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Criminal Law Bulletin**A Thing Called Prisoner**Regina E. **Rauxloh**[\*]

In his article *The Punitive Coma*[1] J.C. Oleson presents a radical solution to the burning issue of overcrowded, violent and expensive prisons in the United States. Oleson proclaims: “The warehouse prison doesn't incapacitate prisoners from committing further offences; it merely insulates them from the respectable taxpaying public. Like its medieval predecessors, the modern warehouse prison is built to contain society's unwanted souls. Nothing more.”[2] The author nevertheless proposes a system that goes further than this; in his suggested facility, efficient storing would be made perfect. Indeed, he advocates putting prisoners into a narcotic coma for the duration of their sentences.

After presenting his idea of punitive coma, the author then outlines the technical possibilities of placing a person into an induced coma, describing precisely the technical and medical requirements as well as the potential risks and the ways to reduce them. He argues that suspending a prisoner's consciousness would make it possible to pack each one into a limited space with a minimum level of staff and thus a minimum of costs. Moreover it would be virtually impossible for the inmates to commit any crime against the other inmates or the correction officers.

Oleson claims that “the punitive coma is an enlightened form of punishment, as it is more efficient and compassionate than the legitimized methods of punishment currently in use.”[3] He argues that this form of punishment neither violates prisoners' constitutional rights nor the Eighth Amendment prohibition of cruel and unusual punishment and outweighs any other moral threshold.

Many people would argue that the proposal to comatose prisoners is such an unacceptable idea that it is not worth dealing with. However, I consider it very important to respond to this unusual suggestion for the following reasons. First, I think Oleson's proposal is such an indication of the degradation and dehumanization of prisoners that it should not be published without any reaction from a criminal lawyer. Second, the public might find his proposal very tempting because it promises to make prisons much safer and especially much cheaper. Therefore, I hold it necessary to give a thorough account of various moral, legal and social objections to the replacement of conventional prisons with the permanent state of an artificial coma.

***The Problems of the Modern Prison***

The idea of imprisonment as punishment is quite modern. Although prisons can be found early in most civilizations, they were usually used only to keep the accused in custody until trial. In Europe until late medieval times, crime used to be a private matter, which was solved in a civil law case. The offender or his clan had to compensate for the damage and, in more serious cases, revenge was sought in feuds. Later, when the state claimed the monopoly over violence, individual body punishment was introduced, mainly in cruel public executions and mutilations.[4] The kind of corporal punishment was supposed to reflect the crime and its cruelty. It not only served as a general deterrent but demonstrated the power of the state.

Two changes characterize modern penology: first, the public nature of punishment was replaced by secret and private executions. Second, the object of punishment shifted from the individual's life and body to his[5] property and personal liberty. The prison as an institution of punishment was thus born.

Oleson wants to solve two major problems of modern prisons, violence and high operational expenses. He spends a considerable amount of space in his article describing the repugnant and violent conditions of American warehouse prisons, with frequent torture and rape, high rates of suicide, and even killings committed or initiated not only by prisoners but even by prison guards. He claims that “our warehouse prisons are animal factories” that are “affirmatively dehumanizing and brutal.”[6]

However, violence in prisons is a problem that should be addressed other than by merely robbing the inmates of their consciousness. The Stanford Prison experiment[7] demonstrated that there is a high violence potential in everybody, regardless of whether or for what reason one is convicted and whether one is a prisoner or a prison officer. This well known experiment suggests that the institution of imprisonment itself bears the roots of the high crime and violence rate in prison. The conclusion that must be drawn is that the very concept of “imprisonment” needs to be reconsidered. If a society starts fighting violence by simply transforming people into unconscious objects, it misses the chance to develop strategies to understand, prevent or at least reduce aggression in the first place.

According to Oleson, besides prison violence, the most compelling problem is the high cost of operating and constructing new prisons to cope with the rapid increase of prison population in the last three decades. The amount of money spent on correctional facilities is enormous,[8] and, of course, diminishes public spending elsewhere; Wray, for example, suggests that the increasing spending on prisons leads to substantial cuts in education.[9] Oleson, on the other hand, estimates that in his proposed coma-bay facility the costs could be cut drastically: the staff required for a 1000 man unit would be only eight nursing aides, two full-time licensed practical nurses, a physician's assistant and an anesthesiologist, to feed, clean, medicate the prisoners and prevent any side-effects of narcotic comas. By little more than doubling the personnel budget, the numbers of prisoners could be increased from 1,000 to 10,000 inmates.[10] However, this calculation does not take into account the risks of technical problems. If there were an accident and a number of prisoners “awoke” at the same time, a shortage in staff might be fatal. Furthermore, prisoners cost society the highest amount after they have been released, due to the high rate of recidivism. According to Levitt, the year after release from prison, a prisoner costs society approximately \$80,000 because he will find it hard to find a job and quickly commits crimes again.[11] This figure would probably be much higher for inmates leaving coma-bay prisons, since they have no chance of rehabilitation or employment. Furthermore, Oleson does not consider the loss of jobs and infrastructure now related to prisons. Gonnerman describes prisons as “the North Country's largest growth industry” during the last 20 years.[12]

### ***Deterrence and Retribution***

Oleson argues that the four classic theories of punishment-retribution, deterrence, rehabilitation, and incapacitation-do not form a coherent system of penology but rather compete with each other. He claims that prison “is a construction without a clear theoretical mandate.”[13] Nonetheless, Oleson argues that the punitive coma “serves the same goals of deterrence and retribution.”[14]

In most societies the core of criminal justice is the notion that a committed wrong has to be put right by retribution. Often, in connection with religion, there is the sense that by imposing suffering on the perpetrator, the “good order” has to be reinforced, rebalancing the scales of justice. In many cases this is also the victim's first interest. According to retributive theories, punishment is the morally necessary response to crime. Retributive punishment is seen as an end itself, which serves no other purpose than in responding to the violation of the victim's rights with the violation of the offender's rights. Consequently, it is crucial that the punishment is proportional to the crime.[15] The difficulty of finding a sentence proportional to the committed crime is not a question of the form of punishment but rather of the process of sentencing itself and thus a problem for the courts. A prison sentence does not become more or less proportional if the prisoner is put into a narcotic coma.

Another problem with proportionality is that a sentence served in a state of unconsciousness might be

seen as paradoxically both too hard or too lenient at the same time. As this Article will later demonstrate, the punitive coma is much crueler than conventional prisons and thus out of proportion to any committed crime. However, I am sure that many people, especially the victims or their families, would find the idea that the perpetrator “sleeps”-while they have to live with the suffering-as unbearably lenient. Although I disagree, some might conclude that a coma is less severe than the hard reality of overcrowded prisons. In this case, retribution would not be well served.[16]

The utilitarian deterrence theories hold that the act of punishing a crime can prevent the criminal from reoffending (individual deterrence) and discourage the rest of the society from committing a crime (general deterrence). Indeed, one might well think that the experience of the loss of his life was so horrible that he would not ever want to repeat it and would not commit any crime again. However, especially in cases of longer sentences in the coma-bay prisons, the effect might be directly the opposite. When the prisoner is released after several years, the world he used to know might be so much changed that he would hardly recognize it. I invite the reader to remember the world of 20 years ago. In 1986 the Cold War was at its height; people would communicate by post instead of emails and use telephones instead of mobile phones. Given the current difficulties of reintegrating long-term prisoners in society, the reintegration of the once-comatose former prisoner would be much less likely than today, and he might well return to his criminal lifestyle.[17]

More importantly, both individual deterrence and general deterrence are undermined by the limited role the prospect of punishment plays at the time of commission of the crime. One can divide the majority of committed crimes into two categories. In the first, the offender believes that the chances of getting caught are slim and hopes to avoid any punishment, no matter how light or severe it is. In the latter, the offender is in such an emotionally excited state that his focus is merely on the crime as such, and he is not open to rational evaluation of any further consequences. In the former situation, certainty of punishment would probably prevent a considerable number of people from offending.[18] In the latter, there is no room for deterrence through the threat of punishment no matter how severe it is. The threat of punishment might only indirectly affect the decision of whether to offend by, for example, raising society's condemnation and, consequently, elevating offender's moral threshold.

### ***Human Rights***

The achievement of the Enlightenment movement is the common notion that no human shall be made an object of state power but will always be certain of his dignity. Today, “civilization” means that even enemies of society are treated respectfully because we do not want to respond to barbaric behavior with barbaric treatment. We claim to behave humanely by treating everybody, criminals included, as humans. Oleson, in contrast, while explaining how to reduce medical risks, suggests that the “coma-bay prisoner should be thought of as a (living) machine, with inputs and outputs.”[19]

The reader should realize that Oleson proposes to transform human beings into objects with no consciousness, who are little more than their physical bodies. One has to be clear about what it means to be put into and kept in an artificial coma. It is not just a state of peaceful sleep, as the author tries to let us assume. Transforming criminals into mere objects is dehumanising in the truest sense of the word. It means that the person is not able to exercise any human activity, even simple things such as speaking to a friend, reflecting on one's day or simply having daydreams. Oleson illustrates himself how inhuman coma-bay prisons would be:

Although rehabilitation is dead in American corrections, its vestiges linger and consume a significant fraction of our resources. Since coma-bay prisoners will remain unconscious, supplementary services like counseling, libraries, or education can be eliminated from corrections budgets. Space-inefficient features such as weight rooms, exercise yards, and visiting facilities can be eliminated entirely, allowing the coma-bay prison administration to fit additional inmates into each facility.[20]

Only in his conclusion does Oleson mention that punitive coma “denies a fundamental value of Anglo-American jurisprudence: the physical integrity of the individual. It compromises human dignity.”<sup>[21]</sup> But besides this single brief mention, there is no reference to this criticism.

In Oleson's coma-bay prison inmates are denied the basic human rights despite their being unconscious and thus unaware of their situation. The comatose prisoner cannot express his opinion, enjoy education, communicate with his family, inform himself about the latest politics, associate with others, be legally counseled; he is not even allowed to talk, to pray, or even just to think. I hold that all human rights are violated, because the prisoner is not allowed any longer to be a human. Even the right of physical integrity is restricted, since it embraces not only the lack of injury and pain but also the right to control and to use the body. Indeed the right to life itself is disregarded, because the permanent unconscious state can hardly be called human life. Moreover, the prisoner will be aware of what he has lost once he is allowed to regain consciousness.

Oleson argues that the considerable advantages of comatosing prisoners justify the denial of constitutional rights. He examines possible violations of freedom of speech (including communication by mail, telephone access, and communication with the press), of the right of assembly (including visitation), the right to free exercise of religion, and the right to counsel. The author follows two lines of argument. First, he shows that American courts tend to grant prison administrations a broad discretion to restrict prisoners' rights and are very reluctant to interfere in prison officials' scope for decision making. Thus Oleson expects that:

As long as reasonable attention is paid to the overall condition of confinement (that is, as long as comatose prisoners are physically well cared for), administrative encroachments upon secondary entitlements—for example, the right to free speech, the right to assembly, or the right to practice one's religion—will not warrant judicial intervention.<sup>[22]</sup>

But as *Douglas v. Sigler*<sup>[23]</sup> stated: “the courts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases.”<sup>[24]</sup> Putting prisoners into a narcotic coma for the time of their sentence would indeed be a very extreme case. Even when it is said that “courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform,”<sup>[25]</sup> the intent is not to exclude all judicial review and give all the decision-making power to the administration.<sup>[26]</sup> And this is for a good reason, because imprisonment is a very important part of political power, and thus in a system of separation of powers the judiciary has to control the executive in this area.

Secondly, Oleson argues that the benefits of coma-bay prisons outweigh the already restricted constitutional rights of prisoners and justify their elimination:

Already, these rights are dramatically truncated. The additional gains in safety and security realized by using the punitive coma will certainly outweigh any additional losses to inmate liberty. It is simply a matter of calculating the logistical issues, and ensuring that prisoners are not unnecessarily stripped of their limited rights to speech, assembly, religion, and legal representation.<sup>[27]</sup>

Of course prisoners cannot enjoy the same rights as free citizens,<sup>[28]</sup> but American courts have repeatedly made it clear that prisoners' rights have to be balanced against penological interests<sup>[29]</sup> and that the former should be given considerable weight. One aspect of this evaluation is the question of whether there are alternative means for the prisoners to exercise their rights.<sup>[30]</sup> Obviously, this is not the case if the inmate is kept in coma.

Oleson's argument that punitive coma does not violate the U.S. Constitution is not quite coherent. He

admits that prisoners have rights under the Constitution, even if those are restricted: “and precisely because American prisoners do remain some rights, it must be determined whether the punitive coma will withstand legal attacks raised in U.S. courts.”[31] However, when examining these rights in particular, he only shows that these rights are restricted but not how it is justified to deny them altogether.

A further problem not taken into account by Oleson is the effect of his scheme on spouses, children, friends, and relatives outside the prison. Presently, every prison sentence affects and harms the prisoner's community, especially his family.[32] Yet even a remote prisoner can play a role in a family in absentia;[33] families even move near the prison to be closer to the prisoner.[34] In *Procunier v. Martinez*[35] the Supreme Court acknowledged that a prisoner's wife has an interest in communicating with him which is protected by the First and Fourteenth Amendments. Later, in *Overton v. Bazzeta*,[36] while upholding severe restrictions on visitation, the Court purposely stopped short of denying that some family members possessed associational rights. Oleson's proposal would render impossible communication and association between inmates and intimate family members. Indeed, it would be unbearable on prisoners and family to cut a prisoner off completely from the family life and make it impossible for him to share important events like weddings or deaths or to be asked his advice in important family decisions.

### ***Cruel and Unusual Punishment***

Arguing that the state of punitive coma is not unusual but rather innovative, and not more but rather less cruel than the present crowded and violent prisons, the author infers that punitive coma does not violate the prohibition of cruel and unusual punishment found in the Eighth Amendment of the U.S. Constitution.[37] His argument is that “[if] anything, the punitive coma is less cruel and less unusual than crowded warehouse prisons or supermax facilities.”[38]

It is true that the unpleasant physical and psychological conditions under which the inmates have to try to survive would be eliminated with punitive coma.[39] However, I argue that comatosing human beings is even crueler than the present situation in prisons. Even if the inmates live under constant fear and in violent struggle, they are able to behave as humans, to think, to pray, and to reflect about their past, present and future actions. Even if one at a first glance thinks that at least the inmate has no pain, one has to agree that the narcotic coma is worse than pain: it is like being buried alive.

Oleson asks us to imagine that we had to advise a convicted person whether to face violence and rape for years, or a painless sleep. Although the latter option seems to be very tempting in this scenario, one has to remember that in extreme cases sometimes one even considers death to be the lesser evil. Still, we would not advise people to commit suicide or even make a nationwide policy of it.

Prisons have been judged to be “cruel” if they deprive inmates of the minimal civilized measures of life's necessities.[40] I argue that these “civilized measures” are more than food and health. I understand that essential human practices, such as reading, writing, or founding a family, are not seen as fundamental necessities; however, other basic human needs such as thinking or communicating with others are. It is not enough to be fed and cleaned. Punitive coma is cruel because it deprives inmates of the exercise of their essential humanity.

Since Oleson's proposal is a new idea and only possible now that medical science is advanced enough to keep a human being in constant coma for such a long time, Oleson argues that coma-bay prisons are innovative rather than unusual. It can easily be acknowledged that the constitution of a country allows changes and developments. However, it is the function of a constitution that certain rights are guaranteed and that the citizens cannot be deprived of them even if society undergoes significant changes.[41] This is especially true of the American Constitution, which can only be amended, but not changed. Each development has to be considered very carefully in this light. I hold that the idea of taking away somebody's consciousness-and thus excluding him from any human activity and putting him in a vegetable state-differs so much from any

other known form of punishment that it is cruel and unusual indeed.

### ***American Society***

Oleson describes three approaches to tackling the problem of over-populated prisons: construction, diversion and crowding. An approach that he does not consider at all is to try to reduce the number of people being sentenced to prison in the first place. As well as crime being part of society, so are prisons. Especially in the United States where the prison population is so incredibly high,[42] prisons are an essential problem of society.

What is needed is an understanding of why so many American citizens are imprisoned. Do the roots of the high prison population lie in the judicial system? According to Morgan, “[t]he rate of imprisonment is not determined by factors beyond government control. It is ultimately a matter of political choice.”[43] Or does the key lie in American social structure and organization?[44] Alternatively, could we draw conclusions from the fact that by far the majority of American prisoners are extremely poorly educated, and most have been unemployed before being imprisoned?[45]

One related factor behind the high prison population is the high rate of crime. Why does the U.S. have such a high crime rate? Is American society more violent than that of other countries? If so, what are the reasons for this? The comparison with other Western countries, of which none has nearly as many prisoners as the United States, shows that there must be other ways of addressing crime. Oleson accuses conventional prisons of being “an inefficient and ineffective means of controlling crime,”[46] but he does not show us whether the punitive coma would affect the crime rate in any way.

A huge prison population as well as a high crime rate show that something must be wrong with the society that is affected by them.[47] Thus, prisons are in the first place a social rather than an economic or technical problem, and what is needed is a social, not a medical, solution. The author illustrates very convincingly how easily, safely and inexpensively new scientific methods can cope with the bad situation. However, even the best science cannot heal growing cancers of society by putting plasters over the wounds. Oleson counters that medical treatments are already used in criminal justice: “If medical procedures can be used for punitive purposes, if we can punish sex offenders by chemically castrating them, then we can probably also incapacitate our most serious prisoners by placing them into narcotic comas.”[48] But involuntary sterilization does affect only one part of the individual, not the person as a whole.[49]

Oleson comforts us by stating, “We may feel uncomfortable with punishing our offenders by treating them with medical therapies (especially in the absence of any penological commitment to rehabilitation), but we would shed these scruples with time.”[50] The thought that scruples would become weak over time might be true but nonetheless cannot provide any justification. But it is not only the idea of a medical approach to a social problem that is disturbing. Storing prisoners together and packing them in the smallest space cannot be a solution to crime. Rather than treating the symptoms, the roots of the problem have to be researched and addressed.[51] Reducing the negative side-effects of imprisonment-crime rates within prisons and high costs-might even worsen the problem, as it takes it out of sight of the public. Society has to deal with its problem directly and not just hide them away, neither in conventional prisons nor in transforming criminals into mere objects.

In modern Western views the conception still prevails that human beings can overcome their more animalistic tendencies with human morals rather than just impair them with narcotics. It is humankind's challenge to overcome behavior that we classify as crime. We should not try to run away from this task. Martinson states that we have “denie[d] ... both the normality of crime in society and the personal normality of a very large proportion of offenders, criminals who are merely responding to the facts and conditions of our society.”[52]



Many of the problems addressed in conventional prisons, especially the violence among inmates, arise in significant part because of the under-funding of prisons. However, the under-funding as such is not addressed by Oleson's article. Clearly, the United States is not so poor as not to be able to afford to spend more money on prisons. It is not a question of funds as such, but rather of their distribution. In my opinion, the reasons why prisons have such a small priority compared to other funded projects, even though the incredible situation of prisoners is known, shows the small importance that is attributed to the prisoners themselves. When a system on the one hand produces such an enormous percentage of imprisoned citizens but on the other hand refuses to fund prisons accordingly, it must be asked what society sees in its prisoners. An illustration is provided by the statement of a neighbor of the new supermax prison in Malone, New York, where two inmates share a 14-by-8.5-foot cell: "You have to be a total animal to be locked up like that ... I think it would drive me nuts. But we don't know who's going to occupy the cell. He probably deserves that or worse."<sup>[53]</sup>

The lack of interest in and respect for prisoners will even grow when inmates are completely cut off from the outside world. At present, prisoners are still part of society, even if an unwanted one; but in comabay prisons they would be completely excluded from society. Inmates will be out of sight of society and they will not even be able to observe passively what is happening in the outside world.

This approach of getting unwanted people out of the sight of society could easily spread into other areas. If a system decides to cope with the problem of crime, violence, and prisons with the proposed measures, it is only a small step to address other problems with the same methods. Why not put a mentally disabled person in a coma until better treatments are found? And where is the line between mental illness and mental handicap? Why not stop the suffering of seriously ill people by letting them sleep for an indefinite time? What about other problematic groups of society, or those who are perceived as problematic by the mainstream? Twenty years ago (and according to some people even today) homosexuals would be considered appropriate candidates. The same might be true for drug-addicted and later even unemployed or homeless people. Treatments that most of us would reject because they remind us of Fascist practices in Nazi Germany should not be allowed in the case of convicted criminals either.

### ***The Criminal Justice System***

Furthermore, Oleson's proposal would have important impacts on the criminal justice system. First, he suggests that punitive coma may substitute for the death penalty. He argues that one of the benefits of punitive coma is that, if a miscarriage of justice is detected, the inmate always can be released. I doubt if he could convince retentionists, who now reject changing the death penalty into a mandatory life sentence without parole, to agree to put prisoners into a lifetime sleep. But there is an additional concern: the number of cases in which innocent people are sentenced to death allow us to infer wrongful convictions in cases of long-term imprisonment. How can a convicted person who is rendered unconscious for years or even decades fight an appeal case? He would be dependent on a lawyer or a friend to start an appeal case; he cannot take his own initiative. But how could a lawyer question the prisoner? In a footnote Oleson tries to solve this problem by suggesting that the prisoners could be awakened periodically "to participate in legal proceedings or parole hearings."<sup>[54]</sup> However, there is no consideration of the psychological impact that waking up would have on the prisoner's psyche. Furthermore, is it very questionable whether the prisoner could give reliable statements in a condition in which his thinking is reduced to a short time between long periods of unconsciousness. In addition, a drop in the number of appeals or re-opened cases could undermine in the long run the awareness that misjudgments are possible.

What is more, the possibility of storing more people more cheaply in such facilities might cause the prison population to rise. More effective ways of imprisonment as well as more efficient ways of handling cases in courts, such as plea bargaining,<sup>[55]</sup> will not decrease but cumulatively accelerate the process of locking people away, and both procedures would be paid for through the loss of individual rights.

The criminal justice system would also have to reconsider the meaning of “life sentence.” In Oleson's proposed system “the prisoner can be allowed to age and to die within the comatose state.”<sup>[56]</sup> But how would this end occur, when all life functions are regulated by machines and the body does not act? What does it mean to age: is this merely a question of decline of the cells? Should elderly people not have the opportunity to prepare mentally for death, speaking a last time with loved ones, receiving religious blessing, sorting out legal matters like writing a will? Moreover, does the artificial coma shorten or lengthen a life-time? If the latter, would there be a policy concerning after how many years the life supporting system would be switched off? What would be the safeguards against misuse? Would there be a justification left not to switch off the machine immediately to cut further costs, since “the thing called prisoner” does not notice experience in his life anyway?

### **Conclusion**

I agree with Oleson in that it is necessary and urgent to find alternatives to this inhuman institution of imprisonment. However, the coma-bay prison is not an acceptable replacement, not only because it ignores the inmates' constitutional rights and bears several serious risks for the criminal justice system as well as broader society, but most of all because it deprives the prisoners of their human dignity. Regardless of the crime which has been committed, we cannot allow this.

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[FN1] J.C. Oleson, *The Punitive Coma*, 90 Cal. L. Rev. 829 (2002).

[FN2] Oleson, 90 Cal. L. Rev. at 843.

[FN3] Oleson, 90 Cal. L. Rev. at 849.

[FN4] See the colorful description in Michele Foucault, *Discipline and Punish-The Birth of the Prison* 6-9 (1991).

[FN5] Throughout this article, I will refer to the prisoner or criminal as “he” largely as a reflection of the predominantly male element to this phenomenon.

[FN6] Oleson, 90 Cal. L. Rev. at 849–50.

[FN7] Craig Haney et al., *A Study of Prisoners and Guards in a Simulated Prison*, in *Readings About the Social Animal* 52, 56-70 (Eliot Aronson ed., 6th ed. 1992).

[FN8] According to Oleson alone the operating costs of American prisons rose from \$3.1 billion in 1980 to \$17.7 billion. Oleson, 90 Cal. L. Rev. at 844.

[FN9] L. Randall Wray, *A New Economic Reality: Penal Keynesianism*, 43 *Challenge* 31, 38 (2000).

[FN10] Oleson, 90 Cal. L. Rev. at 874.

[FN11] Steven D. Levitt, *Preliminary Opinion on the Economics of Inmate Labor Participation*, at 5, presented at the 1999 National Symposium on the Economics of Inmate Labor Force Participation, George Washington University, available at [www.gwu.edu/%EBlabor/prison\\_labor](http://www.gwu.edu/%EBlabor/prison_labor) (last visited Jan. 20, 2003).



[FN12] Jennifer Gonnerman, *The Supermax Solution*, Village Voice, May 19-25, 1999.

[FN13] Oleson, 90 Cal. L. Rev. at 842.

[FN14] Oleson, 90 Cal. L. Rev. at 890.

[FN15] Andrew Ashworth, *Sentencing*, in *The Oxford Handbook of Criminology* 819 (Mike Maguire et al. eds., 2d ed. 1997).

[FN16] Wray holds that since victims are excluded from the criminal justice system, the public always demands harder punishment. Wray, *supra* note 9, at 36.

[FN17] I would even go so far as to suggest that the risk of suicide would increase.

[FN18] Cesare Beccaria, *On Crimes and Punishments and Other Writings* (Richard Bellamy ed. 1995).

[FN19] Oleson, 90 Cal. L. Rev. at 868.

[FN20] Oleson, 90 Cal. L. Rev. at 877.

[FN21] Oleson, 90 Cal. L. Rev. at 899.

[FN22] Oleson, 90 Cal. L. Rev. at 886.

[FN23] *Douglas v. Sigler*, 386 F.2d 684 (8th Cir. 1967).

[FN24] 386 F.2d at 688. In *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974) (overruled by, *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)), the Court makes clear that a restriction on inmate correspondence that furthers an important if substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. 416 U.S. at 414.

[FN25] *Martinez*, 416 U.S. at 404–05.

[FN26] *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), judgment aff'd and remanded, 559 F.2d 283 (5th Cir. 1977), cert. granted in part, judgment rev'd in part, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978).

[FN27] Oleson, 90 Cal. L. Rev. at 886.

[FN28] *U.S. v. Dawson*, 516 F.2d 796, 806 (9th Cir. 1975).

[FN29] *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), provides us with a test of reasonable restriction of prisoners' right to correspondence, which was also used for other rights.

[FN30] See 482 U.S. 396.

[FN31] Oleson, 90 Cal. L. Rev. at 878.

[FN32] See, e.g., R. Pain & S. Gill, *Where Can Children Turn?*, 50 Criminal Just. Matters 16, 16 (2003).

[FN33] *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987) (holding that inmates have the right to marry).

[FN34] Gonnerman, *supra* note 12; Wray, *supra* note 9, at 52.

[FN35] *Procunier v. Martinez*, 416 U.S. 396, 409, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974) (overruled by, *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)).

[FN36] *Overton v. Bazzetta*, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162, 6 A.L.R.6th 731 (2003).

[FN37] Oleson, 90 Cal. L. Rev. at 889. I completely agree with Oleson when he claims that narcotic coma under these circumstances is to be categorised as punishment rather than medical treatment. However I oppose his description of it as “a benign form of punishment.” 90 Cal. L. Rev. at 888.

[FN38] Oleson, 90 Cal. L. Rev. at 890.

[FN39] Although not all risks are excluded, see above.

[FN40] *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981).

[FN41] *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), judgment aff'd and remanded, 559 F.2d 283 (5th Cir. 1977), cert. granted in part, judgment rev'd in part, 438 U.S. 781, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 (1978) (“The content of the Eighth Amendment is not static but ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”).

[FN42] And long prison terms have increased over the last two decades notwithstanding sinking crime rates.

[FN43] Rod Morgan, *Imprisonment: Current Concerns and a Brief History since 1945*, in *The Oxford Handbook of Criminology* 1137, 1145 (Mike Maguire et al. eds., 2d ed. 1997).

[FN44] Steven F. Messner & Richard Rosenfeld, *Crime and the American Dream* (2d ed. 2001).

[FN45] Wray, *supra* note 9, at 54: “[T]here is a disturbingly high correlation between dropping out of high school and becoming incarcerated, and between non-employment and becoming imprisoned ... [;] perhaps a third of all prime-age jobless males without a high school degree are currently under control of the criminal justice system.”

[FN46] Oleson, 90 Cal. L. Rev. at 836.

[FN47] Morgan, *supra* note 43, at 1145, explains:

The modern prison, and its institutional counterpart-the workhouse for the indigent poor, the asylum for the insane, the reformatory for wayward youth, and the penitentiary for fallen woman-reflect what Foucault ... has termed ‘the great confinement’ and emerged alongside the factory. They were social and architectural counterparts. In the factories labour was rationalised for the purposes of more efficient production. In the new institutions of confinement those unproductive sections of the labour force were differentiated, segregated, and disciplined.

One cannot help asking what purpose our contemporary hopelessly overcrowded prisons do serve.

[FN48] Oleson, 90 Cal. L. Rev. at 896.

[FN49] And the treatment is crime related.

[FN50] Oleson, [90 Cal. L. Rev. at 897](#).

[FN51] Messner & Rosenfeld, *supra* note 44, for example, see the reason for the enormously high crime rate in American culture and social structure.

[FN52] Robert Martinson, What Works? Questions and Answers About Prison Reform, 36 *Pub. Interest* 22, 49 (1974).

[FN53] Gonnerman, *supra* note 12.

[FN54] Oleson, [90 Cal. L. Rev. at 888 n.334](#).

[FN55] Mike McConville, Plea Bargaining, in *The Handbook of Criminal Justice Process* 353 (Mike McConville & Geoffrey Wilson eds., 2002).

[FN56] Oleson, [90 Cal. L. Rev. at 874](#).

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42 NO 3 CRIMLAWBULL ART 3

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