggers post-traumatic stress disorder, or has other damaging effects.<sup>65</sup> Combined, these factors make it less likely that prisoners, the prison staff, the public, and the prison culture as a whole will reap the benefits mentors offer to prisoners.

Recognizing the value of mentors is one thing. Integrating them into prison operations such that their presence, work, and recognized utility are embedded in the culture of a prison is quite another. It would be naïve to assume that making mentors a mainstay in prisons would be an easy task. Prison officials

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61. A survey of released prisoners conducted as part of the Serious and Violent Offender Reentry Initiative (SVORI), an undertaking by the federal government to help states reduce the rate with which released prisoners recidivate, found that 60% of them reported that they needed a mentor. Christy A. Visher & Pamela K. Lattimore, *Major Study Examines Prisoners and Their Reentry Needs*, 258 NAT’L INST. JUST. J. 30, 32 (2007). This statistic may understate the need for a mentor because some released inmates may not recognize that need or understand the benefits to be reaped from working with a capable and dedicated mentor.

62. *See, e.g.*, COFFEY CONSULTING, LLC & MATHEMATICA POL’Y RESEARCH, INC., EVALUATION OF THE PRISONER RE-ENTRY INITIATIVE: FINAL REPORT 71 (Mary Grady & Amy C. Coffey eds., 2009), available at [http://wdr.doleta.gov/research/FullText\\_Documents/Evaluation%20of%20the%20Prisoner%20Re-Entry%20Initiative%20-%20Final%20Report.pdf](http://wdr.doleta.gov/research/FullText_Documents/Evaluation%20of%20the%20Prisoner%20Re-Entry%20Initiative%20-%20Final%20Report.pdf) (reporting that the majority of mentors participating in a pre-release-services project—to help prisoners secure jobs upon release and otherwise ease their transition out of prison—came from churches and other faith-based groups).

63. *See, e.g., id.* at 117 (reporting that almost three-fourths of the prisoners participating in a pre-release program with a mentoring component were enrolled in the program within only three months of their release, with almost half of them participating in the program for just one month before release).

64. For a discussion of the adverse effects on prisoners resulting from the prisonization process, see Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 40-46 (Jeremy Travis & Michelle Waul eds., 2003).

65. *See id.*

would have a number of logistical issues, security concerns, and other questions to address and resolve while planning mentoring programs in the jurisdiction's prison system. Examples of these questions include: (1) Who will serve as mentors? (2) How will mentors be recruited? (3) What commitments will be required of individuals in order for them to be eligible to serve as a mentor? For example, how frequently must a mentor have contact with the prisoner? How often must those contacts involve face-to-face interactions? And for what duration of time must a prospective mentor commit to mentoring a particular inmate? (4) How much training and what kind of training will be provided to prospective and existing mentors?<sup>66</sup> (5) How can continuity in mentoring be maintained when situations change? For example, mentors may die or move far away, or prisoners may be transferred to another prison.<sup>67</sup> (6) Should only unpaid volunteers serve as mentors, or should mentors receive some form of compensation for their services?

There is not necessarily one correct answer to the questions posited above. Prison officials therefore can, and should, pilot different ways of structuring mentoring programs to determine the best structure in a particular prison system or prison. In addition, when planning and implementing these mentoring programs, prison administrators can consult with organizations that already provide mentoring services to some prisoners, learning lessons from these organizations about how to maximize the effectiveness of prison mentors.<sup>68</sup> Finally, those establishing mentoring programs in prison, not just for pre-release purposes, but also to transform prison cultures, can turn for advice and assistance to those who have already established mentoring programs for released prisoners.<sup>69</sup>

Inevitably, there will be critics who reject the proposal that a mentor be assigned to each prisoner at the beginning of a prison term as unrealistic, reflecting pie-in-the-sky thinking. Unorthodox ways to help at-risk individuals

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66. In order to be eligible to serve as a mentor, an individual might, for example, be required to receive orientation training before this service begins, as well as supplementary training at periodic intervals afterwards.

67. The value of continuing an existing mentor-inmate relationship and preserving the optimal number of personal contacts between the mentor and the prisoner could, of course, be factored into the decision whether to transfer a prisoner to another prison.

68. Prison Fellowship Ministries, which assigns mentors to prisoners participating in certain faith-based pre-release programs in prisons, is an example of one such organization. See BRITTANI TRUSTY & MICHAEL EISENBERG, CRIMINAL JUSTICE POL'Y COUNCIL, INITIAL PROCESS AND OUTCOME EVALUATION OF THE INNERCHANGE FREEDOM INITIATIVE: THE FAITH-BASED PRISON PROGRAM IN TDCJ 25 (2003), available at [http://www.lbb.state.tx.us/PubSafety\\_CrimJustice/6\\_Links/IFIInitiative.pdf](http://www.lbb.state.tx.us/PubSafety_CrimJustice/6_Links/IFIInitiative.pdf) (noting that continued contact with a mentor after release was associated with lower recidivism rates).

69. See generally RENATA COBBS FLETCHER ET AL., PUB./PRIVATE VENTURES, MENTORING FORMER PRISONERS: A GUIDE FOR REENTRY PROGRAMS (2009), available at [http://www.ppv.org/ppv/publications/assets/316\\_publication.pdf](http://www.ppv.org/ppv/publications/assets/316_publication.pdf) (outlining needed steps when incorporating mentoring into a reentry program for released prisoners).

make the responsible decisions needed to turn their lives around have often been met with skepticism. Teach for America, a program offering college graduates the chance to teach in poor urban schools for two years, is a quintessential example.<sup>70</sup> Few would have ever predicted at the time the idea for Teach for America was floated in a senior thesis written by a college student in 1989 that within a decade, thousands of college students from across the country would be vying for the opportunity to make a positive difference in these challenging environments.<sup>71</sup>

#### V. STEP FIVE: PRISONERS' INVOLVEMENT IN THE DEVELOPMENT OF REENTRY PLANS WHOSE IMPLEMENTATION COMMENCES UPON INCARCERATION

The fifth pivotal step that will enable jurisdictions to, in a sense, put their prisons of the past, and sometimes sullied past, behind them is particularly consonant with the four precepts outlined at the beginning of this Article. These precepts, which would serve as the underpinnings for a transfiguration in the ethos pervading prisons, include hope as an imperative, the attainability of renewal, the catharsis that attends personal responsibility and accountability, and the duty and call for everyone—correctional employees, prisoners, and others—to respect human dignity.<sup>72</sup>

This fifth step entails, in part, the development of reentry plans to foster prisoners' successful reintegration into the community upon their release from prisons. Timing is a key element of this step. As Jeremy Travis, one of the nation's foremost experts on prisoner reentry, recognized a little over a decade ago, reentry planning should not be deferred until shortly before a prisoner's impending departure from prison or after release from confinement.<sup>73</sup> Instead, reentry planning should commence, at the latest, when imprisonment begins.<sup>74</sup> If implementation of the reentry plan begins at this point, the endeavor to address the problems that contributed to the prisoner's poor choice to commit a crime will stand the greatest chance of success. In addition, the timely implementation of the reentry plan will equip the prisoner to adopt a law-abiding lifestyle earlier, while still in prison and not just upon release.

Another key facet of this fifth vehicle for transformative change is that prisoners would play a central role in the development of their individualized reentry plan. It is this part of the recommendation that will, for at least two

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70. *See generally* WENDY KOPP, ONE DAY, ALL CHILDREN . . . : THE UNLIKELY TRIUMPH OF TEACH FOR AMERICA AND WHAT I LEARNED ALONG THE WAY (2001) (describing the Teach for America program and its genesis).

71. *See id.* at 5-13, 149.

72. *See supra* pp. 704-05 and accompanying footnotes.

73. *See* Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, 7 SENT'G & CORR.: ISSUES FOR THE 21ST CENTURY 1, 2 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181413.pdf>.

74. *Cf. id.* at 8-9 (proposing that the role of the sentencing judge be expanded to oversee the development and execution of an individualized reentry plan for a person sentenced to prison, beginning at the time of sentencing).

reasons, give some people the most pause. First of all, there is a tendency for people to want to intercede in prisoners' lives and "fix them" so that they do not persist in making the bad choices that culminated in their imprisonment. Whether this proclivity reflects hubris about a person's ability to correct the flaws and failings in other people, genuine benevolence, or its opposite—the dehumanizing view that prisoners are like broken objects to be repaired—the end effect is that prisoners are, for the most part, shunted to the sidelines during the reentry-planning process.

Another hindrance to prisoners' significant involvement in reentry planning are correctional officials, wedded to the status quo, who view the prospect of a prisoner being part of a collective problem-solving process—in this case, part of a reentry-planning team—as threatening. Underlying their wariness, at least in part, is the concern that according prisoners an instrumental role in this kind of decision-making process will empower them.<sup>75</sup> This empowerment, it is feared, will in turn make prisoners less compliant, more difficult to manage, and even belligerent.

What is unsettling about this topsy-turvy thinking is that it has, ironically, helped fuel, rather than curb, the negative attitudes and behaviors in prisoners about which prison officials manifest concern. This close-minded opposition to a new paradigm in the treatment of prisoners has also foreclosed those who work and live in prisons, as well as the public, from reaping the many benefits of such a model. If we begin recognizing that prisoners have a vital role to play in planning, in concert with others, how to revamp their lives, all would benefit.

There are multiple reasons why prisoners should not be considered just a focus of the reentry-planning process, but a primary, not secondary, partner in that process. First, welcoming prisoners into the reentry-planning process and underscoring the crucial role they will play in that process will teach or remind them that while others, both inside and outside prisons, perform important

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75. Over a decade ago, then director of the Missouri Department of Corrections Dora Schriro wrote about the need to depart from the prevailing norm in prisons, in which virtually every facet of a prisoner's life is controlled by prison officials, and vest prisoners with heightened decision-making responsibilities. Dora Schriro, *Correcting Corrections: Missouri's Parallel Universe*, 8 SENT'G & CORR.: ISSUES FOR THE 21ST CENTURY 1 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/181414.pdf>. Director Schriro acknowledged that her proposal entailed a transfer of some "power" from prison officials to prisoners, something prison officials traditionally have been loath to do. *Id.* But she underscored that according prisoners opportunities to engage in decision making and problem solving can better prepare them for the decisions they will need to make and problems they will need to surmount upon their release from prison. *See id.* at 3 (describing the "parallel universe" to be created in prisons, mirroring the decision-making responsibilities and accountability that exist in the free world, as a "corrections-based reentry program").

The specific recommendation discussed in this Article—to include a prisoner as a member of his or her reentry-planning team—is consonant with the "parallel universe" for which Director Schriro has advocated. However, the primary impetus for the recommendation is to alter profoundly what life is like within prisons, both for correctional staff and prisoners, rather than just what life is like for prisoners and others upon prisoners' release from prison.

reentry-related functions, the ultimate responsibility for the successful transition into community life rests with the prisoner. This emphasis on personal responsibility will heighten the prospect that reentry plans will meet their objectives—that prisoners will refrain from committing crimes and from the maladaptive thinking patterns and behaviors that often are precursors to criminal conduct. Prisoners will be less prone to engage in the blame game that frequently precedes and helps precipitate criminal conduct: “No one’s given me a fair shake in life, so it’s okay for me to do this” or “I need to commit crimes because I can’t get a job because I can’t read, which is because the public schools I attended were so bad.” Other permutations of such finger-pointing rationalizations abound.

A second reason why prisoners should be part and parcel of the reentry-planning team is that when prisoners work hand-in-hand with others to develop their own reentry plans, rather than having those plans imposed on them as a fait accompli, the significance of different parts of the plans will be more understandable to them. They will, for example, more fully grasp why it is important that they complete and excel in a vocational-education program in the prison. Not only will the program help the prisoner develop marketable job skills and critical life skills, such as a work ethic, but the director of that program can then write letters of recommendation on the prisoner’s behalf. This will increase the possibility that the door to a job outside of prison—a door that otherwise will be difficult to even budge<sup>76</sup>—will open. So when prisoners, through their participation in the construction of their own reentry plan, comprehend the import of each component of the plan and the interrelationship between various parts of the plan, they will be more inclined to embrace the plan and perform their responsibilities under it.

Apart from prisoners’ acceptance of personal responsibility for their successful reentry and the understanding and embracing of reentry plans that are likely to ensue when prisoners help to create them, prisoners’ participation in the development of their reentry plans will enhance their effectiveness for a third quite basic reason: their quality will be enhanced. The simple fact is that reentry plans are designed to assist prisoners in overcoming challenges that, if not surmounted, may lead them to make, once again, the foolhardy choice to commit a crime, whether inside or outside prison. And who better than the prisoner can identify, with the assistance of others,<sup>77</sup> the specific impediments to a law-abiding lifestyle that he or she currently is facing or will face upon release?

A fourth benefit of assigning prisoners a central role in planning for their reentry into a community is that it can help combat the deleterious effects of the prisonization process alluded to earlier.<sup>78</sup> One particularly insidious consequence of this depersonalizing process is that prisoners become accustomed to the tight

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76. Surveys have confirmed a marked reluctance on the part of employers to hire ex-prisoners. SOLOMON ET AL., *supra* note 3, at 13.

77. The reentry-planning process will therefore entail introspection on the prisoner’s part, as well as the reality check and professional expertise that others can contribute to that introspective assessment.

78. See *supra* notes 64-65 and accompanying text.

controls exerted over them in prison and eventually become highly dependent on others to make choices for them.<sup>79</sup> When they later are released from prison, they lack the confidence, resilience, and often even the ability to initiate the most basic steps to adapt to life outside prison, such as applying for a job or seeking housing away from people who were criminal compatriots in the past. Participating in the decision making that attends reentry-planning can prevent this erosion or destruction in decision-making and problem-solving skills that may compromise reentry efforts; this participation in fact can help to develop and fortify these skills.

The discussion thus far of the reasons for integrating prisoners into the reentry-planning process has focused primarily on one outcome: the effectiveness of reentry plans, both in terms of their quality and prisoners' adherence to their terms. But another central question is whether assigning prisoners an instrumental role in reentry-planning is related to the transformation in prison cultures for which there is such a discernible need and for which this Article calls. The answer to that question is, indubitably, yes, which brings us to the fifth value of integrating prisoners into the reentry-planning process. The infusion of the normative value of personal responsibility into the prison culture, as well as the engaging of prisoners on a regular and ongoing basis in proactive problem solving, will signal, as well as help catalyze, a shift in the attitudes of both prisoners and correctional employees. Attitudes will shift from getting by, putting one's time in, keeping the lid on, and keeping one's head down to something that is elusive in prisons today . . . hope.

The transformative power of hope cannot be overstated. It is redemptive, cathartic, healing, and uplifting. It is the antithesis of despair. It has been said, in so many different ways, that when a person loses hope, he or she loses everything. And therein lies the quandary created by imprisonment. An unknown author once observed, "When the world says, 'Give up,' hope whispers, 'Try it one more time.'"<sup>80</sup> But the dominant and deafening message society currently sends prisoners, through what transpires and fails to transpire while they are imprisoned, is: Give up! That is not only a disheartening message, but also a dangerous one. As the novelist Marie Louise de la Ramee (pen-named Ouida) once warned, "Take hope from the heart of man, and you make him a beast of prey."<sup>81</sup>

The challenge, then, is finding the ways to instill hope in the hearts of people whose pasts are often replete with failures and stained by the stigma of criminal wrongdoing, who may be consumed with guilt and remorse for the pain they have caused a victim, family members, and others, who are targets of disdain because of their misdeeds, and whose liberty has been so dramatically curtailed. As mentioned above, vesting prisoners with the responsibility to help identify what

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79. See Haney, *supra* note 64, at 40-41.

80. Simran Khurana, *Quotations About Perseverance: Hope, A Select Collection of Quotations*, ABOUT.COM, <http://quotations.about.com/cs/inspirationquotes/a/Perseverance7.htm> (last visited June 15, 2011).

81. II OUIDA, A VILLAGE COMMUNE 61 (1881).

they need to do, and can do, to realize the goal of becoming productive, law-abiding citizens is one step, though not the only step, that will begin to offer them this hope—a hope that they may have lost long ago or perhaps never had. The introduction of restorative justice into the daily lives of prisoners can also be a fount of hope.<sup>82</sup> And there are many other ways, including the content and tenor of daily communications between correctional staff and prisoners, in which the hope prisoners need to brave the inevitable pain and hardship of incarceration can be communicated and nurtured.

The final, though related, reason for treating prisoners as partners in the reentry-planning process is straightforward, but compelling. Treating prisoners not as objects, but as the human beings they are, no matter how despicable their prior actions, will demonstrate an unflagging commitment to human dignity. It is that commitment to human dignity that will, in the end, be the essential underpinning of any endeavor to transform prison cultures. Taking the initiative—and what I believe is the moral path—of treating prisoners with dignity will make it more likely that prisoners, in turn, will treat others, including correctional staff, with dignity. And when the day is reached in this nation's prisons when a critical mass of correctional staff treat prisoners the way the staff would want to be treated if they faced the isolation and debasement that accompany a prison sentence, and when a critical mass of prisoners treat correctional staff the way the prisoners would want to be treated if they faced the hard and dangerous task of working within a prison, the transformation of prison cultures will no longer be an ideal for which few now dare even to hope; it will be a reality.

#### CONCLUSION

It may be a well-worn adage, but Albert Einstein correctly observed that insanity is “doing the same thing over and over again and expecting different results.”<sup>83</sup> Yet in prisons throughout the United States, we have, since their incipency, been doing the same thing over and over again, and in recent years, at an accelerated pace. Yes, it is true that many prisons no longer have a dungeon-like appearance . . . to the external eye. Some prisons, or at least parts of them, even look a bit like college campuses, with their manicured lawns, sleeping rooms with doors instead of cells with cage-like metal bars, and classrooms in which at least some prisoners can go to school. If one digs beneath the surface of even these prisons, however, it is soon discovered that they share many commonalities with their more dilapidated counterparts of the past and present. Specifically, they share the problems that contributed to prisoners' errant choices to commit crimes being usually ignored or addressed ineptly by the prisoners and correctional staff. They also share a pervading sense of

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82. *See supra* notes 42-59 and accompanying text. The well-trained mentors for which this Article calls can also give prisoners the encouragement and practical advice from which hope can spring. *See supra* notes 60-71 and accompanying text.

83. Albert Einstein, *Albert Einstein Quotes*, NOTABLE QUOTES, [http://www.notable-quotes.com/e/einstein\\_albert.html](http://www.notable-quotes.com/e/einstein_albert.html) (last visited June 15, 2011).

hopelessness and aimlessness stemming from prisoners' certitude that they cannot put their pasts behind them and that society, in any event, will not allow them to. Finally, they share the feelings of futility or indifference felt by correctional staff convinced that they either cannot or need not assist prisoners, in a meaningful way, to turn their lives around. Prisons still continue to be, in short, places largely marked by depersonalization, degradation, despair, boredom, bitterness, anger, and fear.

They do not have to be. It is the premise of this Article that conditions in prisons can not only be improved, as they have been in some prisons, but that the culture within prisons can be transformed. This Article posits how prisons can become places where the brunt of correctional staff and prisoners (there will always and inevitably be outliers) are instilled with a sense of hope, despite the challenges and hardships that inevitably accompany residence or employment in a prison. How prisons can become places fostering an understanding, shared by correctional staff and prisoners, that with guidance, support, and a lot of hard work, prisoners, like other people, can learn from their mistakes, change their attitudes, refrain from hurtful actions, and help others. How prisons can become places where prisoners assume personal responsibility for their crimes by attempting to remedy, to the extent possible, the harm their crimes have caused. And how prisons can become places marked by a singular message: No matter who you are and what you have done in the past, you will be treated with dignity while you are living (or working) here.

I have no illusions, and I do not profess, that the transformation in prison cultures for which this Article calls would be easy. Fundamental change never is. There is always reticence or resistance on the part of many to initiatives to depart from the status quo. But as President Ronald Reagan once aptly noted, "Status quo, you know, that is Latin for 'the mess we're in.'"<sup>84</sup>

This Article has proffered five recommendations that, if implemented, provide the foundation for a transformation in prison cultures from which society as a whole will benefit. The recommended steps include: (1) adopting a statutory cap in each jurisdiction on the per-capita imprisonment rate—a cap at least 50% lower than the current national rate; (2) developing and implementing a comprehensive plan by each state and the federal government to make prison operations and conditions more transparent and accountable to the public; (3) incorporating restorative-justice principles into prison policies, practices, and programs; (4) assigning each prisoner, upon imprisonment, a trained and dedicated mentor to help shepherd the prisoner successfully through the challenges and traumas of life behind bars; and (5) assigning prisoners an instrumental role in the development and ongoing refinement of their own reentry plans, whose implementation would commence at the very beginning of their confinement. These recommendations, upon close examination, are not radical, but tempered. They are grounded on data, lessons learned from other countries, core human values, and a sprinkling of common sense.<sup>85</sup>

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84. See Reagan Remarks, *supra* note \*.

85. As an example of the latter, the recommendation that each prisoner be assigned a trained

The jurisdictions that choose, wisely, to take the needed steps outlined in this Article will confront a number of questions concerning the details of their implementation. A sign that I once chanced upon serves as a reminder of the importance of such details. The sign read:

“Let’s eat, Grandpa.”

“Let’s eat Grandpa.”

What a difference one small detail—in that case, a comma—can make. But while it behooves us to remember that the devil (or his counterpart) is in the details, I recommend the thoughtful and expeditious implementation by each state and the federal government the five proposals set forth in this Article to transform prison cultures and clean up, for everyone’s sake, “the mess we’re in.”<sup>86</sup>

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and committed mentor at the outset of his or her incarceration comports with the truism that there are few among us who are so stalwart that they don’t need a friend to get through life and its travails.

86. See Reagan Remarks, *supra* note \* and text accompanying note 85.