Fall 11-28-2022

Rejecting the Paradigm: Reimagining the Philosophy of Punishment To Address the Criminal Justice Crisis in Twenty-First Century America

Jon E. McGee
Eastern Kentucky University, jon_mcgee24@mymail.eku.edu

EASTERN KENTUCKY UNIVERSITY

Rejecting the Paradigm: Reimagining the Philosophy of Punishment To Address the Criminal Justice Crisis in Twenty-First Century America

Honors Thesis
Submitted
in Partial Fulfillment
of the
Requirements of HON 420
Fall 2022

By
Jon E. McGee

Faculty Mentor
Dr. Mike Austin
Department of History, Philosophy,
and Religious Studies

Rejecting the Paradigm: Reimagining the Philosophy of Punishment
To Address the Criminal Justice Crisis in Twenty-First Century America

Jon E. McGee

Dr. Mike Austin, Department of History, Philosophy, and Religious Studies

Legal punishment has been subject to cacophonous debate and transformation throughout the history of American political and philosophical discourse. As a growing body of academic literature indicates a failure in the punitive techniques practiced by American institutions, the necessity for a precise diagnosis of such ailments paired with a new model addressing American concerns for reform remains increasingly pertinent. With due consideration to the previous recommendations of scholars, this paper illustrates the crisis in criminal justice currently felt in the United States. Through statistical, theoretical, and comparative analyses, existing alternatives are examined and an alternative fit to serve the United States' social and political needs is sought. This paper seeks to connect past and present pitfalls with paradigmatic flaws afflicting the theoretical underpinnings of American criminal justice. Ultimately, a new set of principles is formed, providing renewed guidance for a more effective and just approach personalized to the American system's prevailing disparities. Pragmatic models are illustrated, and policy strategies are made accordingly. Given the results of the examinations herein, the conclusion is met: upend the current paradigmatic requirements and reimagine the American philosophy of punishment or continue to see measures intending comprehensive reform fail.

Keywords and phrases: United States, philosophy of punishment, criminal justice reform, retributivism, restorative justice, restitution, moral fortification, American criminal law, mass incarceration, prison abolition.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

I would like to express gratitude to my faculty mentor, Mike Austin, for his help and direction throughout this project. My first class with Dr. Austin inspired this paper's topic, and Dr. Austin's recommendations significantly shaped the path of my research. His guidance, editorial and otherwise, and his reassurance, remained invaluable to this project. Dr. Austin's contributions and our semi-weekly meetings have been indispensable, and I am extraordinarily thankful for his time over the past two semesters.

I would also like to acknowledge the contributions of both my mother, Dr. Myra Beth Bundy, and father, Jon M. McGee, who have been endlessly supportive of my endeavors, and who have offered an immeasurable amount of input, consideration, and encouragement throughout my education. The support of my grandparents, Ruby and Gene Bundy, have been no less vital to my education.

I would like to thank all those close to me who have offered insight, who have provided editorial support for particularly difficult-to-write sections (thank you Ella), and given my perspectives thought, validation, and even challenge. Each conversation and suggestion helped shape the final form of this paper.

Finally, I would like to express my thanks to Dr. David Coleman and the Eastern Kentucky University Honors Program for providing me the opportunity and vehicle to write this paper. The Honors Program and faculty have truly changed my life, and those of countless other students.

Introduction: The Problem

The criminal justice system in the United States is critically ill, and its disease is the pervasive, insensate grip of American punishment. Particularly within the last fifty years or so, the uniquely volatile crucible of American socio-political discourse has forged a character of severe punishment unparalleled among the modern West.[1] In a nation prideful of its once radical innovations to the criminal process, wanton and rampant brutality in dealing with wrongdoing and wrongdoers has grasped society. This attitude has triggered a series of policy changes manufacturing what remains the largest incarcerated population in the world.[2] Ill-fated reforms have been attempted, and remorseful politicians have renounced their past legislative mistakes. Advocates demand the reversal of tough on crime policies, but change seems too little too late. The death knell of American criminal justice reform lives lost in the screeching howl of ideological discourse. Simply put, the broken system cannot be mended by emergency policy change nor reactionary protest in perpetuity – attention must be directed towards American punishment's perilously flawed paradigm.

The trepidation incited by this crisis is not new, nor is the discourse ferociously searching for a method of reversal. But progress is slow, improvements hardly endure, and continuing reliance upon a gravely unsound framework is no doubt the culprit. As Randy Barnett so succinctly explained, "many, if not most, of our system's ills stem from

---

1. Joshua Kleinfeld. "Two Cultures of Punishment," *Stanford Law Review* 68, no. 5 (May 2016): 937-939.

2. "World Prison Brief Data: Highest to Lowest – Prison Population Rate," World Prison Brief, accessed September 14, 2022. https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All.

errors in the underlying paradigm [of punishment]," and as such, "only if we…look at our old problems in a new light do we stand a chance of solving them."[3] Barnett is not alone – thousands of inquisitive pages have been published by philosophers reprimanding the justifications and the supposed necessity for punishment. Perplexingly, robust and tested penological alternatives are no less prominent. However, the integration of these dialogues into a digestible position, one applicable to American values and disparities, remains elusive. On the one hand, while philosophical inquiry correctly outlines paradigmatic flaws in punishment, it is often too abstract. On the other, while criminological and penological studies precisely identify statistical pitfalls, alternatives, and policy reforms, their discussions are merely quantitative and all too focused on "fixing" numbers, failing to ideologically justify their reforms. To consolidate: while it is imperative to assess functional policy alternatives, unless the American public can also come to terms with modifying or eradicating their retributivist punitive techniques, reforms will continue to fail, and the crisis will inevitably reemerge.[4]

It is difficult for Americans to reconcile their inclination to view the nation's large prison population as government overreach with their impulse of outrage towards individuals transgressing the personal or property rights of innocent citizens. Therefore, to comprehend the scope of America's crisis in criminal justice, one must first look beyond what is ordinarily possible for a typical American to conceive. In the U.S., as one

---

3. Randy Barnett, "Restitution: A New Paradigm of Criminal Justice." *Ethics* 87, no. 4 (1977): 279–280. http://www.jstor.org/stable/2379899.

4. While certain policy changes can no doubt reduce the number of incarcerated persons, if the root issue remains unaddressed the problems we are seeing now will certainly mount again in the future. Laws can always be reversed with new legislation. If social transformation occurs, such a reversal will be less likely, change can also be enacted upon multiple fronts, and change can be arrived upon with less contention.

journalist described, a prison system resembling the Norwegian model, where the humanity of an offender is maintained, would "need to be justified by strong evidence in a significant reduction in recidivism." In response, a Norwegian correctional researcher urged Americans not to confuse crime fighting with one's "principles of humanity."[5] In an article published in the *Emory International Law Review*, Emily Labutta recounts the horror of Norwegian domestic terrorist Anders Breivik's attacks, which killed more than seventy people – many of whom were teenagers. Described as "one of the worst terror attacks in Europe," Breivik was found guilty and sentenced to twenty-one years in prison.[6] This would have certainly turned heads in the United States, where such a horrifying crime would have likely landed Breivik the death penalty. But Labutta found "little outrage," nor "cries for vengeance;" in fact, the victims' parents "actually spoke out against the…application of the death penalty."[7] Even Russia and China feature smaller prison populations than the United States, and their incarceration rates hardly compare.[8] The U.S. treasures its free speech, due process protections, and individual rights – which are far broader than those attributable to either nation. Still, the American

5. Jessica Benko, "The Radical Humanness of Norway's Halden Prison," *The New York Times*, March 26, 2015, https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html.

6. Emily Labutta, "The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice." *Emory International Law Review* 31, no. 2 (February 2017): 330.

7. Labutta, 330. While Norway is certainly an extraordinary example, many similar parallels can be drawn between the U.S. and other nations, and while the Breivik analogy is overused, it perfectly illustrates the deviation in cultural attitude.

8. World Prison Brief, "Highest to Lowest – World Prison Population Rate." Russia sits tied at twenty-second place, China sits tied for 126th, America comes first.

character of punishment has forged cultural attitudes and policies that legitimize our country's unparalleled deprivation of wrongdoers' freedom.

Clearly, milder legal penalties are possible, they certainly do not appear to cause runaway crime rates, and they are popularly regarded in other cultures as morally just and entirely satisfactory. However, the barrier in fixing America's crisis lies in an inability to accept the correct solution. The ubiquity of punishment preserves it. The ideology of punishment's ineffable, secretive force succeeds in setting its tentacles not only upon American criminal statute and penalty, but also throughout American culture. In fact, it may be difficult for most Americans to imagine a morally just penalty that does not resemble their own retributivist punitive techniques, no matter how progressive their values. For even many reform advocates, the American criminal justice crisis remains a concrete personification of policies enabling state domination of marginalized groups. However, these instruments of domination are byproducts of the crisis, not its underlying cause. Rarely is attention turned directly to our use of retributive punishments. The lack of an approachable, feasible alternative, featuring a justification tailored to American values, political structure, and bureaucratic anatomy creates greater hesitation. However, if one can address such needs, a path forward can be made clear – and that is what I set out to do in this paper. It is not a simple matter of advocacy, nor ad hoc reforms: the American philosophy of punishment must be wholly reconsidered.

History of American Punishment

To understand the repercussions of punishment's flaws and the desperate need for reevaluation, it is first important to establish a solid historical background illustrating how American criminal justice practices have punished, and how that application of

punishment has evolved over time. In colonial America, rehabilitation or even just deserts[9] were hardly considered in the design of a penalty. Magistrates focused on deterrence – aiming to frighten an offender into lawfulness.[10] This included heavy handed application of shame, banishments, and at worst, the gallows. Should milder methods be ineffective in deterring, even petty thieves faced execution. After independence, such punishments – especially death – increasingly drew criticism. Young America surprisingly tended to blame the persistence of crime on the severity of their punishments: reforms to the old British ways were in order. In the late 1700's, change across the United States abolished capital punishment for all but the most severe murders – and in its place stood the prison and the prison sentence.[11]

Early Americans expected a rational system of punishment effective in certainty, humanity, and deterrence. However, by the early 1820's, faith in the utility of initial reforms diminished, ushering in new developments in public thought.[12] Antebellum Americans were alarmed by the persistence of crime; nevertheless, reformers clung to notions of humanity and set their sights on a new carcel goal: rehabilitation. New prison plans were devised to effectuate this, and militaristic regimentation, control, and conditioning were central to their designs.[13] No matter their intentions, these changes

---

9. To receive a punishment which is deserved in proportion to an offence.

10. Norval Morris and David J. Rothman, *The Oxford History of the Prison: The Practice of Punishment in Western Society*, (Oxford University Press, 1995), 113.

11. Morris and Rothman, *The Oxford History of the Prison*, 115. New York and New Jersey had built penitentiaries by 1797; Kentucky established theirs by 1800.

12. Morris and Rothman, *The Oxford History of the Prison*, 115.

13. Morris and Rothman, *The Oxford History of the Prison*, 117-24.

produced disparate results – Charles Dickens, touring a Philadelphia prison, remarked that its new form was "cruel and wrong."[14] The intent of rehabilitative reform became gradually lost in the monotony of penalty, and post-Civil War prisons were perhaps best characterized by their overcrowding, brutality, and disorder. Prison conditions worsened, administrators became cynical, and rehabilitation became less-than-relevant. Focus shifted and endorsed containment. Regardless of its progressive origins, by the 1950's the American prison had devolved into anything but humanitarian and the language of rehabilitation legitimized an incarceration that was increasingly abusive.[15]

Throughout the post-Civil War era, forced labor and solitary confinement enhanced the corporal control administrators held over the bodies and the production of convicts. The notion that prisons of this harsh character were the most effective, ideal methods in combatting crime caused "excessive institutionalization" and "endemic overcrowding," and the accompanying need for extended disciplinary measures created an "endemic tendency to inflict cruel punishment[s]."[16] By the 1970's, a country which once held high expectations for punishment's results had combined the supposed rehabilitative end of harsh, tortuous incarceration with the justness of levying such punishments upon apparently deserving offenders. The persistence of crime, criminals, and increasing recidivism only emboldened retributivist sentiments. Beginning in the 1970's and peaking by the 1990's, American policymakers "enacted a wide range of laws

14. Morris and Rothman, *The Oxford History of the Prison,* 124.

15. Morris and Rothman, *The Oxford History of the Prison*, 127-29, 170.

16. Morris and Rothman, *The Oxford History of the Prison,* 197.

meant to make punishments severer," rendering practitioners more punitive.[17] Rising crime rates and harsh public attitudes were exploited by politicians for electoral favor, carving the path of contemporary American penal policy – ultimately fashioning mass-incarceration[18] and the criminal justice crisis the nation faces now.

American Punishment Today

At present, America's prison system and its living conditions represent some of the most worrying manifestations of our nation's crisis. Unprecedented overcrowding and minimal accommodations contribute to a carcel habitat of little comparison. Beckoned by the tough on crime policies of the mid-to-late twentieth century, prison populations in America snowballed, setting a grim milestone near their peak in 2009 when one in thirty-two Americans were under some sort of correctional control.[19] The realization that a nation premising its national identity upon precepts of freedom denied out of the lives of countless human beings just that – and far more than any other global superpower – incited, for some, a national existential horror. The peerless, goliath size of the American imprisoned cohort caused concern, however, compared to policy, severe prison conditions and brutal punitive attitudes were hardly targeted in popular discourse.

In the United States, inmates face a brutalizing, dehumanizing, and barbarous prison environment by design and negligence – amounting to nothing less than a

17. Michael Tonry. "Explanations of American Punishment Policies." *Punishment & Society* 11, no.3 (2009): 379. https://doi.org/10.1177/1462474509334609.

18. Tonry, 389.

19. Todd D. Minton, Lauren G. Beatty, and Zhen Zeng. "Correctional Populations in the United States, 2019 – Statistical Tables." *Correctional Populations in the United States,* (July 2021): 1. https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cpus19st.pdf.

violation of their basic human rights. One example of the degrading conditions detainees suffer is enumerated within court filings submitted by the ACLU against the Los Angeles County Inmate Reception Center, or the IRC, in September 2022. At this intake center – serving the largest prison system in the U.S. – overcrowding has extended stays within facilities not apt to house offenders for longer than twenty-four hours. The ramifications, according to court documents, has necessitated individuals sleeping head to toe on the floor within premises riddled with garbage, human urine, and filth.[20] Individuals with mental illness were chained to benches, and no single inhabitant had access to water, showers, regular meals, or adequate medical services.[21] The dehydrated, dirty, starving prisoners fostered a frustrated and violent population, rendering their situation worse. Unfortunately, these ramifications of the American criminal justice crisis are not isolated to Los Angeles County's IRC. Prisoners across the country recount "violence, rape, beatings by officers," and "a pattern of illegal and humiliating strip searches," as well as high rates of disease and illness without adequate health care, which "endanger prisoners, staff, and the public."[22]

Doubtlessly, a significant percentage of such horrifying realities are due to overcrowding. Responsible too, though not as often discussed, is the deliberately

---

20. Exhibits A-Q in Support of the Declaration of Melissa Camacho-Cheung (Doc. 319-1), 84-85, *Rutherford v. Villanueva*, No. 75-CV-04111-DDP, (C.D. Cal). https://www.aclu.org/legal-document/rutherford-v-villanueva-exhibits-q-support-declaration-melissa-camacho-cheung-doc-319. Pages 91-99 of this document feature photographs of the described abhorrent conditions.

21. Ibid. 85-87.

22. John J. Gibbons and Nicholas de B. Katzenbach. "A Report of the Commission on Safety and Abuse in America's Prisons." *Federal Sentencing Reporter* 24, no. 1 (October 2011): 36-37. https://www.jstor.org/stable/10.1525/fsr.2011.24.1.36.

inhumane architecture of prisons themselves. Michel Foucault describes prison's physical construction as giving "almost total power over the prisoners; it has internal mechanisms of repression and punishment," it is "a despotic regime."[23] In America, inmates are stripped of personhood, identified by numbers, and dressed in uniform jumpsuits. They are concentrated into sterile, abrasive facilities, their time is carefully portioned, and comforts are minimized. Views outside are curtailed by narrow windows or prohibited altogether by stone walls – the prisoner's concept of day and night, social integration, and geography is arbitrated by the artificial construct of the prison through architecture. Former inmate Shon Hopwood explains that American prisons produce social isolation "by taking people from their communities and placing them behind razor wire, locked in cages," fostering an environment that "favors dehumanization and cruelty."[24]

The dehumanizing cruelty of prison design is consecrated as not just permissible, but necessary to the effective communication of an offender's penalty. This is perhaps best indicated by the discussion of prison conditions within the law of the United States. The Eighth Amendment of the U.S. Constitution prohibits "cruel and unusual punishment inflicted,"[25] – the U.S. Supreme Court held that "[t]o determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency,'" determining legislation and standard practices as the "most

---

23. Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan, Second ed. (New York: Vintage Books, 1995), 235-45.

24. Shon Hopwood. "How Atrocious Prison Conditions Make Us All Less Safe," *Brennan Center for Justice*, August 9, 2021. https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe.

25. U.S. Constitution, amend. 8.

reliable objective evidence of contemporary values."[26] While courts routinely impose certain restrictions, they are typically limited to specific transgressions such as those enumerated by the ACLU – and this is because the cruel prison architecture and negligence that provokes these problems is recognized by the public as entirely just. In other words, Americans view it as beneficial that the prison environment is designed to produce cruel dehumanization. The ruling in *Brown v. Plata* identifies that the Constitution demands prisoners retain the "essence of human dignity inherent in all persons," though the opinion capitulates: "[c]ourts must be sensitive to the State's interests in punishment."[27] These "interests in punishment" have exacerbated the habitat forced on prisoners, and prison's cruel architecture has incited the barbarism of prison subculture and administrator control. American dehumanization of the convict prevents empathy and enables the permissibility of overcrowding, a lack of medical attention, etcetera. While the Eighth Amendment and its interpretation provides the possibility for protection against these vicious transgressions, the social barrier against fundamental change remains, enabling the continued misuse of state authority.

Rehabilitation

The troublesome gravity of America's crisis in criminal justice, resulting in mass-incarceration and grisly conditions of confinement, are not limited to recent discovery. There has been extensive academic and media discourse concerned with the severity of certain American penalties and prison conditions. The possibility of a life after imprisonment for some crimes promised society and offenders their certain rehabilitation,

26. *Graham v. Florida*, 560 U.S. 48, 58-62 (2010).

27. *Brown v. Plata*, 563 U.S. 493, 510 (2011).

which has often stood as a purpose and justification for punishment. However, in the United States, rehabilitation repeatedly works to justify severe punishment rather than question its productiveness. As the war on crime ramped up during the 1970's, a conversation of alternatives to retributive techniques birthed restorative justice, the basis for Norway's famously humane system. Surprisingly, restorative justice finds itself in use in several ways in the United States today – though its effect in decreasing vengeance, as it has elsewhere, is questionable. For example, victim impact statements[28] are certainly therapeutic for victims, but often compel judges to implement harsher penalties to "make an offender pay." More recently, other reforms have come. Since Joe Biden's Presidential campaign and election, because of his efforts in passing the 1994 crime bill that bolstered mass incarceration, demands for policy reversal have become common. New laws, the slowly changing tide of public opinion, and the COVID-19 pandemic have recently contributed to a slight downtick in the American prison population.[29] Seemingly, rehabilitation as a purpose for punishment is returning to the forefront of American socio-political discussion. However, despite progress concerning certain issues, a new wave of "law and order" conservative candidates appears imminent, improvements have been minimal, and nothing has substantively changed.

America remains the leader in prison population and incarceration rate, and retribution and vengeance persist in America's punitive techniques. Even scholars who

---

28. A restorative justice approach where crime victims describe – in detail – the horrific effects and overall impact of a crime.

29. Carson, E. Anne, Melissa Nadel, and Gary Gaes. "Impact of COVID-19 on State and Federal Prisons, March 2020–February 2021." *BJS Special Report,* (August 2022): 1-45. https://bjs.ojp.gov/content/pub/pdf/icsfp2021.pdf.

inspect Norway's alternative outlook hesitate to disavow America's severe punitive attitudes. Emily Labutta, who marveled at the low crime rates, prison populations, and recidivism rates garnered by Norway's restorative system, maintained that America's retributivist approach should remain intact.[30] For her and many others, the American criminal justice crisis is a problem of numbers – our prison population is too large, our incarceration rate is too high, and recidivism is far too likely. Consistently, critics neglect to realize that these numbers are not merely driven by lengthy sentencing, tough on crime policies, and overcrowding. They are directly intertwined with America's retributivist inclinations and culture of punishment, legitimized by a warped perception of punishment's perceived benefits, which in turn produces our system's problematic effects. Therefore, punishment, especially in the American form, must be questioned directly to isolate a path beyond the American crisis.

The American Paradigm of Punishment

America's crisis in criminal justice is legitimized by our standard cultural perception of offenders: in American popular thought, criminals are understood as "morally deformed…rather than ordinary people who have committed crimes," and as such their criminality is "immutable and devaluing."[31] Pursuant to this impression, so long as criminality is viewed as devaluing and innate, then it is permissible to regard criminals as livestock, shuffling them into barely hospitable cages. It certainly does not matter if a troubled offender ends up spending the majority or entirety of their life institutionalized – in and out of prison, locked up in sordid conditions – because they

30. Labutta, "The Prisoner as One of Us," 329-332.

31. Kleinfeld, "Two Cultures of Punishment," 933.

deserve no better. Many regard their suffering as intrinsically good: it is satisfying to see such a beast be tyrannized, dominated by the bludgeon of American penalty. The American paradigm of punishment is as follows. It insists, because offenders are regarded as inferior to ordinary citizens, and because it is intrinsically good that they are hounded by the hand of American punishment, their subjection to violence, rape, extrajudicial beatings, and deplorable housing facilities embody the requisite terror communicating unto them their monstrous soul. Further, this communication facilitates rehabilitation, if the criminal is even capable of it, and deters other immoral beings from committing criminal acts. This line of reasoning embodies the retributive American paradigm, and upon closer examination, the questionable justness of this paradigm becomes obvious.

The Paradigm

The Oxford Dictionary defines a paradigm as a "conceptual or methodological model underlying the theories and practices of a science or discipline at a particular time; (hence) a generally accepted world view."[32] Essentially, the paradigm of punishment serves as a framework justifying legal punishment in its current American manifestation as a purportedly effective and just way to deal with wrongdoers. Randy Barnett, in his 1977 article "Restitution: A New Paradigm in Criminal Justice," illustrates this paradigm, constructed by two pillars of support. Moral arguments represent one pillar and ordinarily focus upon a single end: the infliction of punishment itself.[33] These justifications posit that punishment is fundamentally good, and as such, the infliction of punishment as an

32. *Oxford English Dictionary*, 3rd ed. (Oxford: Oxford University Press, 2005), s.v. "paradigm," https://www.oed.com/view/Entry/137329?redirectedFrom=paradigm#eid.

33. Barnett, "Restitution: A New Paradigm for Criminal Justice," 283.

end is, alone, enough to legitimize it. This is the apparent justice rendered in repaying evil with evil, a sentiment which embodies perhaps the most popular philosophical understanding of punishment, championed by enlightenment figures such as Kant. Political arguments embody the second pillar. Ordinarily, they focus on three justifying ends: (1) incapacitation, or "the intention to deprive offenders of the power of doing future mischief;" (2) rehabilitation, which supposes that "the visiting unpleasantness [of punishment] will cause [an] offender to see the error of [their] ways;" and finally, (3) deterrence, which argues that "past demonstrations of punishment" and "future threats of punishment" keep others from doing wrong.[34] These ends are utilitarian: they are deemed necessary to maintain order, and punishment has been concluded as the only just means by which to achieve them.

Under this paradigm, incarceration, sentencing, and conditions of confinement in the U.S. are justified – it's good that wrongdoers get wrongs done to them, and, only by penalizing, incarcerating, and brutalizing wrongdoers can ordinary citizens be: (1) safe from a criminal's most certain and imminent future wrongdoing; (2) protected from the prospective wrongdoing of other morally deformed people; and finally, (3) only through this punishment can a wrongdoer be reformed. Such conclusions are so deeply embedded in the upbringings, educations, and media consumptions of contemporary Americans that, without deconstruction, they appear as commonsense truths. In fact, as guiding principles in modeling disciplinary measures, such assumptions justify not only legal penalties, but also collective social and political punishments. However, whatever good is ultimately derived from the process of punishment can easily be attributed to factors simply

34. Barnett, 280-82.

associated with its application, and, while it is arguably satisfying for a wrongdoer to receive their comeuppance, a penalty's forceful imposition by the government regularly introduces more harms than it sets out to right. American punishment fails to sufficiently satisfy its paradigm's valiant utilitarian ends, and its moral arguments constitute empty sophisms no less than their political counterparts.

Even though the United States enjoys a relatively low crime rate, criminal behavior persists no matter the certain and harsh consequences. Moreover, the U.S.'s crime rate is not better than the rates of less-punitive nations such as Germany or Norway.[35] Clearly, harsh American penalties are not superior at deterring criminality than the less-severe alternatives of other nations. America similarly fails to produce better results in criminal rehabilitation. More than eighty percent of offenders released in the United States are rearrested or incarcerated after only ten years of freedom.[36] Although comparing recidivism rates between nations is unreliable, Norway's rate of around twenty percent suggests that, at a minimum, American punishments are no better and are realistically much worse than alternatives in facilitating rehabilitation.[37] The only utilitarian end that American punishment appears to satisfy is incapacitation, though even this is partial. While offenders are locked away from free society for extensive periods of

---

35. "Safety," O.E.C.D. Better Life Index, accessed September 26, 2022. https://www.oecdbetterlifeindex.org/topics/safety/.

36. Leonardo Antenangeli and Matthew R. Durose. "Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)." *BJS Special Report NCJ 256094*, (September 2021): 1-29.

37. Labutta, "The Prisoner as One of Us," 336-337. Labutta argues that to compensate for disparate measures, the U.S.'s rate should be adjusted lower – to thirty percent – which is certainly generous, yet *still* not as low as Norway's. The BJS statistics referenced herein are also newer and more comparable than those used by Labutta.

time, they still manage to exact wrongs upon each other. Defenders of retributive punishment may falsely contend this is due to their immutable immorality; it is most easily attributable to their frustrating environment and inadequate living conditions. The resulting system errs heavily towards incapacitation, making rehabilitation merely coincidental, and providing deterrence that is not at all more effective or certain than less severe alternatives.[38]

Despite these failures, the paradigm insists that criminality is innate, therefore, the only satisfactory thing to do is remove criminals and subject them to serious wrongs; it is permissible to violate their basic human needs because they deserve it, they are subhuman, and it is good that they experience suffering. Although America's paradigm may not exactly meet the political ends which justify it, moral arguments posit that no other alternative could offer true justice. These moral arguments are known as appeals to desert and can be summarized by the standard view that it is non-instrumentally or intrinsically good when wrongdoers have bad things happen to them, because they deserve such.[39] Unlike utilitarian justifications which rely on empirical support, appeals to desert primarily rely on their supposed intuitiveness. In other words, when pressed, someone appealing to the deservedness of one's suffering may defend it by claiming, "because it feels just," or something to that effect. Such defenses normally cite horrible

---

38. The reasoning in this section is based upon statistics that are difficult to compare. Many argue that there can be no comparison due to the unique social milieu of the U.S. and Norway or Germany. However, I have made a point of being broadly charitable: I am not arguing that the U.S. is automatically worse off, instead it is, at least, not any better than less-punitive nations. Furthermore, the essence of my argument is to point to a need for societal change in the U.S., which such a counterargument supports.

39. Nathan Hanna, "Hitting Retributivism Where It Hurts," *Criminal Law and Philosophy* 13, no.1 (2019): 110. https://doi.org/10.1007/s11572-018-9461-1.

crimes – providing sensational accounts of violence, rape, and inevitably, Nazism to garner visceral reactions in support of their conclusion.[40] These arguments can be compelling; however, due to their "instinctual" nature they are hardly questioned, and their simple deconstruction destabilizes the certainty of their correctness.

Appeals to extreme cases of wrongdoing incorrectly skew reactions: in the U.S., property transgressions (theft, property damage, and so on) are by far the most reported crimes, with around 2,000 instances per 100,000 as opposed our homicide rate of six per 100,000.[41] Certainly, it is not intuitive that petty thieves should suffer the same horrid conditions of confinement as more violent offenders, but in America they do. Besides, just because people feel a certain way does not mean such intuitions should be acted upon – jealousy and lust are a few examples of intuitive emotions which people are expected to rationally regulate.[42] Furthermore, the assumption that wrongdoers should feel severe suffering, and, that such a view is widely held with no plausible alternative is simply false. If an offense is framed correctly within an offender's circumstances and considering the harmful consequences of their punishment, it is just as easy to intuitively feel that wrongdoers deserve only disapproval and accountability, not severe imposed suffering.[43] In even the most extreme cases, if outright culpability is slightly disputed –

---

40. David Boonin, *The Problem of Punishment*, (New York: Cambridge University Press): 87-88.

41. "Crime Data: Crime," Federal Bureau of Investigation Crime Data Explorer, accessed September 27, 2022. https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend.

42. Boonin, *The Problem of Punishment*, 91.

43. Boonin, 93, n.10.

that is, if an offence is contextualized within an offender's life, offenders are humanized, and moral deformities are demonstrated as repairable – surveys show that intuitions regarding retributivist desert are less compelling or non-existent.[44] Moral arguments rely on the supposed fact that most people believe wrongdoers deserve suffering, to achieve true justice this suffering must be exacted, and there is no sufficient alternative in providing such justice. But many people don't believe such things, especially depending on how information is presented. In other cultures, such apparently intuitive retorts are hardly relied upon to fashion legal penalties – penalties which are nonetheless regarded as entirely sufficient. As such, the moral justifications for punishment fail. Simply put, unambiguously claiming that severe punishments which "get back" at wrongdoers are justified solely because most people intuit as such, particularly when prompted by the most graphic offenses, is just not enough to rationalize America's crisis in criminal justice nor all its human rights violations.

Others contend that wrongdoers forfeit their rights when they commit their offence. This reasoning submits that offenders who have abused their rights and infringe upon another's rights thereby lose said rights for fear they might abuse them again. This view is not entirely disagreeable. However, the idea that such an argument justifies America's retributive punishments and its criminal justice crisis is mistaken. The violations provided by America's system are too numerous and extreme. Just because a wrongdoer cannot be trusted in free society at the time of their crime, does not justify their subjection to conditions which in fact worsens social adjustment and their ability to participate in that free society. It is not unreasonable to assert those who abuse their

44. Hanna, "Hitting Retributivism Where It Hurts," 125.

liberty lose access to liberty for fear they may abuse it again; however, to presume they could never be trusted with their liberty in the future is shortsighted. Furthermore, to impose many more restrictions and violate many more rights than the ones, namely liberty, wrongdoers abuse – as is the case in contemporary America – is also not justified. It is logical to suppose that wrongdoer does forfeit their right to freedom of movement for some amount of time, given that they have abused it to commit their wrongs. However, it is not fair to allege that such a forfeiture also justifies an offender's exposure to suffering and transgressions of certain human rights that should be impossible to forfeit. Nor that such a forfeiture should eliminate that offender's reasonable opportunity for redemption.

Searching for a Path Forward

The view enumerated by Randy Barnett's radical 1977 article is adopted in this paper: "in the criminal justice system we are witnessing the death throes of an old and cumbersome paradigm" – only by rejecting and replacing the American paradigm of punishment with a more restrained and carefully considered alternative, can the crisis America faces today be solved.[45] Certainly, this paper is not the first to suggest as much, nor will it be the last. After Barnett's article was published, a catalogue of supporting accounts ensued. Critical theory assessments concurred that guilt and the certainty of desert struggle to endure if considering contributing social, economic, and psychological forces.[46] They additionally outline the horrible abuses retributive punishment has enabled by exacting vengeance against innocents and especially through legitimizing domination

45. Barnett, "Restitution: A New Paradigm for Criminal Justice," 280.

46. Jeffrey Paris, "Decarceration and the Philosophies of Mass Imprisonment." *Human Studies* 30, no. 4 (2007): 323–43. http://www.jstor.org/stable/27642806.

of marginalized groups. Case studies further indicate that determinations of guilt can be uncertain and are prone to fail. Ultimately, it is extremely questionable whether our current practice of punishment can be morally justified or fulfill political justifications with all its pitfalls.

In their cited works, Randy Barnett and David Boonin present perhaps the most particularized rejections of the paradigm of punishment. Boonin's book *The Problem of Punishment* serves as the most recent and comprehensive account of Randy Barnett's preliminary idea. Thousands of pages have debated the merits of just deserts in their retributive forms, and countless criminological studies have examined the failures of punishment in satisfying its utilitarian demands. In many places restorative justice has served as a feasible alternative, which some authors contend is the best solution to retributivism's problems. However, restorative justice's discourse operates without directly articulating punishment's flawed paradigm, and the same is true for many criminological studies. Even Barnett's precise reasoning fails to express paradigmatic flaws in their uniquely American forms. If American reform is the goal, then the unique demands of its crisis in criminal justice must be addressed directly. Further, though the criticisms of Barnett and Boonin are important, the system which they advocate for, restitution, suffers from too few utilitarian considerations and fails to survive any robust material analysis. Restorative justice and its diverging systems present reliable and tested sentencing alternatives, however, they also bear flaws. Because restorative practices in America are levied under the same paradigmatic flaws, they, just as other past reforms, fail to meet their rehabilitative ideal. Critics also argue that restorative methods are too coercive, giving the state power that just as easily can serve and enforce political

ideology.[47] Restorative justice focuses on a victim's specific reaction to a crime, which poses difficulties in designing penalties that are predictable, egalitarian, and proportional[48] – principles which protect disenfranchised groups and which U.S. legal philosophy should continue to hold dear.

The discourse on punishment features a variety of compelling alternatives, investigations, and comparisons which are certainly too extensive to exhaustively list. This paper targets the perspectives personifying restorative justice and restitution because they embody the most popular and well-founded cases for reform. They bear weaknesses which need addressing; however, these alternatives also make robust and tested strides in imagining a path away from the current problems America faces. It is not that an alternative is altogether lacking. Rather, it is that a model synthesized from the persuasive aspects of other alternatives, which satisfies the particular demands of America's legal system, and solves the problems created by its paradigm of punishment has yet to be adequately produced. The barrier in convincing the American public of the necessity and sufficiency of alternative systems is the lacking prevalence of one meeting the nation's unique needs. Using an interdisciplinary summary of America's crisis and the paradigm of punishment's flaws as a backdrop, a convincing alternative can be sought through the evaluation of prevailing alternatives and their merits. Through this, principles and methods for a new alternative to the American paradigm of punishment can be fashioned specifically to solve the U.S.'s demands.

---

47. Carrie Menkel-Meadow. "Restorative Justice: What is it and Does it Work?" *Annu. Rev. Law Soc. Sci.* 3 (2007): 166.

48. Menkel-Meadow, 167.

Part One: Developing A Better Model

Before assessing the specific values of existing alternatives, it is important to outline a few necessary aspects imperative for any legal system of criminal justice. First, public well-being and safety must be a matter of course for any state sanctioned justice system. The need for an alternative approach producing less overall harm is the central basis for this reconsideration of America's paradigm and criminal justice system. If a reformed system cannot maintain crime rates which are roughly as low as those of the prior system, it arguably is no better. That does not mean that crime must disappear, nor that typical fluctuations in crime rate above and below the norm should not be expected. However, a reasonable level of safety for both the free and incarcerated populous must be upheld. Second, accountability must be a leading feature: it is the gateway to change, and in the absence of harmful punitive techniques, it exists as the initial step in transforming the lives of offenders. Third, criminality must not be viewed as immutable. Perhaps the most striking divergence between the American paradigm and those of more humane nations lies in their evaluation of the criminal as an ordinary person who committed a wrong, rather than an innately immoral, evil being.[49] This gives offenders an opportunity to engage in productive change, providing them with a true second chance. Finally, we should maintain a view of wrongdoers as complex human beings, who face difficult and endlessly individual circumstances. Hence, reintroducing some level of discretion into the criminal justice sentencing vocabulary will be imperative. While predictability is vital, and one must be weary of unconscious (or conscious) bias, greater diversity should be available to jurists and juries when figuring the proper response to a particular

49. Kleinfeld, "Two Cultures of Punishment," 993.

wrongdoing. Considering the benefits provided by: (1) greater public well-being, (2) accountability for wrongdoing, (3) a view of criminality as mutable, and (4) greater discretion in fashioning penalties while maintaining predictability and procedural safeguards, the search for a model of criminal justice premised on safety, humanity, and the actual benefits of a particular penalty, not their supposed benefits, can ensue.

America's Paradigm and Utilitarianism

Marked by the nation's massive carcel population, its prison's vile conditions of confinement, and their lackluster utilitarian results, America's crisis in criminal justice has been closely examined heretofore. Ultimately, this crisis is putatively legitimized by America's paradigm of punishment – which acts to justify our retributive and punitive penal techniques, despite their pitfalls. America's paradigm of punishment insists that punishments of the American variety are necessary because of their moral value and utilitarian ends. The justifications provided by this paradigm fail in light of the resulting system's transgressions of human rights and utilitarian shortcomings. Appeals to desert are debatable, and no matter the apparent satisfaction in someone receiving what they supposedly deserve, the productive benefit of vengeful retributive punishment is minimal – most offenders in the United States reoffend within a decade of release, and it is questionable whether such punishments provide victims with the closure they promise. Simply put, we must do away with America's paradigm of punishment in favor of an attitude preferring redemption and humanity to solve our nation's criminal justice ills.

Nevertheless, the American paradigm of punishment is not without its insight. Most notably, the utilitarian end focused upon incapacitation – most typically manifested by deprivation of free movement – is likely a necessary feature, in some form, of a

criminal justice model intending to provide public safety. Similarly, utilitarian considerations advocating for the rehabilitation of criminals is not an invalid pursuit, nor is deterrence. However, these should not justify American punishment: such valiant ends are simply not met. Instead, these utilitarian considerations must serve as goals, not justifications. Randy Barnett writes that "any criminal justice system should be critically examined to see if it is having these and other beneficial effects."[50] Barnett's view regarding utilitarian justifications is adopted in this paper: "these utilitarian benefits must be incidental to a just system; they cannot, alone or in combination, justify a criminal justice system."[51] It is important to aim towards such goals; however, stopping at nothing to achieve them, or, claiming they necessarily result from severe punishments when they unambiguously do not, is plainly erroneous.

Option One: Restitutionary Justice

Barnett and Boonin's preferred solution, restitution, views crime as a transgression against a victim, not society: justice within this view "consists of the culpable offender making good the loss that he has caused."[52] This usually is carried through monetary repayment. Randy Barnett sets out this system as consisting of two possible paths – "punitive" restitution and "pure" restitution. Punitive restitution is most similar to the understanding of punishment under the current paradigm. It operates by forcing an offender to "compensate the victim by his own work," or by imposing fines

50. Barnett, "Restitution: A New Paradigm for Criminal Justice," 283.

51. Barnett, 283.

52. Barnett, 287.

"proportionate to the earning power of the criminal."[53] Thus, the payment or fine imposed would not be determined by the actual harm felt, but rather an ability to pay. Pure restitution diverges in that its purpose is not to impose suffering on the offender but provide the offended party with compensation; the only sentence would be to make restitution.[54] Citing Barnett, David Boonin endorses pure restitution as the most theoretically tenable revision to our current criminal justice paradigm. However, Boonin capitulates: objections to both restitution and punishment are credible, because "[t]he thesis of this book…is concerned with defending…pure restitution…only insofar as it serves as a response to…the claim that we may permissibly…continue to punish because it is practically necessary." [55] In other words, a critic who objects to both the paradigm of punishment and restitution in favor of another alternative poses no threat to Boonin's central objective – rejecting punishment. This paper takes such a critical stance.

No matter the logical merits restitution offers in producing an airtight philosophical alternative to the ailing paradigm of punishment, it is simply not pragmatic enough, nor honest in dealing with the brutal realities of anti-social violent crimes, nor adequate in recognizing the material conditions contributing to crime. Doubtlessly, restitution, in both pure and punitive manifestations, have found success through the form of civil action. However, when it comes to criminal proceedings, there are certain violations which restitution simply cannot repair. For murder, as an example, it is hard to imagine a sum of money which would make a victim's family indifferent to the murder

---

53. Barnett, 288.

54. Barnett, 289.

55. Boonin, *The Problem of Punishment*, 218.

having happened.[56] These payments would be necessarily gargantuan, and the productivity of such an intervention is questionable. Foucault, in his book *Discipline & Punish*, connects the realm of the disciplinary institution to the workhouse, establishing the prison, and by extension punishment, as an instrument through which labor relations are enforced and complicity is ensured to a system criminalizing poverty and non-productivity.[57] Empirical studies elaborate. A 2011 study found a relationship "across the board" that unemployment correlates to crime rate, and though the specific mechanics were elusive, "[c]ommunities with high income inequality may encounter specific problems, such as…property crime."[58]

It is difficult to foresee a useful application of restitution where further monetary hardship would not additionally exacerbate the contributing factors to crime, making recidivism even more likely – producing a crime feedback loop. Boonin attempts to solve for some of these problems under the more traditional definition of restitution by suggesting non-monetary interventions, which appear slightly more practical. Posed with problems, such as the notion that, under pure restitution, a rich offender may be essentially able to "buy" a crime, or that it would be impossible for a poor offender to fulfill restitution all together, Boonin's response is to use fragments of old methods, such

---

56. Jesper Ryberg, "A Self-Defeating Theory of Justice." *Social Theory and Practice* 38, no. 2 (April 2012): 288. Raises objections to restitution, several of which are considerably flawed, though provides insight into the theory's lacking pragmatism.

57. Foucault, *Discipline & Punish*, 231-56.

58. Marc Hooghe, Bram Vanhoutte, Wim Hardyns and Tuba Bircan, "Unemployment, Inequality, Poverty, and Crime: Spatial Distribution Patterns of Criminal Acts in Belgium, 2001—06." *The British Journal of Criminology* 51, no. 1 (January 2011): 15. https://www.jstor.org/stable/23640334.

as banishment, imprisonment, coerced treatments, and state surveillance. These solutions come at a cost, contradicting his position, and ultimately necessitating compromises in the true intended effect of his project. Thus, the practical role of restitution – though doubtlessly useful in some areas – will be inevitably limited.[59]

Option Two: Restorative Justice

The literature discussing restorative justice is vast; however, it is relevant to understand its essence and primary features: it is perhaps the most instituted, empirically tested, and, as viewed in cultures abroad, the most philosophically sufficient alternative to American punishment and criminal justice. Restorative justice can be briefly defined as a diverse crop of practices – including aspects of restitution, acknowledgements of harm, and more – devising a complex web of mechanisms which aim to provide healing and successful reentries of offenders into their communities.[60] Ideally, restoration commences in meetings between victims and offenders, in structured environments, where victims and those with a stake in a particular offence describe its impact, and where parties collectively resolve an offense's aftermath.[61] Theoretically, there are four main goals of restorative justice: to (1) repair, (2) restore, (3) reconcile, and (4) reintegrate.[62] These efforts use communication, sometimes between victims, community

59. Scott Gallagher, "The Limits of Pure Restitution." *Social Theory and Practice* 42, no. 1 (January 2016): 74-96. https://www.jstor.org/stable/24575776.

60. Menkel-Meadow, "Restorative Justice: What is it and Does it Work?" 162.

61. Menkel-Meadow, 164; John Braithwaite. "Restorative Justice: Assessing Optimistic and Pessimistic Accounts." *Crime and Justice* 25 (1999): 7. http://www.jstor.org/stable/1147608.

62. Menkel-Meadow, 162.

representatives, or an entire community to reach apology, tabulate restitution, and effect shame upon an offender for their actions – ideally in a non-harmful capacity.[63]

John Braithwaite, one of restorative justice's founding thinkers, sets out a promising tone concerning the philosophical merits of his system in "Restorative Justice: Assessing Optimistic and Pessimistic Views," a paper examining the development and implementation of the theory around the world. Braithwaite describes restorative justice as involving "a very different way of thinking about traditional notions such as deterrence, rehabilitation, incapacitation, and crime prevention."[64] Braithwaite additionally contends that restorative methods serve as an easily acceptable middle ground between retributive and rehabilitative perspectives on criminal punishment, easily pleasing liberals with lessened punitive measures and conservatives by focusing upon victim empowerment.[65] While these points outline important benefits of restorative justice, together, they also highlight areas of weakness, especially given the volatile nature of American democracy's politics and culture.

Restorative justice necessarily operates under a different paradigm, yet provides no specific safeguards preserving or encouraging any such transformation. Thus, the effectiveness of its measures are highly contingent on vulnerable societal and individual attitudes. If restorative measures are instituted in America within the current paradigm of punishment, its benefits will most certainly be compromised. Nations where restorative methods appear most effective, namely, Norway and Germany, possess decades of deeply

---

63. Menkel-Meadow, 162.

64. Braithwaite, "Restorative Justice: Assessing…Accounts," 2.

65. Braithwaite, 4.

rooted progressive perspectives on criminal wrongdoing. That is simply not the case in the U.S., even for those on the left. Furthermore, there will always be a chance of certain attitudes on punishment returning, even where the overall paradigm of punishment may shift, and thus, upon the whims of a slight majority or in the hands of a particularly vengeful mob, retribution could easily be reapplied.[66]

Restorative critics also contend that its measures have the capacity to widen the state's net of social control, which would become detrimental in the hands of a prejudicial regime.[67] In light of Foucault's criticisms establishing the political utility of punishment as a method for defining and enforcing social constructs and reinforcing the state's control over citizens, this becomes especially concerning.[68] Most critics of restorative measures emphasize its tremendous capacity to disadvantage marginalized communities, extend police authority, and compromise the separation of powers.[69] Because of the victim's expanded role, and in light of its lacking procedural protections, these criticisms are well placed. The practical impact of such pitfalls is minor where restorative justice is practiced but serve as relevant points for discussion. While certain restorative methods are doubtlessly effective, applying these measures to a system not accounting or protecting for a revised paradigm would likely heighten punitive outcomes.

---

66. Braithwaite, 86-69.

67. Braithwaite, 89-91.

68. Foucault, *Discipline & Punish*, 135-94.

69. Braithwaite, "Restorative Justice: Assessing…Accounts," 79-104; Menkel-Meadow, "Restorative Justice: What is it and Does it Work?" 66-67.

Another key criticism of restorative justice, and for this paper's purposes, the most detrimental and irreconcilable issue of them all, is restorative justice's unequal penalties and coercive means. Victim offender conferencing per offence inherently enables disproportionate sentencing and unpredictable outcomes, and, for example, in the presence of failed guilt determinations, such victim centric reactions are entirely useless and totally despotic.[70] When in defiance of state codes, the impending threat of further punitive action or additional incapacitating constraints exerts unjust coercive power over offenders – especially for lower-level violations. This feature creates a great capacity for governmental abuse where arbitrary rules, or conclusions, are imposed, where innocents are scapegoated, or considering the detrimental role of unconscious bias.[71] Finally, the forceful, coerced participation of an offender in a therapeutic, rehabilitative procedure, at the impulse of their victim, and the successful completion of which determines an offender's release rings of "treating" and "fixing" a wrongdoer. When the novel *Clockwork Orange*'s main character Alex is sentenced to a cruel psychological treatment program for young anti-social offenders, the narrative raises questions concerning the value of forced reform:[72] if someone is not morally different and is simply forced out of committing wrongs, such a result is really no better than (or in fact, quite similar to) our current default towards incapacitation.

---

70. David Dolinko, "Restorative Justice and the Justification of Punishment," *Utah Law Review* 2003, no. 1 (2003): 319-331.

71. Jennifer G. Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique," *Emory Law Journal* 43, no. 4 (Fall 1994): 1263-72.

72. Anthony Burgess, *A Clockwork Orange: The Restored Edition*, ed. Andrew Biswell (W.W. Norton & Company, 2012).

Restorative Justice's primary issue really lies in its dependency on victim idiosyncrasies. Though the idea of victim rights is quite appealing, the needs of victims are better met outside of penalty's process, provided by therapy, etcetera. While restoration may occur eventually, the primary concern of government procedure in criminal justice should be with the accused, protecting the presumption of innocence, and in the event of conviction, creating egalitarian penalties with the redemptive aims of restoration in mind. Victim's rights legislation has already been popularly proposed around the United States, often billed as "Marsy's Law," and predictably, is intentioned as a measure increasing the likelihood of conviction and harsh punishment. A Kentucky criminal defense attorney notes: the crime victim's bill of rights will "almost immediately put politics in the courtroom," forcing a judge to make every ruling "in the face of a clamoring mob or widow and risk the politics of ruling for the guy in the orange suit," ultimately causing distortions of justice.[73] Other restorative measures are similarly ill-fated in the United States. Victim impact statements cause distortions by prejudicing juries to "inflammatory and emotional factors," to the exclusion of other relevant elements and circumstances to the crime.[74] Restorative justice's lack of due process protections, procedural safeguards, and coercive tendencies pose issues, despite giving insight into several tested alternative methods to retributive punishment. Restorative

---

73. Larry Webster, "Ky. Victim's Rights Bill Would Make Courts Slower, Less Fair," *The Lexington Herald Leader*, March 4, 2018, accessed October 21, 2022, https://www.kentucky.com/opinion/op-ed/article203223509.html, and; Kay Levine, "Victims' Rights in the Diversion Landscape." *SMU Law Review* 74 (2021): 525-26.

74. Bryan Myers and Edith Greene. "The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy." *Psychology, Public Policy, and Law* 10, no. 4 (December 2004): 511.

justice's issues could be most easily rectified by offering its techniques as just one part or option within a system of different targets and more carefully protected procedures.

Option Three: Moral Fortification

Perhaps the most useful alternative outlook unearthed in researching this paper, and one of the more obscure accounts, is a 2017 article by philosopher Jefferey Howard wherein he proposes his "Moral Fortificationist Theory of Punishment." The theory's crux submits that citizens possess a moral duty to each other, and should one fail that duty, they (the offender), and the state, bear a responsibility to reasonably enact the fortification of their morality.[75] The fortificationist theory proceeds as follows:

> An agent is subject to a duty not to steal from others. It is an agent's responsibility to ensure that they do not commit theft. When an agent is genuinely culpable – outside of any causal duress – of betraying this duty, the state is responsible to make an intervention demanding that the agent reform. Intervention may take many forms: it may entail sessions with counselors in which offenders are sanctioned to specify concrete plans for future relationships and employment. Or it may entail sentences to prisons that are designed like the outside world, to prepare prisoners for that world by respecting all their rights except freedom of movement. All interventions involve the requisite incapacitation to provide injunctive relief to society. This intervention, in its minimally coercive extent, is permissible to ensure general societal welfare. The ends of such an intervention aim not to impose suffering for its own sake, but simply to facilitate morally fortifying experiences for criminal offenders.[76]

Though Howard's theory suffers from a few issues, and requires further development considering the precursory examinations herein, his basic idea serves as maybe the best lens through which to measure the humanity, justness, effectiveness, and redemption-oriented quality of proposed reforms. His emphasis on genuine culpability demands

---

75. Jeffrey W. Howard. "Punishment as Moral Fortification," *Law and Philosophy* 36, no. 1 (2017): 45–47. http://www.jstor.org/stable/44980865.

76. Howard, 52-60. This paraphrased summary communicates the aspects of Howard's idea relevant to the utility of this paper. For more detail, refer to his article.

reasonable moral firmness, but accounts for crime's social origins by expanding duress to social factors and demanding that a crime's remediable social genesis be targeted just as much as an offender's morality.[77] Howard's description of maximally permissible punishments become another strength: even if an offender appears not to have improved their moral integrity, there should be limits to the length and burdensomeness of penalties imposed by the government.[78] Additionally, it is inferable that if an innocent is wrongly convicted, through the fortificationist process, it will soon become apparent that said individual is in fact morally well, making further imposition of penalty unneeded.

Nevertheless, there are several things which should be tweaked. The most obvious shortcoming is Howard's reliance on the fortificationist theory as a justification for punishment, though this is merely a technical problem – deducible from his argument, Howard clearly rejects the sufficiency of a retributive utilitarian paradigm of punishment such as the American one.[79] Howard incorrectly deems the state's appropriate role to be forcing compliance with fortifying goals. This slightly compromises an offender's assumption of responsibility and is perhaps a little too coercively intentioned: it is vital for a wrongdoer to want change, not be forced. Instead, the state's role should merely be in enabling an offender's voluntary, independent arrival to a moral standard, while mitigating all harmful factors which may inhibit transformation, and ensuring public safety in the meantime. Their job should be to lead a horse to water, not make them drink.

---

77. Howard, 59.

78. Howard, 64.

79. To avoid this in my writing, I have opted to refer to crime responses outside the purview of retributive punishment as "penalties" rather than "punishments."

Finally, Howard omits to describe that while retribution, restoration, and restitution are not the goals of his theory, suffering could be caused by feelings of guilt and shame, and, remorse, apology, and reasonable efforts at restitution, when possible, may well be natural consequences of an offender's fortification and recognition of their wrongs. This is not a weakness per se, but a strength[80] which Howard does not directly elaborate on.

Overall, Jeffery Howard's moral fortificationist theory, with a few modifications, provides for a system which may impose incapacitation and other measures to ensure safety. It maintains accountability for culpable agents. It rejects criminality as immutable. Finally, it provides for greater sentencing discretion, considering contributory factors, all while maintaining predictability (there are set sentences, which may be shortened, not extended, by demonstrating fortification) and ensuring procedural safeguards (coercion is minimized). Unlike restitution or restoration, moral fortification serves as a tremendously useful tool, not to render the most philosophically airtight penalties, nor ones most satisfactory to victims or offender. Rather, it creates a purpose with which to fashion a variety of sufficient rules and outcomes. Inasmuch as this is true, moral fortification will be used, developed, and added to in the foregoing discussion, using restitution and restoration as possible tools, to understand what an alternative to the American paradigm of punishment might require and what a solution to our crisis in criminal justice could be.

Revising American Criminal Law, Procedural Policies, and Punishments

Upon the background of the preliminary theoretical and abstract discussion in this section, it will be useful to revisit the processes and theory of the American criminal justice system for revisions. There are features of America's criminal process which are

80. Refer to note 50.

not as problematic as the nation's cultural justifications for brutal punishments. The United States has remained prideful of its due process protections for the accused and those convicted of crimes, which should not be relented. If true accountability is an important pillar of any productive criminal justice system, then an emphasis on finding the truth – at the burden of the state – should not be infringed upon. As such, (1) the Fourth Amendment's protections against unreasonable arrest, search, and seizure; (2) the Fifth Amendment's protections against self-incrimination; (3) the Sixth Amendment's right to an attorney and protections of a defendant's right to a speedy, public, and fair trial by an impartial jury, (4) the Eighth Amendment's protections against cruel and unusual punishments;[81] and finally, (5) the Fourteenth Amendment's guarantee of equal treatment and protection under the law should remain vital to any American system.

The matter of bail, if to allow it, and when allowing it, how much to impose it for, is more complex. Bail is a payment posted by a suspect to ensure that they will appear at trial once released.[82] In theory, bail is certainly correctly reasoned. Sadly, for lower income defendants, bail payments are often not reachable. This leads to a startling number of individuals not yet proven guilty – which, in 2017, the American Bar Association (ABA) noted was about 450,000 people total[83] – being stuck, needlessly sitting behind bars until trial. Cash bail also opens the door to predatory lending and other damaging practices. For some charges, bail is denied as a form of preventative detention.

---

81. James F. Anderson and Bankole Thompson, *American Criminal Procedures*, (Carolina Academic Press, 2007), 18-19.

82. Anderson and Thompson, 25.

83. Rhonda McMillion, "Boosting Bail Reform: ABA Urges Congress to Limit the Usage of Cash Bail." *ABA Journal* 103, no. 11 (November 2017): 70. https://www.jstor.org/stable/10.2307/26516161.

No matter how theoretically logical these bail policies are, they have a tremendous capacity to cause harm for those not yet proven culpable. Additionally, the ABA cites studies which indicate "when low- and moderate-risk people are detained in jail for more than a day, they are significantly more likely to commit a crime in the future."[84] Furthermore, those detained for longer before trial are more likely to be convicted and receive longer prison sentences, and innocent detainees endure traumatizing conditions of confinement and stigmatization which leads to a high rate of suicide.[85] Thus, the practice of bail must be changed to fulfill its practical role without such disastrous consequences. Detainment prior to trial may be necessary; however, it must be an absolute last resort, and a reasonable effort to ensure a defendant's arrival at trial, without the imposition of monetary or detentionary constraints, should be favored instead. If conditions of confinement are vastly improved, as they must be, and resorts to disenfranchisement and dehumanization are rejected, as they must be, such changes will additionally mitigate harms of pre-trial detention and cash bail.

Plea bargains are another feature the contemporary American criminal justice system which, at face value, certainly provide expediency and benefit the judicial economy, however, also disadvantage those lacking the resources to fight their case, ultimately acting as another coercive agent. As held by constitutional historian David J. Bodenhamer, plea bargaining makes "for efficient prosecution and conviction of the guilty, not protection of the innocent," essentially circumventing due process altogether, making confessions "the desired end, and police interrogations the preferred means for

84. McMillion, 70.

85. McMillion, 70.

obtaining them."[86] Certainly, for some defendants, plea bargaining may provide a good outcome, but this is far from universal. It is imperative to ensure that every person who wishes to take their case to trial can. Therefore, plea bargaining should be considered with caution to ensure valid accountability is held, not just expedient legal outcome.

American prison institutions and their conditions of confinement have continuously perpetuated unproductive punishments under the American paradigm, and throughout the later era of the twentieth century's tough on crime period, politicians enacted increasingly extensive sentencing laws. Rationalized by a view of criminality as immutable, unduly long stays in prison seemed a reasonable method to incapacitate criminal wrongdoing. Unable to understand that it was the system's own neglect which perpetuated recidivism, the infamous 1994 crime bill essentially propelled mass incarceration wielding the three strikes rule – ensuring life sentences for repeat offenders, no matter how insignificant or non-violent the crime.[87] These lengthy sentences, paired with the negligent, if not entirely uncaring attitude towards inmate quality of life, the indifferent position regarding rehabilitative efforts, and intense stigmatization upon reentry, typify American punishment in its contemporary form. Enabled by a view of wrongdoers as irreparably morally deformed, the American sentencing standard of life in prison without parole (LWOP) must be done away with. Criminal penalties, as they are elsewhere, should be structured to deny that criminality is innate and refuse to cut ties

---

86. David J. Bodenhamer, "Reversing the Revolution: Rights of the Accused in a Conservative Age," in *The Bill of Rights in Modern America*, ed. David J. Bodenhamer and James W. Ely (Bloomington: Indiana University Press, 2022), 147. Police manuals reveal "that beatings, intimidation, psychological pressure, false statements, and denial of food and sleep were standard techniques" in interrogation.

87. Bodenhamer, 147.

between wrongdoer and society.[88] The U.S.'s current practice, which simply banishes wrongdoers, should be rejected. Criminality is not immutable, and under a standard demanding only the best possible outcomes for all parties, not a single person should be without a chance for redemption. As Joshua Kleinfeld writes: "the insistence on parole and the elimination of LWOP stands for the belief...that all offenders are capable of leaving their criminality behind: nothing is unforgivable no one is past saving," and that "criminality is mutable."[89]

On a similar basis, the death penalty must be abolished. Regardless of the horrifying specifics of a crime, the death penalty is simply an illogical punishment. It is purely moralistic, and alone in that regard. We do not sentence rapists to rape, nor do we sentence drunk drivers to be harmed by drunk driving accidents. There appears to be an assumption that execution's value lies in providing closure to victims. However, one should be weary of associating a victim's reaction with a punishment's value: if one victim demands death and another doesn't, then, for no other reason than one victim's satisfaction, one offender receives mercy and the other the chair. The notion, too, that offender death reliably provides victim closure is questionable. For example, out of the recent pop-culture resurrection of Jeffery Dahmer's criminal story, the families of his victims replied with anger.[90] The trauma inflicted by Dahmer, who has been dead for quite a while after being beaten to death by a fellow inmate, has clearly not dissipated –

---

88. Kleinfeld, "Two Cultures of Punishment," 948.

89. Kleinfeld, 948.

90. Remy Tumin, "'We Don't Want to Relive It': Jeffrey Dahmer Drama on Netflix Draws Anger." *The New York Times*, October 5, 2022. https://www.nytimes.com/2022/10/05/arts/television/jeffrey-dahmer-netflix-victims.html.

and no one should expect it to. Therefore, it is hard to imagine that a death sentence could really provide closure and satisfaction for cureless things.

Furthermore, the view that certain offenders, such as Dahmer, are beyond repair, does not mean they should be without an opportunity for redemption. Clearly, certain people have committed crimes so horrific that it is hard to imagine their rehabilitation, and an anti-social or psychopathic personality prognosis for many extreme offenders, Dahmer being one, may realistically prevent them from such.[91] Considering the fortificationist theory, it is reasonable for a government to conclude, though only after trying sufficiently, that it will never be safe to reintegrate certain offenders. But this does not make it permissible to execute them, although a psychopathic diagnosis tends to increase that likelihood currently.[92] Their psychopathic behavior should instead be viewed as mitigating blameworthiness: they are morally inept. Due to the danger posed to society, it would be permissible to permanently incarcerate those who cannot demonstrate fortification and have committed severe crimes. However, every other effort to maintain rights ordinarily enjoyed should be preserved, and inhumane living conditions reduced. While America's current paradigm insists that ultimate wrongdoers are deprived of all human worth, others insist that every living human has basic worth, no matter what they have done:[93] the view of the latter is that which should be adopted in the United States.

---

91. Robert D. Hare. "Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion," *Psychiatric times* 13, no. 2 (February 1996): 39-40. It is likely that someone such as Dahmer would be incapable of demonstrating the fortification necessary to be trusted with unrestricted liberty ever again. Criminals of this caliber would realistically spend the rest of their lives removed from society.

92. Hare, 39-40.

93. Kleinfeld, "Two Cultures of Punishment," 995.

Lastly, but not excluding any discussion omitted, conditions of confinement must be radically improved in the United States. Our Constitution provides for this possibility, but our philosophical, cultural, and therefore legislative attachment to retributive punishment prevents meaningful changes. As others have recommended, the standard summarized by the basic principles of the European Prison Rules serves as a starting point. As relevant to the examinations in this project, prison, and by extension, conditions of confinement, must ensure offenders: (1) are treated with respect for their human rights; (2) retain all rights except those, namely freedom of movement, inhibited for the express purpose of penalty, and that (3) any such deprivation be the minimum necessary to the objective for which they are imposed. Furthermore, (4) insufficient resources never justify the violation of an offender's rights. Finally, (5) prison conditions must reflect positive aspects of outside life as closely as possible, (6) all detention should be managed to facilitate an offender's successful reintegration, and experiences of the outside should be used to provide this.[94] The Eighth Amendment provides a path to protect these rights, so long as our paradigm of punishment, thus, retributive culture and legislation change.

In Summary

Upon the basic standards to which any good criminal justice system must adhere, this analysis has investigated a number of relevant alternatives to America's prevailing paradigm of punishment and solutions to its crisis in criminal justice.[95] Under this

---

94. Council of Europe, *European Prison Rules*, (Strasbourg, FR: Council of Europe Publishing, June 2006), 5-7. https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae. For "(1)"-"(6)."

95. A criminal justice system must provide: (1) the greatest possible overall public welfare, free and incarcerated alike, (2) valid and, without a reasonable doubt, true accountability, (3) a view of criminality as mutable. It must preserve: (4) procedural…

analysis, restitution and restoration have both turned out to be useful additions and options for any revised system in America. However, their scope and utility in providing comprehensive solutions appears ultimately insufficient. By contrast, Jeffrey Howard's moral fortificationist theory provides a well-reasoned framework with which to guide the fashioning of an American alternative. Moral fortification serves as a new American criminal justice system's perfect purpose in penalty. The following analysis of certain features of the current American system reveal a need to maintain and expand due process protections, solve the problems of cash bail, reassess the role of plea bargains, reject LWOP and revise conditions of confinement to conduce redemption, end capital punishment, and finally to adopt relevant selections from the European Prison Rules to protect the rights of prisoners. To understand the practical path to this agenda, an examination of such a plan's political and legal implications will follow.

Part Two: Applying A Better Model

Prison reform advocacy's cyclical failure is perhaps best explained by a lacking specification of America's paradigmatic sickness and an associated composition of an adequate, comprehensive, but carefully practical – as to appear reasonable and convincing – alternative model. The foundation for this alternative has been formulated in the prior section of this paper. The most common and frustrating objections to reforms of this scale are typically twofold. Assuming objections to the substance and basis for reforms are nullified, these political objections typically proceed as follows. One, necessary reforms, though imperative, would never be politically popular to an extent

---

…safeguards, ensure sentencing predictability, while enabling greater discretion in figuring a penalty's comprehensive demands.

rendering implementation likely; therefore, it is useless to attempt such reforms. Two, though these reforms are more than sufficient, and their implementation is imperative, they will simply be too expensive to effectuate; thus, they will not be supported, and it is useless to attempt such reforms. The proceeding section examines political considerations to assess pathways to needed reforms, and hopefully quell these two pessimistic objections to the vital need for American criminal justice reform and the solution to the U.S.'s criminal justice crisis. Due to the unique structure of United States law, these will also be important in locating a means to drive the necessary comprehensive changes.

Policy Reforms and General Guidelines

Many policy reforms are needed to direct a blow to the American paradigm and its crisis in criminal justice. The most essential will be explained here. First, and most importantly, a prisoner's bill of rights should be adopted to ensure application of the previously discussed rules adopted across Europe. Guided by moral fortification, this would mandate fashioning confinement to reflect, to the fullest possible extent, the outside world. This entails adequate living facilities, personal space, internet access, ability to dress freely, ability to work remotely, right to unionize and collectively bargain as to their conditions of confinement, access to free, unlimited, and private visits and interaction with family members, friends, loved ones, etcetera. Revised sentencing guidelines reflecting moral fortification requires ending imprisonment for low-level offenses where restitution, probation, or open-prison alternatives are most productive.[96] It requires minimizing prison sentences and imposing a maximum penalty of fifteen years

96. Ames Grawert, Bryan Furst, and Cameron Kimble. "Ending Mass Incarceration: A Presidential Agenda." *Brennan Center for Justice* (2019): 2. http://www.jstor.org/stable/resrep28435.

in prison for only the most severe crimes. Should an individual not demonstrate fortification, this maximum may be reimposed after an evidentiary hearing, but only for certain violent crimes such as murder and only if all rights, outside of incapacitation, are preserved. Rejecting mandatory minimums should be characteristic: a limit for an offense must be imposed, and once an offender has sufficiently demonstrated their moral fortification, an evidentiary hearing should be called. When appropriate, the offender should be immediately released, regardless of time served. Next, it will be necessary to fund programs dealing with the mental health of prisoners and important to implement effective and available programs helpful to an offender's fortification. Polls emphasize the popularity of less severe sentencing, and a reduction in prison population would necessarily follow – this would produce massive savings, funding other improvements.[97]

Policies directed at unnecessary criminalization and disenfranchisement will be additionally needed. The legalization of marijuana is not enough; it is important to decriminalize the usage of all drugs. While it is appropriate to make drug rehab available and may be necessary to temporarily incapacitate a drug user, addicts should never be legally penalized for addiction, and always be allowed freedom of movement when possible. Also, sex work should be decriminalized, along with other politically constructed non-violent crimes. Public housing for reintegrating offenders and homeless individuals must be funded to end the criminalization of poverty. Additionally, the felony threshold for property crimes must be increased,[98] and restitution should generally be

---

97. Grawert, Furst, and Kimble, 2-3. It costs about $30,000 per year to incarcerate one individual in the United States.

98. Prison Policy Initiative. "Winnable Criminal Justice Reforms: A Prison Policy Initiative Briefing on Promising State Reform Issues for 2021." *Prison Policy Initiative*…

viewed as the only appropriate response to crimes purely against property. Property crime prosecution represents the criminalization of poverty and protects the punishing capacity of capital ownership, which unduly targets disadvantaged communities. Vitally, calling an end to all policies disenfranchising ex-convicts during and after their release must take place. This means restoring voting rights, college grants, and other freedoms, rights, and government benefits ordinarily offered to Americans. Additionally, the prisoner minimum wage should never be less than the non-incarcerated minimum wage. Finally, reparations to those convicted under unjust prohibitions of drugs and laws imprisoning property and other non-violent criminals must be made to produce effective transition.

Lastly, but not to the exclusion of other necessary reforms, it will be important to identify and implement procedural alternatives and reverse initiatives contributing to the criminal justice crisis and to fulfill the role of moral fortification. This includes abolishing cash bail to favor a functional but non-punitive alternative. This also includes reversing monetary rewards for prosecutors for volume and length of convictions, and instead incentivizing prosecutors to reduce recidivism, crime, and incarceration in their districts.[99] Repealing draconian, retributive, and punitive law enforcement and justice directives and replacing them with morally fortifying ones will be additionally vital. Such necessary reforms, considerations, and guidelines propose a non-comprehensive, but nonetheless insightful example of what a new paradigm of criminal justice favoring

…(2021): 1-10. http://www.jstor.org/stable/resrep28640. This source contains several recommendations and associated model legislation included throughout this subsection.

99. Grawert, Furst, and Kimble, "Ending Mass Incarceration…," 6.

redemption, humanity, and moral fortification might entail. The following subsection investigates the political implications of such.

Political Strategies for Advocating Reform

Perhaps the most useful strategy to popularize the need for these reforms is to particularize American punishment's paradigmatic flaws. Without this platform, prison reform may appear pertinent, but ridding the system of retribution seems of little concern. However, this precise foundational revocation of punishment in the American character is necessary. While sentencing reduction and reversals to mass-incarceration era policies are popular,[100] Americans are attached to their punitive vengeance. As such, reforms in recent decades will likely result in what Johnathan Simon calls "mass-incarceration lite," where our overall prison population is lower, but where "serious" offenses still justify needless incarceration.[101] Simon correctly contends that only by establishing that ending the criminal justice crisis "is a moral imperative can we assure the sustained progress over political resistance that will be necessary to avoid such an incomplete and unjust resolution."[102] His recommendations include: (1) making the criminal justice crisis a human rights issue, (2) ending the war on crime, (3) funding sentencing commissions to rescale the overall use of imprisonment, and, (4) advocating for a constitutional amendment to codify reversals of America's crisis.[103]

---

100. Grawert, Furst, and Kimble, 2-8.

101. Jonathan Simon. "Ending Mass Incarceration Is a Moral Imperative," *Federal Sentencing Reporter* 26, no. 4 (2014): 271. https://doi.org/10.1525/fsr.2014.26.4.271.

102. Simon, 271.

103. Simon, 271-274.

So long as the U.S.'s crisis in criminal justice is reframed, reform is likely to gain popularity among many demographics.[104] Furthermore, the reduction in incarceration rate would result in massive spending cuts, per se. Though an initial investment would be required, overtime, a system premised on redemption would likely be far more affordable to taxpayers than our current one. There is even room to address the oft-repeated conservative talking point concerning "law and order." This paper's advocacy for accountability as a central feature of any good criminal justice system in fact supports the need for truthful convictions, and maintains the importance of public safety. Yes, it will be difficult to undo years of political and social tradition on punishment. But, with the recent reform movement and with state governments now realizing more than ever that our current system tends to create more social problems than it solves, there has never been a better opportunity.[105] Quite plainly, the foundation for this movement already exists, and by rejecting the paradigm, it is sure to gain political traction – it is the type of landmark legislation that presidential campaigns are made of.

Political Strategies for Passing Reform

Lastly, and perhaps most difficultly, we arrive at the problem of how to achieve desired results through legislation. The structure of American law often makes reform efforts sluggish due to important constitutional limitations on authority and separated powers of federal and state government. Frankly, a successful path to reform will likely be a slow one. Accelerationist attitudes often result in compromises either in preserving

104. Refer to note 100.

105. Vanessa Barker, *The Politics of Imprisonment*, (New York: Oxford University Press, 2009): 187-88.

important structural features and procedural protections, or in the actual content of policy. However, it must be maintained that truly comprehensive reform is necessary. There are several options relevant to legislative and legal activism regarding this cause.

Certainly, federal reform is needed, and, with presidential authority, wouldn't be terribly difficult to obtain. However, cooperation from Congress to effectively fund programs would be vital and identifying tools to drive both federal and state reform are far more necessary and all the more challenging to identify – state and localities oversee ninety percent of the prison population.[106] Likely, the most effective solution would be packaging comprehensive reform and guidelines to states using federal levers such as grants, funding incentives, and establishing strict enforcement of rights violations by the Department of Justice.[107] Federal initiatives spurring state reform are a fairly untapped tool, but endlessly useful and which rely on federal intrusion less. For example, The Justice Reinvestment Initiative collaborated with state leadership in Kentucky to implement policies reducing recidivism.[108] To effectuate the detailed needs of the alternative approach outlined in this paper, it will be necessary to compose fresh legislation and render methods operating on several fronts, rather than working with or rehashing past proposals. Intrusive methods, if necessary, could include the type of legislative sanctions, rather than incentives, invoked by Reagan to pass The National Minimum Drinking Age Act.[109] A lawsuit related to that act, *South Dakota v. Dole*, held

---

106. Barack Obama, "The President's Role in Advancing Criminal Justice Reform," *Harvard Law Review* 130 (2016): 838.

107. Obama, 838-39.

108. Obama, 846.

109. 23 U.S.C. § 158. Withholds highway trust funds from non-compliant states.

that such sanctions were constitutional, only requiring that (1) the exercise of spending power be in pursuit of "general welfare," (2) conditioning of funds be unambiguous, and (3) conditions on federal grants may be illegitimate if they are unrelated to the particular federal interests in the relevant national project or program.[110] For example, sweeping reform could be tied to state law enforcement funding, further ensuring passage. However, this strategy is fairly invasive and may expose reforms to legal challenge.

A constitutional amendment would be useful to outline a broad bill of prisoner's rights, expand upon the protections offered by the Eighth Amendment, and close the loophole in the Thirteenth Amendment allowing slavery to be imposed during incarceration. Though, this may be difficult to obtain. At the state level, ballot initiatives have proven an important democratic tool in passing progressive amendments. Regardless, the possibility for some constitutional protections already exists under the Eighth Amendment, so long as legislative momentum reflects a societal change in the acceptability of retributive punishments.[111] The pathways to reform exist, it is a simple matter of organizing around a central, robust cause and solution. As such, I am hopeful that Americans will see the fault in their paradigm, revise their moral convictions regarding punishment, understand solving our criminal justice crisis as a human rights issue and moral imperative, and subsequently enable the type of comprehensive criminal justice reform we so desperately need.

---

110. *South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987).

111. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); *Graham v. Florida*, 560 U.S. 48, 58, 130 (2010).

Concluding Thoughts

The crisis in criminal justice in the United States can only be fully mended by rejecting America's flawed paradigm and adopting a system of criminal justice premised on accountability, redemption, maintaining the basic human rights of offenders, and ensuring procedural protections rendering penalties proportional and predictable. The current cataclysmic state of the American criminal justice system, particularly the human rights calamity provided by its prisons and punishments, is not a mere consequence of public policies or conservative executive administrations. It springs out of America's defective paradigm of punishment. The U.S.'s retributive paradigm rationalizes extremely harsh legal punishments because it supposes that imposing suffering upon wrongdoers is the only rational, effective, and just approach to criminal justice. The nation's attitude regarding what should be done to wrongdoers is one obsessed with vengeance. The resulting system violates the basic human rights of those housed in American prisons and produces punishments that simply fail to keep citizens safe, rehabilitate criminals, or incapacitate their ability to do wrong.

American criminal justice policy exacts its retribution through lengthy, harsh sentences and despotic, dehumanizing prison design, creating a slew of unjustifiable pitfalls, ruining the lives and compromising the reintegration of offenders. Often, many of those fated by the system – and therefore by the American paradigm of punishment – face consequences within the prison environment far worse than what they can be conceivably found deserving of. Furthermore, conditions of confinement, even for those not yet proven guilty, increase the likelihood that one may offend after release, impede upon any possible improvements in social adjustment, and aggravate life circumstances

which are all too often disadvantaging enough.[112] Not only does American punishment fail to meet its desired utilitarian ends, its moral justifications remain perilously contestable – a paradigm on such unequal footing should never permit the state to behave as the American government does now. The consequences are too great.

Milder penalties are philosophically and politically sufficient across many European nations, such as Norway, where attitudes towards crime respects the humanity of wrongdoers. These milder penalties appear to have no negative impact on the crime rate, and in fact seem to lessen instances of violent crime. They also appear to be far more effective at decreasing recidivism and ensuring community safety, all while minimizing the authority the government possesses to exact severe suffering upon wrongdoers and transgress the basic human rights of all people, wrongdoer or not. While reformers have emphasized rehabilitation as a valid and humane goal for punishment, since American independence, these reforms have been continuously facilitated under the current system and paradigm, and therefore they repeatedly fail – and will continue to do so. The examinations within this paper reveal that by rejecting the paradigm and paying attention to American needs in terms of system structure (with emphasis on procedural safeguards to combat unconscious bias and our nation's horrific track record in protecting marginalized communities), a pragmatic, realistic solution is perfectly reachable.

My discussion in this paper has been limited to two particular objectives. One objective was to define the history and scope of, plus the techniques and philosophies enabling the criminal justice crisis in twenty-first century America. My second objective was to establish more humane principles that a criminal justice system in the United Sates

112. McMillion, "Boosting Bail Reform…," 70.

should live up to, and as such, which aspects of alternative models are useful to the American cause, and ultimately, which specific purpose is most tenable in designing and imposing any criminal penalty. The basis of this second objective is supported by the broad success of criminal justice alternatives in Europe, which I submit is due to their vastly different attitude towards punishment. They refuse to postulate that a single offender may be beyond redemption. Therefore, the American system should discard its retributive paradigm and instead build a system which ensures the greatest possible public welfare, free and incarcerated alike; without a reasonable doubt, true accountability – at the burden of the state, and; a view of criminality as mutable. To protect the innocent and disadvantaged, the U.S. must also maintain procedural safeguards, predictability, while enabling greater discretion in figuring a penalty's comprehensive demands.

Ultimately, I endorse a moral fortification as the most sufficient basis with which to fashion criminal penalties under these guidelines. Restitution is not pragmatic enough for comprehensive use, and restorative justice focuses too much on a victim's reaction to a crime, failing to provide procedural protections and predictability. Moral fortification can use a variety of restitutionary and restorative techniques, plus, remains flexible by creating a framework with which to model additional measures. In almost every scenario, the justness of a legal penalty or criminal justice policy can be judged by simply asking: does it encourage moral fortification, and as I contend is imperative, by the most minimally encroaching and least coercive means possible? I believe the alternative practices proposed heretofore succeed in satisfying this test, while also protecting the welfare of the public, saving American taxpayers money, and most of all, solving the criminal justice crisis.

While I have been limited from extensive discussion of the intersectional analysis most in the U.S. use to examine how our criminal justice system disproportionately

harms certain disadvantaged communities, the central argument of this paper accounts for these disparities. One important mechanism to address the continuing subjugation of groups based upon economic class, race, gender, mental health, and other intersections is to provide those individuals with the means to transform their lives and a chance to overcome their socio-economic foundations. Now, we treat those with complex and disadvantaging backgrounds as if such conditions are their own fault. My development of moral fortification insists that people who hurt others typically do so because they themselves have been hurt. Thus, to provide offenders with a true second chance, it is the state's responsibility to address and mitigate all harmful elements which may inhibit their fortification, social origins of crime included – for many, reparations are in order.

The perspective of this paper can be summarized as one of prison abolition. At least in terms of how Americans understand the role and architecture of the prison under the current paradigm. I find the retributive, vengeful inclinations of Americans in response to wrongdoing perplexing, and seriously unproductive. Much like purposefully upsetting someone who has upset you, these inclinations only worsen conflict between offender and society, and justify state domination over individuals likely harmed by the structural powers of American society in the first place. It can often be difficult for people to move past the shock-value of horrific crimes. However, I encourage such objectors, who may be more satisfied by the view that it is intrinsically good when a wrongdoer suffers, to question their perspective. Empathizing with a victim or even being devastated by a criminal wrong yourself is not mutually exclusive with respecting an offender's shot at redemption. Both can coexist and a victim's needs can be addressed regardless of what happens to an offender. Many of the inclinations which premise the

endeavors of this paper have been informed by my own experience as a periphery victim of violent crime, and the experiences shared with me about the difficult histories of criminal offenders.

There are many anecdotes which demonstrate the value of forgiveness and the closure created by redemption, but perhaps most touching is one of Mary Johnson and Oshea Israel. As a teenager, Oshea Israel became involved with gangs, and one night, he shot and killed Mary Johnson's son. Israel was convicted and sentenced to 25 years in federal prison before reaching adulthood, and towards the end of his prison term, he and his victim's mother made peace. Johnson repeatedly requested to visit Israel in prison, and he finally agreed. During their meeting Johnson became overwhelmed with emotion: "After you left the room, I began to say, 'I just hugged the man that murdered my son,' and I instantly knew that all that anger and the animosity, all the stuff I had in my heart for twelve years for you — I knew it was over, that I had totally forgiven you." Johnson used her unique position to establish a support group for mothers whose sons have fallen victim to gang activity and violent crime, and she maintains an important role in Israel's life. Israel states: "sometimes I still don't know how to take it," "because I haven't totally forgiven myself yet – It's something that I'm learning from you – I won't say that I have learned yet, because it's still a process that I'm going through." Johnson responds: "I treat you as I would treat my son, and our relationship is beyond belief." The two live next door to one another in Minneapolis and support each other often.[113]

113. NPR Staff, "Forgiving Her Son's Killer: 'Not an Easy Thing'," NPR, May 20, 2011. https://www.npr.org/2011/05/20/136463363/forgiving-her-sons-killer-not-an-easy-thing. Cite to entire paragraph.

In the face of a severe crime, recognizing the importance of maintaining composure and proceeding rationally can often be blinded by despair, rage, and hopelessness. Of course, this should be expected – it is fully reasonable for a victim's reaction to be far from proportional or thoughtful of an offender's needs. That is why vigilantism is legally discouraged and why the American prison system was originally designed to protect the innocent, not carry out the wishes of victims. Nevertheless, Mary Johnson's story proves that forgiveness is possible, even for the most severe crimes. Oshae Israel's story proves redemption is possible too, against all systemic odds. This opportunity for redemption must be expanded, protected, and offered to all wrongdoers – simply because it is the right thing to do. Whether or not that offender decides to take said opportunity is up to them, but it is the responsibility of the state to ensure they get it. The goal of American penalty should be to hold wrongdoers accountable and morally fortify offenders, in a matter consistent with ensuring the greatest public welfare is maintained and an offender's rights be minimally impeded, and as to facilitate fortification flexibly and in accordance with an offender's specific needs. American punishment and the idea that wrongdoers merely deserve suffering must be rejected.

I would like to conclude this paper with the simple but vital assertion that every person should get a chance to redeem themselves, because wrongdoers are no different than you or me, and because every person has the capacity to do unspeakable wrongs. If we would wish redemption for ourselves, we must ensure it for others. There is no reason to make someone suffer nor deprive them of liberty when they have been held accountable for their wrongs, they understand their faults, and have made successful efforts at addressing them. If they no longer pose a danger to society, if they no longer

exist as the same person who committed that crime, there is no utility in keeping them locked up. Simply put, no matter how you've been mistreated nor how wrong one person's actions are, there is no value in depriving that person of rights beyond what may be necessary to ensure security and general welfare.

No single individual should be reduced to the worst of their actions. We should encourage self-awareness, reinforce the importance of such in the lives of those who seem to have forgotten their moral duties to society, and reward those who demonstrate growth. Not only is such an outlook the only path towards ending the violence perpetrated by the U.S.'s criminal justice crisis, but it is also one I believe can bring a tremendous amount of relief to those struggling to reconcile their proximity to violent crime, victim and offender alike. I also believe this outlook can provide tenable value in building a culture less inclined to violence and anger to explain their powerlessness. I am confident that I am not alone in this sentiment, and I hope the pertinency of rejecting the paradigm and reimagining America's philosophy in criminal justice to be guided by moral fortification will not remain exclusive to this paper.

Bibliography

Anderson, James F. and Bankole Thompson. *American Criminal Procedures*. Carolina Academic Press, 2007.

Antenangeli, Leonardo and Matthew R. Durose. "Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)." *BJS Special Report NCJ 256094*, (September 2021): 1-29. https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs.

Barker, Vanessa. *The Politics of Imprisonment: How the Democratic Process Shapes the Way we Punish Offenders*. New York: Oxford University Press, 2009.

Barnett, Randy E. "Restitution: A New Paradigm of Criminal Justice." *Ethics* 87, no. 4 (1977): 279–301. http://www.jstor.org/stable/2379899.

Braithwaite, John. "Restorative Justice: Assessing Optimistic and Pessimistic Accounts." *Crime and Justice* 25 (1999): 1–127. http://www.jstor.org/stable/1147608.

Brown, Jennifer. "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique." *Emory Law Journal* 43, no. 4 (Fall 1994): 1247-1310.

Benko, Jessica. "The Radical Humanness of Norway's Halden Prison." *The New York Times*, March 26, 2015. https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html.

Bodenhamer, David J. "Reversing the Revolution: Rights of the Accused in a Conservative Age." In *The Bill of Rights in Modern America*, edited by David J.

Bodenhamer and James W. Ely, 145-68. Bloomington: Indiana University Press, 2022.

Boonin, David. *The Problem of Punishment.* New York: Cambridge University Press, 2008.

Burgess, Anthony. *A Clockwork Orange: The Restored Edition*. Edited by Andrew Biswell. W.W. Norton & Company, 2012.

Carson, E. Anne, Melissa Nadel, and Gary Gaes. "Impact of COVID-19 on State and Federal Prisons, March 2020–February 2021." *BJS Special Report NCJ 304500,* (August 2022): 1-45. https://bjs.ojp.gov/content/pub/pdf/icsfp2021.pdf.

Council of Europe. *European Prison Rules*. Strasbourg, FR: Council of Europe Publishing, June 2006. https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae.

Dolinko, David. "Restorative Justice and the Justification of Punishment." *Utah Law Review* 2003, no. 1 (2003): 319-331.

Federal Bureau of Investigation Crime Data Explorer. "Crime Data: Crime." Accessed September 27, 2022. https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend.

Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. Translated by Alan Sheridan. Second ed. New York: Vintage Books, 1995.

Gallagher, Scott. "The Limits of Pure Restitution." *Social Theory and Practice* 42, no. 1 (January 2016): 74-96. https://www.jstor.org/stable/24575776.

Gibbons, John and Nicholas de B. Katzenbach. “A Report of the Commission on Safety and Abuse in America's Prisons.” *Federal Sentencing Reporter* 24, no. 1 (October 2011): 36-37. https://www.jstor.org/stable/10.1525/fsr.2011.24.1.36.

Grawert, Ames, Bryan Furst, and Cameron Kimble. “Ending Mass Incarceration: A Presidential Agenda.” *Brennan Center for Justice* (2019): 1-16. http://www.jstor.org/stable/resrep28435.

Hanna, Nathan. “Hitting Retributivism Where It Hurts.” *Criminal Law and Philosophy* 13, no.1 (2019): 109-127. https://doi.org/10.1007/s11572-018-9461-1.

Hare, Robert D. “Psychopathy and Antisocial Personality Disorder: A Case of Diagnostic Confusion.” *Psychiatric Times* 13, no. 2 (February 1996): 39-40.

Hooghe, Marc, Bram Vanhoutte, Wim Hardyns and Tuba Bircan. “Unemployment, Inequality, Poverty, and Crime: Spatial Distribution Patterns of Criminal Acts in Belgium, 2001—06.” *The British Journal of Criminology* 51, no. 1 (January 2011): 15. https://www.jstor.org/stable/23640334.

Hopwood, Shon. “How Atrocious Prison Conditions Make Us All Less Safe,” *Brennan Center for Justice*, August 9, 2021. https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe.

Howard, Jeffrey W. “Punishment as Moral Fortification.” *Law and Philosophy* 36, no. 1 (2017): 45–75. http://www.jstor.org/stable/44980865.

Kleinfeld, Joshua. “Two Cultures of Punishment,” *Stanford Law Review* 68, no. 5 (May 2016): 993-1036.

Labutta, Emily. “The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice.” *Emory International Law Review* 31, no. 2 (February 2017): 229–359.

Levine, Kay L. “Victims' Rights in the Diversion Landscape.” *SMU Law Review* 74 (2021): 501-26.

McMillion, Rhonda. “Boosting Bail Reform: ABA Urges Congress to Limit the Usage of Cash Bail.” *ABA Journal* 103, no. 11 (November 2017): 70. https://www.jstor.org/stable/10.2307/26516161.

Menkel-Meadow, Carrie. “Restorative Justice: What is it and Does it Work?” *Annu. Rev. Law Soc. Sci.* 3 (2007): 161-87.

Morris, Norval, and David J. Rothman. *The Oxford History of the Prison: The Practice of Punishment in Western Society*. Oxford University Press, 1995.

Minton, Todd D., Lauren G. Beatty, and Zhen Zeng. “Correctional Populations in the United States, 2019 – Statistical Tables.” *Correctional Populations in the United States*, (July 2021): 1-15. https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cpus19st.pdf.

Myers, Bryan, Edith Greene. “The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy.” *Psychology, Public Policy, and Law* 10, no. 4 (December 2004): 492-515.

NPR Staff. “Forgiving Her Son's Killer: ‘Not an Easy Thing’.” NPR, May 20, 2011. Accessed October 31, 2022. https://www.npr.org/2011/05/20/136463363/forgiving-her-sons-killer-not-an-easy-thing.

Obama, Barack. “The President's Role in Advancing Criminal Justice Reform.” *Harvard Law Review* 130 (2016): 811-66.

O.E.C.D. Better Life Index. “Safety.” Accessed September 26, 2022. https://www.oecdbetterlifeindex.org/topics/safety/.

Paris, Jeffrey. “Decarceration and the Philosophies of Mass Imprisonment.” *Human Studies* 30, no. 4 (2007): 323–43. http://www.jstor.org/stable/27642806.

Prison Policy Initiative. “Winnable Criminal Justice Reforms: A Prison Policy Initiative Briefing on Promising State Reform Issues for 2021.” *Prison Policy Initiative* (2021): 1-10. http://www.jstor.org/stable/resrep28640.

Ryberg, Jesper. “A Self-Defeating Theory of Justice.” *Social Theory and Practice* 38, no. 2 (April 2012): 279-301. https://www.jstor.org/stable/23558570.

Simon, Jonathan. “Ending Mass Incarceration Is a Moral Imperative.” *Federal Sentencing Reporter* 26, no. 4 (2014): 271–75. https://doi.org/10.1525/fsr.2014.26.4.271.

Tonry, Michael. “Explanations of American Punishment Policies.” *Punishment & Society* 11, no.3 (2009): 337-94. https://doi.org/10.1177/1462474509334609.

Tumin, Remy. “‘We Don’t Want to Relive It’: Jeffrey Dahmer Drama on Netflix Draws Anger.” *The New York Times*, October 5, 2022. https://www.nytimes.com/2022/10/05/arts/television/jeffrey-dahmer-netflix-victims.html.

Webster, Larry R. “Ky. Victim’s Rights Bill Would Make Courts Slower, Less Fair.” *The Lexington Herald Leader*. March 4, 2018. Accessed October 21, 2022. https://www.kentucky.com/opinion/op-ed/article203223509.html.

World Prison Brief. “World Prison Brief Data: Highest to Lowest – Prison Population Rate.” Accessed September 14, 2022. https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All.