

GETTING TO “PRISONER AS NEIGHBOR”

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Introduction

Scholars and activists have long asserted that meaningful prison reform will require abandoning the image of the archetypal prisoner as predatory and recognizing the humanity and, especially, the vulnerability of those we incarcerate. While to acknowledge the vulnerability of prisoners may be a first step towards humanizing them, to eradicate the “us versus them” dynamic that sustains our existing system of mass incarceration, we must take a second step: we must appreciate those we incarcerate as ambitious, striving humans capable of self-improvement. Taking this step would require

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reimagining the archetypal prisoner as *fully* human—not just because they are vulnerable, but also because they aspire to self-fulfillment, personal growth, and actualization.¹ This Essay explores how this reimagining would differ from past and existing frames that cast prisoners as either dangerous predators or vulnerable victims, focusing on the roles of danger, dynamism, and individuation.

Part I introduces the “prisoner as predator” frame, which casts prisoners as amoral and remorseless and contributed to “tough on crime” policies and the rise of mass incarceration in the United States. Part II examines the contrasting “prisoner as victim” frame, a reformist approach that stresses the humanity of prisoners, focusing on their vulnerability in the face of harsh prison conditions. This Essay’s juxtaposition of these two conceptions of prisoners reveals that the “prisoner as predator” and “prisoner as victim” frames serve as mirror images of each other. Whereas the emotions underlying these two conceptions of prisoners are profoundly distinct—the “prisoner as predator” frame is rooted in fear and is the product of racism and callousness, while the “prisoner as victim” frame is rooted in sympathy—each of these conceptions, in its own way, dehumanizes individual prisoners.

Part III explores an alternative frame, “prisoner as neighbor,” that would focus on each person’s unique needs and potential and connect the fate of those we incarcerate to our own. This Essay uses the term “neighbor,” not in a literal sense,² but in a more abstract or normative sense, suggesting a reciprocal moral obligation among individuals who interact in a range of ways.³ My neighbor, in this sense, is a person I will encounter and deal with in my day-to-day life, whose actions and wellbeing matter to me. This “prisoner as neighbor” frame requires a reconceptualization of the state’s responsibility for cultivating the agency and wellbeing of those it incarcerates and highlights the importance of investing in those services necessary to enable every incarcerated person to thrive upon release. Unlike conceptions of the prisoner as either a predator or a victim, the “prisoner as neighbor” frame acknowledges the uniqueness of each individual and the broad

1. There are many dimensions to this move towards full humanity, including addressing past trauma and embracing notions of socialization and responsibility, and a comprehensive treatment of each is beyond the scope of this Essay.

2. Indeed, many of us may not actually know our neighbors, and some may prefer this anonymity.

3. This broader, more normative notion of neighbor as related to moral proximity reflects the “neighbour principle” first articulated in 1932 by Lord Atkin in the landmark “Snail in the Bottle” case that established when a duty of care might arise. *Donoghue v. Stevenson* [1932] AC 562 (HL) 564 (appeal taken from Scot.).

dignitary interests that transcend prison walls, making it fundamentally incompatible with our system of mass incarceration.

I. Prisoner as Predator

A. History

Increasing anxiety about crime and the “criminal element” presaged the rise of mass incarceration.⁴ From 1963 to 1973, reported murders doubled (from 4.5 to 9.07 per 100,000), and assaults and robberies also increased substantially (from 91.4 to 193.6 and from 61.5 to 177.9, respectively).⁵ Richard Nixon capitalized on this increase, making crime a central issue in his successful 1968 presidential campaign.⁶ Nixon, like President Johnson⁷ and Republican nominee Barry Goldwater,⁸ connected street crime with civil rights activism, reflecting and reinforcing popular, racialized beliefs about crime and criminals.⁹

4. While this Essay focuses on the period in twentieth-century U.S. history characterized by an explosion in the rate of incarceration, long before 1970, the ground for mass incarceration was “fertile,” characterized by “public anxiety about both actual and alleged criminal behavior by racial and ethnic minorities and the use of state punishment to control them.” See Ruth Delaney et al., *American History, Race, and Prison*, in VERA INST. OF JUST., REIMAGINING PRISON WEB REPORT (2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison>; see also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). However, as some have observed, an exclusive focus on the racial roots of mass incarceration risks obscuring the role of the dramatic increase in crime during this time. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 35 (2012).

5. Jerome G. Miller, *The Debate on Rehabilitating Criminals: Is It True that Nothing Works?*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/scans/rehab.html> (last visited Aug. 6, 2022) (adapting and expanding upon Jerome Miller, *Is Rehabilitation a Waste of Time?*, WASH. POST, Apr. 23, 1989, at C3 (ProQuest)).

6. Delaney et al., *supra* note 4.

7. See *id.* (“In 1965, President Lyndon Johnson declared the ‘War on Crime,’ and perceived increases in crime in urban centers—which were largely populated by black people—became connected with race in the public’s consciousness.”); ALEXANDER, *supra* note 4, at 45.

8. Delaney et al., *supra* note 4 (“In the 1964 presidential election, Barry Goldwater (Lyndon Johnson’s unsuccessful Republican challenger) campaigned on a platform that explicitly connected street crime with civil rights activism.”); see also Bruce Western, *The Prison Boom and the Decline of American Citizenship*, SOC’Y, Sept. 2007, at 30, 31.

9. See Delaney et al., *supra* note 4 (“Richard Nixon also successfully used a street crime and civil rights activism narrative in his 1968 and 1972 presidential campaigns.”); ALEXANDER, *supra* note 4, at 44.

As crime rates increased,¹⁰ confidence in rehabilitation plummeted.¹¹ Concerns about needing to be “tough on crime” reflected the claim, which was to dominate public discourse by the mid-1970s, that efforts to rehabilitate prisoners were futile because “nothing works.”¹² This claim—most famously associated with Robert Martinson¹³—had bipartisan appeal.¹⁴

As politicians vied for who could demonstrate stronger “tough on crime” bona fides, prison sentences increased in length and the number of incarcerated individuals grew exponentially.¹⁵ The prison population swelled from 196,441 in 1970 to 481,616 in 1985,¹⁶ reflecting the dominance of a “tough on crime” approach.

10. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 90 (2001) (“In the USA, crime rates rose sharply from 1960 onwards, reaching a peak in the early 1980s when the rate was three times that of twenty years before, the years between 1965 and 1973 recording the biggest rise on record. Moreover, the increases occurred in all the main offence categories, including property crime, crimes of violence and drug offending.”).

11. Francis T. Cullen, *Rehabilitation: Beyond Nothing Works*, 42 *CRIME & JUST.* 299, 299 (2013) (“By 1975, the long-standing rehabilitative ideal had collapsed . . .”).

12. See, e.g., Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, *PUB. INT.*, Spring 1974, at 22, 48, https://www.nationalaffairs.com/public_interest/detail/what-works-questions-and-answers-about-prison-reform.

13. Martinson’s skepticism toward rehabilitation can be traced to his participation in *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies*, a “survey of 231 studies on offender rehabilitation” described as “the most politically important criminological study of the past half century.” See Miller, *supra* note 5. Martinson eventually disavowed this claim (and committed suicide). *Id.* Nonetheless, his initial work continued to be used in support of tough-on-crime policies. Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, *N.Y. TIMES MAG.*, Mar. 26, 2015, <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> (noting that a 1984 Senate report that “call[ed] for more stringent sentencing guidelines cited Martinson’s 1974 paper, without acknowledging his later reversal”).

14. Martinson published a four-part series in the *New Republic*, where he asserted that the “array of correctional treatments has no appreciable effect - positive or negative - on rates of recidivism of convicted offenders.” Miller, *supra* note 5. In the *Public Interest*, a conservative magazine, Martinson wrote, “[R]ehabilitative efforts that have been reported so far have no appreciable effect on recidivism.” Martinson, *supra* note 12, at 25 (italics omitted), *quoted in* Miller, *supra* note 5. At a time when the United States was emerging from the Vietnam War and concerns abounded about “an unruly youth and drug culture,” the mantra “nothing works” was a slogan for the times.” Miller, *supra* note 5.

15. See JEREMY TRAVIS ET AL., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 3 (2014).

16. Delaney et al., *supra* note 4.

Incarceration was touted as the best way to reduce crime rates because placing repeat offenders in jail would prevent them from further offending.¹⁷ While Martinson and the “nothing works” mantra focused on the futility of rehabilitation, others—most notably James Q. Wilson—took a more Calvinist stance, discussing not just the “error” of the offender’s ways but also the offender’s “nature,” maintaining that it would be unrealistic to expect a “transformation of his character.”¹⁸ Wilson’s archetypal criminal was young and amoral, and he famously described the “terrif[ying] prospect of innocent people being gunned down at random, without warning and almost without motive, by youngsters who afterward show us the blank, unremorseful faces of seemingly feral, presocial beings.”¹⁹

The notions that rehabilitation was futile and that a prisoner’s character was irredeemable harnessed bipartisan support for 1980s legislation that only further increased incarceration rates and demonized Black men specifically, though without explicitly mentioning race. For example, in 1986, Congress passed the Anti-Drug Abuse Act, which punished crack cocaine users (who were disproportionately Black) 100 times more than powder cocaine users (who were disproportionately White).²⁰ Some of the most extreme of these laws included life-without-parole sentences for juveniles.²¹

By the mid-1990s, the archetypal “criminal” was vilified as a “super-predator.” John Dilulio (a student of Wilson’s)²² developed the “super-predator” theory, which predicted an exponential increase in juvenile crime

17. See, e.g., *Long Sentences Sought for Repeat Offenders*, N.Y. TIMES, Apr. 25, 1982, at 63 (discussing the imposition of longer sentences for repeat offenders as a means of reducing crime) (“[W]ith these people off the streets, more people are not encouraged to commit crimes.” (quoting Pete Adams, president of the Louisiana District Attorneys Association)).

18. Miller, *supra* note 5 (quoting JAMES Q. WILSON, THINKING ABOUT CRIME 170 (1975)).

19. James Q. Wilson, *What to Do About Crime*, COMMENTARY, Sept. 1994, at 35, <https://www.commentary.org/articles/james-wilson/what-to-do-about-crime/> (“[J]ust beyond the horizon, there lurks a cloud that the winds will soon bring over us. The population will start getting younger again. By the end of this decade there will be a million more people between the ages of fourteen and seventeen than there are now. Half of this extra million will be male. Six percent of them will become high-rate, repeat offenders—30,000 more muggers, killers, and thieves than we have now. Get ready.”).

20. See Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs>.

21. See *id.* (addressing the Supreme Court’s ruling against these sentences as “cruel and unusual punishment” in 2012).

22. Jonathan Simon, *The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to Brown v. Plata*, 48 HARV. C.R.-C.L. L. REV. 217, 241 (2013) [hereinafter Simon, *The Return of the Medical Model*].

and violence.²³ The so-called super-predators were remorseless, impulsive juvenile criminals.²⁴ Dilulio warned of this “coming ‘breed’ of juvenile offenders”²⁵ who were “fatherless, Godless, and jobless”²⁶ and who would “kill, rape, [and] maim, without giving it a second thought.”²⁷ Conceptions of the super-predator were highly racialized, and the archetypal super-predator was “imagined as a faceless young Black man, wearing a bandana and sagging jeans.”²⁸

The myth of the super-predator was embraced by politicians across the political spectrum. In 1996, as part of a speech heralding community policing, then-First Lady Hillary Rodham Clinton described the need for “more police officers on the street” to combat crime perpetrated by “the kinds of kids that are called super-predators,” characterizing these youth as having “no conscience, no empathy.”²⁹ Also in 1996, Dilulio collaborated with William Bennett, a drug official in the Reagan administration, co-authoring the book *Body Count: Moral Poverty . . . and How to Win America’s War*

23. John Dilulio, *The Coming of the Super-Predators*, WASH. EXAM’R (Nov. 27, 1995), <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators>.

24. *Id.*

25. Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 425 (2017) (quoting Editorial, *Echoes of the Superpredator*, N.Y. TIMES (Apr. 13, 2014), <http://www.nytimes.com/2014/04/14/opinion/echoes-of-the-superpredator.html> [<https://perma.cc/X9V6-THGL>]).

26. *Id.* (quoting John J. Dilulio, Jr., *Arresting Ideas*, 74 HOOVER INST. POL’Y REV. 12, 15 (1995)).

27. *Id.* (quoting Editorial, *supra* note 25 (quoting Dilulio)).

28. Ekow N. Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 109 (2020).

29. C-SPAN, *1996: Hillary Clinton on “Superpredators” (C-SPAN)*, YOUTUBE (Feb. 25, 2016), <https://www.youtube.com/watch?v=j0uCrA7ePno>. In 1993, then-Senator Biden (and chair of the Senate Judiciary Committee) used the term “predator” in a speech on the Senate floor in support of the Senate’s Violent Crime Control and Law Enforcement Act. See Andrew Kaczynski, *Biden in 1993 Speech Pushing Crime Bill Warned of ‘Predators in Our Streets’ Who Were ‘Beyond the Pale,’* CNN (Mar. 7, 2019, 11:43 AM EST), <https://www.cnn.com/2019/03/07/politics/biden-1993-speech-predators/index.html>. He described the “predators on our streets” as “‘beyond the pale many of those people, beyond the pale,’ . . . ‘And it’s a sad commentary on society. We have no choice but to take them out of society.’” *Id.* He further warned that society must focus on the

“cadre of young people, tens of thousands of them, born out of wedlock, without parents, without supervision, without any structure, without any conscience developing because they literally . . . because they literally have not been socialized, they literally have not had an opportunity.” He said, “we should focus on them now” because “if we don’t, they will, or a portion of them, will become the predators 15 years from now.”

Id. (alteration in original).

Against Crime and Drugs,³⁰ which demonized minority youth (the so-called “super-predators”) and “warned of a coming wave of violence unless harsh new policies were introduced.”³¹

B. Characteristics

1. Danger

The “prisoner as predator” frame casts prisoners as inherently dangerous.³² Prisoners, according to this lens, are monstrous, sub-human creatures, unrestrained by notions of right and wrong. This frame easily justifies lengthy sentences and “total incapacitation”³³ since, if released, these “dangerous criminals” would pose a great threat to society.³⁴

2. Stasis

This construction envisions those incarcerated as irredeemable. Prisoners, according to this lens, inherently lack a moral compass and, with it, compassion or remorse, and thus are incapable of rehabilitation. The prisoner’s status as “criminal” is fixed, and the crime for which a prisoner

30. WILLIAM J. BENNETT, JOHN J. DILULIO, JR. & JOHN P. WALTERS, *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA’S WAR AGAINST CRIME AND DRUGS* (1996).

31. Simon, *The Return of the Medical Model*, *supra* note 22, at 240–41.

32. This construction is highly racialized with the stereotypical “criminal” cast as a young Black male—the archetypal “super-predator.” *See supra* text accompanying note 28.

33. *See, e.g.*, JONATHAN SIMON, *Total Incapacitation: The Penal Imaginary and the Rise of an Extreme Penal Rationale in California in the 1970s*, in *INCAPACITATION: TRENDS AND NEW PERSPECTIVES* 15 (Marijke Malsch & Marius Duker eds., 2013); Avlana K. Eisenberg, *Discontinuities in Criminal Law*, 22 *THEORETICAL INQUIRIES L.* 137, 144 (2021) [hereinafter Eisenberg, *Discontinuities in Criminal Law*]; Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 *BERKELEY J. CRIM. L.* 259, 260–61 (2011).

34. Simon, *The Return of the Medical Model*, *supra* note 22, at 243 (describing a “new penology, which promoted the total incapacitation of prisoners, and presumed a high and unchanging degree of personal threat posed by them to the community”). The Supreme Court affirmed this model when it upheld California’s “three strikes” law, which allowed for a sentence of twenty-five years to life for conviction on a third felony. *Id.* at 243–44. While most accounts of “dangerous criminals” focus on the danger these individuals pose to society-at-large, firsthand accounts of those incarcerated have revealed the dangerousness of the prison environment and how this environment makes people more dangerous and even predatory. In the words of former incarcerated Jack Abbott, “Many times you have to ‘prey’ on someone, or you will be ‘preyed’ on yourself.” JACK H. ABBOTT, *IN THE BELLY OF THE BEAST: LETTERS FROM PRISON* 121 (1981).

was convicted will continue to define that person,³⁵ both within the prison context and beyond. Since a prisoner's "criminal status" is understood to outlast that person's incarceration, the imposition of severe collateral consequences upon release, including any lingering stigma associated with prior convictions, is entirely justified.

This notion of the prisoner as a remorseless individual with the fixed status of "criminal" supports the notion that the prisoner needs to be controlled and separated from civil society. This view is consistent with second-class citizenship and "civil death."³⁶ The prisoner is not viewed as capable of being a full-fledged, contributing member of the polity. Rather, the prisoner is understood to lack the capacity to live in accordance with basic moral norms and instead is driven by passions or even, according to some, by an evil disposition.

3. *Deindividuation*

The "prisoner as predator" frame deindividuates those incarcerated. Prisoners, according to this lens, are represented by an archetype rather than by individual characteristics, stories, quirks, fears, and longings. To the extent that they are in any way differentiated, it is based on their crimes. Over time, even those details fade such that the prisoner becomes part of the consolidated masses of those incarcerated—an indistinguishable speck in the broader picture of mass incarceration in the United States.

II. *Prisoner as Victim*

A. *The Reformist Impulse*

Scholars and activists seeking to expose the pathologies of mass incarceration have focused on the need to reimagine prisoners as human. As Sharon Dolovich has warned, "The self-perpetuating character of the American carceral system will not be disrupted until society as a whole

35. See Priyanka Boghani, *They Were Sentenced as "Superpredators." Who Were They Really?*, PBS (May 2, 2017), <https://www.pbs.org/wgbh/frontline/article/they-were-sentenced-as-superpredators-who-were-they-really/> ("They're just looking at the crime You're a predator, and that's it.")

36. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012). This frame is also consistent with the nineteenth-century understanding of the prisoner as a "slave of the State." See, e.g., *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871) ("He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights . . .").

begins to see that it is fellow human beings we are incarcerating.”³⁷ Michelle Alexander echoes this sentiment, urging Americans to embrace the “humanness” of those we incarcerate.³⁸

In practice, the enterprise of humanizing prisoners has often yielded a focus on prisoners’ *vulnerability*. This has involved exposing ways in which prisoners are mistreated, examples of basic needs that have gone unmet, or instances where a glaring lack of prison oversight has resulted in the victimization of prisoners. For example, Michele Deitch has highlighted “four groups of prisoners for whom the need for external scrutiny with regard to their treatment is critical: prisoners held in administrative segregation and other forms of isolation, prisoners who are particularly vulnerable to sexual assault, prisoners with mental and physical disabilities, and prisoners with serious medical needs.”³⁹ In addition to all the ways in which prisoners are made vulnerable by their experience of incarceration, many prisoners enter prison already burdened by vulnerability, for example, because of severe mental illness.⁴⁰

Owing to the invisibility of life behind prison walls, the vulnerability of prisoners is rarely on public display. It was thus highly significant when, in

37. Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 259 (2009). Dolovich has also maintained that “the humanity principle, which obliges the state to avoid imposing punishments that are gratuitously inhumane,” is critical to legitimating prison practices and policies. Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 445 (2005) (emphasis omitted) (addressing the additional concern that prison sentences are “gratuitously long”).

38. TEDx Talks, *The Future of Race in America: Michelle Alexander at TEDxColumbus*, YOUTUBE (Oct. 16, 2013), <https://www.youtube.com/watch?v=SQ6H-Mz6hgw> (highlighting key points from Alexander’s best-selling book and garnering more than 470,000 views on YouTube); ALEXANDER, *supra* note 4, at 172 (“Rather than shaming and condemning an already deeply stigmatized group, we, collectively, can embrace them—not necessarily their behavior, but them—their humanness. As the saying goes, ‘You gotta hate the crime, but love the criminal.’”).

39. Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291, 292 (2010).

40. See, e.g., *Criminalization of Mental Illness*, TREATMENT ADVOCACY CTR., <https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness> (last visited Aug. 1, 2022) (explaining that, due to deinstitutionalization, jails and prisons currently serve as the nation’s asylums) (“Individuals with psychiatric diseases like schizophrenia and bipolar disorder are 10 times more likely to be in a jail or prison than a hospital bed.”); Matt Ford, *America’s Largest Mental Hospital Is a Jail*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/> (“[The National Alliance on Mental Illness] estimates that between 25 and 40 percent of all mentally ill Americans will be jailed or incarcerated at some point in their lives.”).

2011, the Supreme Court exposed this hidden world of prisons and prisoners to reveal the heightened vulnerability of a subset of the nation's prisoners.⁴¹ Justice Kennedy's majority opinion in *Brown v. Plata* described in excruciating detail the appalling neglect of California prisoners' mental health and medical needs.⁴² An appendix to the opinion included pictures—a rarity in the text-dominant domain of judicial opinions—of squalid prison conditions featuring prisoners on bunkbeds crammed together wall-to-wall in a gymnasium.⁴³

The majority opinion in *Brown v. Plata* was framed around human dignity: "Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.'"⁴⁴ The lack of medical and mental health care plaguing California prisons, the majority opinion maintained, "is incompatible with the concept of human dignity and has no place in civilized society."⁴⁵ The Court revealed the humanity of prisoners by showcasing their vulnerability, fusing the concepts of humanity and vulnerability.

B. Characteristics

1. Endangered

The "prisoner as victim" construction views prisoners as endangered because their basic needs are neglected. Whereas the "prisoner as predator" frame casts prisoners as inherently dangerous, here, prisoners are cast as victims of abuse. This lens centers the category of "perpetrator-victim"—highlighting the dangerousness of the prison environment, not solely because prisoners are known to victimize each other, but because the state, through neglect of basic human needs, may endanger those it incarcerates, rendering

41. See *Brown v. Plata*, 563 U.S. 493 (2011).

42. *Id.* at 507–09. In this narrow (5-4) decision, a slim majority of the Court not only acknowledged the vulnerability of prisoners but also that they have a dignitary interest. *Id.* at 510. This acknowledgement stood in sharp contrast to earlier judicial characterizations of prisoners as "slave[s] of the State." See *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871); see also Simon, *The Return of the Medical Model*, *supra* note 22, at 251–52 ("*Brown v. Plata* is the first case to begin to read the Eighth Amendment in light of the emerging crisis of chronic illness in prison.>").

43. *Plata*, 563 U.S. at apps. B–C.

44. *Id.* at 510 (quoting *Atkin v. Virginia*, 536 U.S. 304, 311 (2002)).

45. *Id.* at 511.

them victims.⁴⁶ This frame recognizes that prisoners, like non-prisoners, have basic human needs and that they suffer when these needs go unmet.

Nonetheless, this construction is still compatible with a system of mass incarceration. The “prisoner as victim” frame suggests that, if only facilities were better staffed and prison conditions improved, prisoners would cease to be endangered and prisons could function without impeding the human dignity of those incarcerated.⁴⁷ Yet, the genuine recognition of the dignity of all persons, including prisoners, is incompatible not merely with mass incarceration involving unsafe, unhealthy conditions, but also mass incarceration without those conditions that threatens to stunt the lives of prisoners after they leave prison.

2. *Stasis*

Though obviously in some ways more sympathetic than the “prisoner as predator” frame, the “prisoner as victim” frame shares with its counterpart a commitment to the idea of prisoners as possessing a fixed status. Where the medical or mental health needs of prisoners are neglected to such an extent that they reach a crisis point, these individuals may be dismissed as a “lost cause” or as “beyond repair.” Abusive and inhumane conditions leave a lasting mark, and the person who has suffered such conditions may forever be cast as a “victim.”⁴⁸

46. A 2012 study surveyed individuals sentenced to life without parole and found “overwhelming evidence that the childhoods they had were considerably violent and disrupted.” Boghani, *supra* note 35 (“79 percent reported witnessing violence in their homes growing up More than half reported seeing violence in their neighborhood on a weekly basis. More than a quarter had a parent in prison, while 59 percent had a close relative who was incarcerated.”). Further highlighting the salience of the “perpetrator-victim” category, “[t]he survey also found high levels of abuse, especially among girls. Around 47 percent reported being physically abused, including nearly 80 percent of girls, while 20 percent reported being sexually abused, including 77 percent of girls.” *Id.* “Most of these kids were victims before they were perpetrators You don’t normally have a 14- or 15-year-old involved in serious violent crime without something having gone wrong early on or somewhere in their past.” *Id.*

47. This frame thus challenges more simplistic, one-dimensional accounts of the sources of danger in prison. Whether framed as a problem of overcrowding, or as a matter of inadequate resources to meet basic medical or mental health needs (or in the case of the *Brown v. Plata* litigation, both), this framing of the problem invites a solution that could keep the system of mass incarceration intact, “solving” the problem by building new prisons, improving conditions, and hiring more medical and mental health providers.

48. While this is a very different frame from the idea that an “errant” or “wicked” character makes a person “irredeemable,” both “prisoner as predator” and “prisoner as victim” frames share a lack of dynamism.

The notion of the prisoner (or certain groups of prisoners) as having a static identity as vulnerable is consistent with the idea that this person cannot overcome his circumstances and will forever be, in some way, a victim or a second-class citizen. The vulnerable prisoner lacks autonomy not because he is driven by “passions” or a “wicked character” but because he is neglected or “acted upon” through the denial of basic needs that resulted (predictably) in failing physical or mental health. However, these frames share a crucial similarity. Whether a prisoner’s character is believed to be irredeemable, or that person’s basic needs have been so neglected that they may never recover, both frames are static. By envisioning prisoners as—for whatever reason—a “lost cause,” both are also consistent with the existing system of mass incarceration.

3. *Deindividuation*

Not so differently from the “prisoner as predator” frame, the “prisoner as victim” frame deindividuates those incarcerated. Prisoners, according to this lens, lack autonomy and are characterized by their status as vulnerable, neglected, and sub-human because they lack the basic provisions associated with human dignity. In the “prisoner as victim” cast, prisoners are defined by their malady—the features and consequences of their neglect. Their numbers are staggering, and the focus on them quickly morphs into a focus on these high numbers rather than on individual stories (other than to illustrate the severity of the systemic neglect).

Indeed, even for those concerned about the human and financial costs of mass incarceration, a focus on the numbers—e.g., two million, or one in 100 adults—casts prisoners as undifferentiated.⁴⁹ Similarly, a focus on vulnerabilities that result from prison overcrowding detracts from the narratives of individuals who are incarcerated.

III. *Prisoner as Neighbor*

Part II demonstrated that the project of reimagining prisoners as human, while an indispensable step away from the “prisoner as predator” frame that contributed to the rise of mass incarceration, is still entirely consistent with

49. *Incarceration Rates in Selected Countries 2021*, STATISTA (June 2, 2021), <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/> (“Roughly 2.12 million people were incarcerated in the U.S. in 2020.”); Peter Wagner & Wanda Bertram, “*What Percent of the U.S. Is Incarcerated?*” (*and Other Ways to Measure Mass Incarceration*), PRISON POL’Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/> (reporting that 0.88% of adults in the United States are “behind bars”).

mass incarceration. Part III considers what further steps would be necessary—how prisoners would need to be further reimagined—to render mass incarceration untenable. It proposes that this project would require no less than reimagining the archetypal prisoner as someone who aspires to self-fulfillment and personal actualization—in essence, as *fully* human. Given the massive (and, to many, unimaginable) ambition of the project, as well as the many roadblocks and contravening incentives that make prison reform so challenging, to even conceive of ending mass incarceration, we must be prepared to entertain a drastic change in perspective—we must permit ourselves to “think big” about sweeping perceptual changes that would not just move the needle but unsettle the system.⁵⁰

To test our commitment to this proposition, this Part invites us to imagine the prisoner as our neighbor and to consider what resources, support systems, and opportunities we would want a neighbor to have, both within prison and upon release.⁵¹ This exercise requires us to examine closely the “practices of incarceration,” which include aspects of the prison environment and specific programs—whether educational, vocational, artistic, religious, or recreational—that can either promote or detract from an incarcerated person’s ability to reenter society.⁵² It would also challenge us to consider whether we would want our neighbor to be incarcerated at all and, if not, what resources and support systems could be developed outside the carceral system.

There are, and foreseeably will continue to be, substantial political and financial obstacles to implementing sweeping decarceral reforms.⁵³ Lack of funding, personnel, and political will are among the reasons broad-based reforms may be dismissed as fanciful or inadvisable (or both). Yet, even

50. This Essay focuses on the shift in thinking that would be required for such systemic disruption; a comprehensive plan for implementation is beyond its scope.

51. Of course, different individuals have (and would choose to have) different relationships with their neighbors. And many may prefer not to have a relationship with their neighbors, opting to retain as much anonymity as possible. However, even for those who do not feel any kinship with their neighbors, this analogy may still be useful. While the happiness of our neighbors may be irrelevant to us, if our neighbors are experiencing distress, whether financial, personal, or professional, signs of their unhappiness—whether as relates to their physical property or emotional affect—may impinge upon our own wellbeing. It is this connection between our own fate and the fate of the other that this neighbor paradigm attempts to illustrate.

52. Avlana K. Eisenberg, *The Prisoner and the Polity*, 95 N.Y.U. L. REV. 1, 5 (2020) [hereinafter Eisenberg, *The Prisoner and the Polity*].

53. See, e.g., Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 101–19 (2016).

incremental shifts in the practices of incarceration could aid in shifting narratives about prisoners, which might ultimately yield additional, more substantial reforms.

This Essay's thought experiment brings into focus ways in which narratives about "criminals" reflect and are reinforced by the practices of incarceration, and how the interdependence of narrative and practice could be leveraged by reformers. It further challenges the reader to confront not only the substantial challenges of operationalizing this vision on a grand scale, but also ways in which we may feel personal resistance—how we may viscerally push back against the notion that a prisoner could be our neighbor—and how such resistance, whether conscious or not, continues to impede the decarceral enterprise.

A. *The Principle of Return*

More than ninety-five percent of prisoners will eventually leave prison to reenter society.⁵⁴ As I have argued elsewhere, to give meaning to the notion of a time-limited punishment requires acceptance of a "principle of return," which includes "the idea of a fair chance of reestablishing oneself in the community."⁵⁵

This approach would require an investment in each imprisoned person's emotional, mental, and physical health, educational attainment, and job prospects. It would recognize each person as a unique, complex individual, with their own goals, dreams, and fears, like any other member of society.

From the time a person enters prison, consideration would be given to how best to prepare that individual to thrive upon release from prison. This approach reflects the philosophy of "normalization," which characterizes prisons in Germany and the Netherlands, where efforts are made to keep life in prison as "normal" as possible such that it is easier for those incarcerated to reintegrate into society.⁵⁶

54. Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, BUREAU OF JUST. STAT., <https://www.bjs.gov/content/pub/pdf/reentry.pdf> (Apr. 14, 2004).

55. Eisenberg, *The Prisoner and the Polity*, *supra* note 52, at 1.

56. Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, VERA INST. OF JUST. (Oct. 2013), <https://www.vera.org/publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states>. Adherence to the philosophy of "normalization" would also affect decisions made *ex ante* about who should be incarcerated. Countries that ascribe to a normalization model rely far less on incarceration, instead using fines, community service, warnings, and other less severe sanctions in most cases. *See* Peter Wagner, *Incremental Declines Can't Erase Mass Incarceration*, PRISON POL'Y INITIATIVE (June 5,

The “prisoner as neighbor” frame purposefully goes beyond abstractions. Rather, it insists that we include ourselves in the narrative, challenging us to envision a scenario in which we are invested in those we incarcerate not just out of benevolence, but because we imagine ourselves to share membership in a polity, and even more concretely, in a neighborhood. This thought experiment requires us to connect the fate of those we incarcerate to our own, to imagine them in our lives.⁵⁷

B. Characteristics

1. Beyond Danger

Both “prisoner as predator” and “prisoner as victim” frames are fixated on danger—either the danger posed by the “criminals” who are incarcerated, or the dangers they face because of the conditions of their incarceration. By contrast, danger is not the focus of the “prisoner as neighbor” frame.

Instead, the focus is on needs. This inquiry is two-fold. First, this approach demands a “root-cause analysis,” a needs-based assessment that should occur when a person first enters prison.⁵⁸ A person’s needs will often expose the root causes of their criminal activity. Perhaps they have an undiagnosed mental health condition.⁵⁹ Or they need drug or alcohol treatment. Or a way

2018), <https://www.prisonpolicy.org/blog/2018/06/05/annualchanges/>. If one is focused on a person’s prospects for reintegration into society, one must consider the consequences of separating that person from society. For example, if a person is already part of the labor force, taking that person out of the labor force to put them in prison could have deleterious short- and long-term effects on that person’s employment prospects. The philosophy of normalization is, at its core, inconsistent with mass incarceration and demands close consideration of the full panoply of consequences that may result when we choose to incarcerate a fellow human being.

57. It is worth noting that contemporary U.S. society is known for its limited social support networks and high levels of loneliness. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (demonstrating, based on evidence that includes nearly 500,000 interviews over a twenty-five-year period, that Americans “sign fewer petitions, belong to fewer organizations that meet, know our neighbors less, meet with friends less frequently, and even socialize with our families less often”). While the focus of this Essay is on how we view prisoners, perhaps the further step of imagining *everyone* as our neighbor would make it harder to dehumanize people and to “other” them, ultimately making us less prone to turn to incarceration on the front-end.

58. A person’s needs should be assessed upon entry to a carceral facility and reassessed at regular intervals thereafter. The needs of those already in prison should also be regularly assessed.

59. See, e.g., Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL’Y 265

to earn money. Or basic life skills. Or mentorship. Whether related to education, employment, or health,⁶⁰ the focus would be on each person's unique needs.

Second, and just as important, the state should assess what each person would need to thrive in society upon release. Once having identified these needs, the state should determine what services must be provided to those it incarcerates such that they will be able to reintegrate successfully upon release from prison.⁶¹ Put simply, we imagine each individual upon release from prison as a striving, well-functioning person pursuing his or her life goals, and then we work backwards to discern what investments would be necessary to reach that vision. This investment in the personhood of those we incarcerate would be transformative, as they would be viewed as having the potential to grow, develop skills, and contribute to society.

Whereas the image of the prisoner struggling with unmet medical or mental health needs might provoke sympathy, as well as acknowledgement of that person's shared humanity and vulnerability, the frame that envisions the prisoner as a neighbor insists that this person is deserving of not just sympathy, but opportunity. We expect that our neighbors have opportunities akin to ours—we even aspire to “keep up with the Joneses.” Such a frame is inconsistent with the notion of second-class citizenship. Rather, it expects us all to be on an equal playing field. An assessment of and investment in the unique needs of every prisoner would be geared towards enabling each individual to flourish upon release.

2. *Dynamism*

In contrast to the static “prisoner as predator” and “prisoner as victim” frames, this lens imagines prisoners as capable of transformation. There is no telling what this person will accomplish, where his or her path may lead. This lens allows for the possibility of personal growth, self-discovery, and

(2006) (referencing studies that document a high rate of undiagnosed mental disorders in California prisons).

60. These needs are, of course, not mutually exclusive. Most prisoners will have needs in more than one of these areas, and the intersectionality of these needs should be addressed.

61. This approach stresses the individual needs of those incarcerated, rather than a one-size-fits-all model. However, the general notions that prisoners have a range of needs, and that the state should provide services that will address these needs as they relate to different dimensions of a person's life, are not new. In his iconic *Discipline and Punish*, Michel Foucault outlines Leon Faucher's 1938 rules “for the House of young prisoners in Paris,” which included a timetable with designated times for work; study of “reading, writing, drawing and arithmetic”; recreation; prayer; and affirmations. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 6–7 (1977).

evolving aspirations.⁶² There is no fixed status that defines the person incarcerated. Their incarceration is a chapter of their life, but they are not defined by their crime, nor are they imagined to be forever vulnerable because they lack the provisions necessary to thrive in society.

Consistent with the dynamic identity of the “prisoner as neighbor,” this approach focuses on each person’s capabilities and potential for growth.⁶³ It also focuses on the prisoner’s relationship to the polity and how that person could contribute to the collective wellbeing upon release from prison.

Imagining the prisoner as a neighbor would require us to reconsider our system of collateral consequences—the “vast array of restrictions that preclude the former prisoner, upon release, from full social, professional, and political participation.”⁶⁴ It would benefit us if our neighbors were thriving (financially, socially, and emotionally), and thus, it would behoove us to remove stumbling blocks that hinder their ability to access resources (be they educational, employment-related, or otherwise) that would enable them to contribute fully as productive citizens.⁶⁵

62. The default assumption should shift from viewing prisoners as possessing a static identity to one that acknowledges the prospect of human dynamism. However, this is not to suggest that such meaningful transformation will be possible for every individual, or to deny that there will be some individuals who will not be able to benefit from this shift because of the severity of their mental disorders or other afflictions, in many cases because their needs have gone unmet for so long.

63. This concept may have most traction as pertains to juveniles, especially given the U.S. Supreme Court’s jurisprudence about juveniles and sentencing, and the Court’s references to the neurological development of minors. *See Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (“The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’” (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988))). While juveniles may provide a helpful—because perhaps less controversial—starting point, this concept is not intended to apply solely to juveniles, and there is some concern that a focus on juveniles could obscure the value of treating all those incarcerated as having the potential for transformation. It is worth noting that, while juveniles represented the archetypal example of “prisoner as predator,” ironically, they may also provide the most compelling example for the “prisoner as neighbor” frame.

64. Eisenberg, *Discontinuities in Criminal Law*, *supra* note 33, at 145.

65. These are not hypothetical scenarios; rather, they represent pressing policy questions that affect many individuals, including graduates of elite schools. *See, e.g.,* David Lat, *From Jail to Yale -- and Hopefully the Bar*, ABOVE THE L. (Aug. 11, 2017, 1:47 PM), <https://abovethelaw.com/2017/08/from-jail-to-yale-and-hopefully-the-bar/> (describing Yale Law grad Reginald Dwayne Betts’s struggle to gain admission to the Connecticut Bar); Nick Sibilla, *Federal Judge: Californians Who Fought Fires in Prison Can’t Become Career Firefighters*, FORBES (Feb. 16, 2021), <https://www.forbes.com/sites/nicksibilla/2021/02/16/federal-judge-californians-who-fought-fires-in-prison-cant-become-career-firefighters/?sh=3>

We might support expungement more readily if the alternative was that many of our neighbors were forever stigmatized because they were once convicted of a felony. We would want our neighbors to be able to secure gainful employment, so perhaps we would be more inclined to support measures that improve former prisoners' access to meaningful employment opportunities, as well as to support the educational attainment of the people who lived next door. If a former prisoner's fate were linked to our home's property value, we might be inclined to see that person—and his or her capacity for self-actualization—in a new light.

Newly released former prisoners would be welcomed into the community and given opportunities to connect with community leaders, including high-status individuals. Such efforts—whether informal or programmatic⁶⁶—would reflect the ethos of the existing Voluntary Probation Officer (“VPO”) program in Japan.⁶⁷ The goal of the VPO is to “smooth the way for the offender’s return to the community by seeking to arrange employment and alternative housing . . . , and by visiting the offender and family regularly during the parole or probation period.”⁶⁸ VPOs are well situated to promote reentry and serve post-release messaging functions.⁶⁹ They are “generally financially stable, well-respected members of the community; they come

ad2f3d8170f (discussing the California licensing law, upheld by a federal judge, that bans former prisoners who were trained to fight fires while in prisons from working as full-time firefighters once released from prison).

66. Informal mechanisms would include personal mentorship and extend to writing op-eds and starting social media campaigns to support a person's opportunities upon reentry. *See, e.g.*, James Forman, Jr., Opinion, *A Prison Sentence Ends. But the Stigma Doesn't*, N.Y. TIMES (Sept. 15, 2017), <https://www.nytimes.com/2017/09/15/opinion/a-jail-sentence-ends-but-the-stigma-doesnt.html> (highlighting the injustices faced by Michelle Jones and Reginald Dwayne Betts and advocating for their being given the opportunity to pursue their professional goals after having been released from prison); Bari Weiss, Opinion, *Admit This Ex-con to the Connecticut Bar*, N.Y. TIMES (Aug. 9, 2017), <https://nytimes.com/2017/08/09/opinion/admit-this-ex-con-to-the-connecticut-bar.html> (advocating for Betts to be admitted to the Connecticut Bar).

67. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 358 (1992). The VPOs constitute “a group of nearly 50,000 individuals who serve under a staff of approximately 800 professional probation officers responsible for the supervision and aftercare of released offenders.” *Id.*

68. *Id.*

69. The Japanese model is not without its detractors. *See* KARL N. LLEWELLYN, *The Anthropology of Criminal Guilt*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 439, 448 (1962); Foote, *supra* note 67, at 321 (“[T]he Japanese criminal justice system more closely resembles an ‘inquisitive’ family that insists on keeping tabs on its members and learning everything it can about them if they come under suspicion.”).

from established families with close ties throughout the community.”⁷⁰ It is common that the former prisoner visits the VPO every few weeks in his or her home to share tea or a meal—much as might be typical among neighbors in a tight-knit community.

3. Individuation

This approach would require assessing the uniqueness, needs, and capacities of each person we incarcerate. In doing so, it would reject the deindividuating “mass” frame that groups people together who have very little in common. While highlighting the aggregate numbers—e.g., how many people are incarcerated—reveals the vast scale of mass incarceration, ironically, focusing on the “masses incarcerated” detracts from individual narratives, which could make mass incarceration more sustainable.⁷¹ By contrast, if we envisioned those incarcerated as neighbors and community members, as productive citizens, as artistic and intellectual contributors, and as workers who are crucial to our economic growth, mass incarceration would be indefensible.

Conclusion

The move from “prisoner as predator” to “prisoner as victim” may be necessary to a reconceptualization of the state’s responsibility towards those it incarcerates, but it is far from sufficient to address our nation’s mass incarceration crisis. This Essay exposes the limitations of reformist approaches that focus on the vulnerability of prisoners, arguing that a further narrative shift would be necessary to acknowledge the full humanity of those we incarcerate and the interconnectedness of their lives with ours. The Essay’s alternative “prisoner as neighbor” frame, which recognizes each person—whether incarcerated or not—as flawed yet aspiring, and as capable of contributing to society, would render our system of mass incarceration untenable.

70. Foote, *supra* note 67, at 358. “In contrast to the professional probation officers, who have an average caseload of nearly 150 parolees and probationers at any given time, VPOs are responsible for an average of less than two people.” *Id.*

71. It is, however, important to keep track of the numbers of those we incarcerate, and of their demographic information, which further highlight the pathologies of the system.