

Reforming Prisons to Reduce Harm and Increase Wellbeing  
by  
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A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Bachelor of Arts with Honors  
Department of Philosophy  
at the University of Michigan  
2018

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## I. Introduction

Over 2 million people are currently incarcerated in the United States, making us the country with the highest incarceration rate in the world.<sup>1</sup> Given that current and former prison inmates represent such a large set of the population, we should ensure that the criminal justice system is functioning properly. Many academics, prison reformers, and inmate advocates have published works intended to show that prison facilities and the prison system are harming those under its control, as well as other members of society. As a response to these reports, it is necessary to establish whether the conditions and treatment to which inmates are subjected is justified. Answering this question requires examining the practices used in prisons to determine if they withstand scrutiny. If not, we should implement reforms. If these reforms do not work, we must consider replacing prisons with more effective institutions.<sup>2</sup>

In the following chapters, I will argue that we ought to adopt a consequentialist approach for evaluating whether certain punishments are justified; if a form of punishment is not reasonably expected to produce the best possible outcome, we should abandon it in favor of one that is. I will argue that the status quo in U.S. prisons fails to satisfy this justification. The state is thus obligated to implement certain reforms to mitigate harms to individuals. I will then explain why it may not be possible to implement these reforms within the current criminal justice system. If this turns out to be the case, the state is obligated to abolish the current system and adopt alternatives that cause less harm to individuals.

## II. Consequentialist Standard of Justification

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<sup>1</sup> Wagner, Peter, and Sawyer, Wendy. "Mass Incarceration: The Whole Pie 2018." *Mass Incarceration: The Whole Pie 2018* | *Prison Policy Initiative*, Prison Policy Initiative, 14 Mar. 2018, [www.prisonpolicy.org/reports/pie2018.html](http://www.prisonpolicy.org/reports/pie2018.html)

<sup>2</sup> Although prisons and jails serve different purposes, I will not distinguish between them from this point forward, but will refer to them all as "prisons," for the sake of brevity.

David Boonin defines punishment as the intentional infliction of harm on those who have committed crimes.<sup>3</sup> Punishing people who are charged with certain crimes has historically been accepted as the appropriate response by the state. In *Criminal Punishment and the Pursuit of Justice*, Mike Materni explains the retributivist approach to justice throughout history, “which tended to be exacted through cruel and violent forms of punishment.”<sup>4</sup> Although harsh punishments have a longstanding history of use, we should not automatically assume these practices are beneficial, necessary, or even morally permissible. Contrary to historical norms, justification for the type of punishments a state uses is required. If, after convicting people of theft, for example, the state’s policy were to give them a high five, this might not need any justification at all. Perhaps punishment would not require justification if it did not involve harm to individuals, but “since punishment involves pain or deprivation that people wish to avoid, its intentional imposition by the state requires justification.”<sup>5</sup>

From this point forward, I will adopt a consequentialist approach to justifying punishment practices. Consequentialism holds that normative judgments should be made based on the consequences of actions. I argue that, to be justified, a policy should produce or reasonably be expected to produce the best possible outcome. Although what is expected to result may not actually occur in all cases, a variety of empirical evidence can provide us with reasonable beliefs about what will likely follow from certain policies and practices. I will not rely on pure utilitarianism that is concerned with hedonistic pleasure and pain, but I will instead use preference utilitarianism as a guiding principle. Preference utilitarians think of utiles, the value unit used in moral calculations, not as points with which to calculate happiness and

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<sup>3</sup> Boonin, David. *The problem of punishment*. Cambridge University Press, 2011, pp. 13.

<sup>4</sup> *Criminal Punishment and the Pursuit of Justice* MC Materni - *Brit. J. Am. Legal Stud.*, 2013, pp. 278

<sup>5</sup> Greenawalt, Kent. “Punishment.” *The Journal of Criminal Law and Criminology*, vol. 74, no. 2, 1983, pp. 346 [www.jstor.org/stable/1143080](http://www.jstor.org/stable/1143080)

sadness, but instead as the result of the calculation one would make if they were rational, well-informed, and they understood the expected impact of a policy or choice. Using preference utilitarianism instead of pure utilitarianism as an evaluative tool saves us from concerns about favoring policies based on the emotional preferences of ill-informed or irrational people.

Having adopted a consequentialist, preference utilitarian approach for justifying policy decisions regarding punishment, I can conclude that the best possible outcome of a policy is that which simultaneously produces the most wellbeing and the least amount of harm to individuals. Not only should the outcome of a policy choice increase wellbeing, it should produce the most wellbeing for which we can reasonably hope. When I say the “most” wellbeing possible, I do not simply mean the average wellbeing of some abstract community. Jeremy Bentham argued that we should strive for the “greatest happiness” of “the greatest number.”<sup>6</sup> By this, he meant that we ought to improve “the...welfare...of the community as composed of individuals.”<sup>7</sup> When I refer to increasing wellbeing and reducing harm, I too am concerned with the welfare not merely of society, but of individual members of society. These calculations of harm to individuals ought to be measured in roughly agent-neutral terms, meaning that every person’s life has equal value for our purposes.<sup>8</sup>

Bentham provides a classic utilitarian account of evaluating punishment policies.

Bentham was a pure utilitarian, who dealt primarily with calculations of utility in terms of happiness and sadness. As I have chosen to adopt a preference utilitarian view, I have replaced

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<sup>6</sup> William L Davidson, *Political Thought in England: The Utilitarians from Bentham to J.S. Mill*. New York: Henry Holt, 1916, pp. 48 – 49.

<sup>7</sup> Bentham, Jeremy, and Wilfred Harrison. *A Fragment on Government and an Introduction to the Principles of Morals and Legislation*. Basil Blackwell, 1967.

<sup>8</sup> There currently exists a debate over whether agent-neutrality is a necessary condition for consequentialism. Because many consequentialists agree that outcomes ought to be agent-neutral, I will not take up the project of presenting both sides of this debate and defending agent-neutrality as a necessary condition of consequentialism. (Parfit 1984; Nagel 1986).

measurements of “happiness” and “sadness” with “wellbeing” and “harm,” to create a less hedonistic metric. People may disagree over what truly constitutes wellbeing and harm. I will not provide a strict or comprehensive definition of wellbeing, but argue that it can roughly be measured by one’s physical and/or mental health. By harm, then, I mean things that are injurious to one’s physical and/or mental health. I have loosely based these definitions on John Stuart Mill’s definition of harm. Mill distinguishes between “mere offenses,” which are minor, fleeting, undesirable consequences of actions, and harms. He defines harms as actions that injure people or set back important interests they have, to which they have a right.<sup>9</sup> In calculations of wellbeing and harm, the relevant agents are those “whose interests are in question” in a particular situation.<sup>10</sup>

Bentham posits several premises that establish the definition and purpose of punishment: (1) the aim of all laws ought to be to increase total wellbeing of the community, (2) that which reduces wellbeing is mischief, (3) punishment reduces total wellbeing of the community, (4) punishment is mischief, (5) punishment ought to be allowed only insofar as it prevents reduction in wellbeing or increases wellbeing.<sup>11</sup> I adopt condition (5) moving forward as a necessary condition for justified punishment.

### III. Desired Ends of Punishment

To ensure that more wellbeing than harm results from certain policies and choices, it will first be necessary to establish our desired outcomes. Because I am concerned with assessing the effects of prison on individual members of society, I will present and evaluate several popular

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<sup>9</sup> Mill, John Stuart, and Gertrude Himmelfarb. *On Liberty*. Penguin, 1974.

<sup>10</sup> Bentham, Jeremy, and Wilfred Harrison. *A Fragment on Government and an Introduction to the Principles of Morals and Legislation*. Basil Blackwell, 1967.

<sup>11</sup> Bentham, Jeremy, and Etienne Dumont. *An introduction to the principles of morals & legislation: principles of the Civil code, principles of the penal law, &c., &c.* Tait, 1843.

utilitarian ends of imprisonment: incapacitation, reform, general and individual deterrence, and vengeance.

One commonly cited end of incarceration as a punishment is incapacitation. By separating people who may pose a risk to others from the rest of society, utilitarians accept the harm inflicted on incarcerated individuals, by restricting their freedom. This harm is considered permissible because of the wellbeing that seems to result – safety for the rest of society. This particular outcome of incarceration is clearly effective, at least as long as people are actually incarcerated; people who might harm those around them if they were not in prison cannot physically harm members of the general public while detained. Although this result of incarceration seems positive, we ought to examine whether someone’s time in prison increases risk to others in society when that individual is eventually released. Because we are evaluating wellbeing in agent-neutral terms, we should also be concerned with the harm an inmate may inflict on those around her in prison, as well as the harms that person experiences as a result of her incarceration. I will return to address these concerns later in my thesis.

Another frequently cited utilitarian end of incarceration is reform. Reform has historically involved attempts to reshape inmates’ character through religious studies and isolated contemplation of their wrongdoings.<sup>12</sup> Modern reform, however, typically seeks to alter character by participation in programming, like education and activities. By providing stimulation and educational opportunities, and by increasing inmates’ skills and employability, modern reform efforts are focused on enhancing self-respect, decreasing anti-social behavior, and generally improving inmates’ personal future prospects upon release.<sup>13</sup> Because more than

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<sup>12</sup> “History Explorer: 19th-Century Prison Reform.” History Extra, BBC History Magazine, 7 Nov. 2013, [www.historyextra.com/period/victorian/history-explorer-19th-century-prison-reform/](http://www.historyextra.com/period/victorian/history-explorer-19th-century-prison-reform/).

<sup>13</sup> Greenawalt, Kent. “Punishment.” *The Journal of Criminal Law and Criminology*, vol. 74, no. 2, 1983, [www.jstor.org/stable/1143080](http://www.jstor.org/stable/1143080)

95% of prison inmates will eventually return to society, improving their chances for success upon release is a productive goal of incarceration.<sup>14</sup> Consequentialists concerned with increasing wellbeing should support policies like these, which improve inmates' outcomes post-release.

General deterrence is also a widely accepted utilitarian goal of the use of prisons.<sup>13</sup> Based on general intuitions about human decision-making behavior, it has historically been and is presently believed that the expectation of harsh punishment if caught committing a crime effectively deters many people from doing so. Appeals to deterrence are a common utilitarian justification for punishments that cause harm to those upon whom they are inflicted. Some people criticize deterrence as an acceptable justification of punishment because the state is using one group of people, those it incarcerates, as mere means to an end, which Immanuel Kant argues is morally impermissible.<sup>15</sup> The incarcerated group is used for the purpose of deterring a second, separate group of people, potential future criminals, from committing crimes. One who maintains that deterrence is a legitimate justification of punishment could evade this criticism by responding that deterrence is just one of several justifications of punishment, so the incarcerated group is not a *mere* means to an end. I do not find this challenge to incarceration as a deterrent to be sufficiently problematic, as a supporter requires only one other non-deterrent reason for incarceration to evade the objection.

My criticism of deterrence as a justification for prison policies is not grounded in the above Kantian principle. Although intuitively satisfying to many and popular among economists, the idea that harsh punishments effectively deter people from committing crime is

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<sup>14</sup> Hughes, Timothy, and Doris James Wilson. "Reentry Trends in the United States." Bureau of Justice Statistics (BJS), Office of Justice Programs, 1 Apr. 2018, [www.bjs.gov/content/reentry/reentry.cfm](http://www.bjs.gov/content/reentry/reentry.cfm).

<sup>15</sup> Kerstein, Samuel. (2009). Treating Others Merely as Means. *Utilitas*, 21(2), 163-180. doi:10.1017/S0953820809003458

flawed because of its empirical inaccuracy.<sup>16</sup> First, for deterrence to work, one must assume that individuals are rational, self-interested decision-makers, who have the capacity to perform cost-benefit analyses before they act. Around 68% of inmates in state prisons did not complete high school.<sup>17</sup> A study by the Bureau of Justice Statistics also found high rates of serious mental illness among the prison population. Over half of all inmates in prisons and jails report symptoms of mental health problems: 54% of local jail inmates and 43% of state prisoners had symptoms of mania, while 24% of local jail inmates and 15% of state prison inmates experienced delusions or hallucinations.<sup>18</sup> Symptoms like these have the potential significantly to reduce one's capacity for rational choice. The education level and mental health status of most of the prison population may effectively preclude them from the ability to make rational decisions that accurately weigh the costs of certain behavior. One study reported that high-risk offenders "frequently engage in skewed decision-making processes that greatly overestimate the benefit of antisocial actions vs. the costs involved," not to mention those who are impaired by alcohol or other drugs.<sup>16</sup> While we may still wish to hold people responsible for actions they perform while under the influence, we should expect deterrent effects to be largely ineffective in these cases. This empirical evidence about those who are actually apprehended committing crimes, tried, and incarcerated suggests that harsh prison conditions and prison policies that serve to deter rational individuals do not work to deter those who will actually be impacted by such policies.

Recidivism rates and the tendency of certain neighborhoods to have higher crime rates than others also indicate the ineffectiveness of prison policies as a deterrent. If deterrence were

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<sup>16</sup> Gendreau, Paul, et al. "The Effects of Prison Sentences on Recidivism." Public Safety Canada , Government of Canada , 1999, [www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf).

<sup>17</sup> "Education and Correctional Populations." Bureau of Justice Statistics (BJS), Office of Justice Programs , 1 Jan. 2003, [www.bjs.gov/index.cfm?ty=pbdetail&iid=814](http://www.bjs.gov/index.cfm?ty=pbdetail&iid=814).

<sup>18</sup> "Study Finds More Than Half of All Prison and Jail Inmates Have Mental Health Problems." Bureau of Justice Statistics (BJS), Office of Justice Programs , 6 Sept. 2006, [www.bjs.gov/content/pub/press/mhppjpr.cfm](http://www.bjs.gov/content/pub/press/mhppjpr.cfm).



as effective as assumed, we would expect those who have personal relationships with formerly and currently incarcerated individuals, who understand the experience of incarceration, to be those least likely to commit crimes. The available empirical evidence does not confirm the effectiveness of general deterrence, despite its appeal as a justification for punitive policies.<sup>19</sup>

An individual's expectation of negative consequences from an action and subsequent choice to refrain based on the expected consequences, referred to as individual deterrence, is another popular end of harsh prison policies. We are again faced with empirical evidence that contradicts this theory; those with personal experience in the criminal justice system are extremely likely to be re-incarcerated. Approximately two-thirds of inmates will be re-arrested within the three years following their release.<sup>20</sup> If expected consequences were truly a sufficiently important factor in decisions to commit crimes, formerly incarcerated people would presumably be the most deterred, as they have directly experienced incarceration. One might respond to this lack of evidence supporting the effectiveness of deterrence by suggesting that punishments today are insufficiently harsh. One could claim that, if prison sentences were longer and treatment less humane, people would eventually be effectively deterred. To this I would respond that it would be both morally questionable and ineffective to institute increasingly harsh punishments for minor crimes, in the hopes of eventually reaching a level of severity that would effectively deter everyone. Based on available empirical data "most scholars agree that altering sentencing policy in the United States, and elsewhere, has a *relatively small* influence on criminal activity," such that deterrence alone is insufficient to justify causing serious harm to

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<sup>19</sup> Golash, Deirdre. *The Case Against Punishment Retribution, Crime Prevention, and the Law*. NYU Press, 2005, pp. 24

<sup>20</sup> "Recidivism." National Institute of Justice, Office of Justice Programs, 17 June 2014, [www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx](http://www.nij.gov/topics/corrections/recidivism/Pages/welcome.aspx).

those convicted.<sup>21</sup> States without the death penalty, for example, report lower rates of homicide than those with capital punishment.<sup>22</sup> If the fear of death does not adequately deter people from committing homicides, then we should not expect threats of less punitive measures to do so either.

In response to my worry about empirical inaccuracy, one could point out that a large percentage of the prison population's lack of ability to be deterred does not mean that no one is deterred; there could be a huge number of people that were effectively deterred by a policy, which is precisely why they are not represented in the prison population. My critique is not, however, of the concept of deterrence in general. It may be true that a large number of people would commit crimes if they did not expect punishment to follow. Indicating to people that they may be punished if apprehended for a crime does seem justified for deterrent purposes, but inflicting harsh punishments on those who are actually apprehended requires a separate justification. A report published by The Sentencing Project indicates that increases in the certainty of punishment, not the severity of punishment, produce deterrent effects.<sup>23</sup> This report is based on earlier work by legal scholars Daniel Nagin and Greg Pogarsky, who argue that "punishment certainty is far more consistently found to deter crime than punishment severity, and the extra-legal consequences of crime seem at least as great a deterrent as the legal consequences."<sup>24</sup> These findings perhaps justify increased surveillance to heighten people's

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<sup>21</sup> Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. (2006), pp. 447. <http://scholarship.law.wm.edu/wmlr/vol48/iss2/2>,

<sup>22</sup> "Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates." Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates | Death Penalty Information Center, Death Penalty Information Center, [deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates](http://deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates).

<sup>23</sup> Wright, Valerie. "Deterrence in Criminal Justice, Evaluating Certainty vs. Severity of Punishment." Sentencingproject.org, The Sentencing Project, Nov. 2010, pp. 1, [www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf](http://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf).

<sup>24</sup> Daniel Nagin and Greg Pogarsky. "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence," *Criminology*, 39(4), 2001

perceived likelihood of arrest, as well as the existence of some negative consequence for those apprehended of crimes. They do not, however, serve to justify the imposition of harsh punishments on prison inmates.

Utilitarians also cite allowing victims and family members to experience state-facilitated vengeance as a justification for punitive policies within the criminal justice system.<sup>25</sup> Although I acknowledge that it is common for crime victims and their families to wish for harm to come to the person(s) responsible for their pain and suffering, I argue that the state's interest in preventing harm outweighs those desires. In my utilitarian calculations of harm, based on Bentham's original justifications of punishment, harms are calculated on an agent-neutral basis. This means that harms inflicted on perpetrators of crimes count for as much as harms inflicted on "innocent" people. Those who explicitly wish to see criminals harmed may reject this view and claim that the criminal has lowered her moral status by committing a crime, so we should not worry about harming her. Even if I abandon agent-neutrality and ignore harm caused to prison inmates, desires for vengeance are still outweighed in light of harm-prevention considerations for members of the general public.

There are two types of consequentialist justifications for prohibiting vengeance. The first is based on the harm principle, posited by John Stuart Mill in *On Liberty*. Mill argues that the only acceptable justification for interfering with people's autonomy is to prevent harm to others.<sup>26</sup> The harm principle entails that the government is justified in imposing laws if they protect individuals from harming others. When people are the victims of crimes, they or their family members may want vengeance in the form of punitive prison policies. Empirically, however, these policies cause more crime to be committed. I will further elaborate on the ways

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<sup>25</sup> Greenawalt, Kent. "Punishment." *The Journal of Criminal Law and Criminology*, vol. 74, no. 2, 1983, [www.jstor.org/stable/1143080](http://www.jstor.org/stable/1143080)

<sup>26</sup> Mill, John Stuart, and Gertrude Himmelfarb. *On Liberty*. Penguin, 1974.

harsh punishments cause future crimes in upcoming sections, as the effects are well documented. These crimes cause harm to other people in society and to the state. By adopting the harm principle, the government is justified in restricting people's actions to seek out vengeance or facilitate vengeance on behalf of victims and their families, to prevent harm to others.

The second type of strategy one might employ to justify the prohibition of vengeance is based in paternalism. On this view, although there may be some acts we wish to perform, the government is arguably justified in prohibiting us from performing them if they will cause harm to come to us. Because the government has an interest in preserving the lives of its citizens for a variety of reasons, we should accept that the government is justified in prohibiting certain actions, if doing so may protect the person or group carrying out those actions from serious harm. When people are the victims of crimes, they or their family members may want vengeance. One act of vengeance, however, may cause significant harm to the person committing the act because of a cycle of vengeance that starts if citizens are permitted to take vengeance into their own hands. Gang violence is an example of what happens when vengeance is exacted by members of the public; one gang murders a member of its rival gang, the rival gang avenges its member's death by murdering a member of the original gang, and so on. One might respond that this serves to support the notion that the state should be responsible for exacting vengeance on criminals, to prevent the commencement of this cycle. However, if the state carries out acts of vengeance on victims' behalf, the state may itself be harmed; increased recidivism and the subsequent need for more law enforcement officers and prison and court employees imposes a financial burden on the state, not to mention the potential physical harm that may come to state agents. Prohibiting vengeance carried out by individuals and the state is justified because it protects people and the state from harm.

Despite what victims and their families may desire, we can reject vengeance as a satisfying utilitarian justification of punishment, because of the subsequent harms that result from it. Simply put, the importance of protecting members of society from becoming the victims of future crimes outweighs the importance of a previous victim's desire to see harm come to their aggressor. Vengeance fails to withstand consequentialist scrutiny, which, under my view, obligates us to prefer policies that increase wellbeing and cause the least amount of harm. Empirically, non-vengeful policies cause less recidivism and thus less harm, so we ought to prefer them to their more vengeful counterparts.

Another popular end of punishment is retributivism. Unlike consequentialists, retributivists are not mainly concerned with the effects punishments might have on individuals, but instead think punishment is justified because it gives people what they deserve. Giving people what they deserve requires that we calculate the badness of an action and attempt to administer a punishment based on that calculation, to give the perpetrator of a crime her just deserts and restore whatever imbalance of justice was arguably created by the original bad act. Retributivists may have difficulty actually implementing this view in the criminal justice system. Despite its intuitive appeal, there is something extremely challenging about the task of calculating the moral imbalance in the world caused by a crime, combined with the moral standing of the perpetrator(s) and the victim(s), to produce a just punishment that individuals truly deserve.<sup>27</sup> Imagine that a battered woman who frequently performs lifesaving humanitarian work eventually kills her abusive husband. Her husband murdered someone earlier in his life but was not charged with the crime. The question of how the criminal justice system ought to calculate what type of punishment this woman truly deserves is challenging to answer. One

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<sup>27</sup> Greenawalt, Kent. "Punishment." *The Journal of Criminal Law and Criminology*, vol. 74, no. 2, 1983, [www.jstor.org/stable/1143080](http://www.jstor.org/stable/1143080)

could also wonder, if one is concerned with giving people what they deserve, why do retributivists care only about punishment. For appeals to the importance of administering just deserts to be taken seriously, perhaps retributivists should be equally concerned with giving people who perform good acts what they deserve as well. This lack of concern for responding to all types of desert is certainly not a fatal flaw for the retributivist, but is a puzzling position for one so occupied with administering just deserts.

Retributivists also support punitive policies because they arguably serve to correct for the unfair advantage one gains when one commits a crime. This kind of example seems straightforward if one considers a crime like shoplifting, where the rest of society may find it unfair that one person can flout the rules and acquire new items without payment. The appeal breaks down somewhat when we consider cases of crimes that either do not advantage the perpetrator or those that people generally do not want to commit. Rape and other sex crimes, for example, are problematic because they cause mental and physical harm to victims, not because they give the perpetrator an unfair advantage that others in society would wish to have.<sup>27</sup> For the unfair advantage view to apply to rape and other similar crimes, it would have to be true that other people in society want to do those things, but refrain because of rules prohibiting them.

For cases like shoplifting and theft more generally, it does seem like the perpetrator gains an unfair advantage. It is not clear, however, if this worry is enough to justify harsh responses to crime. Except in cases of white-collar crime, the annual cost of which is an estimated \$426 billion to \$1.7 trillion, individual incidences of theft typically do not place perpetrators in positions of economic superiority over the rest of society.<sup>28</sup> Appeals to justify punishment based on rectifying some unfair advantage “[depend] upon an initially fair

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<sup>28</sup> Helmkamp, J C, et al. “How Much Does White Collar Crime Cost?” Ncjrs.org, Bureau of Justice Assistance, US Dept of Justice, [www.ncjrs.gov/App/Publications/abstract.aspx?ID=167026](http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=167026).

distribution of the relevant advantages.”<sup>29</sup> Those in prison are already among those in some of the worst positions in society; their economic advancement through illegal means would still not place them in positions of relative advantage over most others. In cases of theft, correcting an unfair advantage might require the thief to pay a fine, return the stolen item, or compensate the victim financially. It is not clear, however, why incarceration would be the most precise or effective way to fix the unfair advantage gained by these types of property crime.

#### IV. When and How to Punish

In this section, I will argue that people ought to be incarcerated in whatever conditions produce the least possible amount of harm to the incarcerated individuals and to individual members of society. To ground my claims, I will refer to Jeremy Bentham’s account of when and how it is appropriate to punish. As I explained earlier, I have replaced the words happiness and sadness with wellbeing and harm, as I believe them to be more meaningful measures of utility.

Bentham argues that the government ought not inflict punishment in several cases. We ought not punish if no harm was caused by the initial act and there is thus no reduction of wellbeing for the punishment to prevent. We also should not punish if the punishment will not successfully increase total wellbeing. We should refrain, too, if it would be too expensive to punish, such as if the reduction in wellbeing produced by the punishment would be greater than what is prevented. Finally, we should not punish if it is not strictly necessary; if whatever is threatening people’s wellbeing could be prevented or cease itself without punishment, then

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<sup>29</sup> Golash, Deirdre. *The Case Against Punishment Retribution, Crime Prevention, and the Law*. NYU Press, 2005, pp. 82.

punishment should be avoided.<sup>30</sup> This means that if an alternative institution or less punitive measures could solve some problem, then we should always choose the alternative over punishment.

Bentham was concerned with preventing sadness that results from punishment. Although I am interested in preventing harm, not mere sadness, Bentham's account is equally useful. He lists four specific "evils" that punishment can cause: the evil of coercion and restraint, which Bentham argued results from the pain people experience when they are prevented from performing certain acts under threat of punishment.<sup>30</sup> There is also the evil of fear, which is the pain felt by those who fear they will be punished for breaking some law. These two evils are not particularly relevant to my consideration of harms caused by punishment, as I am not convinced that the deterrent effects of expected punishments are sufficiently salient in people's decisions to commit crimes so as to cause legitimate harm. There are of course certain cases where laws in the United States have historically been so restrictive that they denied full social participation to those to whom they applied, which produced genuine harm. I will not be addressing those cases here. People may sometimes feel saddened by the existence of punishments to which they might be subjected if they commit certain crimes, but in most modern cases, this sadness does not constitute harm of the type on which I am focused.

My priority is the two other evils caused by punishment that Bentham discusses: the evil of sufferance and the pain of sympathy.<sup>30</sup> The evil of sufferance is the pain that results directly from a punishment itself. When I reference harm, I will most often be referring to the physical and mental harms that result from people's experiences while incarcerated. For this reason, the evil of sufferance is the most relevant of Bentham's evils to my project. The fourth evil, the pain

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<sup>30</sup> Bentham, Jeremy, and Etienne Dumont. *An introduction to the principles of morals & legislation: principles of the Civil code, principles of the penal law, &c., &c.* Tait, 1843.



of sympathy, is also relevant for my calculations. This evil is the pain felt by anyone who has a relationship with those suffering from the other pains of punishment. As it relates to the harms I will be discussing, this pain could take the form of distress caused by the incarceration of a loved one, the financial burden of remaining in contact with someone in prison, or the harms resulting from high rates of incarceration in one's neighborhood.

Not listed by Bentham but also of great importance is the harm that indirectly results from the evil of sufferance, that is, the harm that follows from the negative experience of incarceration. Reoffending after release, for example, is a more distant harm caused by one's treatment in prison that I will include in my calculations of harm caused by certain punishment policies. Although not as direct as physical and mental harm caused by specific punishments, these harms are equally important for considering the effects of certain policies, as empirical studies illustrate the causal relationship between certain policies and specific consequences. Later, I will use Bentham's guidelines for when and how punishments should be administered to argue that the status quo in U.S. prisons is unjustified. First, I will explain the conditions in U.S. prisons and some of their harmful effects.

## V. Explaining the Status Quo

In this section, I will argue that the literal conditions of confinement and inmate treatment in the United States cause significant harm to individuals. I reiterate the importance of examining the harms caused by incarceration in part because of the large number of people affected by prison policies. Two point three million people are currently imprisoned throughout

a variety of facilities in the United States.<sup>31</sup> That means that not only are these 2.3 million people potentially impacted by prison policies and practices, the families and communities of incarcerated individuals are also adversely affected, both directly and indirectly.

First, there are the basic harms that inmates experience, resulting directly from incarceration. Restricting inmates' autonomy is a clear and intended outcome of incarceration. Deirdre Golash argues that "imprisonment means, at a minimum, the loss of liberty and autonomy, as well as many material comforts, personal security, access to heterosexual relations.... But these are only the minimal harms, suffered by the least vulnerable inmates at the best run prisons."<sup>32</sup> A variety of sources indicate, however, that a lack of freedom of movement is far from the worst harms to which inmates are frequently subjected. Over the last few decades, policy changes have intentionally sought to make conditions of confinement increasingly harsh on inmates.<sup>33</sup> This does not include the unofficial practices employed by prison officials, which are not strictly sanctioned but persist nonetheless.

Many commonly used punitive measures in prisons cause inmates permanent or semi-permanent damage. Solitary confinement, for example, which involves confining an inmate in a small cell for 23 hours a day, is frequently used to maintain order, to punish disobedient inmates, and even to protect vulnerable inmates from other detainees. Although popular for its effectiveness at improving prison efficiency, solitary confinement often causes permanent harm to inmates. Those with pre-existing mental illnesses subjected to solitary confinement experience worsening illnesses. Those entering with no history of mental illness often develop

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<sup>31</sup> Wagner, Peter, and Wendy Sawyer. "Mass Incarceration: The Whole Pie 2018." *Mass Incarceration: The Whole Pie 2018* | *Prison Policy Initiative*, Prison Policy Initiative, 14 Mar. 2018, [www.prisonpolicy.org/reports/pie2018.html](http://www.prisonpolicy.org/reports/pie2018.html).

<sup>32</sup> Golash, Deirdre. *The Case Against Punishment Retribution, Crime Prevention, and the Law*. NYU Press, 2005, pp. 2.

<sup>33</sup> Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 *Wm. & Mary L. Rev.* (2006), pp. 406. <http://scholarship.law.wm.edu/wmlr/vol48/iss2/2>,

mental illnesses resulting directly from their time in solitary confinement.<sup>34</sup> Inmates placed in solitary confinement also pose a heightened safety risk to members of the general public, once released. In a lecture at the University of Michigan Law School, Rick Raemisch, the Executive Director of the Colorado Department of Corrections, shared the story of how he came to hold his current job; an inmate who had recently been released directly from solitary confinement back into the community had assassinated his predecessor. Raemisch cautioned that solitary confinement does improve the internal efficiency of facilities, but at great cost to public safety. When practices like solitary confinement are employed, inmates are worse upon release than when they were admitted to prison, according to Raemisch.<sup>35</sup> Another policy that causes serious and direct harm is overcrowding. At Bedford Hills Correctional Facility for women in New York, prison officials exceeded the capacity of inmates for which the facility had space. The significant overcrowding quickly led to an increase in suicide attempts by inmates.<sup>36</sup> Worsening or developing mental illness and a sharp increase in suicide are both clear and serious direct harms caused by specific policy decisions.

Inmates are also routinely subjected to serious threats to their mental and physical health. Many view these risks as normal side effects of incarceration, which is an extremely common position that impedes public policy reform attempts. “Rape and other forms of coerced sexual assault are commonplace, and inmate healthcare is frequently so inadequate that ‘preventable suffering and death behind bars has been normalized.’”<sup>37</sup> Given the stigma associated with sexual assault and rape, as well as fear of retaliation, inmates may be hesitant to report

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<sup>34</sup> Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U.MICH. J.L. REFORM 495 (2014). Available at: <http://repository.law.umich.edu/mjlr/vol47/iss2>

<sup>35</sup> Raemisch, Rick. “Solitary Confinement, Mental Health, and Access to Healthcare in Prison.” A More Human Dwelling Place: Reimagining the Racialized Architecture of America, February 17, 2018, University of Michigan Law School, 100 Hutchins Hall, 625 S. State Street, Ann Arbor, MI.

<sup>36</sup> “Prison Conditions in the United States.” Human Rights Watch, United States of America, Nov. 1991, pp. 34.

<sup>37</sup> Dolovich, Sharon. “Cruelty, Prison Conditions, and the Eighth Amendment.” Georgetown Law Faculty Publications, 84 NYU L. Rev, 881, 2009.

experiences of sexual abuse. It is thus challenging to ascertain precise victimization rates. The available data, however, indicate high levels of assault and rape in prison facilities. “One victimization survey found that 69 percent of prisoners in a state prison for young offenders had experienced at least ten of the fourteen surveyed forms of victimization during their current prison term.”<sup>38</sup> Another study found that more than 10 percent of prison inmates have been forcibly raped, while a significantly larger number has been pressured or coerced to engage in sex.<sup>38</sup> In addition to the physical and emotional harms that accompany sexual victimization, the high rates of AIDS among federal, state, and jail inmate populations add an additional cause for concern.<sup>38</sup> The harm caused by these high rates of sexual violence extends to all those in facilities where sexual violence is commonplace, not just actual victims. Sharon Dolovich argues that “to force prisoners to live in constant fear of violent assault, under conditions in which many of the most vulnerable among them can expect that fear to be realized, is to inflict a form of physical and psychological suffering akin to torture.”<sup>39</sup> Although challenging to quantify, the physical and mental harm produced by prison policies and practices that permit this type of victimization to occur is significant and long lasting.

Sexual violence against prison inmates is not merely a result of attacks by fellow inmates. Prison staff members also victimize inmates, regardless of gender. When Radhika Coomaraswamy, the United Nations Special Rapporteur for Violence Against Women, toured a variety of facilities in several states, she reported that “sexual misconduct by prison staff is widespread in American women’s prisons.”<sup>40</sup> A study of sexual victimization at 13 state prisons

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<sup>38</sup> <sup>38</sup> “Prison Conditions in the United States.” Human Rights Watch, United States of America, Nov. 1991, pp. 31, 3, 65.

<sup>39</sup> Dolovich, Sharon. “Cruelty, Prison Conditions, and the Eighth Amendment.”

<sup>40</sup> Davis, Angela. *Are Prisons Obsolete*. Seven Stories Press, 2003, pp. 80.

revealed the most common perpetrator of sexual assaults to be staff members.<sup>41</sup> Sexual abuse perpetrated by fellow inmates is certainly a harm the state ought to mitigate, but that the perpetrators of sexual violence are, in a large number of cases, those actually charged with protecting inmates is particularly troubling.

The damage caused by sexual violence is not limited to the duration of the attack. Many victims require medical or psychological treatment, often for months to years after an incident.<sup>42</sup> “Substance abuse, depression and psychological symptoms similar to posttraumatic stress disorder are just a few of the problems likely to manifest themselves following a sexual assault.”<sup>42</sup> Victims are more prone to chronic pain and other long-term illnesses. Harm experienced is also not limited to direct victims of sexual violence; economic, familial, and social and community harms often result because, after release, victims of sexual violence struggle to work and adequately care for family members, all of which has negative consequences for a victim’s family, friends, and community more generally.

In addition to tangible physical and mental damage, inmates in U.S. prisons suffer from general mistreatment in many forms. After visiting numerous prison facilities around the United States, the United Nations Human Rights Watch documented the prevalence of unsanitary conditions, like rat infestations and open sewers near kitchens. In terms of physical treatment, U.S. prison officials employ a variety of harmful tactics at their own discretion, administered as punishments for various behavioral infractions. “Strip status” is an example of one notably humiliating practice used in Oregon prisons. Inmates are stripped of all bedding and clothing

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<sup>41</sup> Wolff, Nancy, et al. “Sexual Violence Inside Prisons: Rates of Victimization.” Ncbi.nlm.nih.gov, US National Library of Medicine National Institutes of Health, 23 May 2006, [www.ncbi.nlm.nih.gov/pmc/articles/PMC2438589/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2438589/).

<sup>42</sup> “Study Argues That Conjugal Visits Can Reduce Number of Prison Rapes.” Prison Legal News, Human Rights Defense Center , 26 Aug. 2016, [www.prisonlegalnews.org/news/2016/aug/26/study-argues-conjugal-visits-can-reduce-number-prison-rapes/](http://www.prisonlegalnews.org/news/2016/aug/26/study-argues-conjugal-visits-can-reduce-number-prison-rapes/).

and forced to reside naked in their cells, earning back each individual article of clothing and bedding as a reward for compliance with prison rules.<sup>43</sup> Although the specific effects of this degrading practice are difficult to measure, experts advise against the use of policies of this kind, citing concerns that inmates will be more violent upon release.<sup>44</sup>

Aside from degrading punishments and unsanitary conditions, many inmates suffer non-sexual physical abuse by guards. An independent investigation of Rikers Island Jail revealed that guards had a practice of beating inmates who misbehaved. Guards would don riot gear and repeatedly punch inmates in the face.<sup>43</sup> This direct physical harm to inmates caused many to require medical attention, depleting prison healthcare resources on preventable injuries. Another practice that contributes to physical harm caused to inmates is the failure of many facilities properly to separate inmates based on their crimes. Those jailed for DUIs, for example, may find themselves in the same cell as extremely violent criminals.<sup>45</sup> This careless practice places inmates in direct contact with people by whom they may be victimized.

The consequences of incarceration in the U.S. are not limited to those physically behind bars, but instead extent further, causing harm to inmates' families and communities more generally. The combination of both fines and imprisonment fall "heavily on a criminal's wife and children."<sup>46</sup> As previously discussed, this places an additional burden on those who are already more likely to be disadvantaged. Unlike the person incarcerated, however, these people have not been charged with committing wrongdoing of any kind. One practice that not only causes families significant distress but also incurs high financial costs for non-incarcerated

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<sup>43</sup> "Prison Conditions in the United States." Human Rights Watch, United States of America, Nov. 1991, pp. 45, 1.

<sup>44</sup> Raemisch, Rick. "Solitary Confinement, Mental Health, and Access to Healthcare in Prison." *A More Human Dwelling Place: Reimagining the Racialized Architecture of America*, February 17, 2018, University of Michigan Law School, 100 Hutchins Hall, 625 S. State Street, Ann Arbor, MI.

<sup>45</sup> "Prison Conditions in the United States." Human Rights Watch, United States of America, Nov. 1991, pp. 21.

<sup>46</sup> *Criminal Punishment and the Pursuit of Justice* MC Materni - *Brit. J. Am. Legal Stud.*, 2013, pp. 279.

individuals is the frequency with which inmates are housed in facilities far from their homes. In the District of Columbia, for example, the district's federal prison was closed after reports of widespread abuse.<sup>47</sup> As no facility reopened to replace it, inmates are forced to enter the federal system and are sent to prisons all over the country.

While working as an Intern Investigator at the Public Defender Service for the District of Columbia, all my clients who were originally apprehended and charged in Washington, D.C. were incarcerated in Pennsylvania, Kentucky, California, Texas, Colorado, or Arizona. As a result, none were able to meet face to face with their attorneys. Several also reported increased harassment and abuse because they were federally charged inmates intermixed in a population of federally charged inmates. Several of my clients' immediate family members cited an inability to afford transportation costs as the reason for not having seen their incarcerated relative for twenty years since their transfer into the federal prison system.

The consequences of an inmate's isolation from family and friends do not merely result in sadness; they are a tangible threat to other individuals' safety and wellbeing. One important condition for success after release from incarceration is the maintenance of social ties. A study of 7,000 prior inmates in the Florida Department of Correction illustrates the significant role visitation plays in reducing recidivism rates. Inmates who had visitors were 30.7% less likely to recidivate than those who were not visited.<sup>48</sup> The frequency with which inmates had visitors was also a factor; "for each additional visit an inmate received, the odds of recidivism declined by 3.8 percent."<sup>48</sup> Given that, on average, less than a third of inmates receive any visitation in a given

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<sup>47</sup> Wheeler, Linda. "No Escaping the History of Lorton Prison." The Washington Post, WP Company, 7 Feb. 1999, [www.washingtonpost.com/archive/local/1999/02/07/no-escaping-the-history-of-lorton-prison/9f8230d9-e33c-4b3f-b4fe-136570930735/?utm\\_term=.849b5b15d778](http://www.washingtonpost.com/archive/local/1999/02/07/no-escaping-the-history-of-lorton-prison/9f8230d9-e33c-4b3f-b4fe-136570930735/?utm_term=.849b5b15d778).

<sup>48</sup> Bales, William D, and Daniel P Mears. "Inmate Social Ties and the Transition to Society Does Visitation Reduce Recidivism?" Journal of Research in Crime and Delinquency, Florida State University , Aug. 2008, pp. 305 [citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.865.9780&rep=rep1&type=pdf](http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.865.9780&rep=rep1&type=pdf).

month, not including visits from their lawyers, increasing the accessibility of visits could have a significant impact on post-release success and public safety more generally.<sup>49</sup> Visitation was also shown to improve inmates' behavior while incarcerated. Improving inmate behavior increases both the safety and efficiency of prison facilities for inmates and staff alike. Although this study was conducted exclusively on inmates in Florida, there is little reason to think the results are not generalizable.<sup>48</sup> Placing inmates far away from their homes and the current visiting policies of facilities, many of which require strip searches and long waits, inhibit inmates from maintaining social ties, which causes harm to the safety of guards and inmates in facilities, reduces efficiency, and leads to increased recidivism.<sup>49</sup>

Lengthy prison sentences, too, have been shown to be harmful not only to inmates, but also to public safety. Long prison sentences harm inmates by restricting their autonomy, limiting their Constitutional rights, and increasing their chances of victimization. As is the case in the examples I explained above, harm here is not merely limited to offenders. An analysis of 50 studies from 1958 to 1993 involving 336,052 offenders demonstrated that a correlation exists between recidivism and length of time in prison, and between recidivism and serving prison time versus receiving a community-based sanction.<sup>50</sup> Alternative community-based sanctions include but are not limited to community service on a work crew, halfway houses that permit residents to leave the premises for work, and house arrest.<sup>51</sup> The study also revealed the tendency of inmates deemed "lower risk" to have more negative outcomes, in the form of increased recidivism, than their higher risk counterparts.<sup>50</sup> Low-risk and high-risk refer to an inmate's likelihood of

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<sup>49</sup> Rabuy, Bernadette, and Daniel Kopf. "Separation by Bars and Miles: Visitation in State Prisons." Separation by Bars and Miles: Visitation in State Prisons | Prison Policy Initiative, Prison Policy Initiative, 20 Oct. 2015, [www.prisonpolicy.org/reports/prisonvisits.html](http://www.prisonpolicy.org/reports/prisonvisits.html).

<sup>50</sup> Gendreau, Paul, et al. "The Effects of Prison Sentences on Recidivism." Public Safety Canada, Government of Canada, 1999, [www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf).

<sup>51</sup> "The Effectiveness of Community-Based Sanctions in Reducing Recidivism," Oregon Department of Corrections 5 Sept. 2002, <https://multco.us/file/29250/download>



committing future crime, typically calculated by one's background, criminal history, category of offense, and other relevant factors.

Specific policy decisions inform whether inmates will be sentenced to longer or shorter periods of time incarcerated. Before its amendment in 2012, California's "three strikes" law served as an example of a policy that resulted in more inmates serving longer sentences. The old version of the law, which did not distinguish between types of felonies, required judges to sentence those convicted of a third felony to 25 years to life.<sup>52</sup> Policies like these are popular among those who cite deterrence as an important justification for harsh punishments – the longer the expected sentence, the lower the chance that someone would take such a risk. Those who are unaware of sentencing policies or who fail to perform rational cost-benefit analyses and are incarcerated for lengthy sentences ultimately pose a risk to public safety, in the form of increased recidivism after release.

Increased recidivism resulting from lengthy prison terms and time served in prison instead of in community-based programs can be attributed to a variety of factors. Some experts argue that anti-social behaviors and beliefs are positively reinforced in a prison environment.<sup>53</sup> Proponents of this view suggest that incarceration acts as a kind of negative reform, in which low-risk offenders learn anti-social behavior from their high-risk peers. Those interested in adopting policies that reduce crime should note that the above study concludes that prison ought not be used "with the expectation of reducing future criminal activity."<sup>53</sup> It also warns that, although the findings suggest only a few percentage points increase in recidivism from more punitive rather than less punitive sentences, "the costs accruing from the excessive use of prison

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<sup>52</sup> "California's Three Strikes Sentencing Law." California's Three Strikes Sentencing Law - criminal\_justice, California Courts , [www.courts.ca.gov/20142.htm](http://www.courts.ca.gov/20142.htm).

<sup>53</sup> Gendreau, Paul, et al. "The Effects of Prison Sentences on Recidivism." Public Safety Canada , Government of Canada , 1999, pp. 50, 20. [www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf).

could be enormous.”<sup>53</sup> Lengthy sentences not only produce harmful outcomes in the form of crime, they are financially burdensome as well. The estimated cost of one high-risk offender is approximately \$1,000,000, over his entire lifetime.<sup>54</sup> As the amount of time served by the average prison inmate has grown significantly in the last five to ten years, it is worth examining whether this trend should be permitted to continue, given its harmful consequences.<sup>55</sup>

Despite the available empirical evidence demonstrating the effects of certain policies, some still might want criminals to get what they deserve. This, for some, necessarily involves significantly unpleasant treatment. I have not included calculations of desert, whatever those might look like, in my justifications for prison policies. Despite many people’s intuitions about harsh punishment as deserved by those who break the law or do things generally thought to be wrong, I argue that we should be skeptical of that view. I am committed to a forward-looking approach. This can be contrasted with an approach that focuses primarily on events that have already taken place. Someone seeking vengeance, for example, focuses her efforts on reacting to a wrongdoing that has already been carried out. As a consequentialist, I prefer an approach that focuses attention and effort on influencing the outcome of future events. I argue that, because past events cannot be changed, it is more worthwhile to exert effort to influence future events, over which we can have control. Even if someone has caused harm in the past, intentionally harming her with punishment, even if “deserved”, does not redistribute this harm to the offender. Instead, harm to an offender merely increases the total amount of harm done.<sup>56</sup> For consequentialists, policies that merely add to the net harm caused will lose out to policies that

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<sup>54</sup> Bales, William D, and Daniel P Mears. “Inmate Social Ties and the Transition to Society Does Visitation Reduce Recidivism?” *Journal of Research in Crime and Delinquency*, Florida State University , Aug. 2008, pp. 305 [citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.865.9780&rep=rep1&type=pdf](http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.865.9780&rep=rep1&type=pdf).

<sup>55</sup> Williams, Janice. “Prison Sentences Are Getting Even Longer, Particularly for Black People.” *Newsweek*, 22 July 2017, [www.newsweek.com/prison-sentences-increased-2017-jail-639952](http://www.newsweek.com/prison-sentences-increased-2017-jail-639952).

<sup>56</sup> Golash, Deirdre. *The Case Against Punishment Retribution, Crime Prevention, and the Law*. NYU Press, 2005, pp. 99.

seek to diminish harm moving forward. Increases in recidivism resulting from harsh policies also pose risks of harm to innocent members of the public, which should concern retributivists and non-retributivists alike.

## VI. The Possibility of Change

In the following sections, I will argue that there are changes that could be made such that the literal conditions of confinement and experience of incarceration in U.S. prisons would produce less harm to individuals than they currently do. Many current policies and practices are not strictly necessary to maintain safety and prevent harm. Many of these measures are tangibly more harmful than helpful. Bentham argues that punishment ought only be allowed in certain cases. In the section above, I addressed specific practices that cause harm. Those policies are consistent with situations in which certain punishment practices should not be permitted, according to Bentham's rules. In this section, I will address each category of policy and explain why, under the utilitarian model I have adopted, these are cases in which a punishment should not be administered.

The policies that result in permanent or semi-permanent damage to people in prison cause clear harm. Some worry that solitary confinement, for example, ought not be abolished because it is necessary to maintain safety within prison facilities. Solitary confinement, however, is a practice that causes more harm than it prevents. Inmate assignments to solitary confinement may be made arbitrarily, instead of based on a safety risk that the inmate poses to others.<sup>57</sup> This means that solitary is often used with the awareness that it will not effectively increase wellbeing, which is one of the conditions for not using a punishment. Executive Director of the

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<sup>57</sup> Shira E. Gordon, Solitary Confinement, Public Safety, and Recidivism, 47 U. Mich. J. L. Reform 495 (2014).

Colorado Department of Corrections, Rick Raemisch, led reform efforts in Colorado by ending solitary confinement for juveniles and women and restricting its use to a maximum of 15 days for all other inmates. Raemisch himself urged other departments to make efforts like these to reduce solitary confinement and practices like it, remarking that “the way prisons are built manufactures violence.”<sup>58</sup> The government should heed warnings like these from qualified individuals and eliminate practices that ultimately threaten public safety.

Bentham also prohibits the use of punishments if there is a more effective way of achieving one’s goal of increasing wellbeing. In a study of prisons in Mississippi, the state transferred inmates in solitary confinement to the general population and mentally ill inmates to health treatment.<sup>57</sup> The result was a significant decrease in violence within the facility. This illustrates how wellbeing could effectively be increased by the reduction or elimination of solitary confinement. Because alternatives to solitary confinement produce less harm, we should adopt those alternatives.

Overcrowding, resulting from the decision to place too many inmates in the same facility, is another policy the elimination of which would reduce harm and increase wellbeing. The practice of overcrowding in one facility led to a significant increase in suicide attempts.<sup>59</sup> Policy decisions that increase suicidal behavior are harmful. This is a case of a policy that does not sufficiently increase wellbeing so as to be justified. Any financial benefit a prison experiences from being able to house more inmates in the same facility is outweighed by the harm to inmates, in this case death, that may result. To combat overcrowding, I do not suggest we build more

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<sup>58</sup> Raemisch, Rick. “Solitary Confinement, Mental Health, and Access to Healthcare in Prison.” *A More Human Dwelling Place: Reimagining the Racialized Architecture of America*, February 17, 2018, University of Michigan Law School, 100 Hutchins Hall, 625 S. State Street, Ann Arbor, MI.

<sup>59</sup> “Prison Conditions in the United States.” Human Rights Watch, United States of America, Nov. 1991.

prisons; more inmates should be considered for community-based programs, instead of incarceration in prisons and jails, which are linked to reduced recidivism.<sup>60</sup>

Programs that allow offenders to remain in their communities result in improved public safety and should thus be preferred, when appropriate. One study showed that those who were incarcerated, compared to those enrolled in community-based programs, recidivated 7% more.<sup>60</sup> Sending some convicts to such programs could increase the wellbeing of those incarcerated, as they would not live in overcrowded conditions. The wellbeing of those in the programs would also be increased, as they would have more autonomy and privileges than those incarcerated, in addition to the wellbeing of the general public, in the form of reduced recidivism down the line. This is another case in which there exist alternative means of increasing wellbeing and reducing crime, which we should adopt, in place of the more harmful, less effective current policy.

Another major source of harm that could be addressed to increase the wellbeing of incarcerated people is sexual violence. A focus on sexual assault prevention, increased resources for victims during and after release, and improved reporting measures could reduce incidences of rape and sexual violence, which clearly cause harm. Conjugal visits are a concrete policy measure that could be implemented to reduce sexual violence and the harm it causes. Rates of sexual violence in prison are significantly lower in states that allow conjugal visits than in those that do not: 57 incidents per 100,000 inmates versus 228 incidents per 100,000 inmates.<sup>61</sup> Permitting conjugal visits could reduce sexual violence, improve behavior and facility efficiency, and increase inmates' chances for success by "enhancing the inmate's ability to maintain ties

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<sup>60</sup> Gendreau, Paul, et al. "The Effects of Prison Sentences on Recidivism." Public Safety Canada , Government of Canada , 1999, [www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/ffcts-prsn-sntncs-rcdvsm-eng.pdf).

<sup>61</sup> "Study Argues That Conjugal Visits Can Reduce Number of Prison Rapes." Prison Legal News, Human Rights Defense Center , 26 Aug. 2016, [www.prisonlegalnews.org/news/2016/aug/26/study-argues-conjugal-visits-can-reduce-number-prison-rapes/](http://www.prisonlegalnews.org/news/2016/aug/26/study-argues-conjugal-visits-can-reduce-number-prison-rapes/).

with his or her family.”<sup>61</sup> Although the general public may take issue with a policy that allows inmates to have access to heterosexual relations while incarcerated, the desire of the public for inmates to live in harsh conditions, cut off from sexual relations, is outweighed by the need to reduce sexual violence in prison. Any harm that might result from the state’s not satisfying the public’s retributivist desires is outweighed by the increase in wellbeing that would result from ameliorating the health crisis related to prison sexual violence.

Policies that allow the persistence of poor and negligent healthcare practices in prison also fail effectively to increase wellbeing. Suffering and death that could have been prevented produce more harm than money saved in cost-cutting measures employed by prison facilities. Because preventable suffering and death tangibly reduce inmates’ wellbeing, prisons should implement whatever policy changes experts deem necessary to ensure inmates have access to adequate medical attention, without dangerously long delays. Programs designed to address inmates with mental health concerns must also be introduced or enhanced. A study by the Treatment Advocacy Center showed that “specialized programs for individuals with serious mental illness who have committed major crimes can reduce their re-arrest rate from 40%–60% five years after release from psychiatric hospitals, prisons or jails to 10% or less.”<sup>62</sup> This finding illustrates how significantly reform efforts can improve the wellbeing not only of mentally ill inmates, but also that of other individuals in society, in the form of improved public safety.

Purely punitive measures, which serve no other function than to punish, could also be replaced by practices that involve positive reinforcement to encourage improved behavior.

Practices like strip status, for example, serve no purpose other than intentional degradation aimed

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<sup>62</sup> “A State Survey of Serious Mental Illness, Major Crimes and Community Treatment.” Treatmentadvocacycenter.org , Treatment Advocacy Center, Office of Research and Public Affairs, Sept. 2017, [www.treatmentadvocacycenter.org/storage/documents/treat-or-repeat.pdf](http://www.treatmentadvocacycenter.org/storage/documents/treat-or-repeat.pdf).

at punishing inmates. The same can be said for physical abuse by guards, like punching and beating shackled inmates, which causes physical and emotional damage. In cases like those, the punishment tactic used will not effectively increase wellbeing in any way. If prison officials administer these punishments with the goal of correcting misbehavior, they should instead adopt different practices that cause less harm and will lead to actual improvement. This would be better for inmates and prison efficiency and safety. Practices that involve positive reinforcement for good behavior, instead of merely punishing inmates for bad behavior, are more effective if one's goal is behavior improvement. Positive reinforcement practices could thus replace many punishment practices to reduce harm, and increase wellbeing.

There are a number of other steps that could be taken to increase the wellbeing of inmates, guards, and the general public. Implementing mechanisms to reduce inmate-on-inmate violence would improve the safety of facilities not only for those incarcerated but also for employees. One concrete reform that could curb prison violence and poor behavior is increased programming. When prisoners do not have access to organized programs, education, vocational training, and hobbies, they may experience severe loneliness, boredom, and psychological pain. Such idleness also contributes to increased anti-social behavior and violence in prison facilities.<sup>63</sup> It has been shown that when activities and learning opportunities are available to inmates, they recidivate less after release.<sup>64</sup> Ensuring that inmates have access to mental stimulation can thus improve the mental wellbeing and safety of inmates and that of the general public. Although programming requires staff and funding, violent, uncooperative inmate populations and recidivism are arguably more costly, both financially and in terms of harm caused by violence.

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<sup>63</sup> “*Toussaint v. McCarthy*, 597 F. Supp. 1388 (N.D. Cal. 1984).” Justia Law, [law.justia.com/cases/federal/district-courts/FSupp/597/1388/1437556/](http://law.justia.com/cases/federal/district-courts/FSupp/597/1388/1437556/)

<sup>64</sup> Shira E. Gordon, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. Mich. J. L. Reform 495 (2014).

Punitive policies that result in isolation and idleness, if replaced by stimulation, would be an alternative means of increasing wellbeing that should be adopted.

Another way for the state to increase wellbeing would be to implement strict guidelines requiring the placement of inmates as close to their families as possible. The Strengthening Women and Families Act, passed in New Jersey in 2010, which requires that the Department of Corrections Commissioner make all reasonable efforts to assign women to facilities as close as possible to their families, is the type of act for which I would advocate to reduce harm.<sup>65</sup>

Perhaps surprisingly, studies showed no relationship between visitation and recidivism rates for female inmates, but the relationship between visits and future crimes is significant for male inmates.<sup>66</sup> If acts like the Strengthening Women and Families Act were passed for male inmates, who comprise most of the prison population, wellbeing could be greatly increased.

Finally, shorter sentences and alternatives to incarceration could be administered when possible. Given the higher recidivism rates produced by longer sentences and convict placement in prisons versus community-based programs, policies that reduce mandatory minimum sentences or offer alternatives to prison could increase individual wellbeing in the form of public safety in the long run.

Academics, advocates, and prison policy experts agree that a number of reforms could be made that would lessen the harms caused by prison. I argue that we ought to improve prison conditions, policies, and practices so that they are reasonably expected to produce outcomes that cause the least harm possible to individuals. Because many of these less harmful alternatives are known, we ought to follow Bentham's rules and not punish when: (1) it will not effectively

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<sup>65</sup> "Public Safety and Prisoner Reentry Bills." ACLU of New Jersey, American Civil Liberties Union, [www.aclu-nj.org/theissues/criminaljustice/publicsafetyandprisonerree/](http://www.aclu-nj.org/theissues/criminaljustice/publicsafetyandprisonerree/).

<sup>66</sup> Bales, William D, and Daniel P Mears. "Inmate Social Ties and the Transition to Society Does Visitation Reduce Recidivism?" *Journal of Research in Crime and Delinquency*, Florida State University, Aug. 2008, pp. 305 [citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.865.9780&rep=rep1&type=pdf](http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.865.9780&rep=rep1&type=pdf).



increase wellbeing, (2) the harm that results is greater than the harm that would have been prevented, and (3) there are alternative means of increasing wellbeing, which we should prefer. Currently, many prison policies and practices conflict with conditions (1)-(3). I have not addressed all possible reforms that could be implemented to reduce harm and increase wellbeing. There are many other policies and practices that, if changed, would have consequences preferable to those under the status quo. For the cases I have discussed and other similar cases, we should adopt reforms that we expect will produce the least amount of harm and the greatest increases in wellbeing for individuals.

## VII. Problems with Reform

In this section, I will introduce some potential problems with implementing reform. These worries might lead us to conclude that we cannot sufficiently improve conditions of confinement in U.S. prisons to justify them on consequentialist grounds. There are several reasons we might not be able adequately to reform the U.S. prison system. First, incarceration may simply be so harmful that any wellbeing it produces will always be outweighed by harm. Second, it may not be feasible to expect satisfying reform to be implemented any time soon in the United States because of beliefs and attitudes held by policymakers and the general public. Third, the prison system may be too inextricably linked to racist history and ideology ever to be justifiable as a modern institution that is not overly harmful.

A clear challenge to utilitarianism is the difficulty of assigning values to different types of wellbeing and harm and making calculations in a way that is satisfying to all. Although difficult to quantify, the harm produced by incarceration may never be justifiable, even in light of the increased public safety that could conceivably result from confining potentially dangerous

people. One could still attempt to implement reforms to improve the wellbeing of inmates, but as Deirdre Golash points out, “it is not clear that the institution so reformed could successfully compete on utilitarian grounds with other ways of reducing crime that do not involve harm to offenders”.<sup>67</sup> Separate from any assessment of physical and mental wellbeing and harm, we must not forget to factor in the financial cost of this industry. Around \$81 billion is spent annually to run prisons, jails, parole, and probation alone.<sup>68</sup> This huge sum of money, if spent on social programs like welfare, education, and accessible mental health care, could prevent crime in significantly less harmful ways, with huge benefits to society that are not presently enjoyed under our current government budget. Pouring money into the criminal justice system may always be an unjustifiable misallocation of resources. For incarceration to be justified, the wellbeing it produces would need to outweigh the wellbeing that could result from “other uses of social resources to prevent crime, as well as against other goods that might be done with those resources”.<sup>67</sup> Given the extremely high cost of the criminal justice system, both financially and in terms of harm caused to inmates and members of the public, the current system may not be justifiable, even post-reform.

Even if the government could incarcerate people in conditions of confinement that caused minimal harm to them and others, there are reasons to believe these types of policy changes will not occur in the U.S. The general public, whose opinion often influences public policy decisions, holds inaccurate perceptions about crime. For example, public opinion polls over the last thirty years have shown that people consistently believed crime rates are increasing, when they have in fact been declining steadily. The FBI’s and Bureau of Justice Statistics’

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<sup>67</sup> Golash, Deirdre. *The Case Against Punishment Retribution, Crime Prevention, and the Law*. NYU Press, 2005, pp. 43, 148.

<sup>68</sup> Wagner, Peter, and Bernadette Rabuy. “Following the Money of Mass Incarceration.” *Following the Money of Mass Incarceration* | Prison Policy Initiative, Prison Policy Initiative, [www.prisonpolicy.org/reports/money.html](http://www.prisonpolicy.org/reports/money.html).

comprehensive crime report shows this perception to be completely inaccurate.<sup>69</sup> Beliefs about the harshness of punishments are also out of touch with reality. “The general consensus that [prison] sentences are not harsh enough has persisted despite the major increase in both sentence length... as well as the record-high rates of incarceration.”<sup>70</sup> This perception of insufficiently harsh sentencing practices reflects a lack of understanding of the history of punishments as well as how current practices in the United States compare with international punishment norms. Much of the public’s skewed perception is arguably the result of media portrayals of crime. Numerous studies show the “media’s power to set the public’s agenda.”<sup>70</sup> The amount of crime depicted on local news stations does not reflect the actual crime rates of any given area, which distorts public opinions about crime.<sup>70</sup> Crime coverage by newspapers also contributes to these misperceptions; the low cost of reporting crime stories and the potential for increased interest by readers incentivizes newspapers to cover such stories.<sup>70</sup> Although scholars disagree on its cause, they generally agree that media exposure increases one’s desire for harsher punishments.<sup>70</sup> Given the general public’s susceptibility to false and skewed beliefs and the media’s tendency to depict crime as a high-priority issue, we should not expect public opinion to favor non-punitive approaches to crime. And given the incentive for public officials to gain and maintain the support of the public, we should not expect legislation to be passed that the public would view as overly radical. Many reforms that would significantly reduce harm and increase wellbeing are of the kind that the public would not support, in light of their false beliefs about crime.<sup>71</sup>

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<sup>69</sup> Gramlich, John. “Voters’ Perceptions of Crime Continue to Conflict with Reality.” Pew Research Center, 16 Nov. 2016, [www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/](http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/).

<sup>70</sup> Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. (2006), pp. 420, 442, 431, 433. <http://scholarship.law.wm.edu/wmlr/vol48/iss2/2>,

<sup>71</sup> Public disapproval of reducing the punitiveness of prison policies might support implementing policy changes without alerting the general public. Perhaps prison policy experts and inmate advocates should confer with policymakers to enact harm-reducing legislation. If this information were somehow not publicized, the necessary

If the public did understand crime data and the various harms caused by incarceration, it is still unlikely that they would favor drastically improving prison conditions. The general public and politicians may be less concerned with what goes on inside prison facilities because they cannot relate to and do not sympathize with prison inmates. Most people conceive of prison as “disconnected” from their own lives, as it is simply too challenging “to cope with the possibility that anyone, including ourselves, could become a prisoner.”<sup>72</sup> The continued prevalence and acceptance of prison rape jokes in popular media illustrate the extent to which people are indifferent to the wellbeing of prisoners. While punishments were once a public spectacle, present-day inmates are punished behind closed doors. This has allowed more harmful forms of punishment to be administered, completely unseen by the general public.<sup>73</sup> The racial makeup of the prison population may also play a strong role in this mental disconnect. People of color make up over 70% of the prison population.<sup>72</sup> The likelihood that a white man is incarcerated is 1 in 17, while the likelihood for black men is 1 in 3.<sup>74</sup> Given that black people represent only approximately 13% of the U.S. population, it is possible that most members of general public cannot relate to issues related to incarceration, as they do not feel personally affected, or identify as more likely to be the target of violence rather than the potential perpetrator.<sup>75</sup>

There also exist significant incentives to maintain the status quo. Over the last several decades, as the prison population has grown drastically, so has the extent to which prison is a

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changes could be enacted without significant public unrest. This need for policy changes to be made but not publicized was a solution proposed to me by Professor David Baker.

<sup>72</sup> Davis, Angela. *Are Prisons Obsolete*. Seven Stories Press, 2003, pp. 15.

<sup>73</sup> Davis, Angela Y. *Abolition Democracy: Beyond Empire Prisons and Torture*. Readhowyouwant, 2010, pp. 51.

<sup>74</sup> Ghandnoosh, Nazgol. “Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System.” Sentencingproject.org, The Sentencing Project, 2015, [sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf](https://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf).

<sup>75</sup> “QuickFacts.” U.S. Census Bureau QuickFacts: UNITED STATES, United States Census Bureau, 1 July 2016, [www.census.gov/quickfacts/fact/table/US/PST045216](https://www.census.gov/quickfacts/fact/table/US/PST045216).

major part of the U.S. economy.<sup>76</sup> Both public and private prisons benefit from the current system of mass incarceration. Political activist Angela Davis argues that “private prisons are direct sources of profit for the companies that run them, but public prisons have become so thoroughly saturated with the profit-producing products and services of private corporations that the distinction is not as meaningful as one might suspect.”<sup>77</sup> Many corporations, government employees, and elected officials all have stakes in maintaining and expanding prisons, given the huge profits they generate.<sup>77</sup> Despite the clear harms produced by incarceration, many powerful members of society have an incentive not to reduce our reliance on prisons by curbing crime or relying on alternative institutions.

The continued existence of prison as an institution may necessarily be harmful, even if the government implements significant reform. Some argue that mass incarceration was a direct response to the abolition of slavery and has persisted as an effort to maintain control over black populations.<sup>77</sup> If this position is true, then prison as an institution has caused and is continuing to cause serious harm in the form of perpetuating de facto slavery. Improving the experience of incarceration would thus be insufficient to rectify this harm. Angela Davis argues that, after the abolition of slavery, racism found “its most reliable refuge in the prison system.”<sup>76</sup> The continued existence of prisons allows for black people to be treated as “dispensable within the ‘free world’ but as a major source of profit in the prison world.”<sup>78</sup> To achieve a true, non-racist democracy in the United States, we must abolish the institution of prison and, in its place, establish new institutions that can address social problems for which prison is wholly ill

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<sup>76</sup> Davis, Angela Y. *Abolition Democracy: Beyond Empire Prisons and Torture*. Readhowyouwant, 2010, pp 108.

<sup>77</sup> Davis, Angela. *Are Prisons Obsolete*. Seven Stories Press, 2003, pp. 100, 88, 102, 95.

<sup>78</sup> Davis, Angela Y. *Abolition Democracy: Beyond Empire Prisons and Torture*. Readhowyouwant, 2010, pp. 51, 85.

equipped.<sup>78</sup> Until modern institutions like prison are abolished, Davis argues, institutional racism will persist and cause significant harm.

The history of the expansion of the prison system illustrates the extent to which prison arguably serves to justify the persistence of racial inequality. Five years after the abolition of slavery, the prison population rose from around 0% to around 33%.<sup>79</sup> Some argue this arose from white supremacist power structures and a continued desire to exercise control over black labor.<sup>79</sup> Mass incarceration, under this view, is the modern manifestation of slavery, illustrated by the many direct descendants of slaves who are currently incarcerated. The prison system is thus an institution that directly perpetuates racial oppression. If this is true, then drastic improvements to the conditions of confinements within prisons will be insufficient.

## VIII. What Follows

So far, I have argued the following:

1. Justifications to implement policies and practices should be consequentialist; to be justified, a policy or practice should reasonably be expected to produce the best possible outcome.
2. The best possible outcome is that which produces the least amount of harm to individuals.
3. People should be incarcerated in literal conditions that produce the least amount of harm to them and other individuals.

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<sup>79</sup> Saleh-Hanna, Viviane, et al. "PENAL ABOLITIONIST THEORIES AND IDEOLOGIES." *Colonial Systems of Control: Criminal Justice in Nigeria*, University of Ottawa Press, Ottawa, 2008, pp. 417–456. *JSTOR*, [www.jstor.org/stable/j.ctt1ckph37.27](http://www.jstor.org/stable/j.ctt1ckph37.27).

4. The literal conditions of confinement in U.S. prisons cause significant harm to individuals.
5. There are changes that could be made to the literal conditions of confinement in U.S. prisons that would produce less harm to individuals than the status quo.
6. The literal conditions of confinement in prisons as they exist in the U.S. are thus currently unjustified.
7. We ought to improve the literal conditions of confinement in the U.S. today so they produce/are reasonably expected to produce outcomes that cause the least harm possible to individuals.
8. We may not be able sufficiently to improve the literal conditions of confinement to be justified.

I can thus conclude that, if the U.S. is unable to adopt conditions of confinement that are justified, then the state is not justified in incarcerating people. If the United States cannot incarcerate people, then what are we to do with people who commit crimes? This entails conclusions that may seem quite radical to some. As the U.S. has not actually implemented significant reforms on a large scale, it is not yet clear whether conditions can be changed so as to render incarceration justifiable. If the state turns out not to be able to adequately improve its prisons so as to justify incarceration, then it should adopt a variety of alternatives to incarceration. By the standards I adopted earlier, these alternatives to incarceration will be justified as long as they result in less harm to individuals than incarceration.

#### IX. Alternatives to Incarceration

As I have previously argued, it might be the case that the U.S. will not be able to implement reforms that pass my test for consequentialist justification. We may thus need to replace prisons with some institution or combination of institutions that will produce more wellbeing overall than they do harm. The belief that we should not incarcerate people for committing crimes, popularly referred to as prison abolitionism, rejects the current view of justice in the United States. For the prison abolition perspective to seem tenable, people may need to alter their definition of justice from retributive to restorative. A restorative justice (RJ) approach to responding to crime focuses not on inflicting more harm for the sake of punishment, but rather focuses attention and resources on increasing the wellbeing of victims and preventing such harm from reoccurring. Although radical to some, consequentialists may prefer this approach because it has the potential to increase overall wellbeing more effectively than current punitive measures.

Prison abolitionism, the view that we ought to get rid of the institution of prison altogether, fits into a broader framework of penal abolitionist theories. Theories under this larger umbrella of penal abolition all question mainstream criminological discourse and how societies choose to categorize acts as legal or illegal.<sup>80</sup> Many penal abolitionists argue that the state's choice to criminalize some harmful acts while permitting other injurious behavior, like certain human rights violations, is inconsistent and reveals an alternate agenda, of which we should be wary. Instead of focusing attention and resources on punishing criminals, penal abolitionists

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<sup>80</sup> Saleh-Hanna, Viviane, et al. "PENAL ABOLITIONIST THEORIES AND IDEOLOGIES." *Colonial Systems of Control: Criminal Justice in Nigeria*, University of Ottawa Press, Ottawa, 2008, pp. 417–456. *JSTOR*, [www.jstor.org/stable/j.ctt1ckph37.27](http://www.jstor.org/stable/j.ctt1ckph37.27).



advocate addressing the shortcomings of other social institutions that contribute to promoting crime.<sup>81</sup>

There are three forms of abolitionism, which promote different strategies. Immediate penal abolitionists hold that society must “immediately” and “unconditionally” abolish institutions that punish individuals, not merely prisons. Gradual penal abolitionists advocate reducing reliance on institutions that punish in favor of alternative forms of conflict resolution. They believe that these will eventually delegitimize the penal system and render it obsolete. Prison abolitionists focus more narrowly on eliminating the institution of prison as a form of punishment. They hold that alternative forms of punishment may be permissible and useful, but the institution of prison is oppressive and should be replaced.<sup>81</sup> This third position, prison abolitionism, is the one for which I am advocating in this section. I do not propose the establishment of one specific institution to replace prisons. Instead, I argue in favor of increasing funding for and attention to a variety of existing social institutions and perhaps establishing new ones, which will gradually reduce society’s need for the existence of prisons.

Restorative justice approaches to crime seek to reframe how we respond to wrongdoing and harm. As Mike Materni Materni proposes, it is not clear why “evil needs to be compensated by evil, and not by good.”<sup>82</sup> American lawyer and author Alan Dershowitz takes on a similar position by suggesting an alternative conception of justice that focuses on “the reparation of the wrongs suffered; the restitution of the losses incurred; the compensation for the suffering endured.”<sup>82</sup> This idea of justice supports a forward-looking response to crime; instead of responding to harm by inflicting a separate harm on the perpetrator of the original harm, we

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<sup>81</sup> Saleh-Hanna, Viviane, et al. “PENAL ABOLITIONIST THEORIES AND IDEOLOGIES.” *Colonial Systems of Control: Criminal Justice in Nigeria*, University of Ottawa Press, Ottawa, 2008, pp. 417–456. *JSTOR*, [www.jstor.org/stable/j.ctt1ckph37.27](http://www.jstor.org/stable/j.ctt1ckph37.27).

<sup>82</sup> Criminal Punishment and the Pursuit of Justice MC Materni - *Brit. J. Am. Legal Stud.*, 2013, pp. 273, 283.

should focus our energy and resources on improving the wellbeing of the person harmed. Unfortunately, except in specific cases of theft, “the harm [crimes] do cannot be undone by compensation. But it is equally true that the harm done by such crimes cannot be undone by punishment, either,” as Deirdre Golash points out.<sup>83</sup> In basic terms: two wrongs do not make a right. In lieu of punishment, restorative justice advocates favor responding to perpetrators of crimes in ways that they expect will improve their behavior and cause the least amount of harm possible to all parties. In most cases, this means diverting resources away from punitive measures focused on perpetrators and towards compensating victims and their families for losses suffered. In practice, this could take the form of state-funded therapy, compensation or increased benefits for victims, and financial penalties and mandatory programs to minimize future potentially harmful behavior for perpetrators. These examples are not specific policy recommendations; relevant experts should select whichever system is most likely to produce maximally positive outcomes for all.

Although RJ initiatives are yet untested as a replacement for traditional responses to crime, their success at increasing wellbeing in schools illustrates their potential to do so on a larger scale. The restorative justice approach to school discipline encourages the use of non-punitive measures to address harmful student behavior and to solve various types of conflicts. Although experts are not in unanimous agreement over RJ’s exact definition, the National Centre for Restorative Approaches in Youth Settings defines it as

... an innovative approach to offending and inappropriate behavior which puts repairing harm done to relationships and people over and above the need for

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<sup>83</sup> Golash, Deirdre. *The Case Against Punishment Retribution, Crime Prevention, and the Law*. NYU Press, 2005. pp. 53.

assigning blame and dispensing punishment. A restorative approach in a school shifts the emphasis from managing behavior to focusing on the building, nurturing and repairing of relationships. (Hopkins, 2003, p. 3)

RJ practices serve to replace traditional, zero-tolerance discipline practices of suspending or expelling students, effectively eliminating some students' educational opportunities, with no marked improvement in school safety.<sup>84</sup> RJ allows schools and communities to reduce their reliance on referring youth to the official criminal justice system, while still holding them accountable for harm they may have caused.<sup>84</sup> Research shows that minority and LGBTQ students, poor students, and students with disabilities are disproportionately impacted by punitive school discipline policies.<sup>84</sup> A study of one Texas school district, for example, found African American students to be 26.2 times more likely to receive out-of-school suspension for a first offense than their white peers.<sup>84</sup> By replacing punitive measures for youth offenders with RJ alternatives, we can hope to significantly improve the educational outcomes of not only these groups of students, but of all those affected as well. The ABA recognizes this funneling of students into the criminal justice system, also referred to as the "school-to-prison-pipeline," as a serious threat to minority youth and has recommended the use of RJ and other alternative strategies for addressing student wrongdoing.<sup>85</sup> Decreasing harmful behavior in schools with RJ and improving educational outcomes, which reduce young people's likelihood of entering the criminal justice system, should be a major government priority.

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<sup>84</sup> Fronius, Trevor, et al. "Restorative Justice in U.S. Schools: A Research Review." Wested.org , WestEd Justice & Prevention Research Center, pp. 2, 2, 16, 16. [jprc.wested.org/wp-content/uploads/2016/02/RJ\\_Literature-Review\\_20160217.pdf](http://jprc.wested.org/wp-content/uploads/2016/02/RJ_Literature-Review_20160217.pdf).

<sup>85</sup> "School to Prison Pipeline, Preliminary Report ." Americanbar.org, American Bar Association, Feb. 2016, pp. 14. [www.americanbar.org/content/dam/aba/administrative/diversity\\_pipeline/stp\\_preliminary\\_report\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf).

Some might worry that abolishing prison enables harmful acts to go unpunished. Perhaps if prisons were abolished, those who harm others would suffer no consequences and victims would have no recourse. This probably does not sound like a world in which most people would want to live. My alternative proposal does, however, include the ability for the state and other institutions to punish perpetrators of harm. There are a variety of ways the state and non-state groups can express disapproval of and publicly condemn certain acts and people. John Stuart Mill argues that the state is not permitted to restrict people from performing actions unless they cause harm to others.<sup>86</sup> If the U.S. applied this rule, the state would be precluded from making laws prohibiting a variety of actions that are currently illegal, often referred to as victimless crimes. This does not entail that members of a society will perform any action that is not strictly harmful to other people. There are multiple ways the state and its members can strongly express disapproval that does not involve incarceration. Mill suggests that, although we cannot physically restrain those who commit victimless crimes, we can ostracize them, distance ourselves from them, and express our distaste.<sup>86</sup> In many cases, clear responses of this kind from the state and in the form of social norms may be sufficiently persuasive to prevent people from acting in ways we think are wrong, but are not strictly harmful.

Although incarceration has historically served as the automatic response to most law breaking, it is not clear that incarceration itself is necessary to deter and punish. Some have argued that what deters some people from committing crimes actually stems from the “collateral effects, rather than from the punishment itself.”<sup>87</sup> The stigma associated with criminal wrongdoing and its effects on one’s social reputation and employability, and not prison time itself, serves an effective punishment. The imposition of social sanctions, for example, clearly

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<sup>86</sup> Mill, John Stuart, and Gertrude Himmelfarb. *On liberty*. Penguin, 1974 pp. 73.

<sup>87</sup> Golash, Deirdre. *The Case Against Punishment Retribution, Crime Prevention, and the Law*. NYU Press, 2005, pp. 26.

expresses disapproval of certain acts; prison is not required. Over the last several months, women throughout the entertainment industry have publicized stories of their experiences with sexual harassment and assault. A variety of women have publicly accused famous men of committing harmful acts. As a response, these men faced social and professional sanctions, ranging from loss of employment and money to widespread public shame. Although I am not necessarily advocating for the immediate firing of anyone accused of a crime, or the suspension of due process more generally, I point to this movement as a clear example of how people performing actions of which society disapproves can be punished without the involvement of incarceration.<sup>88</sup>

Some may be unsatisfied by the request to abolish prisons with no clearly established institution to serve as a replacement. Angela Davis and other abolitionists urge, however, that a crucial step to accepting the abolition of prisons is to relinquish the “desire to discover one single alternative system of punishment that would occupy the same footprint as the prison system.”<sup>89</sup> Unlike the current criminal justice system, which has standardized responses, like sentencing guidelines, for crimes committed under an array of different circumstances, alternative systems of justice would not require such a one-size-fits-all approach. By improving existing institutions and creating new ones that respond to harm by emphasizing reparations and harm reduction, the U.S. can increase everyone’s safety and wellbeing significantly.

One might worry that, while a society without the need for incarceration sounds wonderful, it is an unrealistic goal. If there are dangerous people who are hurting others, we need the option to incarcerate them in the name of public safety. This worry about dangerous people who pose an immediate threat of harm to others seems like a real problem for the

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<sup>88</sup> Professor Derrick Darby proposed this example of extra-legal sanctions.

<sup>89</sup> Davis, Angela. *Are Prisons Obsolete*. Seven Stories Press, 2003, pp. 106.

abolitionist. What about serial killers, violent pedophiles, and sociopaths? Should we simply let them roam free? Critics will demand answers for questions like these. The issue of the likely inevitable existence of some people who pose such a significant threat to the safety of others that they require confinement is a problem for an absolute abolitionist view. A view that holds that it is never justified to incarcerate anyone, for any reason, for any length of time, will have a problem addressing those who fear the small subset of people who may simply be too dangerous to live among the rest of society. One could respond that, even if some people will be harmed by this group, the harm caused by incarceration in addition to the harms they cause will still render prisons unjustifiable. It will, however, be challenging to convince most that harm to a pedophile should be thought of as equally worth preventing as the harm caused to a child by that pedophile, so I will not attempt to make such a case.

The view that I propose, unlike the absolute abolitionist, allows for prison abolition to serve as an ideal toward which we ought to strive, but one that we may never be able to reach entirely. As a consequentialist, I am comfortable with granting that, in some cases, the state may be justified in confining individuals, if all other measures to protect the public have failed, and doing so would produce significantly more wellbeing than harm in that particular case. By permitting the state to respond to individual law-breakers on a case-by-case basis in ways that will lead to the best outcome for all, no response to wrongdoing is automatically ruled out. My view of prison abolition, in practice, does not advocate for unconditional abolition of all incarceration, as a strict penal abolitionist might. By advancing a one-size does *not* fit-all approach that seeks to eliminate our reliance on prison as the default for responding to incidences of harm, we should expect significantly to reduce the need for prisons in U.S. society.

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