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Giovanna Shay

Western New England University School of Law, gshay@law.wne.edu

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ILLICH (VIA CAYLEY) ON PRISONS

GIOVANNA SHAY*

INTRODUCTION

Ivan Illich did not write much about prisons. However, in the mid-1990s, Canadian broadcaster David Cayley memorialized conversations with Illich that were inspired by a 1995 prison conference that Illich attended in Stockholm.¹ Cayley's own writings from the 1990s, in the midst of the U.S. incarceration wave,² applied Illich's theory of counterproductivity to the vast American prison system.³

This Article considers whether, more than a dozen years after publication of Cayley's book *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives*, Illich's theories help us to make sense of America's "prison-industrial complex."⁴ It concludes that our current situation reflects in part the dynamics of his theory of "counterproductivity,"⁵ but that Illich did not take sufficient account of the salience of race and class in American criminal punishment.

* Associate Professor of Law, Western New England University School of Law. Thanks to my WNE colleagues who collaborated in organizing this Symposium on the work of Ivan Illich—especially Jennifer Levi for initiating the project, Erin Buzuvis for making it happen, Bridgette Baldwin for inviting fantastic participants, Julie Steiner for jumping right in, Bruce Miller and Matthew Charity for supporting the idea, Anne Goldstein for providing intellectual leadership, and Renee Rastorfer and Elliott Hibbler for research and web support. Also, thanks to our esteemed guests who made the day so memorable. In my case, special thanks are due to Teri Miller, who commented on this Article, and James Forman, who travelled to join us. Finally, thanks to Dean Art Gaudio for his support of a wonderful event.

1. Transcript, *Prison and Its Alternatives*, IDEAS (Canadian Broadcasting Corporation broadcast June 17-28, 1996) [hereinafter IDEAS].

2. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74-75.

3. DAVID CAYLEY, *THE EXPANDING PRISON: THE CRISIS IN CRIME AND PUNISHMENT AND THE SEARCH FOR ALTERNATIVES* 4 (1998) [hereinafter CAYLEY, *THE EXPANDING PRISON*].

4. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 84 (2003) ("The term 'prison industrial complex' was introduced by activists and scholars to contest prevailing beliefs that increased levels of crime were the root cause of mounting prison populations.").

5. IVAN ILLICH, *LIMITS TO MEDICINE: MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH* 211 (Marion Boyars 2002) (1975) [hereinafter ILLICH, *MEDICAL NEMESIS*].

I. "COUNTERPRODUCTIVITY"⁶

As other papers in this Symposium discuss, Ivan Illich published a series of works in the 1970s describing how social institutions, which he classed as a species of "tools,"⁷ can grow to a scale that produces "[n]egative returns."⁸ Illich focused on education,⁹ highway transportation,¹⁰ and the medical establishment.¹¹ "A tool can grow out of man's control," Illich explained, "first to become his master and finally to become his executioner."¹² As Cayley summarized Illich's ideas: "modern institutions often reach a scale at which they begin to frustrate their own purposes: schools stupefy their students, traffic hampers movement, and medicine becomes a threat to health."¹³

In his 1998 book, Cayley argued that prison was "a prime instance of [Illich's] law of unintended consequences."¹⁴ Listing statistics about the "prison boom,"¹⁵ Cayley argued that "during the last generation, country after country has increased its reliance on this counterproductive tool."¹⁶ He noted, however, that the rise in incarceration rates had not accompanied "any increase in crime,"¹⁷ and that no one appeared to have any faith that prisons actually reformed inmates.¹⁸

Cayley argued, influenced by Illich, that prison's true purpose was "symbolic and ideological."¹⁹ This argument was in part the product of a dialogue between Cayley and Illich in which Illich had theorized that prison was a "religious ceremonial."²⁰ Illich's work, according to Cayley, had focused on "what a tool *does* and what it *says*."²¹ The only way that Illich could make sense of a vast and

6. *Id.*

7. IVAN ILLICH, TOOLS FOR CONVIVIALITY 82 (Calder & Boyars 1973) [hereinafter ILLICH, TOOLS FOR CONVIVIALITY].

8. *See* ILLICH, TOOLS FOR CONVIVIALITY, *supra* note 7, at 84.

9. *See generally* IVAN ILLICH, DESCHOOLING SOCIETY (Ruth Nanda Anshen ed., Harper & Row 1971).

10. *See generally* ILLICH, TOOLS FOR CONVIVIALITY, *supra* note 7, at 81-82.

11. *See generally* ILLICH, MEDICAL NEMESIS, *supra* note 5.

12. ILLICH, TOOLS FOR CONVIVIALITY, *supra* note 7, at 84.

13. CAYLEY, THE EXPANDING PRISON, *supra* note 3, at 4 (footnote omitted).

14. *Id.*

15. *Id.* at 7.

16. *Id.* at 4.

17. *Id.* at 5.

18. *Id.* at 8.

19. *Id.*

20. IDEAS, *supra* note 1, at 45-48; *see also* CAYLEY, THE EXPANDING PRISON, *supra* note 3, at 73 (quoting Illich as describing prison as a "religious ceremonial").

21. CAYLEY, THE EXPANDING PRISON, *supra* note 3, at 81.

growing prison system that seemed at best counterproductive was to examine its symbolic purpose.²²

II. PRISON AS A “RELIGIOUS CEREMONIAL”²³

Illich related to Cayley that when he met corrections officials at the Stockholm meeting, he originally had felt “disorientation.”²⁴ He was struck by the fact that these conscientious bureaucrats, who took their jobs so seriously, were administering systems that they knew to be largely pointless, and which inflicted human suffering.²⁵ In his remarks to the Stockholm conference, Illich told the assemblage that he did not know what to make of “caring people whose task is to inflict pain.”²⁶

Ultimately, Illich, himself a one-time Catholic cleric trained at seminary,²⁷ hit upon an explanation: corrections officials were “cardinals” or “pontiffs” who “preside over and organize an extraordinary ceremony in society.”²⁸ He concluded that the prison acted “as a huge ritual which creates a scapegoat which we can drive out into the desert.”²⁹ Prison was a “*colossos*” in the classical Greek sense, “which mirrors . . . our society.”³⁰ We believe, he explained, “that by loading onto that scapegoat all that we experience, we’ll get rid of it.”³¹ The purpose of prison, Illich reasoned, was to enable us to say, “Thank God I am not there.”³²

III. PRISONS GENERATE CRIME

It may be true, as Cayley argued, that mass incarceration³³ is a paradigmatic example of Illich’s theory of counterproductivity, at least in some respects.³⁴ This is probably even more apparent today than it was when Cayley’s book was published a dozen years ago.³⁵

22. IDEAS, *supra* note 1, at 47.

23. CAYLEY, THE EXPANDING PRISON, *supra* note 3, at 73.

24. IDEAS, *supra* note 1, at 45.

25. *Id.* at 45-46.

26. *Id.* at 45.

27. DAVID CAYLEY, IVAN ILLICH IN CONVERSATION 80-83 (1992).

28. IDEAS, *supra* note 1, at 47.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. The term “mass incarceration” has entered into the scholarly lexicon, and may first have been popularized by a paper given by David Garland in 2000. See Wacquant, *supra* note 2, at 78.

34. CAYLEY, THE EXPANDING PRISON, *supra* note 3, at 4.

35. *Id.*

Many commentators argue that prison is “criminogenic.”³⁶ This includes the familiar argument that poor prison conditions and inadequate medical and mental health care ensure that released prisoners are all too likely to return to custody.³⁷

In addition to the effects on the prisoners themselves, mass incarceration has secondary effects.³⁸ It contributes to “intergenerational” poverty, breaks up families,³⁹ and fosters the “prisoniz[ation]” of children who are exposed to the routines of corrections.⁴⁰ In communities in which mass incarceration is concentrated, it “distorts social norms” and “damages social networks.”⁴¹ According to James Forman, Jr., who also spoke at this Symposium:

We have reached a tipping point where taking so many adults out of inner-city neighborhoods disrupts the social organization of those communities—whole neighborhoods are chock full of kids with nobody to raise them, teens grow up thinking that prison is a normal part of adolescence, and waves of young men and women come home from prison needing jobs and support.⁴²

Mapping the geography of mass incarceration, researchers have demonstrated that prisoners are taken from (and return to) highly concentrated areas, contributing to poverty and instability in these neighborhoods.⁴³ Based on their study of Chicago census tracts, Sampson and Loeffler have suggested that “community vul-

36. Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1049 (2008) (cataloguing all the “‘criminogenic[]’ effects” of prisons on offenders, families, and communities, and estimating that prisons increase crime rates by 7%, and that we are close to a “tipping point” at which prisons will increase crime by more than they reduce it).

37. James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 1008 (2010) (quoting *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at *86 (E.D. Cal. Aug. 4, 2009) (quoting a corrections professional as saying “‘there’s only one term you can use’ to describe California’s over-crowded prisons: ‘criminogenic’”)).

38. Megan Comfort, *Punishment Beyond the Legal Offender*, 2007 ANN. REV. L. & SOC. SCI. 271, 279 (discussing “‘secondary prisonization’ of the family and friends of inmates, a form of socialization to carceral norms”) (citation omitted).

39. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DÆDALUS, Summer 2010, at 16.

40. Comfort, *supra* note 38 at 279 (discussing Comfort’s concept of “secondary prisonization”).

41. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African-American Communities*, 56 STAN. L. REV. 1271, 1281 (2004).

42. Forman, *supra* note 37, at 999.

43. See Robert J. Sampson & Charles Loeffler, *Punishment’s Place: The Local Concentration of Mass Incarceration*, DÆDALUS, Summer 2010, at 20.

nerability and incarceration are involved in a negative-feedback loop.”⁴⁴ And the collateral consequences of criminal conviction—including the loss of housing and welfare benefits, job and professional opportunities, and civic responsibilities—all contribute to a permanently stigmatized class.⁴⁵ Writing about these recent research reports, Sasha Abramsky argued that mass incarceration “has undermined one of America’s most durable, and valuable, traits—social mobility.”⁴⁶

The prison system has grown so vast, and so clearly fails to achieve its ostensible purposes, that its counterproductivity is increasingly recognized. Influential voices are acknowledging that the current prison system is taking a huge toll. In July 2010, the U.S. House of Representatives sent a bill to the Senate—ultimately defeated there—that would have established a National Criminal Justice Commission, to conduct a comprehensive review of the federal and state criminal justice systems.⁴⁷ One of the sponsors of the bill, Representative Bill Delahunt of Massachusetts, issued a press release estimating the cost of America’s prison system at \$75 billion and saying, “our prison population is expanding at an alarming rate, with costs to the taxpayers that are unsustainable.”⁴⁸

In California, the state’s massive prison system is, by the Governor’s admission, “collapsing under its own weight.”⁴⁹ Last term, the U.S. Supreme Court affirmed the judgment of a three-judge panel commanding the release of 40,000 California prisoners to bring conditions in the state’s prisons in-line with constitutional re-

44. *Id.* at 29; see also Comfort, *supra* note 38, at 279-85.

45. Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, CRIM. JUSTICE, Fall 2010, at 23-24. Cf. Western & Pettit, *supra* note 39, at 8 (describing prisoners “[a]s an outcast group”).

46. Sasha Abramsky, *Toxic Persons: New Research Shows Precisely How the Prison-to-Poverty Cycle Does Its Damage*, SLATE (Oct. 8, 2010, 7:34 AM), www.slate.com/id/2270328.

47. National Criminal Justice Commission Act of 2010, S. 714, 111th Cong. See Wesley P. Hester, *Senate GOP Defeats Webb’s Criminal-Justice Reform Bill*, RICHMOND TIMES-DISPATCH (Oct. 21, 2011), <http://www2.timesdispatch.com/news/virginia-politics/2011/oct/21/tmain04-senate-gop-defeats-webbs-criminal-justice-ar-1398378/> (reporting that the bill was defeated in the U.S. Senate, garnering 57 of the 60 votes needed to pass).

48. Wendy Zeldin, *United States: House Passes Bill on Criminal Justice System Review*, LAW LIB. OF CONGRESS (Aug. 10, 2010), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402152_text.

49. Brief of Plata Appellees at 4, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (No. 09-1233). See generally Geri Lynn Green, *The Quixotic Dilemma, California’s Immutable Culture of Incarceration*, 30 PACE L. REV. 1453 (2010).

quirements.⁵⁰ The panel that issued the order stated that “the State’s long-standing failure to provide constitutionally adequate medical and mental health care to its prison inmates has necessitated our actions.”⁵¹ Ironically, prison conditions litigation like that in California ultimately may feed the mass incarceration leviathan, by creating mandates for the construction of new institutions.⁵²

The recent economic crisis may be accelerating a reexamination of the costs of mass incarceration.⁵³ The Vera Institute issued a report in October 2010 surveying how state departments of corrections are responding to tight budgets.⁵⁴ It concluded that states are attempting to decrease the number of people who are incarcerated, shorten the terms of those who are imprisoned, reduce recidivism, and close facilities.⁵⁵

Nonetheless, some commentators warn that such a giant prison system, once created, can become self-perpetuating.⁵⁶ Marie Gottschalk notes ways in which the prison-industrial complex has become entrenched, with prison-building and staffing constituting a form of “public works,” in which employees are represented by in-

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

51. *Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JRM P, C01-1351 TEH, 2010 WL 99000, at *4 (E.D. Cal. Jan. 12, 2010).

52. See Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 *LAW & SOC’Y REV.* 731, 731 (2010) (describing Florida’s experience as a case study). The counterproductive dynamic of prison litigation was illustrated recently in the arguments in the California case *Schwarzenegger v. Plata*. In argument day remarks on SCOTUSblog, Paul Clement, former U.S. Solicitor General and counsel for one of the plaintiff-prisoner classes, said that California’s huge prison population “would not create a problem” if the State had allocated funds to build additional prisons when it had passed its “tough on crime laws.” Adam Schlossman, *Argument Day Podcasts: Schwarzenegger v. Plata*, SCOTUSBLOG (Nov. 30, 2010, 11:10 AM), www.scotusblog.com/?p=109615.

53. See Charlie Savage, *Trend to Lighten Harsh Sentences Catches On in Conservative States*, *N. Y. TIMES* (Aug. 12, 2011), http://www.nytimes.com/2011/08/13/us/13penal.html?_r=1; see also American Civil Liberties Union, *Smart Reform is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities*, (Aug. 2011), www.aclu.org/criminal-law-reform/smart-reform-possible-states-reducing-incarceration-rates-and-costs-while.

54. CENTER ON SENTENCING AND CORRECTIONS, *The Continuing Fiscal Crisis in Corrections: Setting a New Course*, VERA INST. OF JUSTICE 10-13 (Oct. 2010), <http://www.vera.org/download?file=3072/The-continuing-fiscal-crisis-in-corrections-10-2010-updated.pdf>.

55. *Id.* at 6.

56. See, e.g., Marie Gottschalk, *Cell Blocks & Red Ink: Mass Incarceration, the Great Recession & Penal Reform*, *DÆDALUS*, Summer 2010, at 62.

fluent guards' unions.⁵⁷ She questions whether the economic crisis will ultimately provoke a rollback of mass incarceration.⁵⁸

IV. THE "RITUAL" FUNCTIONS OF MASS INCARCERATION⁵⁹

Most of Illich's explicit commentary about prisons focused on the prison's place in our collective consciousness.⁶⁰ He characterized the prison's role as largely "ceremonial," saying it functioned as a "scapegoat" for society's "horror."⁶¹

Sounding a similar theme, some observers, including Gottschalk, ask whether the costs of mass incarceration really will lead to its abandonment, in light of the social functions it fulfills.⁶² Although acknowledging that, at least in the near-term, budgetary constraints may prompt decarceration efforts,⁶³ Gottschalk (like Illich) points to the symbolic role of the prison, writing that the "[e]conomic crises may foster public punitiveness."⁶⁴ She also argues that bad times may promote "scapegoating," and that crime control measures often are promoted in response to periods of "public anxiety," including "persistent economic distress."⁶⁵ Other commentators have used similar language to describe mass incarceration as a civic "ritual" that serves collective needs.⁶⁶

Recent research supports Illich's theory that the prison functions as a type of "scapegoat" for social ills—out of sight, out of mind.⁶⁷ Social scientists confirm that, in fact, the prison does mask

57. *Id.* at 65-67; Green, *supra* note 49, at 1470 (noting the California prison guards' union's role in advocating harsher sentencing policies).

58. Gottschalk, *supra* note 56, at 71.

59. IDEAS, *supra* note 1, at 47.

60. *Id.*

61. *Id.*

62. Gottschalk, *supra* note 56, at 62-63.

63. *Id.* at 62.

64. *Id.* at 63.

65. *Id.*; see also Forman, *supra* note 37, at 993 ("Our appetite for vengeance sometimes seems insatiable: politicians make careers out of being tough on crime, only to lose elections to those who are yet tougher . . .").

66. Forman, *supra* note 37, at 995 ("Our society . . . creates criminogenic conditions in our sprawling urban ghettos, and then acts out rituals of punishment against them as some awful form of human sacrifice.") (quoting GLENN C. LOURY, RACE, INCARCERATION, AND AMERICAN VALUES 27-28 (2008)); see also John Paul Stevens, *On the Death Sentence*, N.Y. REV. OF BOOKS, Dec. 23, 2010, at 10 (reviewing David Garland's *Peculiar Institution: America's Death Penalty in an Age of Abolition* and quoting Garland as saying that the death penalty provides "gratifications[] of professional and political users, of the mass media, and of its public audience") (internal quotations omitted).

67. IDEAS, *supra* note 1, at 47.

poverty and social ills in a way that allows mainstream society to turn a blind eye, or even disavow the existence of its problems.⁶⁸ Bruce Western and Becky Pettit recently have written about how the prison creates “invisible inequality,” providing the type of cache for social problems that Illich described.⁶⁹ Western and Pettit argue that “[t]he segregation and social concentration of incarceration . . . help conceal its effects.”⁷⁰ Not only are prisoners physically relocated and hidden away within facilities, they explain, but they are also omitted from metrics of social welfare, such as unemployment statistics.⁷¹

However, current research also makes clear that the prison, although walled, is not really separate from society.⁷² Illich missed the mark in emphasizing the separateness of the prison, which he termed “a world without place.”⁷³ In fact, experience and commentary in the intervening years have uncovered the inter-connectedness of the prison and free communities. Prison is not a “colossos” that “mirrors . . . society,” as Illich suggested.⁷⁴ Rather, it is part of a symbiotic structure that reproduces disadvantage for certain groups within society.⁷⁵

V. FOR WHAT (OR WHOSE) PURPOSE?

So far, this Essay appears to agree with Cayley that mass incarceration is a textbook example of “counterproductivity.”⁷⁶ However, I take issue with Illich in one important respect. Illich’s theories overlook a key question: what is the true purpose of “mass incarceration”?⁷⁷ Illich was puzzled by the “uselessness of the prison,” because there was “no relationship now or ever during the century between the rate of imprisonment and the rate of crime,” and because prison was not providing “correction or education.”⁷⁸

68. Western & Pettit, *supra* note 39, at 8; *see also* Abramsky, *supra* note 46 (commenting on Western & Pettit’s article).

69. Western & Pettit, *supra* note 39, at 12.

70. *Id.*

71. *Id.*

72. Forman, *supra* note 37, at 995 (arguing that “America’s [c]rime [p]olicy [h]urts [u]s [a]ll”). *See generally* Comfort, *supra* note 38; Western & Pettit, *supra* note 39.

73. IDEAS, *supra* note 1, at 47.

74. *Id.*

75. *Cf.* Western & Pettit, *supra* note 39, at 16.

76. CAYLEY, THE EXPANDING PRISON, *supra* note 3, at 4.

77. *See* Wacquand, *supra*, note 2, at 78 (explaining origins of term “mass incarceration”).

78. IDEAS, *supra* note 1, at 46.

He failed to consider that mass incarceration might be devastatingly functional, in furthering objectives that are beneficial to some, but not all.

It is true, as every law student learns, that rehabilitation, deterrence, and incapacitation are traditional justifications for criminal punishment.⁷⁹ The question overlooked by Illich, and much discussed by commentators in the intervening years, is whether the “prison-industrial complex” is serving other aims, *sub rosa*.

Most notably, scholars have suggested that mass incarceration is a new form of achieving class and racial subordination. Michelle Alexander has suggested that the American prison system is a successor to *de jure* segregation, or “the [n]ew Jim Crow,”⁸⁰ while Loïc Wacquant has referred to mass incarceration as a “judicial ghetto.”⁸¹

Wacquant, in particular, has refined the analysis of the prison’s subordinating work. Unlike *de jure* segregation, mass incarceration does not affect all persons of color regardless of class.⁸² Rather, Wacquant argues, the prison contains those who are subordinated by race, by class, and by geographic location, typically inner-city African-American men.⁸³ To better capture the focused nature of the incarceration campaign, and its intersectional effects,⁸⁴ Wacquant uses the term “hyperincarceration,” rather than “mass incarceration.”⁸⁵

79. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 14-18 (5th ed. 2009) (discussing utilitarian and retributivist theories of punishment).

80. MICHELLE ALEXANDER, *THE NEW JIM CROW* 4 (2009); *see also* PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 37 (2009) (“Freedom has a special resonance for African Americans. Slavery limited their liberty; it was a way of controlling blacks. Now prison serves the same function.”) *But see* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. (forthcoming 2012) (acknowledging the power of the Jim Crow analogy, but critiquing it for ignoring class distinctions among African-Americans; minimizing crime’s effects on the African-American community; failing to acknowledge mass incarceration’s impact on poor whites; and down-playing the brutality of Jim Crow segregation).

81. Wacquant, *supra* note 2, at 74, 81. Wacquant’s work appeared in a special issue of *Dædalus* devoted to mass incarceration in Summer 2010. The group of essays collected in that edition greatly influenced this Article.

82. *Id.* at 78 (noting that mass incarceration has left “middle- and upper-class African Americans . . . practically untouched”).

83. *Id.*

84. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (describing the concept of intersectionality).

85. Wacquant, *supra* note 2, at 78.

What is the purpose of the prison? According to Wacquant, along with its sibling institution of “workfare,” the late twentieth- and twenty-first-century prison’s purpose is to control “problem populations and neighborhoods.”⁸⁶ Wacquant exposes the prison as a means of containing the population of the inner-city, a group that was left behind by both the civil rights movement and the transition to a service economy.⁸⁷

So has the prison become counterproductive, in an Illich-ian sense? In the mid-1990s, Illich looked at the expanding carceral bureaucracy, reflected that it did not fulfill its ostensible purposes of reducing crime and rehabilitating the convicted, and conceived of only a ceremonial role for the prison. Illich’s error, however, was focusing on the ostensible rationales of criminal punishment.

Wacquant’s analysis suggests that the prison may be quite productive in the service of race and class subordination. The trick to recognizing this reality is not to accept the ostensible aims articulated for the criminal punishment system, but rather to acknowledge mass incarceration’s actual function. The prison-industrial complex is not counterproductive; it is insidiously effective, in the service of an immoral purpose.⁸⁸

In fairness, some of Illich’s writings on “counterproductivity” do acknowledge that institutionalization of certain functions, such as education, have a particularly negative effect for the poor.⁸⁹ But in his musings on the prison, Illich focuses on the functioning of the entire society as a system, without sufficiently acknowledging divisions of power and authority within it.

This criticism of Illich has been made elsewhere. When he spoke at Berkeley in the 1980s, feminist scholars said that his theory of gender failed to take account of how traditional gender roles reflect male privilege.⁹⁰ He seems similarly blind to the specific ways in which criminal punishment enacts subordination.⁹¹

86. *Id.* at 83.

87. *Id.* at 80-81.

88. Forman, *supra* note 37, at 998 (“If it took the white majority more than two hundred years to understand that slavery was wrong, . . . how long will it take them to perceive that American criminal justice is evil?”) (quoting Paul Butler, *Brotherman: Reflections of a Reformed Prosecutor*, in *THE DARDEN DILEMMA: 12 BLACK WRITERS ON JUSTICE, RACE, AND CONFLICTING LOYALTIES* 1, 16 (Ellis Cose ed., 1997)).

89. ILLICH, *DESCHOOLING SOCIETY*, *supra* note 9, at 4-5.

90. Arlie Hochschild, *Illich: The Ideologue in Scientist’s Clothing*, *FEMINIST ISSUES* 7, Spring 1983.

91. See Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privilege*, 105 *YALE L.J.* 2117, 2119-20 (1996) (discussing how legal regimes, including the

CONCLUSION

Mass incarceration is “criminogenic,”⁹² and so may be another example of “counterproductiv[ity].”⁹³ However, Illich’s ideas fail to capture the particular quality of the evil of mass incarceration in twenty-first century U.S. Aristotle observed of philosophers debating whether competing theories of equality were just: “They omit the ‘for whom’ and judge badly.”⁹⁴ The same critique applies to Illich.

criminal law, can change while still preserving status hierarchies of race, class, and gender).

92. Pritikin, *supra* note 36, at 1052.

93. CAYLEY, *THE EXPANDING PRISON*, *supra* note 3, at 4.

94. See Maureen B. Cavanaugh, *Towards a New Equal Protection: Two Kinds of Equality*, 12 *LAW & INEQ.* 381, 421 (1994) (quoting ARISTOTLE, *POLITICS*, 1280a9-17 (R. Robinson, trans., 1962)).

