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Graham, Miller, & the Right to Hope

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GRAHAM, MILLER, & THE RIGHT TO HOPE

J.M. Kirby†

I. INTRODUCTION

In 2010, the Supreme Court held that it is unconstitutional to sentence a youth, convicted for armed robbery committed at age 16, to life in prison with no hope of release.¹ *Graham v. Florida* explicitly ends the practice of sentencing individuals convicted for non-homicide offenses committed while under the age of 18 to life without parole (“LWOP”).² Justice Stevens’ concurrence, joined by Justices Ginsburg and Sotomayor, placed the ruling in an ongoing evolution of “standards of decency” in Eighth Amendment jurisprudence.³ On June 25, 2012, the Court expanded on this decision in *Miller v. Alabama*, ruling that courts may not impose mandatory LWOP sentences on youth convicted of homicide committed while aged 17 and under, and thus that age must be considered at sentencing for these defendants.⁴

From the perspective of prisoners’ rights and youth advocates, these decisions represent a positive advancement,⁵ particularly when measured by international standards, which largely reject LWOP for juveniles.⁶ However, they also call into question the nature of the “evolution” in Eighth Amendment jurisprudence, suggesting that it is not fully ever-progressing, given the increased severity of U.S. sentencing practices over the past few decades.⁷ Set-

† J.D. Candidate (2013), Northeastern University School of Law (NUSL). My experience with NUSL’s Prisoners Assistance Project clinic continues to widen my understanding and deepen my analysis. For that, I am grateful to Professors Patty Garin and Wally Holohan. My thanks also to the staff of the City University of New York Law Review.

¹ *Graham v. Florida*, 130 S. Ct. 2011, 2018–20, 2030 (2010).

² *Id.* at 2030.

³ *Id.* at 2036 (Stevens, J., concurring).

⁴ *Miller v. Alabama*, 132 S. Ct. 2455, 2460, 2469 (2012).

⁵ See, e.g., Adam Liptak & Lisa Faye Petak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. TIMES, Apr. 20, 2011, at A13 (describing juvenile justice advocates’ efforts to extend *Graham v. Florida* to juvenile homicide cases); James Bell, *High Court’s Decision in Miller v. Alabama is a Victory for Many, Especially in Communities of Color*, JUV JUST INFO EXCHANGE (July 9, 2012).

⁶ See *Graham*, 130 S. Ct. at 2033 (noting that only 11 countries allow LWOP sentences for juveniles, and that in practice, only the United States and Israel actually impose the sentence).

⁷ ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT 1 (2009) (describing increasingly harsh sentencing policies over the past three decades, including mandatory sentences, cuts to parole release, emphasis on drug criminalization,

ting aside key decisions protecting certain classes of people from the death penalty in the broader tough-on-crime context of the past 30 years, the decisions could be framed more accurately as small steps forward after decades of leaps backwards. While undoubtedly representing important reforms, *Graham* and *Miller* should spark a profound rethinking of the foundation and trajectory of the U.S. prison system as a whole.

The decisions point to the lessened culpability of juveniles,⁸ and the court in *Graham* notes that there is a greater chance that young people's "character deficiencies will be reformed."⁹ Momentarily suspending what this means for adults, and considering solely the implications for youth, the decision's potential impact is limited¹⁰ despite this recognition of young people's probability for positive change. In *Graham*, the Court's recognition of the potential for change was not extended to those youth, even as young as 12,¹¹ who commit homicide offenses and are charged as adults. *Miller* does pose a significant hindrance to the imposition of LWOP sentences on juveniles convicted of homicide, but it falls short of a categorical prohibition.¹² Also, it is still conceivable for someone convicted as a juvenile to spend his or her entire life in prison, even on a non-homicide offense. The Court wrote that states are "not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime."¹³ Most states have mecha-

and de-emphasis on rehabilitation, all leading to dramatically increased imprisonment).

⁸ *Graham*, 130 S. Ct. at 2026; *Miller*, 132 S. Ct. at 2464-65.

⁹ *Id.* at 2027 (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

¹⁰ Courts are testing the outer limits of the *Graham* decision. In Virginia a Circuit Court judge recently dismissed a petition filed by a man who was sentenced as a juvenile to a life sentence with no hope of parole for a non-homicide offense. The judge reasoned, in part, that the man has an opportunity at conditional geriatric release when he reaches age 60. See Kristin Davis, *Va. Beach Judge Dismisses Claims Against Life Sentence*, VIRGINIAN-PILOT (May 5, 2011), <http://hamptonroads.com/2011/05/va-beach-judge-dismisses-claim-against-life-sentence>. In another recent case, the Seventh Circuit Court of Appeals refused to offer relief based on the *Graham* decision to Reynolds Wintersmith, who has served nearly two decades of a LWOP sentence on a first-time conviction for a non-violent drug offense he committed at age 17. See Annie Sweeney, *Supporters Seek Freedom for Convict Serving Life Sentence for First Time Conviction*, CHI. TRIB. (Oct. 2, 2011), http://articles.chicagotribune.com/2011-10-02/news/ct-met-drug-lifer-1002-20111002_1_sentencing-guidelines-drug-conspiracy-life-sentence.

¹¹ Just last year a Florida prosecutor charged a 12-year-old as an adult in a first-degree homicide case. Mark Woods, *'Baby-Faced' Boy's Case Highlights Debate about Trying Juveniles*, THE FLA. TIMES-UNION (Dec. 5, 2011, 1:44 PM) <http://jacksonville.com/news/crime/2011-06-04/story/baby-faced-boys-case-highlights-debate-about-trying-juveniles>.

¹² *Miller* 132 S. Ct. at 2469.

¹³ *Graham*, 130 S. Ct. at 2030.

nisms for “waiving” youth out of juvenile courts in order to try them as adults,¹⁴ and changes in sentencing structure since the 1970s, combined with the politicization of parole decisions, mean that fewer prisoners, including those convicted as youth, are released on parole.¹⁵ Thus, the limits of *Graham* and *Miller* as applied to juveniles reflect the severity of the U.S. prison system as a whole for all imprisoned people, regardless of age.

Other broader problems with the sentencing structure and with the nature and elusive goals of the prison system seep through the decisions, disrupting the Court’s line drawing. Writing for the majority in *Graham*, Justice Kennedy noted, “[p]arts of the brain involved in behavior control continue to mature through late adolescence.”¹⁶ Research suggests this process of brain maturation through adolescence continues until at least age 22.¹⁷ This would at least raise questions about courts’ approaches to sentencing people ages 18 to 22. Additionally, while this evidence points to adolescents’ lessened culpability and their potential to dramatically change, we should also question whether this means the Court should allow for adults to be presumed incapable of rehabilitation. Since evidence suggests that access to higher education and visits from loved ones reduce the chances of imprisoned people committing new offenses once paroled,¹⁸ might this mean that, with certain supports, the potential for fundamental change in all imprisoned people is far greater than many courts’ sentencing practices recognize? Justice Kennedy even asked during oral argument in *Graham*, “[w]hy does a juvenile have a constitutional right to hope, but an adult does not?”¹⁹

The *Graham* decision is peppered with unscientific terms such

¹⁴ Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL. (U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention) 1 (2010), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf>. Justice Kennedy points out that, while not necessarily a “realistic” practice in the most extreme theoretical cases, in Florida a child of any age can legally be tried as an adult and sentenced to life without parole for some offenses. See *Graham*, 130 S. Ct. at 2025–26.

¹⁵ DORIS L. MACKENZIE, NAT’L INST. JUSTICE, SENTENCING AND CORRECTIONS IN THE 21ST CENTURY: SETTING THE STAGE FOR THE FUTURE 19–20 (2001), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/189089.pdf>.

¹⁶ *Graham*, 130 S. Ct. at 2026.

¹⁷ Robert E. Shepherd, *The Relevance of Brain Research to Juvenile Justice*, 19 CRIM. JUST. 51, 52 (2005).

¹⁸ See discussion *infra* Parts II and III.

¹⁹ Joan Biskupic, *Kennedy Holds to Hope in 5-4 Ruling*, USA TODAY (May 17, 2010, 10:20 PM), http://www.usatoday.com/news/washington/judicial/2010-05-17-court-kennedy_N.htm?csp=obinsite.

as “irredeemable,”²⁰ “incorrigible”²¹ and “irretrievably depraved character,”²² which stem in part from language in the Court’s 2005 decision in *Roper v. Simmons*, barring capital punishment for juveniles. The *Miller* decision also has a small number of quotes from *Graham* containing these terms.²³ The idea in *Graham* seems to be that people age 17 and below who commit non-homicide offenses *may* not represent any of those things—hence why a LWOP sentence is inappropriate for them—but the same may not be said about everyone else convicted of crimes. The decision recognizes rehabilitation as “a penological goal that forms the basis of parole systems” in determining that penological theories do not justify non-homicide juvenile LWOP sentences.²⁴ In support of its holding, the court in *Miller* reiterates *Graham*’s reasoning regarding the role of the rehabilitation.²⁵ Yet in many ways the nature and operation of prison run counter to any reformatory or rehabilitative potential and may be to blame for recidivism or return to prison upon release. Rehabilitative opportunities for the thousands of youth who are confined to adult prisons may range from limited to non-existent.²⁶ In these adult prisons, youth face a high risk of suicide, are subject to physical and sexual abuse,²⁷ and are not accessing programs or education tailored to juveniles. For the high percentage of imprisoned people suffering mental illness, behavior associated with their mental illness may lead to disciplinary action, including “segregation,” which may dramatically worsen their mental health.²⁸ Even prisoners with no preexisting mental health issues may suffer hallucinations and other mental problems as a result of being held in prolonged isolation—a punishment that correctional officers have wide latitude in applying.²⁹ Given these and other forms of suffering that prisoners endure, coupled with

²⁰ *Graham*, 130 S. Ct. at 2030.

²¹ *Id.* at 2029.

²² *Id.* at 2026 (“Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

²³ See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

²⁴ *Graham*, 130 S. Ct. at 2029–30.

²⁵ *Miller* 132 S. Ct. at 2465.

²⁶ JAMES AUSTIN ET AL., BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, JUVENILES IN ADULT PRISONS AND JAIL: A NATIONAL ASSESSMENT I (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

²⁷ VINCENT SCHIRALDI & JASON ZEIDENBERG, JUSTICE POLICY INSTITUTE, THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS (1997).

²⁸ Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 398, 402–03 (2006).

²⁹ *Id.* at 403.

the decreasing access to already limited prison programming and education, it is no wonder that Robert Dellelo, imprisoned for nearly two-thirds of his life before his sentence was commuted, notes that it is *in spite of* the current conditions of imprisonment, not because of prison programming, that many prisoners are able to “rehabilitate” themselves.³⁰

Ultimately, when the Supreme Court underscores the potential for certain youth to be “reformed,” it silently accepts problematic corollaries; namely, that it is fine to assume that adults and potentially some youth convicted of homicide³¹ are incapable of change, unworthy of clemency, and undeserving of another chance. This Note explores the implications, for both youth and adults, of this last presumption. It describes how increased imprisonment and sentence lengths, as well as a lack of rehabilitative prison programming and a denial of prisoners’ access to communities outside of prison, reflect a destructive notion that imprisoned people are undeserving of hope. It briefly discusses alternatives to this system in the form of decreased sentencing, increased access to education and other services, and less reliance on imprisonment overall.

Part I details the degree of severity in U.S. sentencing practices, as manifested over time, particularly since the initiation of the “war on drugs,” and as compared to international practices. It ties this harsh approach to the foundational role of racism in U.S. prison and drug policy and points to the racial implications of both the initial decision to sentence Terrance Jamar Graham to die in prison and the Supreme Court’s decision to categorically protect youth against LWOP sentences for non-homicide offenses. Part II illustrates the extent to which the lack of hope that the *Graham* and *Miller* decisions arguably permit the majority of imprisoned people to bear is not only manifested in sentencing lengths, but also in a growing denial of education and rehabilitative programming in prisons.

Part III describes how imprisoned people are made invisible to the broader public. Prisoners not only face barriers to meaningful connection to loved ones, due to excessive phone rates and being imprisoned far from their communities, but they are also hidden

³⁰ Robert Dellelo, *Epilogue* to JAMIE BISSONETTE, *WHEN THE PRISONERS RAN WALPOLE: A TRUE STORY IN THE MOVEMENT FOR PRISON ABOLITION* 223, 224–25 (2008).

³¹ While the Court surmises that “appropriate occasions for sentencing juveniles [convicted of homicide to LWOP] will be uncommon,” *Miller* does not categorically bar juveniles convicted of homicide from facing LWOP sentences. *Miller*, 132 S. Ct. at 2469.

from public view through restrictions on media access to prisons. An overview of the press coverage of the imprisonment of Washington, D.C. residents since the early 1970s illustrates how the public narrative of imprisonment in news media dramatically shifted over time ultimately silencing those most able to speak reliably to conditions and impacts of imprisonment: prisoners themselves. This “invisibilization”³² is part of a cycle of hopelessness in that it prevents the public from being able to see prisoners’ humanity, and thus being able to countenance their potential to return to society. It also hides prison conditions that may cause the public to question the role of prisons in addressing social problems. Part III further shows how the ongoing practice of preventing prisoners’ observations of their conditions from reaching the public affects their perceived credibility and severely limits their ability to impact their conditions through democratic processes.

Finally, Part IV points to alternatives to hopelessness currently proposed by prisoner advocates that address factors that lead to imprisonment and that keep people imprisoned. I touch on the historical example of the temporary reforms and changes in Massachusetts correctional policy, which were spurred in the early 1970s in large part by reformer John Boone and in the solutions that the Massachusetts prisoners enacted themselves briefly at Walpole.

II. U.S. SENTENCING SEVERITY

The United States has the highest incarceration rate in the

³² I use *invisibilization* to capture how the prison system, its physical structure, its legal and social ramifications, and the culture surrounding it, render imprisoned people silent, socially dead, and without a place as citizens in a democratic process. “Criminals” figure widely in political discourse, but as I describe later, people in prison, or those formerly imprisoned, often only have a small role in shaping public perceptions of their lives and conditions of imprisonment, or in political debates about policies affecting them. *Invisibilization* has been used in other contexts to describe the public silence around the views and concerns of marginalized groups and the disappearing of their perspectives and even their existence in historical conceptualizations and political decision-making. See Alexandra Dobrowolsky, *Interrogating ‘Invisibilization’ and ‘Instrumentalization’: Women and Current Citizenship Trends in Canada*, 12 CITIZENSHIP STUDIES 465, 465–66 (2008) (using *invisibilization* to describe how Canadian women and issues like feminization of poverty disappear from political discourse where the state’s primary goal is “the enhancement of market forces in a competitive global economy . . .”); Gastón Gordillo & Silvia Hirsch, *Indigenous Struggles and Contested Identities in Argentina: Histories of Invisibilization and Reemergence*, 8 J. OF LATIN AM. ANTHROPOLOGY 4, 4–6 (2003) (describing *invisibilization* as the lack of acknowledgment of Indigenous people’s existence at the Argentinean nation-state’s formation, in Argentinean history books, and in political decision-making, and juxtaposing this with Indigenous groups’ struggle for *visibilization* in part through state recognition).

world, with approximately 2.3 million people behind bars, representing 756 people for every 100,000.³³ By way of comparison, this is more than 6.5 times higher than the Canadian imprisonment rate.³⁴ Prison overcrowding is a serious problem in jurisdictions throughout the United States,³⁵ resulting in hazardous and inhumane conditions for those imprisoned. The Supreme Court recently upheld a court-ordered reduction of California's prison population, which will lower it from close to twice the prison system's design capacity to 137.5% of capacity. The Court found that the current degree of overcrowding created conditions horrific enough that they violated the Eighth Amendment.³⁶ It further found that overcrowding caused grossly inadequate mental health and medical care, which resulted in preventable deaths, a suicide rate of close to one per week, and an environment that supported the rapid spread of disease among prisoners including antibiotic-resistant staph infections.³⁷

As a result of lengthy mandated sentences under both the drug war and a general "tough-on-crime" approach, the national average prison population increased six times over from 1972 to 2003.³⁸ The number of people incarcerated for drug offenses increased by over 11 times between 1980 and 2003,³⁹ and the total number of people held in state prisons grew by 70% from 1972 to 2008.⁴⁰ Referred to even in mainstream Western European political circles as an "inexplicable deformity,"⁴¹ the U.S. prison system stands out globally for its harsh sentencing lengths. There is little judicial check on elected politicians' temptation to legislate increased criminal sentences for easy political gain, as the Supreme Court traditionally will not make proportionality determinations in

³³ ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1, 3 (8th ed. 2009), available at http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf.

³⁴ *Id.* at 3.

³⁵ MACKENZIE, *supra* note 15, at 20.

³⁶ *Brown v. Plata*, 131 S. Ct. 1910, 1910 (2011).

³⁷ *Id.* at 1923–25, 1933 n.7.

³⁸ NELLIS & KING, *supra* note 7, at 1.

³⁹ MARC MAUER, THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION 7 (2003), available at http://www.sentencingproject.org/doc/publications/inc_comparative_intl.pdf.

⁴⁰ PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 1 (2010), http://www.pewtrusts.org/uploadedFiles/Prison_Count_2010.pdf.

⁴¹ MAUER, *supra* note 39, at 11.

challenges to legislatively imposed sentence lengths.⁴² Only once prior, in *Solem v. Helm*, has the Supreme Court found the length of a prison sentence excessive.⁴³ Because of mandatory sentencing and other policies, prisoners often cannot find relief in parole.⁴⁴ As of 1987, parole was ended in the federal system⁴⁵ and by 1990, 14 other states had abolished it as well.⁴⁶ Observers note that where it exists, the parole process is overwhelmingly politicized.⁴⁷ Even where eligibility is built into a life sentence it “does not equate to release and, owing to the reticence of review boards and governors, it has become increasingly difficult for persons serving a life sentence to be released on parole.”⁴⁸

While race as a significant factor in imprisonment is by no means solely a U.S. phenomenon,⁴⁹ the role of racism in the foundation of today’s prison system and in the expanded use of policing and imprisonment as social policy in this country cannot be ignored. Many prison scholars trace the racial disparity and capitalist exploitation permeating the criminal system back to the social and economic control that powerful corporations and White landowners sought to keep over the free Black population in the Civil War era. Similar to fugitive slave codes, “Black codes” enacted both prior to and after the Civil War imposed impossible restrictions on freed African-Americans. Innumerable new petty “crimes” were created that were enforced by harsh prison sentences and forced labor.⁵⁰ One historian notes that the post-war courtroom became “an ideal place to exact racial retribution” and that in addition to facing a new set of criminal codes directed solely at them, African-

⁴² Jeffrey L. Fisher, *The Exxon Valdez Case and Regularizing Punishment*, 26 ALASKA L. REV. 1, 36–37 (2009).

⁴³ *Solem v. Helm*, 463 U.S. 277, 303 (1983) (finding LWOP sentence for passing bad check violated Eighth Amendment for being grossly disproportionate to crime in question).

⁴⁴ NELLIS & KING, *supra* note 7, at 1.

⁴⁵ *Id.* at 5 n.3.

⁴⁶ MACKENZIE, *supra* note 15, at 18.

⁴⁷ NELLIS & KING, *supra* note 7, at 26–27.

⁴⁸ *Id.* at 6.

⁴⁹ MAUER, *supra* note 39, at 11 (noting similar racial disparity for imprisonment in Australia, Canada, England, and Wales).

⁵⁰ Crimes punishable by forced labor included attending a “nightly and disorderly meeting,” vagrancy, inability to pay fines, insulting gestures or acts, and violating curfews that were enforced solely against the Black community. *See, e.g.*, DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* 1–2 (2008); SCOTT CHRISTIANSON, *WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA* 171–72 (1998); ANGELA DAVIS, *ARE PRISONS OBSOLETE?* 28–36 (2003); CONSTANCE McLAUGHLIN GREEN, *THE SECRET CITY: A HISTORY OF RACE RELATIONS IN THE NATION’S CAPITAL* 18–19 (1967).

Americans often faced imprisonment under fabricated charges.⁵¹ The convict lease system and the population of African-Americans subject to penal servitude expanded dramatically following the Civil War.⁵² The number of imprisoned African-Americans far outpaced the White convict population. Additionally, prisons became overcrowded and prison populations changed from being primarily White to being primarily Black.⁵³ Convict laborers toiled on plantations, railroads, in mines,⁵⁴ and, for corporations like U.S. Steel,⁵⁵ under conditions described as “worse than slavery.”⁵⁶

Today, prisons continue to be sites of capitalist exploitation⁵⁷ and racial disparity. People of color are over-represented in the criminal justice system at all stages. African-Americans are more likely than Whites to be sentenced to incarceration for similar felonies and are also given lengthier sentences.⁵⁸ Studies suggest ra-

⁵¹ DAVIS, *supra* note 50, at 33–34 (2003) (citing MARY ANN CURTIN, *BLACK PRISONERS AND THEIR WORLD, ALABAMA 1865–1900* 44 (2000)).

⁵² CHRISTIANSON, *supra* note 50, at 171–74.

⁵³ DAVIS, *supra* note 50, at 29.

⁵⁴ *Id.* at 32, 34–35.

⁵⁵ BLACKMON, *supra* note 50, at 3.

⁵⁶ See generally DAVID M. OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

⁵⁷ Certain companies, such as Corrections Corporation of America and Geo Group, operate private prisons. See generally Judith Greene, *Banking on the Prison Boom*, in *PRISON PROFITEERS: WHO MAKES MONEY OFF MASS INCARCERATION* 3 (Tara Herivel & Paul Wright eds., 2007). Private industry profits from the incarceration and social control systems in myriad other ways, including by suppling the contracts for numerous prison services such as medical care. In order to maximize profits, private companies that provide medical services often cut corners, creating cruelly low healthcare standards in prisons that can and do result in deaths of inmates. See generally Wil S. Hylton, *Sick on the Inside: Correctional HMOs and the Coming Prison Plague*, in *PRISON PROFITEERS: WHO MAKES MONEY OFF MASS INCARCERATION* 179 (Tara Herivel & Paul Wright eds., 2007). In some states private probation supervision companies are permitted to charge additional fees that probationers must pay or face imprisonment for failure to pay. Kirsten D. Levingston, *Making the “Bad Guy” Pay: Growing Use of Cost Shifting as Economic Sanction*, in *PRISON PROFITEERS: WHO MAKES MONEY OFF MASS INCARCERATION* 52, 70–72 (Tara Herivel & Paul Wright eds., 2007). Private telecommunications companies offer states extraordinary kickbacks in order to receive lucrative contracts for long-distance and collect calls from prisons and then pass the exorbitant costs to the inmates and their loved ones. Ben Iddings, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?* 8 N.C. J. LAW & TECH. 159, 160–62 (2006). Additionally, prisons supply corporations with a large pool of workers paid far below minimum wage—sometimes as little as 23 cents an hour—without normal labor standards and protections for benefits and rights. Ian Urbina, *Prison Labor Fuels America’s War Machine*, in *PRISON PROFITEERS: WHO MAKES MONEY OFF MASS INCARCERATION* 109, 110–11 (Tara Herivel & Paul Wright eds., 2007).

⁵⁸ CHRISTOPHER HARTNEY & LINH VUONG, NAT’L COUNCIL ON CRIME AND DELINQ., *CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM* 2, 12 (2009), available at <http://nccd-crc.issuelab.org/research/0/program/Reports/filter/title> (click on “Download” below article title).

cism had an important role in the development of a U.S. drug policy that emphasized penal sanctions in lieu of a public health response; this approach flowed from inaccurate public associations of crime and drug abuse with communities of color.⁵⁹ The prevalence of skewed “crime news story scripts” in mainstream media that focus on violent crime and depict African-Americans as the primary perpetrators have been linked to support among Whites for “tough” approaches to crime in general.⁶⁰ There is also some evidence that police act on the implicit racism permeating society as a whole. A study of drug arrests in Seattle suggested that police fail to see Whites as suspected drug users and deliverers, and thus arrest them at rates disproportionately lower than their actual participation in the drug trade.⁶¹ Comparatively, police arrest African-American and Latino users and deliverers at rates far higher than their actual participation.⁶² A Chicago study of youth arrests, controlling for various socio-economic factors at the family and neighborhood levels, found that racial disparity in arrests still remained.⁶³ Another study, seeking to explain vast racial disparities in Wisconsin’s imprisonment rates, found evidence suggesting “high levels of policing and surveillance of the African-American population.”⁶⁴ Racially disparate law enforcement patterns and arrest rates for low-level offenses and for drug crimes contributed heavily to Wisconsin’s imprisonment disparities.⁶⁵ Nationally, the

⁵⁹ HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG LAW ENFORCEMENT AND RACE IN THE UNITED STATES 4–5 (2008), available at http://www.hrw.org/sites/default/files/reports/us0508_1.pdf.

⁶⁰ Franklin D. Gilliam Jr., Nicholas A. Valentino, & Matthew N. Beckmann, *Where You Live and What You Watch: The Impact of Racial Proximity and Local Television News on Attitudes About Race and Crime*, 55 POL. RES. Q. 755, 758–59 (2002). Media depiction of cocaine use changed as crack cocaine came to be used in impoverished communities. The media narrative—which in the early 1980s focused on White users, on elements of the drug treatment industry and on the potential for recovery—by the mid-1980s featured law enforcement officials underscoring policing and imprisonment approaches to the drug, and people of color figuring as the criminalized drug users and dealers. Katherine Beckett, Kris Nyrop, Lori Pfingst, & Melissa Bowen, *Drug Use, Drug Possession Arrests, and the Question of Race: Lessons from Seattle*, 52 SOC. PROBS. 419, 421 (2005).

⁶¹ Katherine Beckett, Kris Nyrop, & Lori Pfingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 108, 117–22 (2006).

⁶² *Id.*

⁶³ David S. Kirk, *The Neighborhood Context of Racial and Ethnic Disparities in Arrest*, 45 DEMOGRAPHY 55, 71–74 (2008).

⁶⁴ PAMELA OLIVER & JAMES YOCOM, INST. FOR RESEARCH ON POVERTY, RACIAL DISPARITIES IN CRIMINAL JUSTICE: MADISON AND DANE COUNTY IN CONTEXT 28 (2002), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp125702.pdf>.

⁶⁵ *Id.* at 28–31.

incarceration-focused “drug war” initiated in the early 1980s⁶⁶ specifically targeted communities of color, and ultimately resulted in disproportionate numbers of people of color being sent to prison, despite the fact that illicit drug use was proportionately nearly equal among different racial groups in all communities.⁶⁷

One metric of the harshness of U.S. criminal justice system, and a key factor in its outsized prison population, is the increasing number of defendants sentenced to life imprisonment. The amount of people serving a life sentence, not including those sentenced to a term of years equivalent to or greater than a natural life before becoming parole eligible, increased more than four times from approximately 34,000 in 1984 to 140,610 in 2008.⁶⁸ LWOP sentences increased by 22% in just five years from 2003 to 2008.⁶⁹ The Supreme Court has noted that a LWOP sentence is the “second most severe penalty permitted by law.”⁷⁰ The Court compared the severity of LWOP sentences to that of death sentences:

[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable.⁷¹

As with policing and imprisonment as a whole, communities of color are the most heavily affected by life-sentencing practices. African-Americans comprise almost half the life-sentenced population nationally, though the percentage of African-Americans in the general prison population is 37.5%.⁷² This reflects an overall trend across the criminal system, where the harsher the sentence in question, the more concentrated the number of sentenced people of color.⁷³ Such extensive and severe rates of imprisonment impact communities outside of the prisons. As of 2000, an estimated 1.5 million children were growing up without the emotional or finan-

⁶⁶ HUMAN RIGHTS WATCH, *supra* note 59, at 9 n.15 (noting that drug policy switched from treatment to punishment after the 1970s, which federal drug budgets consistently reflected).

⁶⁷ *Id.* at 14, 41–46.

⁶⁸ NELLIS & KING, *supra* note 7, at 7.

⁶⁹ *Id.* at 3.

⁷⁰ *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)).

⁷¹ *Id.* at 2027.

⁷² NELLIS & KING, *supra* note 7, at 11, 26. The JLWOP sentence was disproportionately applied to youth of color. African-American youth comprised 56.1% of the juveniles sentenced to life without parole as of 2008.

⁷³ *Id.* at 14.

cial support of a parent because that parent was imprisoned, with the number reaching one out of every 14 among African-American children.⁷⁴

When pronouncing the JLWOP sentence at issue in *Graham*, the trial court judge said to Mr. Graham, who was born to crack-addicted parents and began drinking alcohol and smoking at age nine,⁷⁵ “[y]ou had, as far as I can tell, you have quite a family structure. You had a lot of people who wanted to try and help you”⁷⁶ Chief Justice Roberts noted in his concurrence that “Graham’s sentence was far more severe than that imposed for similar violations of Florida law, even without taking juvenile status into account.”⁷⁷ He pointed out that in Florida, the average adult sentences for burglary or robbery are “less than five and less than ten years, respectively,”⁷⁸ and juvenile sentences are even shorter. He wrote, “Graham’s life without parole sentence was far more severe than the average sentence imposed on those convicted of murder or manslaughter, who typically receive under 25 years in prison.”⁷⁹ While Roberts highlighted these facts in order to argue against the majority’s categorical standard protecting youth from LWOP sentences, and to call for a case-by-case “narrow proportionality” standard for deciding if a non-capital sentence violates the Eighth Amendment,⁸⁰ these facts undercut his argument. He critiqued the majority decision for emphasizing that a “clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile non-homicide offenders who are not sufficiently culpable to merit that punishment.”⁸¹ Yet the renegade actions on the part of the trial court judge that he describes, which could easily be repeated or followed, point to the merits of a categorical rule that would prevent this type of action by judges.

The racial implications of the decision, unspoken by the Court, add weight to the majority opinion. As noted earlier, the concentration of sentenced people of color becomes greater and even more out of proportion to their percentage in the general population, the harsher the punishment in question.⁸² It is rele-

⁷⁴ MAUER, *supra* note 39, at 14–15.

⁷⁵ *Graham*, 130 S. Ct. at 2018.

⁷⁶ *Id.* at 2019.

⁷⁷ *Id.* at 2040 (Roberts, C.J., concurring).

⁷⁸ *Id.*

⁷⁹ *Id.* at 2041 (Roberts, C.J., concurring).

⁸⁰ *Id.* at 2039, 2041 (Roberts, C.J., concurring).

⁸¹ *Id.* at 2042 (Roberts, C.J., concurring).

⁸² NELLIS & KING, *supra* note 7, at 14.

vant to note that the petitioner in *Graham* is African-American, and as Chief Justice Roberts pointed out, was treated far more severely by the sentencing judge than most people similarly convicted would be.⁸³ The undeniable role of race and racism in sentencing decisions⁸⁴ further demonstrates that the majority's argument for standards and a clear line with regard to harsh sentencing practices has merit. Yet it also underscores broader problems raised by Justices Thomas and Alito in their dissents,⁸⁵ such as the fact that this decision does not explicitly protect juveniles (and protects no adults) from extremely lengthy term-of-years sentences, including those equivalent to a life. Had the trial court sentenced Graham to 30 or 40 years imprisonment, which is still far greater than the average sentence for his convictions, the case may never have reached the Court despite the unfairness and the destructive impacts of such a long sentence on a youth. Thus, what is called for is systemic change far greater than what the Court provides. As described later, grassroots organizations and other advocates have long recognized this. They are committed to creating the necessary broad social movement, not only to hold officials accountable for racial disparity in the criminal system, but also to hold them accountable for the destructive impacts of reliance on imprisonment in general.

III. DENYING EDUCATION, ENCOURAGING RECIDIVISM

Along with increased imprisonment rates and lengthier sentences, a lack of access to educational and other rehabilitative programming in prisons can create hopeless prospects for people convicted under the U.S. criminal system. Following the termination of Federal Pell Grant college funding for prisoners in 1994, there was a dramatic drop in postsecondary education programs and enrollment at prisons, with the number of states offering college programs declining from 37 to 21 by 1997, and less than 2% of the national prison population enrolled in them.⁸⁶ In the years following the loss of Pell grants, a significant number of other rehabil-

⁸³ *Graham*, 130 S. Ct. at 2040–41 (Roberts, C.J., concurring).

⁸⁴ See ASHLEY NELLIS, JUDY GREENE, & MARC MAUER, *THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM* 3, 14 (2d ed. 2008).

⁸⁵ *Graham*, 130 S. Ct. at 2052 n.11 (Thomas, J., dissenting) (“[I]t seems odd that the Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years’ imprisonment).”); *Id.* at 2058 (Alito, J., dissenting) (“Nothing in the Court’s opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole ‘probably’ would be constitutional.”).

⁸⁶ WENDY ERISMAN & JEANNE BAYER CONTARDO, *THE INST. FOR HIGHER EDUC. POL-*

itative and educational programs in prisons were cut, including vocational and technical training and even some secondary schools as imprisonment increased and state and federal funding decreased.⁸⁷

While prison administrators have drawn on state funding and federal block grants directed at post-secondary education for incarcerated youth to continue post-secondary programming at many prisons,⁸⁸ a 2003–2004 survey by The Institute for Higher Education Policy found that college courses were available to around just 5% of prisoners, and that actual rates of completion were low.⁸⁹ The majority of incarcerated students taking college-level courses and receiving certificates were enrolled in vocational certificate programs for college credit, and there were not significant numbers of students earning college or even associates level degrees.⁹⁰ While the primary barrier to enrollment in college-level courses was a lack of funding, according to the survey respondents, other barriers to enrollment and completion included the need for substantial academic remediation among potential students, prohibitive security protocols that create logistical barriers, overcrowding resulting in transfers that disrupt students' coursework, and a lack of support for the programs among policymakers.⁹¹

Tragically, the lack of access to adequate education in prisons represents a continued denial of education to a population that overwhelmingly did not gain adequate educational services prior to incarceration. State and federal prisoners are significantly undereducated compared to the general population. A larger percentage of state and federal prisoners lack a General Educational Development (GED) or high school diploma as compared to the household population,⁹² and one study found that of those imprisoned who had earned a GED by 1997, at least 70% obtained it while in prison.⁹³ While 51% of the general household population as of

ICY, LEARNING TO REDUCE RECIDIVISM: A FIFTY STATE ANALYSIS OF POSTSECONDARY CORRECTIONAL EDUCATIONAL POLICY x (2005).

⁸⁷ Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 75 n.71 (2002).

⁸⁸ ERISMAN & CONTARDO, *supra* note 86, at xi.

⁸⁹ *Id.* at vi.

⁹⁰ *Id.*

⁹¹ *Id.* at vi–vii.

⁹² As of 1997 only 60% of state prisoners and 73% of federal prisoners had a GED or high school diploma compared to 82% of the general U.S. population. *Id.* at 4.

⁹³ *Id.* In 1991 the Federal Bureau of Prisons required that prisoners receive education adequate to earn a GED or a minimum of 240 hours of literacy instruction, whichever was achieved first. Emily A. Whitney, *Correctional Rehabilitation Programs and*

2003 had completed some post-secondary education, only 22% of imprisoned people had.⁹⁴ The rate of diagnosed learning disabilities was higher in prisons as of 2003, at 17% versus 6% in the adult household population.⁹⁵ Illiteracy rates are also higher among imprisoned people than among the general adult household population, with one study finding 56% of prisoners at basic or below basic literacy levels for prose and 50% in those two bottom categories for documents, versus 43% and 34% respectively for household populations.⁹⁶ Another report estimates that 70% of federal and state prisoners are functionally illiterate or read below an eighth grade level.⁹⁷ One study also found that the rate of language impairment disorders, including difficulty understanding spoken language, to be four to five times higher among imprisoned adults than in the general population,⁹⁸ and that up to 84% of institutionalized juveniles have severe communication difficulties.⁹⁹

In hopeful contrast to these bleak statistics are the success rates that literacy and higher education programs can have in preventing people from returning to prison. Recidivism dramatically drops among formerly imprisoned people who have participated in higher education while in prison, averaging about 46% lower than recidivism rates of those formerly imprisoned people who have not participated in post-secondary classes, according to one analysis.¹⁰⁰ Another study found that while programming like GED courses or vocational training is helpful, post-secondary education is even more effective, reducing chances of re-incarceration by 62%.¹⁰¹ Evidence also shows that post-secondary level education significantly increases employment chances for formerly imprisoned people.¹⁰²

Other opportunity-providing programs for prisoners, includ-

the Adoption of International Standards, 18 TRANSNAT'L L. & CONTEMP. PROBS. 777, 787-88, 788 n.77 (2009).

⁹⁴ ELIZABETH GREENBERG, ERIC DUNLEAVY, MARK KUTNER, & SHEIDA WHITE, NAT'L CTR. FOR EDUC. STATISTICS, LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 27 (2007).

⁹⁵ *Id.*

⁹⁶ *Id.* at 29.

⁹⁷ ARK. LITERACY COUNCIL, ADULT ILLITERACY: ITS COST TO US ALL 2 (2005).

⁹⁸ Michele La Vigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why it Matters*, 15 U.C. DAVIS J. JUV. L. & POL'Y. 37 (2011).

⁹⁹ *Id.* at 44 n.12.

¹⁰⁰ ERISMAN & CONTARDO, *supra* note 86, at 9.

¹⁰¹ *Id.*

¹⁰² OPEN SOCIETY INST., EDUCATION AS CRIME PREVENTION 7-8 (1997), available at http://www.prisonpolicy.org/scans/research_brief__2.pdf.

ing furlough and work release programs, have also seen cuts in the context of the “get tough” movement.¹⁰³ Ironically, in deciding if a prisoner qualifies for parole, parole boards often look to whether that person has completed certain programs that will help him or her secure income, including education and job training. They also look to whether he or she has succeeded in a work release program. Having a viable job prospect outside the prison, which is often established through work release programs that allow imprisoned people to make contacts with community members, also supports a potential parolee’s case. In terms of both increasing prisoners’ prospects for liberation and for a successful, permanent exit from prison, it is clear that education and other programming that bring prisoners into contact with a broad community are important and should be expanded.

IV. INCOMMUNICADO & INVISIBLE: IMPRISONMENT AS EXILE

Often cut off from communicating even with close family members, and blocked from media cameras and reporters, imprisoned people are largely walled out of public consciousness. This invisibilization has disturbing implications both for imprisoned people’s ability to rebuild their lives and for the extent to which human rights abuses can happen inside of prisons with little to no consequences for those responsible. One key way that communication with loved ones outside of prison is made difficult for imprisoned people is through excessive phone charges. One investigation found that just one hour-long collect call per week can cost the family of an imprisoned person nearly \$300 a month.¹⁰⁴ Because prisons are frequently located in remote rural areas, far from the primarily impoverished urban communities where prisoners’ friends and loved ones live,¹⁰⁵ and because states often send prisoners to out-of-state private prisons, calls between prisoners and their family and friends are usually long-distance and collect.¹⁰⁶ By the mid-1990s, almost all prisons took commission payments, or “kickbacks,” from the profits of high-cost prison phone charges, with the commission running up to 60% in some

¹⁰³ For example, restrictions to New York’s Temporary Release Program enacted in the mid-1990s caused over a 90% decline in inmate participation. Alan Rosenthal & Patricia Warth, *In Search of a Workable Sentencing Model*, ATTICUS, Winter 2011, at 11.

¹⁰⁴ MEDIA JUSTICE FUND, CRIMINAL CHARGES: EXCESSIVE PRISON PHONE RATES TAKE A TOLL ON INNOCENT FAMILIES 2 (2009), available at <https://org2.democracyinaction.org/o/6587/images/MJFPrisonPhones-final.pdf>.

¹⁰⁵ 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 13:1 (4th ed. 2009).

¹⁰⁶ MEDIA JUSTICE FUND, *supra* note 104.

states.¹⁰⁷ Because of grassroots organizing, the number of states taking these kickbacks has decreased, but the problem remains, and the cost is still extremely high for interstate collect calls from all prisons.¹⁰⁸ Imprisoned people primarily come from impoverished backgrounds,¹⁰⁹ and for many of their families, the exploitive costs of communicating via phone may be too great to bear. For those imprisoned and their family members who may have limited literacy skills, including the young children of imprisoned people, letters would likely be a difficult medium. Further, letters do not provide the immediacy and emotional connection of personal visits and phone calls. Visiting a loved one in a prison located far away from home often also proves too expensive and is made further difficult through limits on visiting times that restrict opportunities for working people to visit their loved ones.¹¹⁰

The effects of marooning imprisoned people through these limitations on communication can be particularly dramatic for their children. One former prisoner in Washington, D.C. described what happened to his family when he was put on one of many “loads” of prisoners that the Department of Corrections sent far from the D.C. area to prisons across the country.¹¹¹ Imprisoned at Lorton, Virginia since 1983, and jailed in D.C. prior to that, he had maintained close ties to his family via phone conversations and personal visits, and supported his children in their schoolwork over the phone and during visits.¹¹² For the cost of a city bus ride, his family would visit him every Sunday.¹¹³ In 1988, he was sent without warning to the prison at Walla Walla, Washington:¹¹⁴ “It was the only time that I had been separated to that magnitude with my

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ A 1997 study found the reported unemployment rate of prisoners in the month prior to their arrest was over six times the average unemployment rate in the United States. Nine percent were homeless in that month while an estimated 1% of the general population experienced homelessness at some point within a year. For those with income, 43% reported earnings of less than \$9,600 a year. Among African-American imprisoned people, the rates of pre-arrest unemployment and poverty were even higher. ERISMAN & CONTARDO, *supra* note 86, at 2–3.

¹¹⁰ MUSHLIN, *supra* note 105.

¹¹¹ This event happened prior to the final closure of Lorton Reformatory in Virginia, the prison where most people sentenced to prison terms in Washington, D.C. were sent. After closing the prison, the Department of Corrections began sending D.C. residents serving prison sentences to prisons scattered across the country in places as far away as Youngstown, Ohio and Walla Walla, Washington.

¹¹² Interview with formerly incarcerated person #1, Wash., D.C. (Oct. 10–11 2006 & Nov. 2, 2006) (on file with author).

¹¹³ *Id.*

¹¹⁴ *Id.*

kids,” he said, “[a]nd my kids’ grades dropped. One of my sons got to acting crazy. He decided he wanted to hang out.”¹¹⁵

Studies suggest that for children, having a parent in prison can lead to emotional, mental, and behavioral problems,¹¹⁶ and that the consequences of this separation include a risk of involvement in criminal behavior and even imprisonment.¹¹⁷ While research is limited, there is evidence that the ability to have quality visits with their incarcerated parent, particularly with contact, and to maintain connection with them improves outcomes for youth.¹¹⁸ There is strong evidence that imprisoned peoples’ ability to maintain a connection with family members and loved ones encourages rehabilitation and reduces recidivism.¹¹⁹

Another way prisoners are made invisible to the public, and thus dehumanized, is through the news media’s lack of access to prisons and jails. Supreme Court cases decided in the early 1970s granted prison authorities wide latitude to deny journalists access to interview prisoners, and to prohibit media outlets from filming or photographing inside of prisons.¹²⁰ In *Pell v. Procunier*, the Supreme Court held constitutional the denial of non-written personal contact between prisoners and the media, upholding a policy that, among other restrictions, prohibited reporters from interviewing prisoners who were not chosen by guards for interviews through the prison’s randomized process for selecting interviewees, or outside of a guided tour.¹²¹ The Court established an “alternative means” test and found that the policy withstood the test, in part, because prisoners could theoretically correspond through “uncensored” mail with media.¹²² Of course, for prisoners with limited literacy skills, this has little meaning. Furthermore, the definition of

¹¹⁵ *Id.*

¹¹⁶ Elise Zealand, *Protecting the Ties that Bind from Behind Bars*, 31 COLUM. J.L. & SOC. PROBS. 247, 277–78 (1998).

¹¹⁷ *Id.* at 278; Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL’Y REV. 283, 289 (2009).

¹¹⁸ Benjamin Guthrie Stewart, *When Should a Court Order Visitation Between a Child and an Incarcerated Parent?*, 9 U. CHI. L. SCH. ROUNDTABLE 165, 172–74 (2002).

¹¹⁹ See generally William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RES. CRIME & DELINQ. 287 (2008).

¹²⁰ *Pell v. Procunier*, 417 U.S. 817, 827–28, 834–35 (1974) (finding that policy preventing non-written personal contact between imprisoned people and reporters was constitutional); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (holding that Federal Bureau of Prisons policy prohibiting personal interviews between reporters and prisoners in federal medium and maximum security prisons did not violate First Amendment).

¹²¹ *Pell*, 417 U.S. at 830.

¹²² *Id.* at 824.

“uncensored mail” has been interpreted to include outgoing prisoners’ mail that is subject to inspection and restriction by prison officials, including for content of the letter,¹²³ which would necessarily limit what prisoners can communicate about prison conditions.

Other states have banned in-person media interviews of prisoners altogether.¹²⁴ In states with fewer restrictions on media access to prisons, more liberal laws prove meaningless and are readily ignored by unaccountable prison administrators.¹²⁵ As one Republican Assemblyman in California, critiquing California’s severe restrictions on media access to prisoners, pointed out: “[f]ree societies don’t hold prisoners incommunicado.”¹²⁶ And yet, the combined restrictions on visitors generally, and on the media specifically with regard to accessing prisons, mean that prisoners’ immediate perspectives and images of people imprisoned rarely reach the public.

A survey of local news articles about prisons in Washington, D.C. over the past several decades exemplifies a shift in the mainstream media narrative toward denying prisoners’ humanity by silencing them and making them invisible. Whether as a result of journalists’ decreased access to prisons or a change in overall editorial sentiment and policy, both the images and the voices of prisoners all but disappeared from print media stories a few years after the 1971 Attica prison uprising. In the time immediately following that uprising, when D.C. prisoners staged uprisings or demonstra-

¹²³ Alana M. Sitterly, *Silencing Death Row Inmates: How Hammer v. Ashcroft Needs a Rational Basis for Its Rational Basis*, 21 GEO. MASON U. C.R. L.J. 323, 345–46 (2011) (pointing out that in referring to the “alternative communication rationale” from *Pell* to uphold restrictions on access to media by prisoners in its decision in *Hammer v. Ashcroft (Hammer II)*, 570 F.3d 798, 804 (7th Cir. 2009), the Seventh Circuit glossed over the fact that all outgoing inmate mail was subject to inspection, and that the prison-imposed content restrictions prohibited references to other inmates in written correspondence or via phone). This runs counter to the Supreme Court’s justification in *Pell*, which suggested that prisoners with limited literacy skills could communicate to the press through other prisoners with greater literacy skills, thus justifying restrictions on in-person interviews. *Pell*, 417 U.S. at 827–28 n.5. *Pell* also specifically protects content of letters in noting that a communication restriction is appropriate “[s]o long as this restriction operates in a neutral fashion, without regard to the content of expression[.]” *Id.* at 828.

¹²⁴ Don Thompson, *More States Restricting Media Access to Inmates, Survey Finds*, ST. AUGUSTINE RECORD, Dec. 11, 2000, http://staugustine.com/stories/121000/nat_121000025.shtml.

¹²⁵ CHRISTINA RATHBONE, *A WORLD APART: WOMEN, PRISON, AND LIFE BEHIND BARS* xii–xiii (2006).

¹²⁶ *Davis Vetoes Measure to Overturn Interview Restrictions on Inmates*, METRO. NEWS ENTER., Sept. 9, 1999, at 9.

tions, newspapers showed images of prisoners holding protest signs, with their messages clear, and the accompanying stories quoting both prisoners and prison system administrators.¹²⁷ In an article on a 1972 prisoners' strike, *Washington Post* reporter William Claiborne described a tour of the maximum security section of prison at Lorton, guided by a prisoner who told reporters he was beaten by guards while handcuffed when he was transferred there from medium security:

About 15 reporters and photographers then toured the maximum security area . . . observing tiny windowless cells in a tier that the inmates call the "hole," and the administration calls the "control section." They talked with a number of inmates who said they had been confined for months on a 24 hour a day "deadlock" without having faced formal disciplinary board charges. "Deadlock" prisoners leave their cells only twice a week . . . Members of the grievance committee showed visitors a cell in which an apparently mentally disturbed man cowered under his bunk. The inmates said the man had rarely emerged from under the bed in 17 months.¹²⁸

By the mid-1980s, the media reduced the use of photographs, prisoner quotations,¹²⁹ and for the most part, prison guard quotations, in their coverage of prison demonstrations.¹³⁰ The only perspec-

¹²⁷ For example, an article in *The Washington Post* on a September 1972 demonstration at Lorton prison, features direct quotes from prisoners and a photograph of maximum security prisoner Van LaGon standing in front of a bank of microphones, delivering his message to press and prison officials, while a light rain falls on a protest of over 1,000 Lorton prisoners massed in the main courtyard. William L. Claiborne, *Prisoners at Lorton Win Reforms*, WASH. POST, Sept. 28, 1972, at A1. This peaceful strike received about four days' worth of editorials and local news coverage. Much of the coverage shows prisoners holding signs and intently watching negotiations. See William L. Claiborne, *Inmates Give Lorton Aides 12 Demands*, WASH. POST, Sept. 26, 1972, at C1; William Raspberry, *The Problem at Lorton*, WASH. POST, Sept. 27, 1972, at A27; William Raspberry, *Winning 'War' at Lorton*, WASH. POST, Sept. 29, 1972, at A27.

¹²⁸ Claiborne, *Prisoners at Lorton*, *supra*, note 127, at A1.

¹²⁹ See, e.g., Alma Guillermoprieto, *Inmates' Strike Halts Lorton Manufacturing—Anger over Delay in Pay, Food Supplements Blamed*, WASH. POST, Aug. 24, 1983, at C4 (reporting a strike at Lorton's Central Facility that solely uses the words of the D.C. Department of Corrections spokesman as its source); Eric Pianin, *Prisoners Stage Protest at Lorton*, WASH. POST, Mar. 12, 1985, at B4 (reporting a protest by 170 maximum security inmates that included no quotes by imprisoned people). In a short break with the general pattern of not publishing quotes by imprisoned people, *The Washington Post* published a short series about Lorton in February 1983 that included interviews with prisoners, guards, and other staff. See Edward D. Sargent, *A Prisoner, a Journalist: Two Lives, Two Roads*, WASH. POST, Feb. 14, 1983, at A1.

¹³⁰ Apparently, guards primarily expressed anger when administrators acceded to some demands by prison demonstrators, but a small number expressed some sympathy with the prisoners. Journalist Raul Ramirez described one interview with a correctional officer following a prisoner demonstration: "Officer Ronald Savoy claimed that

tives print journalists quoted on prison issues, whether those stemming from uprisings or otherwise, are by prison system administrators, lawyers, and politicians.¹³¹

The lack of prisoners as everyday interview subjects represents a form of presumed “narrative incompetence” on the part of prisoners.¹³² The underlying message is that imprisonment renders one incapable of the human abilities to reflect, to step outside oneself and provide analysis that accounts for an array of perspectives while honestly portraying one’s own conditions. As one imprisoned person observed, “prisoners, although they understand what is wrong with the system better than any criminologist, judge, cop, or outsider, have the credibility of elves.”¹³³

This denial of credibility is also convenient for corrections officials seeking to avoid accountability for human rights violations occurring in prisons including: the use of physical violence against prisoners; purposeful denial of prisoner medical care; rampant misuse of stun weapons, chemical sprays, and restraints; and use of solitary confinement to quiet anyone who would challenge these and other violations.¹³⁴ The types of abuses news reporter William Claiborne heard from the prisoners at Lorton in the early 1970s have certainly not ended, but they now receive less news coverage. Denying access to prisons stifles the democratic function media serves in helping the public address these abuses. Charles N. Davis,

attempts by officers to help individual inmates often are blocked by unsympathetic supervisors. ‘The way inmates are treated is unfair,’ he said . . . Savoy claimed that other guards shared his views, but are just scared to let them be known to their supervisors for fear of harassment.” Raul Ramirez, *Guards Assail Jail Head for Cut in Power*, WASH. POST, Aug. 16, 1973, at B1.

¹³¹ According to Washington, D.C. residents imprisoned during the 1980s, several other uprisings and strikes to address poor conditions occurred at Lorton, many of which were brutally suppressed by guards and not covered by the media. For those that were covered, interviewees who were imprisoned at the time often had far different perceptions and remembrances of events than those the administrators provided to the media. Interview with formerly incarcerated person #1, Wash., D.C. (Oct. 10–11, 2006 & Nov. 2, 2006) (on file with author); Interview with formerly incarcerated person #2, Wash., D.C. (Nov. 2, 2006) (on file with author).

¹³² In the late 19th century, journalist Henry Mayhew interviewed impoverished London residents about their lives and helped set a standard that challenged social researchers to presume that marginalized communities have the ability to adequately provide meaningful information about their own experiences, thus challenging the notion of narrative incompetence researchers had previously assigned them. JAMES A. HOLSTEIN & JABER F. GUBRIUM, *THE ACTIVE INTERVIEW: QUALITATIVE RESEARCH METHODS* 21, 22 (1995).

¹³³ Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. POVERTY LAW & POL’Y 249, 255 n.34 (2004) (citing Paul St. John, *Behind the Mirror’s Face*, in *DOING TIME* 119, 121 (Bell Gale Chevigny ed., 1999)).

¹³⁴ *Id.* at 254–55.

Freedom of Information co-chairman of the Society of Professional Journalists, notes, “[t]he correctional industry is the only functional unit of state governance free from the scrutiny of an active press, and it is at our peril that we allow prisons to run in the dark.”¹³⁵

V. ALTERNATIVES

A vision of alternatives to imprisonment and the current U.S. prison system should encompass the needs of people currently imprisoned and consider broader societal factors contributing to mass incarceration including sentencing policy and socio-economic issues. As discussed earlier, for those inside, it is clear that maintaining ties with family and the broader community, and accessing rehabilitative programming, particularly education, are key to their success outside of prison. Thus, such programming should be dramatically expanded. Additional elements that diminish recidivism include mental health and drug treatment, training, and alternative sentencing.¹³⁶ Other industrialized countries have dramatically lowered imprisonment rates through changes to sentencing policy. In Germany, for example, officials substantially reduced the prison population and cycle of imprisonment by reducing the use of short prison terms.¹³⁷ One scholar notes that “the German legislature had embraced the idea that short-term imprisonment does more harm than good; it disrupts the offender’s ties with family, job, and friends, introduces the offender into the prison subculture, and stigmatizes the offender for the rest of his or her life.”¹³⁸ Clearly, ending the use of imprisonment to address social and public health issues like drug use would also dramatically reduce the number of people stigmatized through imprisonment.

Building alternatives also calls for shifting public expenditures away from prisons and toward social and community programs that address factors leading to imprisonment. There is a growing understanding that included among “factors contributing to . . . criminal conduct” are “poverty, unemployment, inadequate living conditions such as substandard housing and homelessness”¹³⁹ Advocates are also more sharply focusing on the school-to-prison

¹³⁵ Press Release, Society of Professional Journalists, SJP Asks Massachusetts DOC to Drop Proposed Inmate Interview Restrictions (June 21, 2002), *available at* <http://www.spj.org/news.asp?ref=247>.

¹³⁶ Feierman, *supra* note 133, at 250 n.7.

¹³⁷ MAUER, *supra* note 34, at 9.

¹³⁸ *Id.*

¹³⁹ Taifa & Beane, *supra* note 117, at 291.

pipeline, elements of which include zero-tolerance policies, increased use of expulsions and suspensions, under-resourced schools, and racism, all which ultimately lead to increased imprisonment.¹⁴⁰ Groups like America's Promise Alliance, a multi-sector organization devoted to improving the wellbeing of young people, propose a number of policy shifts to address these underlying factors and ensure developmental resources for youth.¹⁴¹ A RAND Corporation study found that crime prevention is more cost-effective for governments and municipalities than investing in prisons.¹⁴² A report from the Sentencing Project points to "a variety of research demonstrat[ing] that investment in drug treatment, interventions with at-risk families, and school completion programs are more cost-effective than expanded incarceration as crime control measures."¹⁴³

There are points in history we can look to for successful alternatives, such as the profound changes that occurred temporarily at Walpole, in Massachusetts, in the wake of the uprising at Attica and a major community organizing campaign both in and out of the Walpole prison, which are well documented by historian Jamie Bissonette. In 1972, the governor of Massachusetts appointed John Boone, a progressive reformer who ultimately became a prison abolitionist, as the first African-American commissioner of corrections.¹⁴⁴ Boone ushered in a series of reforms similar to those he had enacted at Lorton Reformatory in Virginia, where he had briefly served as superintendent before going to Massachusetts.¹⁴⁵ These reforms included furloughs, educational and vocational training, and other community-based programs. Rehabilitation was his central focus, with the ultimate goal being the shuttering of large state prisons.¹⁴⁶ Under his appointment, recidivism rates dropped by close to two-thirds,¹⁴⁷ and it appeared his vision could have born out his goals. Unfortunately, the political and racial climate of Massachusetts was not prepared to allow him success. However, following a walkout by guards in retaliation for Boone's having met some prisoners' demands in response to a determined strike by inmates that the guards had met with fierce brutality, the

¹⁴⁰ *Id.* at 289–90.

¹⁴¹ *Id.* at 296–97.

¹⁴² OPEN SOCIETY INST., *supra* note 102, at 8.

¹⁴³ RYAN S. KING, MARC MAUER, & MALCOLM YOUNG, *THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP* 8 (2005).

¹⁴⁴ JAMIE BISSONETTE, *WHEN THE PRISONERS RAN WALPOLE* 40–50 (2008).

¹⁴⁵ *Id.* at 46–47.

¹⁴⁶ *Id.* at 64–65.

¹⁴⁷ *Id.* at 9.

prisoners actually took over the prison and ran it themselves for over two months. The temporary end of brutal treatment by guards, and an end to murders, rapes, and robberies, ensued.¹⁴⁸ At a time when racial tension in Boston was becoming more heated in the lead-up to explosive reactions to court-ordered school desegregation, the prisoners at Walpole had developed a sophisticated mediation program and method for maintaining internal order, and were engaged in the effective and peaceful cross-racial organizing of the workings of the entire prison.¹⁴⁹ Prisoners, who had found solidarity in similar experiences of poverty and deprivation throughout much of their lives, operated on a sense of restorative justice, self-determination, and community building. While the prisoners were brutally repressed when the state retook the prison,¹⁵⁰ the lessons of those several weeks and what they mean for how “corrections” should be approached are invaluable. This example of meaningful exercise of imprisoned peoples’ agency, not just in running a prison but in guiding a movement, should strongly inform current advocacy efforts.

VI. CONCLUSION

With regard to the often-conjured pendulum swinging between rehabilitation and retribution, *Graham* and *Miller* should sound like a broken gear signaling the extreme distance the pendulum has traveled in one direction. How far into unthinking retribution has the U.S. criminal justice system gone if the U.S. Supreme Court is only now recognizing that it should blink when a judge sentences a juvenile to imprisonment for the rest of his or her life? While the Court holds its nose and speaks of the chances prison will reform a youth’s “character deficiencies,” the challenge is for community-based movements from an array of sectors to continue to shine light on the societal deficiencies that feed crime and criminalization, and to underscore the important visioning and enactment of alternatives happening now amongst communities most impacted by imprisonment.

¹⁴⁸ *Id.* at 123–68.

¹⁴⁹ *Id.* at 143.

¹⁵⁰ *Id.* at 172–85.