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**DISSERTATION**

How Criminal Justice should be rethought so that the punishment of offenders includes a contribution to Society through mandatory labor.

## Table of contents

<b><u>Introduction</u></b>	.....p.4
<b><u>Chapter I – The justifications of punishment</u></b>	.....p.6
Section 1 – Retributivism	.....p.6
Section 2 – Consequentialism	.....p.7
Section 3 – A new view: The “Rational Compromise”	.....p.9
<b><u>Chapter II – An overview of the proposed reform</u></b>	.....p.18
Section 1 – Redefining offenses and offenders	.....p.18
Section 2 – Focus on “inclusionary punishment”	.....p.19
Section 3 – The new prisons	.....p.20
1 – Mandatory labor	.....p.21
a. Prison self-sufficiency – unpaid labor	.....p.21
b. Prison factories – paid labor	.....p.21
2 – Punishment as “restitution to Society”	.....p.22
3 – State-run prison-factories	.....p.24
<b><u>Chapter III – Why my proposed reform would be justified</u></b>	.....p.27
Section 1 – My reform in regards to retribution	.....p.27
Section 2 – My reform in regards to deterrence	.....p.30
Section 3 – My reform in regards to incapacitation	.....p.34
Section 4 – My reform in regards to rehabilitation	.....p.36
Section 5 – General cost-efficiency of my reform	.....p.40
<b><u>Chapter IV – Addressing the main challenges to my reform</u></b>	.....p.46
Section 1 – State prison-factories would not be economically viable	.....p.46
Section 2 – State prison-factories would be unfair competition to the private sector	.....p.47
Section 3 – Mandatory labor and racial bias create modern-day slavery	.....p.50
<b><u>Conclusion</u></b>	.....p.56
<b><u>BIBLIOGRAPHY</u></b>	.....p.57

*“A civilization will be judged by how it treats its wrongdoers.”*

– Dostoyevsky

## Introduction

Here will be put forth a proposed reform of punishment that counters two hundred years of criminal theory and practice, and that will at first glance ruffle the feathers of most human rights activists, prison abolitionists and criminologists. In short, I will argue that punishment of *incarcerated criminals* must not only involve the deprivation of their liberty but should systematically entail some form of *mandatory labor* contributing to Society. As a flipside to this, I will argue in favor of *inclusionary* punishments for all offenders who don't warrant incarceration.

In 1764, Italian jurist Cesare Beccaria captured the ideological that was fueling the soon-to-be revolutions, being the first to significantly claim that the purpose of punishment should not be to inflict revenge but to create a better Society. With the philosophical success of the *Enlightenment* and the recognition of individual rights, punishment ceased to be seen as the *infliction* of something (pain) to become the *deprivation* of what individuals were considered to own: liberty (through incarceration), property (through fines) and life (through execution). The criminal justice system, seen no more as the vengeful arm of the sovereign but as the legal institution of the State, gained legitimacy, and so did the practices that were put in place as means of punishment. As a result, prisons never stopped flourishing and since the 1970's, they have been multiplying at a terrifying rate.

Not much has changed in what we consider to be criminal punishment: usually a fine coupled with a period of incarceration. Nowadays, although prisons have a major symbolical influence on our minds, they are subject to heavy criticism: their conditions are often poor, they cost a lot of public money, they aren't renown for preventing recidivism, and they bear

little sense of Justice (they are, after all, a place where murderers and rapists earn business degrees and get medical care).

Whatever our particular view on the current form of punishment, there are undoubtedly questions to be raised, especially considering the fact it concerns an ever-growing amount of individuals (there are an estimated 9.8 million people currently held in penal institutions around the World<sup>1</sup>). Is “restriction of liberty” enough or even adequate punishment? Are prisons, today, morally and economically justified? Does the current criminal justice system serve the interests of the different parties in a satisfactory way? Should we not seek to change the current practices, and if so, how?

Putting inmates to work is not a revolutionary idea, but its past occurrences have not had the appropriate justifications or the correct administration. The principle itself is fundamental though, for, as reported by the US Federal Bureau of Prisons, “no single phase of life within prison walls is more important to the public or to the inmate than efficient industrial operations and the intelligent utilization of the labor of prisoners”<sup>2</sup>.

I will first give an overview of the current justificatory theories of punishment in order to show how they are unsatisfactory and from there build a new theory which I believe is more appropriate (Chapter 1). I will then detail my proposed reform (Chapter 2) before justifying the changes entailed in light of these theories of punishment (Chapter 3). Finally, as I will have left room along the way for some unanswered questions and objections, I will address the main challenges facing my reform (Chapter 4).

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<sup>1</sup> *World Prison Population List (8<sup>th</sup> Edition)*, International Centre for Prison Studies, KCL

<sup>2</sup> *Factories with fences*, Federal Prison Industries (1996), p.13

## Chapter I – The justifications of punishment

Why punish offenders? How much? And why should it be the State's responsibility?

### Section 1 - Retributivism

As a child of the *Enlightenment*, retributivism takes root in the recognition of every individual's moral agency and therefore claims that whoever does wrong is responsible for his actions and consequently *deserves* punishment, regardless of what positive or negative consequences that punishment may have. Kant viewed the punishment of wrongdoers as a categorical imperative, meaning by extension that a state of impunity is immoral. Following logically from his claim that no man is to be used as means to an end, Kant extrapolates that "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society... [and that] a man must first be found to be deserving of punishment before any consideration is given to the utility of his punishment"<sup>3</sup>. The notion of moral desert (i.e. the condition of being deserving of something) is paramount in retributivism, especially with regards to its normative implications. Seen as people are to be punished only if they are guilty, it follows that they are to be punished only *as much as they* are guilty. In other words, the *type* and *severity* of punishment must correspond to the *gravity* of the offence. Concretely, this means determinate and proportionate sentencing.

Yet, what is it that turns an act into an "offense", a "wrong", a reprehensible action in the eye of Justice? Again, the heritage of the *Enlightenment* provides the answer: along with the recognition of every individual's moral agency (which serves to root moral desert) comes the acceptance of their inherent *equality* in rights and liberties but also in obligations towards one another and the State. This entails notions of mutual respect, reciprocity and obedience to

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<sup>3</sup> Kant, cited by Michael Tonry (ed.), *Why punish? How much?*, Oxford University Press (2011), p.32

the law of the State to which every citizen is equally bound. Therefore, by committing a crime, the wrongdoer refuses to respect this equality and thereby justifiably exposes himself to unequal treatment (i.e. State punishment). In retributivist literature, this idea is often captured by the formula of “removing an unfair advantage” that would be gained by the wrongdoer. It would be unfair that the disobedient benefit from breaking the common rules, especially when their victims do not.

This is the angle that retributivism takes to vest in the State the responsibility to punish. As the legal philosopher Anthony Duff clearly explains, “since it is the State that, through the criminal law, imposes the burden of law-abiding self-restraint on its citizens, it is also the proper task for the State to try to ensure that those who accept that burden are not unfairly disadvantaged in doing so”<sup>4</sup>. The subtext here is noteworthy: not only does the offender *deserve* the pain of punishment, but the punishment *should* in some way aim to restore the balance unsettled by the offence.

## **Section 2 – Consequentialism**

Consequentialist theories claim that punishment is inherently bad as it adversely affects human happiness and is therefore only justified insofar as it avoids a greater evil. If its beneficial consequences don’t outweigh the burdens imposed by the punishment itself, then it loses its reason to be. In his early developments on utilitarianism, Jeremy Bentham wrote that the purpose of criminal law was to “augment the total happiness of the community” and to “exclude as far as possible everything that tends to subtract from that happiness: in other words, to exclude mischief”<sup>5</sup>. In consequentialist terms, then, the end goal of the criminal

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<sup>4</sup> R.A. Duff, *Punishment, Communication and Community*, Oxford University Press (2003), p.22

<sup>5</sup> Jeremy Bentham, *An introduction to the principles of morals and legislation*, Chap. XVIII – 1, e-book at: <http://www.econlib.org/library/Bentham/bnthPML13.html>,

justice system is simply to preserve and increase the welfare of the State through crime prevention.

To this effect, there are three main branches to the consequentialist rhetoric: deterrence (prevent crime from happening), incapacitation (prevent crime from continuing) and rehabilitation (prevent crime from repeating). The first in the chronology of criminal behavior is deterrence, whereby the threat of punishment is said to discourage potential offenders from committing crimes. This assumes, of course, that people act in their own self-interest, in order to avoid the pains of punishment even though they could be tempted to commit an offense. The second means of consequentialist punishment is incapacitation: once an offender has been apprehended, he must be incapacitated from causing further harm to Society. Concretely, this means removing offenders from civil society (prison). Finally, the third strategy of consequentialist punishment is the rehabilitation of offenders, which aims to eradicate recidivism by changing their dispositions and motives so they return to the free community as law-abiding citizens.

As with all consequentialist matters, the justification of a practice hinges on its success and by the 1970's, the unconvincing results in crime prevention bred pessimism (the so-called "nothing works" period) about the mainstream practices that fueled new retributivist claims. It became apparent that consequentialism poses serious moral dilemmas in terms of Justice. If deterrence is the main focus of punishment, then what counts is the people's *perception* of that deterrent. This means that nothing stops a consequentialist system from either punishing an offender more than should be reasonably necessary or, even worse, punishing an innocent person so long as the effect on the general public is identical. Same goes for incapacitation and rehabilitation: if we consider that crime prevention is the end goal, then predictive criminology should compel us to lock up and cure those who have not yet done anything wrong but who are

unfortunate enough to be diagnosed as potential offenders. In such cases, the power of sentencing is not in the hands of the jurist anymore but in those of various experts (penologists, psychotherapists...). This not only removes punishment from the sphere of morality and Justice but leads to indeterminate and disproportionate sentencing.

### **Section 3 – A new view: The “Rational Compromise”**

I would like to offer here a different take on the question that will attempt to reconcile into one single justificatory theory of punishment the claims of both retributivist and consequentialist theories. First, I will draw the essential lines of the dichotomy in order to shed light on the root of the problem.

<b>Retributivism (Kant)...</b>	<b>Consequentialism (Bentham)...</b>
... posits that the individuals' capacity to make moral choices is what counts...	...claims that the individual capacity for happiness is what counts...
...and that the respect for moral autonomy...	... and that the goal of maximizing utility...
...requires that the offender be punished as much as he deserves even if nothing of value would be accomplished.	... entails that the punishment of offenders is justified only insofar as it avoids greater unhappiness.
The State has an inherent moral obligation to punish.	The State has no inherent moral obligation to punish.
Punishment is an end in itself: moral Justice.	Punishment is a means to an end, which is crime prevention.
Morality <i>precedes</i> the necessities of political/social utility → it is <i>because</i> such behavior is moral/immoral that Society should shape itself in a given way.	The necessities of political/social utility <i>precede</i> morality → it is <i>because</i> such behavior is good/bad for utility that it is moral/immoral.

What makes these two conceptions seemingly irreconcilable is that, besides the fact there is no flaw in their respective logic, their fundamental premises are true: we *are* capable of moral choices and we *do* prefer happiness to suffering. How then can we claim that one view is the right one, when by doing so we imply the other is wrong?

We must first establish a solid premise that is non-contingent and completely neutral from a moral standpoint. First, we can split the retributivist premise into two parts:

- The fact that humans *have* conscious capacity.
- The fact this conscious capacity is what, *in turn*, allows humans to develop moral autonomy.

From here we can enumerate three facts of existence that are completely arbitrary and neutral from a moral standpoint:

- Humans have conscious capacity
- Humans prefer happiness
- Humans live in community

These are cold facts that we cannot start to doubt and from which we can draw the defining dynamics of human association:

- Humans have conscious capacity → this conscious capacity allows us to develop moral autonomy, and in turn to make moral evaluations based on the way we experience the world (our consciousness is the condition for us to even be able to think about political associations and see others as possessing the same attributes).

We come to construct an idea of '*what is good*' and thus recognize **moral values** of

varying strength, depending on *how* morally right/wrong something is (I will offer an explanation for this on the next page).

- Humans prefer happiness → it is a mere fact of our natural constitution that we feel positive or negative emotions in relation to a given experience. It follows naturally that, out of self-interest, we seek the positive ones rather than the negative ones (this is true even though the source of positive feelings can be different from one person to the next). So, as humans construct a “*what is good for me*” landscape, they logically seek the **maximization of happiness**.
- Humans live in community → due to their number, humans can't live unaware of each-other. Community does not necessarily mean, yet, any form of organization; it simply means that humans recognize each-other as the same (consciousness), as pursuing the same goals (happiness) and therefore as members of a “common unity”. Living together also turns out to be in everyone's best interest: humans thrive in interaction (cooperation, social relationships, etc...) and for this they need order (as opposed to chaos). So, in seeking ‘*what is good for us*’, we face the necessity to regulate the community with rules for **harmonious cohabitation**.

We now have three principles that naturally boil down from arbitrary and morally neutral facts of life:

We *have* **moral values**.

We *seek* the **maximization of happiness**.

We *need* **harmonious cohabitation**.

All three posits are inseparable, which is why it is futile to try and construct a theory that either takes only one of them into account or that attributes more importance to one than to another. For example, it is because we have moral values and accept that other human beings possess them that we feel a sense of community in the first place; otherwise, we would be like animals, remorseless in killing each other and oblivious to any project of harmonious cohabitation. Similarly, seen as our sense of morality is inescapably a result of our conscious capacities and that our conscious capacities feed off the way we experience life, then our moral evaluations are directly determined by the way we experience existence. It is no coincidence that our most stringent moral intuitions concern facts of life which are paramount to our individual and common wellbeing (such as murdering or raping is wrong) while our less stringent moral intuitions reflect more tolerable behaviors (lying, for instance). Let's imagine for one second that our bodies could regenerate in such a way that if someone axed my arm off it would grow back within hours and with no pain; the negative moral value we would then attach to cutting someone's arm off would be no more than it is for, say, dumping a bucket of water onto a colleague at work.

In my attempt to explain how this is relevant to the justification of punishment, I must first establish what the justification of the State is. To do so, I will draw here on two correlated ideas: social contract theory and Rawlsian distributive Justice. We need to imagine a state of nature, previous to any organized State institution, which would resemble a Rawlsian "original position": behind a "veil of ignorance", individuals are impartial to the particular circumstances of "normal life" (they don't know whether they are rich or poor, healthy or sick, intelligent or stupid, confident or shy, etc...) and enjoy sound moral constitution. In other words, their condition is shaped solely by the three principles I have just established: they have inherent moral values, they seek the maximization of their happiness and they need to establish

harmonious cohabitation. In drafting the common rules (the social contract), these are the three elements which *equally* come into play:

- 1) The need for harmonious cohabitation drives us to agree on common binding rules.
- 2) Seen as we naturally seek the maximization of happiness, the leading aim of these rules will be to further that purpose as best possible, both individually and commonly.
- 3) The moral values we inherently possess will invariably shape the content of these rules depending on how strong each value is.

We must realize here that the essential characteristic of drafting these rules and of life in general is *rational compromise*. We compromise between living isolated and living together; we compromise between what is good for us individually and what is good for the community; we compromise between the proposed rules and the moral values we possess. The fact that the compromise is rational means that it cannot lead to any kind of rules, only those to which rational individuals would agree upon. This is an essential presupposition that safeguards against agreeing on evidently immoral or counter-beneficial rules (for instance, it will never be *legally* tolerable to steal, even though the better thieves could maximize their happiness).

The only difference between 'our world' and the 'original position' is the particularities of life (individual subjectivity, cultural and historical disparities), because the core remains the same: we have moral values, we seek to maximize our happiness and we need harmonious cohabitation. Consensus is always an ongoing process among these three elements, both at the level of the individual and of the community. By looking at the three dynamics, then, we can acknowledge that the first one (moral values) leads us to deontological – and thereby retributivist – principles while the other two (maximization of happiness and harmonious

cohabitation) impose consequentialist goals. In short, then, the terms of the social contract are no less than the fruit of a compromise between deontology and consequentialism.

How does this compromise work? While it poses no problem to turn a strong moral value (“murder is wrong”) into a condition for personal and common happiness (“murder is forbidden”), it is also equally easy to accept that a weak moral value (“greed is wrong”) doesn’t entail a rule in the social contract (such as “greed is forbidden”). The relationship between morality and legality is paramount in understanding the justification of punishment. When the veil of ignorance drops, the social contract becomes the law which is protected by the State – a State that has nothing more than instrumental value. In the original position, the contractors forfeit some of their natural rights and vest in the State monopoly of legitimate force so that matters of Justice are not dealt personally or arbitrarily, but through the commonly recognized and equally binding institutions of the State. This is essential as it roots the legitimacy of the State as the sole administrator of legal punishment; as such, State punishment exists only in respect to what is *legally* wrong and not what is morally wrong. As I have just explained, in defining the content of the law, some weaker moral values yield to the necessities of harmonious cohabitation (adultery, for instance, is arguably a moral wrong, but its moral value is weaker than is the necessity, for social wellbeing, of tolerating its occurrence). This explains why, when legality does not put an obligation on a behavior to which is still attached a negative moral value, other forms of punishment exist to compensate: social (loss of family/friends), economical (tarnished reputation) and psychological (regret).

The nerve of the difficulty concerns the grey area in the middle of the “moral value spectrum”, where, for the purpose of establishing order, a decision must be reached. This isn’t to say that the terms of the contract can’t evolve; in fact, they do, because all three core elements can evolve too. The strength of our moral values can change based on our knowledge

of experience (if we were to discover that our ozone was regenerating itself instantly, would it still be considered *as morally wrong* to burn petrol?), and so do our perspectives on what makes us happy individually and as a community. These changes happen incrementally though (occurring through debate, experimentation and the discovery of new knowledge) and thus operate slight shifts in the points of consensus.

What effect does this have for State punishment, then? Whoever transgresses the laws of the State violates the terms of the social contract and thereby *forfeits* his right to be treated as the contract would otherwise guarantee. By virtue of his contractual engagement, he justifies his own punishment. The question is then raised: *what* should State punishment be? To determine this, we must follow the same logic as the rest of the contract: rational compromise.

On the one hand, following the consequentialist aims of individual/common wellbeing, the contractors would agree that the punishment should benefit, or at the very least avoid burdening, the political community. By violating the rules of the community, the offender is not only harming his immediate victim, but Society at large and also himself. As Kant eloquently explains, when “someone steals, he makes the ownership of everyone else insecure; hence he robs himself of the security of any possible ownership”<sup>6</sup>. Any offence committed in a political community is an offence on that community; it follows that the punishment should in return benefit that community.

On the other hand, inhabited by their moral values, the contractors of the original position would recognize the fact that punishment must be the community’s way of reprimanding behavior that cannot be tolerated and gaining retribution from the unruly. This entails that offenders need to be deserving of punishment before being punished. How,

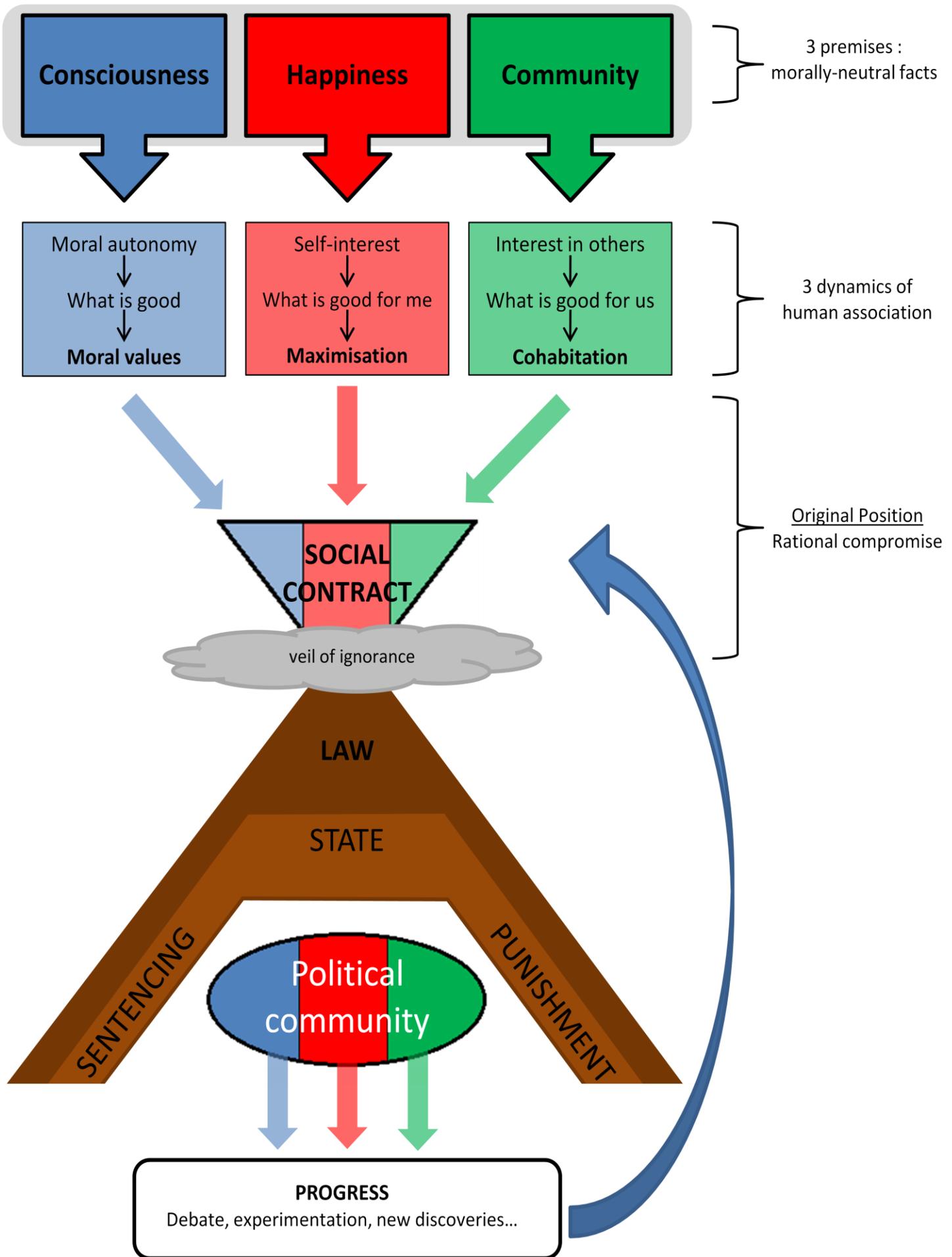
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<sup>6</sup> *Supra*, note 2, Kant cited by Tonry, p.33

though, can this be achieved when moral values sometimes yield to consequentialist considerations? There are two answers to this question. The first is to recognize that the rational compromise can create new attributions of moral value. Taxation is a good example: in itself, taking from someone what he has produced is not moral, but in the context of a political community where public funds are necessary for individual/common wellbeing, refusing to contribute then becomes immoral, thus justifying punishment. The second answer is more straight-forward: by simple virtue of agreeing on the content of the rules, the contractors also commit to respecting them. Refusing to honor the contractual engagement is in itself source of moral desert (I must stress here that any conception of moral desert can only be relevant for people who have moral agency, which excludes all those lacking sufficient conscious capacity; this is not to say, however, that children and mentally challenged individuals cannot be *legally* deserving of punishment, insofar as the law provides for their particular punishment).

One last interrogation remains to be answered: how do we decide the amount of punishment, so that it isn't disproportionate? Again, we must abide by the rules of rational consensus. Contractors will agree to the amount of punishment incurred taking into account how morally wrong the offense is *and* how harmful it is to individual/common wellbeing. The amount of punishment will then reflect this evaluation and be satisfactory in restoring the moral/consequentialist balance. The sentencing scale would be transcribed in the law and appropriately applied by the courts of Justice.

**THE « RATIONAL COMPROMISE » THEORY - SIMPLIFIED**



## **Chapter II – An overview of the proposed reform**

In the light of the justification of punishment detailed above, my claim is that incarceration is neither an adequate nor a sufficient form of State punishment. I must, however, put my reform into perspective: what I will detail here is one part of a larger web of reform that needs to take place concerning the nature of the State. This is not an over-ambitious statement, and Duff would back me up on it: “what punishment ought to be – what it must be if it is to be adequately justified – will be radically different from what it actually is now”<sup>7</sup>. I will now detail what those changes must be, but first it should be noted that this is not a blueprint that can be applied to all countries around the World; it is directed at modern developed countries where criminal justice systems are already in place and most advanced.

### **Section 1 – Redefining offenses and offenders**

First and foremost, there needs to be a reconsideration of *what* behaviors are considered criminal (i.e. should all drug-related behavior be considered criminal?), but this is not the subject at hand. What needs to be changed is *how* these behaviors are judged and in turn *what type* of punishment they should deserve. In accordance with the logic of the contract, punishment should carry a sense of moral Justice all the while benefiting the community. This should be the ground rule of punishment, and since “restriction of liberty” is unsatisfactory on both accounts, here is what I contend should be done.

First, seen as the contract is drafted as a rational compromise, we must establish as a guiding principle that State punishment must benefit both the community and the offender as much as it can. When crimes are committed and the culprits are being assessed, there are going to be two kinds of offenders:

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<sup>7</sup> *Supra*, Note 4, Duff, Introduction p.XV

- Those whose crime was inferior to a certain level of moral wrongness *and* who pose no imminent or ongoing threat to the wellbeing of others → these are offenders that the State **can and must allow** to continue living within the community.
- Those whose crime was above a certain level of moral wrongness *and/or* who pose an imminent or ongoing threat to the wellbeing of others → these are offenders that the State **cannot and must not allow** to continue living within the community.

This directly affects the reason-to-be of prisons, for *only* offenders who, through their behavior and/or psychology, make it impossible for the harmonious cohabitation of the community to continue, must be incapacitated. This is not anything new, for “it is by now almost a commonplace amongst penal theorists, although sadly not among penal policy makers, that we should drastically reduce the range of crime for which imprisonment is the normal sentence”<sup>8</sup>. This being said, recidivism, of any kind, should warrant a custodial sentence.

## **Section 2 – Focus on “inclusionary punishment”**

My reform inevitably then brings a huge proportion of current inmates back into the “free society” (in 1998, there were 1 million nonviolent offenders in US prisons alone<sup>9</sup>) in favor of “non-custodial punishments”. Seen as the contract is created with individual/common wellbeing in mind, then if it is not morally deserved or consequentially necessary, the *exclusion* from Society that prison operates cannot be justified. Instead, the punishment of this type of offender should be *inclusionary*; it should “enable offenders to make reparation to the community [while] retaining their place in the community”<sup>10</sup>. It is not hard to understand that contact is favorable for any reconciliatory process, bridging the social rift, avoiding convict-

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<sup>8</sup> *Supra*, Note 4, Duff, p. 150

<sup>9</sup> Michael Welch, *Ironies of imprisonment*, Sage Publications (2005), p.143

<sup>10</sup> *Supra*, Note 4, Duff, p. 46

alienation and allowing the offender to make positive changes in his behavior that he can immediately display.

Where a partial restriction of their liberty is required, there exist ways to “incapacitate” offenders without resorting to prison: house arrest, restraining orders and electronic tagging are the more common. Then, depending on the offense/offender, their punishment should aim to benefit both themselves (for instance, drug rehabilitation) and the community. Fines are commonly used today and retain their purpose. Actually, they indirectly make a point for a forced contribution to Society as a means of punishment: in paying fines, an offender assumingly uses money he earned through previous work, so in fact, that amount of work becomes, retroactively, “unpaid labor” done for the benefit of Society.

But this is not enough; various forms of community service must be favored, many types of which already exist. New ones can also be developed, such as fundraising missions. Also, private sector companies that would be struggling financially could, under certain conditions, get the free-of-charge services of offenders who display particular sets of skills (accounting, translation, IT...) thus helping a company stay afloat and avoid unnecessary redundancies. Offenders should be included in the attribution of their work so to encourage their acceptance of the punishment and commitment to fulfilling it. For those offenders who would refuse the inclusionary punishment, then prison can be used as a threat and last resort.

### **Section 3 – The new prisons**

I will now focus on those offenders who are sent to prison: restriction of their liberty, on its own, is not the right punishment, because they should be put to the contribution of Society through mandatory labor.

## **1 – Mandatory labor**

The best way for the punishment of offenders to concord with the logic of the contract is to make them work for the benefit of the State. To this effect, the inmates' schedule should be filled with two types of labor.

### a. Prison self-sufficiency – unpaid labor

First and foremost, inmates must work to alleviate the cost of the prison itself by making it as self-sufficient as possible. Here is a list of functions (most of which are already established) inmates should hold on a rolling basis, and for which they are to receive no salary:

- Janitorial (keeping the place clean and tidy)
- Laundry (clothes, sheets, towels, etc...)
- Maintenance (sewing, DIY, electrics, etc...)
- Cooking and service
- Food production: each prison should have a farm, taken care of by the inmates, that grows a large proportion of their food consumption. Not only would this be a cost-beneficial change, but giving inmates the opportunity to work on the land, grow healthy food and be in contact with nature would be a positive thing.

### b. Prison factories – paid labor

Second, inmates must work to make the other State institutions as self-sufficient as possible. This concretely means that every prison should have an integrated "factory unit" where the inmate labor force produces goods intended exclusively for use by State institutions. For their work in prison, they receive from the State a salary corresponding to the competitive

wage of that function; they can be attributed a function depending on their existing competencies and can also evolve within the factory.

## **2 – Punishment as “restitution to Society”**

Depending on their crime, offenders are sentenced to a monetary reparation (the material act of restoring the balance) which comes in two forms: common reparations (fines) and individual reparations (victim compensation). Upon sentencing, the State will immediately take charge of these reparations, serving as an intermediary who “loans” the money to the offender, thereby defusing the personal conflict and preventing the victim from having to wait.

In consequence, this puts the offender *in debt* towards the State; an offenders’ sentence would then be understood as a *combination* of liberty-restriction and labor in view of repaying that debt. However, the attribution of punishment would not be calculated as a simple “pound-for-pound” reimbursement. Rather, depending on the offense/offender, the inmates would be sentenced to an amount of time in prison that reflects the gravity of their crime, determined by law and by the courts.

The inmate’s salary is then divided into approximately the following sections:

- 10% → regular tax (thereby they contribute, just as much as anyone else, to all State institutions, including the prisons they occupy)
- 80% → goes to a State-run “Justice fund”:
  - 30% of that goes into a “fine fund”
  - 50% of that goes into a “victims’ compensation fund”
- 10% → personal gains of the offender

The State then deducts from the “Justice fund” in order to pay for the offenders’ reparations. There are several reasons why the State should operate in this way. First, offenders have unequal amounts of personal wealth, which means some may well be able to pay off straight away their monetary reparations. If the work was solely intended to pay back a State “loan”, then wealthy offenders would not be required to work and punishment would lose its purpose.

Secondly, although we can assume that offenders that warrant incarceration will be subject to heavy debt, the amount of reparations can vary greatly. This would mean that if the length of the sentence was solely determined by the exact amount of work necessary to repay the debt (calculated on an hourly-rate for instance) then we could face two problematic situations:

- Cases where the debt would be paid back too quickly: in these instances, the State would not be able to justify its large wage-imposition and the inmates’ labor would then cease to be regarded as a punishment but as a regular job.
- Cases where the debt would be too great to be paid back: in these instances, the reparations would be left unpaid.

So, to make up for these inconsistencies and ensure above all else that the community and victims are satisfied, the value of each debt is made “abstract”, so that the inmates’ work is an *appropriate* contribution to the “Justice fund”.

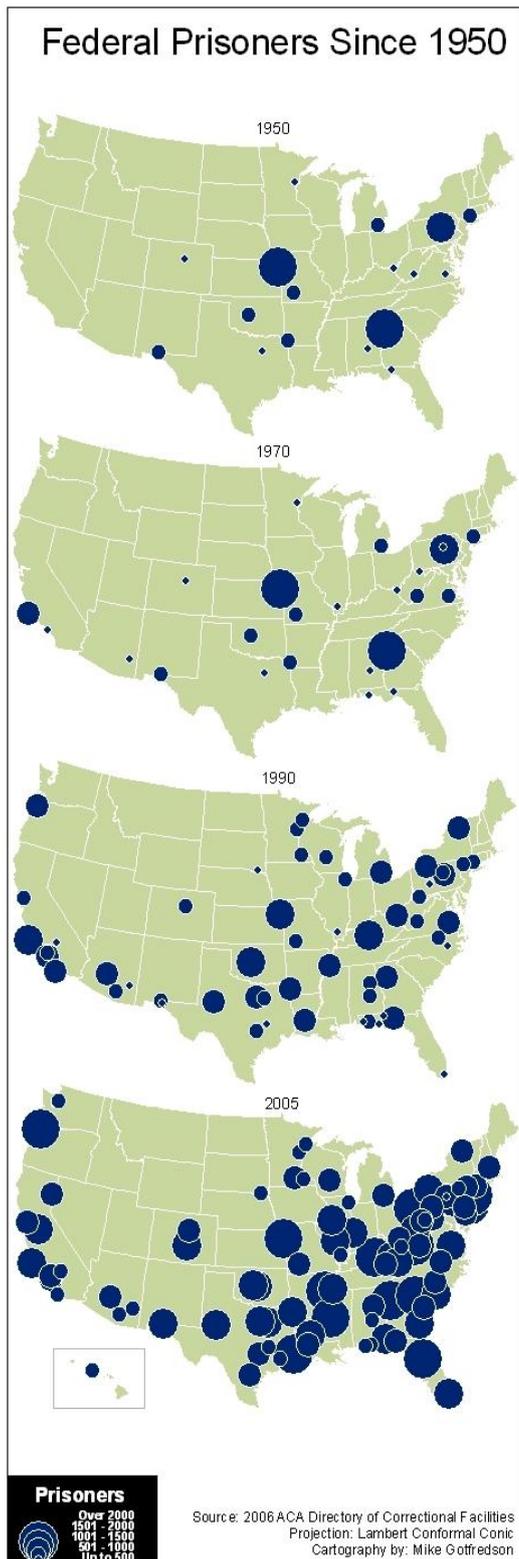
The changes I am calling for entail a fundamental reconsideration of sentencing, because, as I have said, punishment would be determined as a combination of liberty-restriction and labor. So first, to counter the concerns of those who could claim that adding work to imprisonment would make the punishment too harsh, this entails that the time spent

in jail would be somewhat shorter than it is today. This also means, though, that if the labor is not accomplished, then the punishment is not deemed executed. In other words, those who “do the crime” must not only “do the time” but “walk the line”: it is only once they have submitted themselves to the punishment (once they have *paid their dues*), and that their psychological condition doesn’t impose further incapacitation, that they can be released back into normal Society.

As for inmates displaying physical incapacities or who are beyond a certain age, they can be required to participate in more pedagogical activities: they can be presented to schools in order to talk about the risks of criminal behavior or mentor juvenile offenders. In the instance of uncooperative inmates, two mechanisms can be put in place: first, their incarceration can be prolonged, and indefinitely so. Second, they progressively lose their contact privileges with the outside and with other inmates (resulting in isolation).

### **3 – State-run prison-factories**

These changes in the determination of punishment necessarily entail a change in the physical form of prisons. First of all, structurally, they would need to change in order to incorporate a farm and a “factory unit”. Secondly, and most importantly, prisons must always be public institutions, run by the State and financed by public money. This means that wardens, guards and all other functions within the prison that cannot be occupied by inmates are to be employees of the State. We cannot allow prisons to be private enterprises, otherwise we are violating the very purpose of State punishment as established by the contract and we turn the whole criminal justice system into a capitalist masquerade. Such is the case in the USA where groups of political leaders and corporate conglomerates have turned State punishment into a “corrections-industrial complex”, where inmates have become commodities used as means to



keep prisons profitable. New prisons are built because the investments are there, which leads to a demand in inmates that corrupt authorities supply for by targeting weak communities; in turn, the prison fills up to the point of overcrowding which enables officials to scare the population into thinking there is a rise in crime and justify the creation of yet more prisons; the vicious circle keeps growing.

The fact that prisons must be entirely public is fundamental and for several good reasons. First, inmates are not employees who are working for a merited salary, they are deserving offenders who are working to repay Society. Secondly, it is more efficient: subjecting the labor of workers to private sector employment invariably means that the conditions of their punishment would be unequal (different companies pay different wages) and its execution would not be guaranteed (it would hinge on the will of companies to employ, and, by extension, on economic prosperity).

Of course, these changes should also be accompanied by reinforced schemes to support the inmates at every stage of their punishment. There must be in each prison a defined section dedicated to helping the inmates deal positively with their punishment and prepare for release into Society. This means appropriate educational/vocational training, reinforced psychological

monitoring and counseling, and also various opportunities for leisure and sport. Inmates should be guided to understand the purpose of their punishment and particular attention should be given to help them change their outlook on life. The mere fact that my change induces a drastic reduction of inmate population means that each inmate receives more personalized attention.

### **Chapter III – Why my proposed reform would be justified:**

It is my belief that the changes I have offered above reflect what kind of criminal justice system the contractors would agree upon as the result of rational compromise. In order to justify this claim in a clear way, I will successively explore the four main justificatory arguments of punishment (retribution, deterrence, incapacitation, rehabilitation) in order to show how the current system is not justified and why the one I call for would be.

#### **Section 1 – My reform in regards to retribution**

I doubt anyone would disagree with the principle that punishment should only be administered to individuals who are deserving of it and that it should neither be exaggerated nor insufficient. Yet, the current conception of punishment is not satisfactory in this regard.

We must start by asking ourselves the following question: is “deprivation of liberty” what offenders really deserve? Over the centuries, the question has been turned around to ask, instead, what kind of punishment a community is justified in imposing. As a result, punishment has evolved from the *infliction* of something (pain) to the *deprivation* of something (liberty). Although this was a necessary step in theory, in practice it seems to me to be nothing more than a terminological misrepresentation, for, what is incarceration if not the *infliction* of four walls around an offender’s body? Do prisons not *inflict* upon offenders the physical pain of restricted movement and the psychological torment of claustrophobia? Even worse, if we consider the dismal conditions of many contemporary prisons, does it not become a complete hypocrisy to call imprisonment a mere “deprivation of liberty” when inmates are directly subject to the constant and very real threat of getting beaten up, raped and murdered?

One of the main problems we face today, and that makes the retributivist claim all the more problematic, is the disparity between prisons. Seen as any reasonable conception of Justice goes hand in hand with the respect for every human's equal moral worth, then, by definition, Justice requires that every human be treated equally and every offender be punished in equal terms. Justice simply cannot exist in a world where people live under different rules and are punished in different ways. Unfortunately, that is precisely the world we live in.

On the one hand, we can point our fingers at "prisons and jails in even the richest and most developed countries... plagued by massive overcrowding, decaying physical infrastructure, inadequate sanitation, lack of medical care, guard abuse and corruption, prisoner-on-prisoner violence... [and where] conditions [are] life threatening"<sup>11</sup>. Do offenders *really* deserve this kind of treatment? On the other hand, we can site prisons such as the Halden Prison in Norway, "spread over 75 acres of gently sloping forest... where cells rival well-appointed college dorm-rooms, with their flat-screen TVs ... mini-fridges... [and] long vertical windows [with] no bars,... [and where] every 10 to 12 cells share a living-room and kitchen [that] resemble Ikea showrooms"<sup>12</sup>. Again, do offenders *really* deserve this kind of treatment? Without yet judging what kind of conditions inmates should be in, the fact that such inconsistencies exist even within State borders makes it necessary, at the very least, to agree on some middle ground which would be *the same* for everyone.

The first aspect, then, of my proposed reform on punishment that makes it legitimate is that it would entail a leveling of the playing field, so that all individuals submitted to a given legal system face the same type of punishment. In order for proportionality to happen, there

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<sup>11</sup> Human Rights Watch Report on Prisons, 2002, p.1

<sup>12</sup> Time Magazine, 2010 - <http://www.time.com/time/magazine/article/0,9171,1986002,00.html>

needs to be coherence throughout the whole punitive institution, resting upon the principle of equality. To this effect, transforming *all* prisons into public institutions, modifying/building them to be as self-sufficient as possible and enabling them to manufacture goods in an organic production chain would be, as such, a monumental achievement.

This being said, we must return to the original question: is “privation of liberty” what offenders justly deserve? If so, we are considering that, in view of restoring balance, restricting an offenders’ movement is the way to go. However, if prisons were to fulfill that role and nothing more, an offender armed with a lot of patience and few outside ambitions would sit rather well in jail; and in this case, prison would hardly constitute a satisfactory punishment, let alone a way of restoring balance. If critics of punishment rightly turn the question around to focus instead on what the community is justified in doing to its offenders, we should just as much be able to look at desert in both ways too: admittedly, an offender should *deserve* his punishment, but in return, should the community, that has already been undeservedly harmed by his offense, then further *deserve* to carry the full burden of his punishment? Shouldn’t the offender, at the very least, *deserve* to limit his subsequent burdening of that community? If there is an obligation on the community to take care of its offenders, then surely there is equally an obligation on the offender’s part to do everything he can to make the community’s obligation as light as possible.

In addition, it makes absolute “retributivist” sense to limit the range of offenses that warrant a deprivation of liberty to offenders who, well, actually *warrant* a deprivation of liberty. It is so commonsensical that it almost beggars belief that still today we are in need of rectification on this point: unless an individual has made it *impossible* for the community to allow him to live among the innocent law-abiding citizens then there can be no justification whatsoever for putting him in a jail. So, returning to the question: is it “restriction of liberty”

that offenders really deserve? The answer, invariably, is: no. What offenders should deserve is to “give something back to Society” to restore balance (remember: “removing an unfair advantage”). In consequence, should the community be limited, in its punishment, to “restricting an offenders’ liberty”? The answer must follow suit: no. The community should be justified in establishing the necessary mechanisms in order to punish offenders in a way that gets them to restore the balance they have disrupted by their offense.

Saying this, I am obviously not granting the State an unlimited license to exploit its offenders, but there is nothing controversial in recognizing the fact that a community cannot sit idly by, waiting for its offender to make amends on their own good will. Respect for an offender’s moral autonomy is one thing, faith in his self-imposed repentance another, and under no circumstance should the law-abiding citizens let their healthy sense of morality lead them to a self-destructive tolerance for the liberty to act of the unruly. This is why it would be far more satisfactory from a “retributivist” point of view to have a punishment system that is not so much giving the *offender* what he deserves, but getting from the offender what the *community* deserves.

## **Section 2 – My reform in regards to deterrence**

To be effective, a deterrent needs to have three essential qualities: certainty (it cannot be avoided), severity (it must be strong enough to dissuade) and celerity (it cannot be delayed). Most punishment systems today successfully display two of the three: certainty and celerity, mainly due to the fact they are nothing but “technical” aspects of the punishment and as such need nothing more than the good functioning of the institutions.

Things are different, however, concerning severity, because it requires some thought and determination. *How much* negative effect must it have upon the person who is punished?

A deterrent is successfully severe when its negative effects outweigh the positives that can be gained by committing an offense. In a purely “detering” logic, a system that would execute *every* offender for *any* offense would, effectively, be the most successful. It would still never get 100% results, though. Most often, potential offenders are fully aware of the punishments they incur and yet still commit the crime, either rationally through necessity, or irrationally through fits of passion. This is why we cannot sacrifice morality for efficiency on grounds of deterrence and why deterrence, in turn, requires a little more than good results: it requires *appropriateness*.

The way the current system of punishment works seems to lack any sort of such appropriateness and this is due again, in large part, to the disparity between offenders and between facilities. First of all, the deterring effect of monetary reparations is entirely subject to the wealth of offenders and consequently constitutes unequal treatment. We can easily imagine that the threat of paying a hefty fine will be a successful deterrent for a poor man but will hardly constitute a barrier for a rich one. This is why, by considering offenders as equals in regards to their debt upon sentencing and forcing them to repay Society, not with what they already own but with what they are going to actively produce, my proposed reform is a much more appropriate way of deterring potential offenders. Rich criminals will no longer have the privilege of “buying out” their crimes.

Secondly, since my reform also induces a narrowing of the scope of offenses that warrant prison, one could argue that it would then no longer provide enough deterrence for those types of behaviors. Although legitimate, this supposition is misguided. Monetary reparation would still be demanded, on top of which offenders would be submitted to community service. Their punishment, although not being incarceration, would simply be “more appropriate”, and that doesn’t necessarily mean “less deterring”. A drunk driver, for

instance, will receive a fine and lose his license; these are commonly accepted punishments and are quite deterring due to the significant inconvenience they cause. But suppose punishment also involved “attending meetings with victims of drunken driving, visiting accident units dealing with such victims... with the aim of confronting [the drunk driver] with the effects of such wrongdoing and challenging [him] to face up to what he has done. This [would] be more disturbing and less welcome because it involves a demanding moral challenge”<sup>13</sup>. Unlike with prisons, community punishment allows for direct confrontation of the public at large with the offenders and therefore provides people with a greater awareness of the reality of punishment. Offenders would discuss and share the demands of their punishment with their friends and relatives, thus spreading the deterrent’s grasp on people’s minds.

If we now look at prisons, the present disparity between conditions causes two opposing dynamics. In some cases, the severity of the punishment *seems* too weak to the people it is supposed to deter. In order for punishment to be a successful deterrent, it must constitute a condition that is worse than the current situation of the potential-offenders; in other words, “if the prison does not underbid the slum in human misery, the slum will empty and the prison will fill”<sup>14</sup>. So for instance, in countries such as the USA where inmates receive compulsory healthcare, punishment can appear to some people as more of an incentive than a deterrent (for example, the case of an American clerk who robbed his bank only in the hope of being sent to jail to get the treatment he couldn’t otherwise afford<sup>15</sup>).

The opposing phenomenon is even more alarming, because in most instances, what really deters people today in the threat of custodial punishment is not so much the severity of

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<sup>13</sup> *Supra*, Note 4, Duff, p.126

<sup>14</sup> George Bernard Shaw, quoted in *English prisons under local government*, by Sydney Webb, (1938) Longmans Green and Co, p.286

<sup>15</sup> The Guardian, 2011 - <http://www.guardian.co.uk/world/2011/jun/21/verone-one-dollar-robbery-healthcare>

the punishment itself (“deprivation of liberty”), but everything that goes around it: prison conditions, gang violence, harm to loved ones, blighted lives, diminished prospects, etc... In other words, if prison today has any success as a deterrent it is mainly due not to what the punishment is supposed to be, but to what the punishment *is not* supposed to be and the catastrophic failures of its administration. If prisons strictly “deprived offenders of liberty”, they would hardly have much of a deterring effect at all; they would be little more than old-folks homes filled with young people. Although deterrence is a major condition in legitimizing punishment, we simply cannot accept that the main justification for our present punishment system rest upon wholly immoral shortcomings in inmate safety and welfare.

This is why the first step of my reform would be to pose as a fundamental principle the equal and safe treatment of inmates. It is only on the grounds of this solid prerequisite that I then bring in the “mandatory labor” side of punishment, as this provides a much more potent, and legitimate deterrent. To make my point, let me draw a comparison between two possible prison systems which would both present a healthy and safe environment for inmates:

- one system where prisoners are simply “deprived of their liberty”; that is what it should be today.
- another system where prisoners are not only “deprived of their liberty” but required to “give something back to Society” through mandatory labor; this is the type of prison I call for.

It becomes evident, here, that of the two systems, it is the latter that constitutes the greater deterrent.

### **Section 3 – My reform in regards to incapacitation**

In a sense, deterrence and rehabilitation are extended forms of incapacitation (both before and after the crime), but the incapacitation we are discussing here is the only one the State has absolute control over; in other words, anything short of 100% effectiveness is entirely the State's fault. Therefore, the occasional jailbreaks coupled with inside violence (inmate-on-inmate and between inmates and staff) tend to show not only that prisons, today, fail to be completely incapacitating devices, but also that the State (as administrator of the prisons) is not doing its job. This being said, it is undeniable that prisons have the best potential for being instruments of incapacitation and what's more, pitted against alternatives such as exile, they appear to be the only way for a State to incapacitate offenders all the while being true to its mission.

For me to illustrate how my reform would be justified in this sense, I must first define both sides of incapacitation. The first reflects a "retributivist" logic: the offender *deserves* to be excluded from the free society because his deprivation of liberty is an appropriate form of moral punishment. Offenders are individuals who refuse the freedom-constraining rules of the community and thereby warrant a punishment that directly confronts their misconception of liberty. Exclusion thus operates a form of pedagogical treatment, instructing offenders that individual freedoms are not unlimited and teaching them to understand and respect the fact that, as the saying goes, 'one man's liberty ends where another man's liberty starts'. The second aspect of incapacitation reflects, unsurprisingly, consequentialist aims: the community needs to prevent its dangerous members from causing further harm.

When analyzing the changes I call for in the light of both sides of the "incapacitation-coin", it becomes clear that they are absolutely justified. Limiting prison as the punishment for

offenses that have breached the most stringent rules of self-restraint upholds the first side of incapacitation, while sending to prison only those offenders who pose an imminent/ongoing danger to the wellbeing of others corresponds clearly to the second side. Anything outside of these two principles makes incapacitation unjustified, and as such, the current attribution of imprisonment must be redefined.

The strongest challenge that could be made to my proposition is that many offenders who today would be imprisoned, wouldn't anymore. It is obvious that in favoring inclusionary punishments, we expose the free society to more offenders. However, although this concern is commonsensical, it lacks insight. First of all, such recidivism would be limited: as I have established before, only those offenders whose offense was minor *and*, more importantly, who don't pose a threat to the wellbeing of others are to be allowed to serve their punishment within the free community. In addition, other methods of incapacitation can be put in place (i.e. electronic tagging).

I cannot avoid, though, the fact that keeping a large proportion of offenders out of prison inevitably exposes the law-abiding citizens to their presence. So, for argument's sake, let's suppose that some of these offenders were to commit (and some would) subsequent offenses they wouldn't have had the opportunity to commit had they been in jail. First of all, recidivism being sufficient cause for imprisonment, they would be sent to prison. But, considering the fact that those offenders who are not sentenced to prison in the first place are those deemed able to live in the free society, then there is little chance that whatever crime they commit will be especially harmful (rarely will a petty thief who has been allowed to serve his punishment in the community then ignore the deterring factor of imprisonment and murder a family). This is, of course, conjecture, for anything is possible, and Society is not immune from such tragedies. But I contend, *still*, that the community would be for the better. If we were to

keep jailing offenders who don't present the necessary conditions warranting such a privation of liberty, those offenders would come out of prison more delinquent than they went in, and recidivism, as a whole, would be worse, both in quantity and in gravity. So in the end, those crimes that would be permitted by the presence of non-violent offenders in the free society would be a moderate price to pay for the general wellbeing of the community.

#### **Section 4 – My reform in regards to rehabilitation**

Rehabilitation also perfectly reflects both sides of the contract's rational compromise. From a moral standpoint, it is the community's responsibility to help those in need. Seen as, for many reasons, the circumstances leading offenders to criminal behavior are determined by Society, rehabilitation constitutes a commonly recognized palliative to the arbitrary and morally neutral circumstances of life. We could easily argue that, before becoming delinquents, ghetto drug dealers are in their own right victims of Society, born into a life of meager resources and miserable socio-economical opportunities. Behind the veil of ignorance, contractors wouldn't know if they were born into a castle or a council estate, and so they would all agree upon establishing successful rehabilitative methods. In this sense, rehabilitation is the "positive side" of what offenders deserve: they deserve to have a chance to change, and the community has the obligation to give offenders that chance. At the same time, rehabilitation pursues consequentialist goals: in view of harmonious cohabitation, the community needs to make sure that the punishment of an offender will prevent him from committing more crimes.

I have already touched on how the current practices of punishment bear little rehabilitative hope. First of all, many studies have been made on the different effects of exclusionary versus inclusionary punishments and the recurring conclusion is that, as far as rehabilitation is concerned, inclusionary punishments bring about the best results. It is not hard

to understand that, however good the conditions of prison are, the mere fact it cuts offenders off from the normal course of life is, in itself, not ideal as far as rehabilitation goes. Especially today when prisons breed criminality, putting non-violent offenders in jail is by far the most counter-productive thing to do.

For the sake of incarcerated criminals, if prisons were to be the way I have described, they would be far more successful rehabilitative facilities. The first, more obvious reason for this would be the instauration of safe and healthy environments for the inmates to evolve in. Secondly, as I have already said, the mere numerical reduction of inmates means greater individual attention. Actually, in order to rehabilitate such individuals, excluding them from Society for a given time in a controlled space may be the best way to go, seen as they are the ones who live in the most crime-prone environments and are the most in need of stability. Finally, and more importantly perhaps, putting inmates to work would be a considerable contribution to the rehabilitative process, and for many reasons (granted, most of their wages are taken back, but that's not the point; it's the activity in itself that counts).

First of all, it is no secret that the tremendous amounts of idle time that inmates currently have on their hands breeds frustration and gives them the opportunity to indulge in violent behavior. This is why giving them something to do can, at worst, limit their opportunities for conflict, and at best, help for high spirits. Furthermore, the work they are doing is constructive and useful, not merely digging ditches and filling them in again; inmates can get the feeling that their work has a purpose, for them (in repaying their debt) but also for the betterment of Society. Although critics bemoan the lack of incentives for inmate labor, I believe the system I call for would provide many. First, the (meager) wage they can save up, but more importantly the access to managerial positions within the prison and factory, and more opportunities for family contact. The prison should, to this effect, be far more permeable to

contact with friends and relatives. Excluding dangerous offenders from the community is a necessary measure, but breaking their relationships is a mistake. This is why prison should view healthy ongoing relationships as essential to the rehabilitative process of inmates. Good behavior at work can be rewarded by extra time in a “family” quarter of the prison, where couples can spend the night and parents can play with their children. This to me seems essential and doesn’t take anything away from the “punitive” purpose of prison.

Coming back to the work itself, for the inmates to feel incentivized, the work undoubtedly needs to be productive *to them*. To this effect, it undeniably provides them with many valuable lessons, both personally and professionally. On the one hand, all the chores required for the maintenance of the prison and production of food would inculcate them with a responsible, self-supporting and healthy lifestyle. Just like the army does in a similar sense, prison can be an excellent instigator of rigor and self-respect. Habituating individuals who usually come from disruptive backgrounds to take care of common belongings as though they were their own and subjecting them to a strict schedule is an effective way of preparing them to maintain autonomous lives outside. Making the bed, staying clean, cooking food, repairing clothes, DIY – these are all tasks one has to do in real life, and, as the saying goes, ‘before being able to live with others, one needs to learn how to live alone’.

As for the paid factory-labor, inmates would have numerous possibilities to learn skills useful for future professional insertion. The learning curve of being part of a work-team habituates them to having colleagues and superiors, instilling in them values such as cooperation and obedience, and above all else gives them a work ethic. Also, most offenders strayed from normal life into criminality often because of a lack of professional goals, which is why prison labor can offer some vocational guidance, if not in the factory, then in the educational programs.

As a whole, the prison-life would be meant to mirror the free world with similar rules. Therefore, living and working as a group would inevitably teach the inmates codes of conduct that are just as necessary in free Society. Studies show that putting offenders to work is the best way to go in view of their reinsertion: the Post-Release Employment Project (one of the most important recidivism studies ever conducted in the USA) concluded that inmates busy with work were, compared to inmates who were not working, “less likely to engage in misconduct while incarcerated,... more likely to find and keep full-time, better paying jobs [and] less likely to commit crimes after release”<sup>16</sup>.

More generally, the activities that offenders would be performing would give them a better image of themselves. Knowing that their work is constructive, both for them and the community, inmates can attach moral value to it. In a sense, prison should resemble a training facility for community life, where the inmates, if receptive, would be eager to get out on the field and show the crowd how good they’ve got. It is not out of naïve optimism that I say this; prisoners who today have the chance to complete educational programs in prison but who are stuck on life sentences express feelings of frustration at not being able to show people how much they have changed. Interviewed on television, an unnamed “lifer” from California reflected with perceivable sadness on the two college degrees he had earned while in prison: “My biggest concern is that I went through all the trouble, on a personal level, to become a different person, and now I don’t know for what reason other than personal satisfaction. I can’t give anything back to Society”<sup>17</sup>.

Unfortunately, some inmates are less receptive and willing to change than others and of course, special attention would be required for these individuals. However, it is impossible to

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<sup>16</sup> *Supra*, Note 2, FPI, p.36

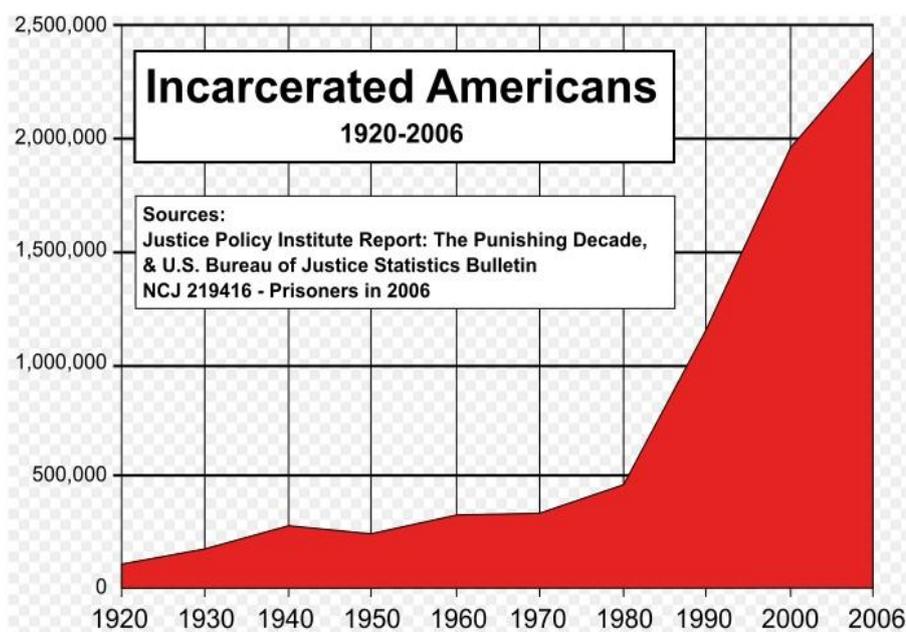
<sup>17</sup> KPBS Documentary « Cost of being hard on crime », <http://www.kpbs.org/news/envision/prisons>

change someone who stubbornly refuses to make the effort. So if the support and attention they receive isn't sufficient to change their dispositions positively and encourage them to work, then we can assume that they also refuse to recognize the value of common rules, which thereby makes it impossible for the punitive system to release them. It may be a tough conclusion to reach, but prison should serve as a trap for the unruly and, unless they are willing, provided the necessary support and guidance, to search and find the key to being members of Society, then the trap should not release them simply because they have been stuck there for a long time.

Finally, one last point must be made about rehabilitation as an objective. If it is to be successful, then it should necessarily diminish the number of offenders it concerns. So, as much as rehabilitation is the "brighter", more encouraging side of the punitive system, its virtues should not blind us from the real problem. At the end of the day, rehabilitation exists only because crime precedes it. So, just like in medicine, we should not praise and concentrate all our efforts on the cure instead of attacking the source of the pathology.

### **Section 5 – General cost-efficiency of my reform**

Finally, I would like to make a broader point that, from a cost-beneficial perspective, my proposed reform is not only justified but necessary. The current state of public expenditure on criminal punishment in modern countries is today quite terrifying. States keep putting more and more people in jail because they believe it is the best way to fight crime, despite statistics quite clearly showing that there is no real correlation between incarceration and crime rate. Taking a drug dealer off the streets only means another two will battle out to take his place.



The USA, with its “tough on crime” stance since the 1970’s, is the most shocking example of this mentality: with less than five percent of the world’s total population, it claims more than twenty percent of the world’s combined prison population<sup>18</sup>. Every day in the USA 200 new cells are constructed<sup>19</sup>, with each bed costing between \$25,000 and \$100,000 depending on the security level<sup>20</sup>; in the “land of the free”, one in every 31 adults is in prison, on parole or probation, at the public cost of \$47 billion in 2008<sup>21</sup>. The UK displays similar statistics: prison population went from 44,000 in 1993 to over 83,000 today; that’s almost double. It is estimated in the UK that each new prison place costs £119,000 and that the annual average for each prisoner exceeds £40,000<sup>22</sup>. That’s more than enough to pay for a student’s university tuitions fees and living expenses.

Bearing in mind the frightening prospect that there is no sign of these numbers going down, it is quite clear that something must be done in order to either cut the costs of prison or

<sup>18</sup> Angela Davis, *Are prisons obsolete?*, Open Media (2003), p.2

<sup>19</sup> <http://heartsandminds.org/prisons/facts.htm>

<sup>20</sup> « Public Safety, Public Spending », the Pew Charity Trust, p.29, <http://www.pewcenteronthestates.org>

<sup>21</sup> New York Times, 2009, <http://www.nytimes.com/2009/03/03/us/03prison.html>

<sup>22</sup> The Guardian, 2008, <http://www.guardian.co.uk/commentisfree/2008/jul/28/justice.prisonsandprobation>

make them more efficient. The criminal justice system is a highly visible and sensitive aspect of public life, and is particular in the sense that it deals with the “negative side” of life; people who come into contact with it are always either victims or soon-to-be-punished. This is why, when its (mis)management doesn’t justify its cost, it becomes pitted against more “positive” public prerogatives, in particular healthcare and education.

For instance, there are 35,000 “lifers” in California prisons; the cost of their accumulated sentences could cost taxpayers up to \$130 billion<sup>23</sup>, and this is mainly due to their healthcare bills. Offenders usually come to prison with severe physical pathologies (due to alcohol and drug abuse) and, with life expectancy constantly getting longer, “lifers” are spending more and more time behind bars. It is estimated that the population of male inmates over 60 years-old will triple by 2018<sup>24</sup>. Although it is fundamentally the duty of the State to take care of inmates, the system works today in such a way that it neglects many law-abiding citizens and rightfully breeds a sense of injustice. When people hear inmates thank prison for curing their cancer, or that an inmates’ back operation cost \$200,000 in security-guard wages alone<sup>25</sup>, it becomes understandable that law-abiding citizens who lose their loved ones to diseases they cannot treat or who suffer themselves from pains they can’t afford to cure feel unfairly treated. At the end of the day, those people who don’t have the money to pay for their own medical bills still had to contribute, through tax, to the medical bills of offenders. There is, unquestionably, something very wrong there. It is after all quite disgraceful that a country unable to decide whether healthcare is a right for all free citizens has no trouble guaranteeing such a right for convicted criminals.

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<sup>23</sup> *Supra*, Note17, KPBS documentary

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

The same criticism can be made in relation to education, and it is even more justified. A study carried out between 1987 and 2007 showed that higher education spending in the USA grew by 21% while funding for corrections saw its allowance increase by 127%<sup>26</sup>. The reason why this staggering mishandling of public funds is a terrible omen as far as Justice is concerned is precisely because lack of education is almost always a major causal factor of criminal behavior. It is no hidden truth of human behavior or social conduct that the more education people receive, the less criminal they become. In his “state of the State” address of 2010, Governor Schwarzenegger made the reversal of these expenditures central to his policy, and although he is no authority in political theory and even less in philosophy, his words bear much light on the problem:

“The priorities have become out of whack... Thirty years ago, you had 10% of the general fund going to higher education and only 3% to prisons. Today, almost 11% goes to prisons and only 7.5% goes to higher education. Spending 45% more on prisons than Universities is no way to proceed into the future.”

In the light of these major deficiencies, my proposed reform undeniably finds a powerful reason to be. First of all, the mere fact of preferring inclusionary punishment whenever possible proves to be a massive money-saver. In the UK, for instance, residential drug treatment programs have been shown to offer a £200,000 net-benefit over prison, while resorting to surveillance instead of cells saves on average £125,000 per convict<sup>27</sup>. Similarly, in the USA, a study found that States spent on average, every year, over 14 times less on probationers and

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<sup>26</sup> NAACP Report, <http://www.npr.org/2011/04/07/135209942/naacp-u-s-prisons-funded-at-expense-of-education>

<sup>27</sup> *Supra*, note 22, The Guardian

parolees than on inmates<sup>28</sup>. Finally, a 1995 study on the benefit-cost of sentencing corroborates precisely the types of changes I argue for, concluding that “prison pays for most State prisoners who comprise either violent or repeat offenders and/or who present a real danger to the physical safety or property of their community”<sup>29</sup>.

**Potential Cost Savings for 80% of Nonserious\* Offenders**

	<b>US</b>	<b>California</b>	<b>Florida</b>	<b>New York</b>	<b>Texas</b>
<i>Current expenditure</i>	\$12.9 billion	\$1.5 billion	\$399 million	\$1.8 billion	\$2.8 billion
<i>Cost of alternatives</i>	\$3.2 billion	\$120 million	\$128 million	\$692 million	\$433 million
<i>Potential savings</i>	<b>\$9.7 billion</b>	<b>\$1.4 billion</b>	<b>\$271 million</b>	<b>\$1.1 billion</b>	<b>\$2.4 billion</b>

\* offenses that are not violent, not sexual, and don't involve significant property loss.

Source: National Council on Crime and Delinquency, January 2010 Report

More importantly, the different ways in which I propose to change the structure of prisons would set straight a number of mechanisms that today make them so expensive. First of all, “prisons without meaningful activities for inmates are dangerous prisons, and dangerous prisons are expensive prisons”<sup>30</sup>, which is why lowering the incarceration rate and guaranteeing safe environments would drastically cut the costs of running prisons. Secondly, forcing the inmates to contribute to Society through their work is, without a doubt, the most cost-beneficial change to make. Stanford Bates, the first director of the Federal Bureau of Prisons, observed that “prisoners should work because it is economically necessary, socially advisable, and because it represents the most important element in the general attempt to solve the problem of delinquency”<sup>31</sup>. In the USA, there has been for many years a scheme for inmate

<sup>28</sup> *Supra*, note 21, NY Times

<sup>29</sup> *Benefit-Cost of Analyses of Sentencing Report*, Campbell Systematic Reviews, 11/03/2008, p.31

<sup>30</sup> *Supra*, Note 2, FPI, p.36

<sup>31</sup> *Ibid*, p.13

labor called UNICOR that resembles in many ways the “factory unit” I have put forth, and despite some structural differences (detailed later), most of the justificatory arguments are the same. As economics professor Neil Singer quite rightly explains, without inmate labor, “Society loses because it is denied the \$1 billion or more worth of goods and services that inmates could have produced... The magnitude of unrealized inmate power makes it imperative to overcome these barriers... [Putting inmates to work] should be high on the agenda of every correctional system”<sup>32</sup>.

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<sup>32</sup> Neil Singer, *The value of Inmate Power*, Crime & Delinquency (1976) vol.13, p.11

## **Chapter IV – Addressing the main challenges to my reform**

### **Section 1 – State prison-factories would not be economically viable**

I am aware that many economists may frown at the prospect of an entirely State-run prison-factory, seen as it would cause an immediate raise in public spending (because of inmate wages; 90% of which, remember, returns in any case to the benefit of the community/victims).

However, as my reform induces a considerable reduction of the incarceration rate, we can assume there won't be an overwhelming amount of wages to pay. Not only this, but if the type of prison I call for is successful and effectively rehabilitates whoever goes through it, we can then further predict that the rate of incarceration will drop down to a regular minimum constant. Unlike the current system in which prisons breed prisons, the punitive system I call for would not seek to renew itself but instead would aim to end its own reason-to-be, thereby making the whole process progressively cheaper.

This still does not, however, eliminate the possibility that paying for the manufacture of a certain set of goods may be more expensive than it would be to buy that set of goods from a private merchant. Although I cannot here go into a study of exactly what activity the prison factories should have in order to be more advantageous economically, I claim that even if this were impossible, then there are two good reasons for which such an enterprise would still be beneficial – and economically so.

First, we can turn the economical logic on its head: if the prison factories do turn out to be more expensive for the State than buying from private companies, then, assuming the State sticks to its responsibilities (putting inmates to work and paying them), then it will be in the State's best economic interest to pursue successful rehabilitative methods, as this would

reduce the number of inmates it would subsequently have to employ. This is, however, a rather cynical reasoning, and what's more, it is the least convincing of the two.

Second, even if it costs slightly more to pay the wages of inmates in factory-prisons, the mere rehabilitative virtues of such prison activities will, in the long run, save considerable amounts of public money on all the recidivism that won't occur. While the State may spend \$100,000 in wages over the course of an inmates' incarceration, it won't have to spend the \$1,000,000 taking care of that inmates future crimes. To illustrate, if the State had to choose between two financial plans:

- PLAN A: paying a certain and unavoidable cost (the wage of the inmate) but a cost which is predictable, controlled, individual and relatively low.
- PLAN B: taking the risk of paying an uncertain cost (recidivism is not 100% sure) but a cost which is highly probable, inestimable, dispersed and considerably high.

It appears quite clearly that the more sensible and profitable operation is PLAN A.

## **Section 2 – State prison-factories would be unfair competition to the private sector**

Obviously, by turning prisons into factories that produce goods for the State, they will necessarily replace the existing providers of those goods. Many critics already point their fingers at the current practices of inmate labor as unfair competition with private sector jobs. In focusing more specifically on the USA (where the inmate labor program is the most developed), I will show that while the current practices do in fact warrant their share of criticism, the fundamental differences of the system I call for make it justified.

The first aspect of the current problem is the effect of inmate labor *outside* of prison, through work-release. Seen as offenders today aren't all necessarily dangerous, some can be

released on parole under the condition they have a job outside. This means that businesses will rather employ a parolee on a low wage (knowing he is forced to accept if he wants to get out) over a regular citizen who would expect a higher wage. This way, the parole system goes around the open labor market, driving wages down and unfairly blocking law-abiding citizens from employment. In the system I offer, there would be no work-release seen as inmates are individuals who, in the first place, are not deemed able to be part of Society, and would not be released until they had completed their punishment (this isn't to say they shouldn't have the support of post-release reinsertion programs).

More importantly, it is the work done *within* the prison that draws the strongest objections. In the current practice, prisoners work on a voluntary basis, are employed by private sector companies and are hired below the legal minimum wage. Although there are many restrictions put in place (for instance, UNICOR must ensure the inmate production is diverse enough to not impact any one activity), inmate labor is still attractive for private companies. Therefore, "low-skilled US workers... are being laid off as jobs formerly available on the free market are moved behind bars"<sup>33</sup>; while inmates have been employed by subsidiary companies of Boeing, Victoria's Secret, IBM and Starbucks to name a few, the former employees of those companies struggle to find work. A sense of injustice has rightfully been brewing and US Representatives have voiced these concerns to congressional commissions: one from North Carolina claimed that small textile and furniture businesses within his district were "deprived of employment in order to give work to federal inmates"; another from Iowa argued that since UNICOR pays its inmates no more than \$1.15 an hour without providing benefits, "private sector employees cannot compete"<sup>34</sup>.

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<sup>33</sup> Genevieve Le Baron, *Captive labor and the free market*, Capital & Class (2008), p.60

<sup>34</sup> Ibid, p.72

Such unfair situations would not arise in the system I have detailed because three of its core structural features are radically different. First, following my reform, inmates are paid the competitive wage for their position (granted, most positions will be minimum wage, or slightly higher). Even though most of that money is taken back, it means that the State is not giving inmates a competitive edge over law-abiding citizens. Second, seen as the prison-system I call for is entirely public, it means that the inmates cannot be hired by private sector companies, thereby preventing any “interested” parties from exploiting inmate labor at the direct expense of free citizens. Third, in order to keep the system coherent and efficient, the whole network of factory-prisons should be organically linked in order to have a *monopoly* on manufacturing certain sets of State-use goods, instead of being diverse (we can easily imagine a comprehensive set of prison factories taking care of all the aspects of a given production chain, for example desks and chairs: one prison could be in charge of cutting trees, the next in charge of reshaping, and a third in charge of assembly). This will inevitably cause a major infringement on the market of private providers: if the prisons are organized to manufacture all the desks and chairs for State offices, the company/companies that previously provided those goods will lose an important client and possibly go bankrupt. Not only do I claim this is justified, but I believe it is a good thing. If we follow the logic of the contract, the State is a means to end and, as such, should aim to be as self-sufficient as it can be. In other words, it should be the client of exterior providers only when it cannot avoid doing so, or when it is substantially more beneficial economically. In consequence, a criminal justice system such as the one I have put forth would fit the bill on all accounts. If today some private companies hold the State as one of their clients it is only because the fundamental structure of the State is not the way it should be, and this is not acceptable. If the process of changing the State (and therefore prisons) to make it more coherent and self-sufficient causes some companies to lose public institutions as their clients then that is a necessary sacrifice to make. We cannot uphold the interests of one or

several private companies if it means maintaining glaring failures in the structure of the common institutions.

Of course, realistically, if the changes I call for were to be implemented and companies were to lose a considerable amount of their market, financial programs could be put in place in order to ease the transition, both for the company and its employees. Although on the short term these changes may disappoint some individuals, in the long run the community would be for the better. Furthermore, seen as the prison system I have set forth is not self-renewing but actively seeks to lower crime rates, one can assume that private sector companies will progressively be called upon again by the State to compensate.

### **Section 3 – Mandatory labor and racial bias create modern-day slavery**

The idea of putting inmates to mandatory labor does not sit well with most human rights activists who will remind us of the abolition of slavery and involuntary servitude. Critics will argue that in the past, criminal punishment has been used as a substitute for slavery, most notably through penal colonies, where inmates were shipped abroad to work in construction or on farms, and the “lease system” in the USA where inmate chain-gangs could be hired in sub-slave conditions because they could easily be replaced. On the similarities between prison-labor and slavery, historian Adam Hirsch pointed out that “both institutions subordinated their subjects to the will of others,... reduced their subjects to dependence on others for the supply of basic services, ... isolated their subjects from the general population by confining them to a fixed habitat,... [and] coerced their subjects to work... for longer hours and for less compensation than free laborers”<sup>35</sup>.

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<sup>35</sup> Adam Jay Hirsh, *The rise of the penitentiary*, (1992) Yale University Press, p. 71

This may be true, but the failure of past practices does not mean that the idea of mandatory labor is itself wrong. By Kant's own admission, "because the State will not support [the inmate] gratis, he must let the State have his labor at any kind of work it may wish to use him for"<sup>36</sup>. Over the years, American courts have constantly held that inmates are not protected by the constitutional prohibition against involuntary servitude and that, having no constitutional right to compensation, they are paid by the "grace of the State"<sup>37</sup>. Requiring that offenders must work as a means of punishment is not, and should not be subject to controversy. Where critics would still argue that the mere coercion of labor is in fact inherently wrong (as a violation of an individuals' moral autonomy), I claim, for all the reasons stated throughout this dissertation, that offenders don't in fact deserve any such respect for their right to refuse the commonly-agreed punishment. In any case, inmates in my system are not working at the end of a whip, they can refuse the work; however, by doing so, they choose not to be part of the community anymore.

The specter of slavery and oppression, though, resurges because of another correlated issue: the fact that a majority of inmates are from minority backgrounds (African, Asian, Hispanic, etc...). In 2009, African-Americans accounted for 39.4% of all inmates while comprising less than 20% of the countries' population; while black males in the USA have a 32% chance of serving time in jail at some point in their lives, white males only have a 6% chance<sup>38</sup>. Similar statistics can be found in the UK, where the ratio of inmates to 1000 people is 7.3 for black people against only 1.7 for white people<sup>39</sup>. Staunch critics of criminal policy and prison abolitionists claim that prisons play a role in perpetuating social, racial and economic inequalities, and suggest that the "State [has] transformed the criminal justice system from a

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<sup>36</sup> *Supra*, Note 3, Kant cited by Tonry, at p.31

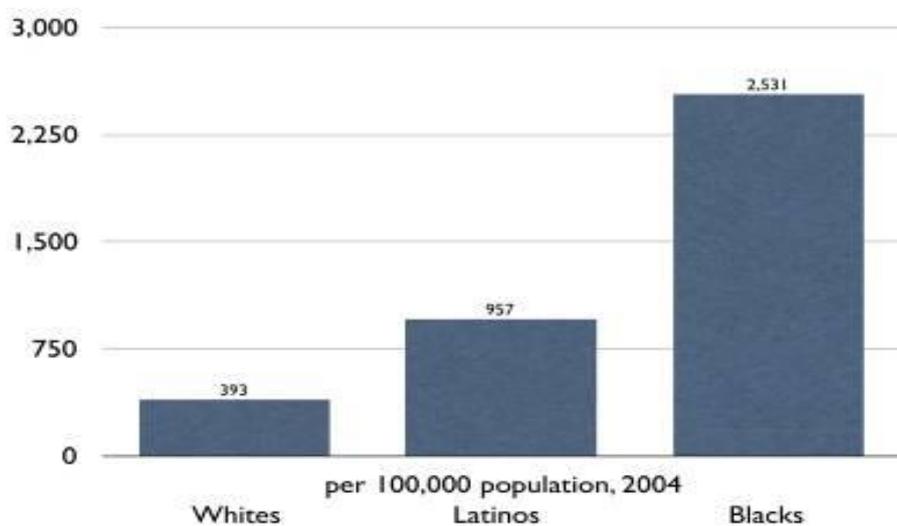
<sup>37</sup> *Perspectives on paying the federal minimum wage*, Report of US General Accounting Office, 1993

<sup>38</sup> *Facts about prisons and prisoners*, The Sentencing Project, [www.sentencingproject.org](http://www.sentencingproject.org)

<sup>39</sup> BBC News, 2007 - [http://news.bbc.co.uk/2/hi/uk\\_news/7069791.stm](http://news.bbc.co.uk/2/hi/uk_news/7069791.stm)

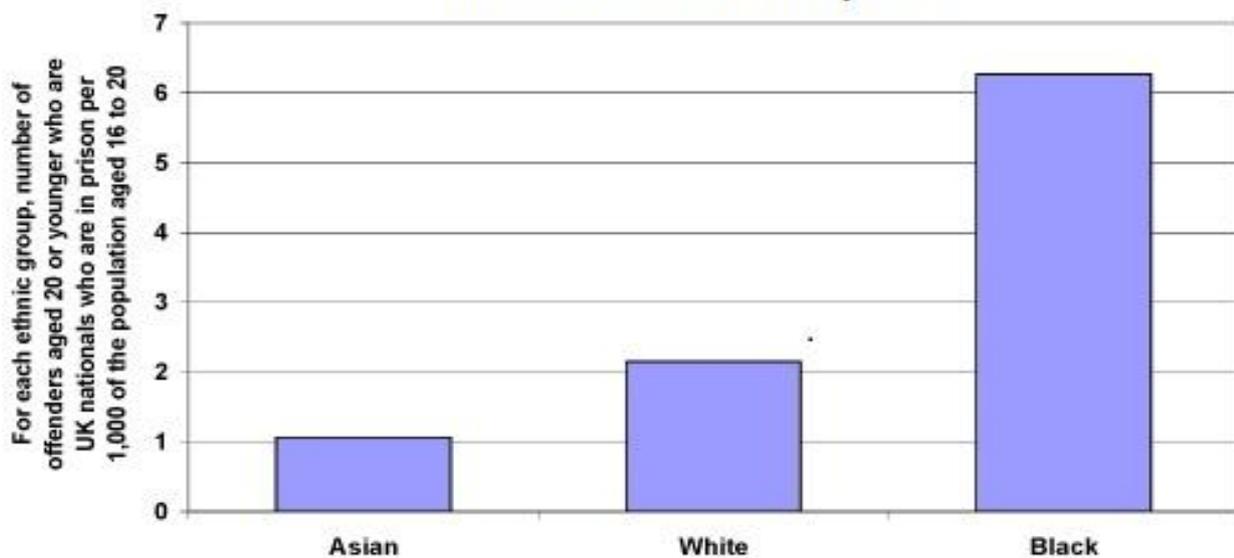
shield designed to protect all citizens into a sword used to intimidate and control the less powerful"<sup>40</sup>. Inevitably, the image of a prison factories with mostly colored inmates immediately raises memories of colonial exploitation and hints at political abuses, whereby States in need of labor could be incentivized to target weak communities in order to fill the prison-industries (like gulags in the former Soviet Union).

**U.S. incarceration rates by race**



*Prison Policy Initiative*

**UK Incarceration rate by race**



Source: Offender Management Caseload Statistics, Ministry of Justice; the data is for June 2006; England & Wales; updated Dec 2007

<sup>40</sup> *Supra*, Note 9, at p.3

Although this widespread criticism is necessary in shedding light on major issues that need to be resolved, they are perhaps the most unconstructive and inappropriate attack on the criminal justice system, pointing fingers in the wrong direction and ultimately bearing little practical utility for pertinent reform. Prisons *are* mostly filled with colored people – that is a fact. But saying that the criminal justice system is defective is missing the point because actually, *it is doing its job perfectly well*. In modern countries where someone is innocent until proven guilty, there are only rare cases in which people are put in jail on false pretenses, and when they occur, they usually cause major public outburst. What these rates are showing is not that there are innocent colored people being sent to jail, but simply that there are *more* colored *offenders* being sent to jail. This is not a racist claim to make; it is a statement of fact that should lead us to focus on two other realities.

The first is a biased one: before being incarcerated, one must be found guilty of a crime, and on this point, there is undoubtedly a double standard in treatment between “colored” and “white” people. A black male will have a greater chance of being pulled over and searched than a white male, even though both may be carrying drugs. Racial profiling is obviously an issue that must be resolved, particularly by a better practice of law enforcement.

The second mechanism however is not biased and is far more insidious: if a strong proportion of minorities end up in jail, it is not because of their color or race but because of their socio-economic situation. In other words, skin doesn't cause crime, poverty does; ethnicity doesn't cause crime, Society does. The reason there are in prison more people from minority backgrounds is simply because these minorities, usually of immigrant lineage, live in less fortunate areas, have little chances of education and struggle to climb the professional ladder. This context breeds frustration and aggression which ultimately leads to crime. If there are proportionally more black offenders, it is not because black people are more crime-prone,

it's because there are more black people in criminalized communities. If we were to look at the 1000 richest African-American families, there is little chance they would display a crime-rate higher than any given 1000 white-trash families. As a result of this, "racial" segregation has effectively been replaced by "social" segregation and prisons, insofar as they hold more minority offenders, have become the natural reflection of this. So claiming that the criminal justice system is causing this segregation is completely wrong; if anything, it is exacerbating this segregation and proving to be an extremely telling measure of how bad it is.

Therefore, instead of calling for the abolition of prisons, we should be looking to fight the reasons why offenders commit crimes in the first place. It is quite annoying to witness the almost apologetic stance of critics who seem more sympathetic to offenders than to their victims, especially when victims play no active part in the social circumstances of offenders. It makes no doubt that more public money should be spent on building infrastructures and schemes designed to eradicating the social segregation that occurs before crime: increased educational chances, a more comprehensive employment system and guaranteed public healthcare. It must be noted here that what all these reforms are pointing at is greater social *equality*, which makes perfect sense when thinking back to the "original position": the contractors, behind the veil of ignorance, would agree on creating a Society in which everyone has an equal chance to prosper, regardless of their original circumstances.

Although such important transformations would require dissertations of their own, my reform would create a criminal justice system that follows this logic and contributes to eradicating social segregation. First of all, ensuring that all offenders face punishment on equal terms brings some egalitarian sense to the criminal justice system; as such, the social background of the offender would bear absolutely no influence on the attribution or effect of his punishment. Secondly, by narrowing the scope of custodial sentences in favor of

inclusionary punishments, all those “non-serious” offenders (who usually come from impoverished communities) would not be sent to jail anymore, which is preferable seen as incarceration depletes these communities even more. Finally, the rehabilitative virtues of the prisons I detail would “recycle” the unruly into law-abiding citizens who would then return to criminalized communities as vectors of positive change.

## Conclusion

I believe it is by now clear that the reform I have proposed is entirely justified, both in respect to retributivist and consequentialist principles. Encouragingly, some of the changes I call for are slowly progressing in public policy today, in particular the reduction of the number of inmates in favor of inclusionary punishment. However, exclusionary punishment is still widely limited to “deprivation of liberty”, which is why there is little chance of seeing governments transform penitential institutions into schemes designed for claiming “restitution to Society” through mandatory labor.

In searching for a new form of criminal punishment, I have come to realize that it is only one element in a complete overhauling of the current conceptions of State and Justice. Our world is organized in such a way, and is evolving at such a rate, that we cannot keep on going in the present manner without addressing these issues at a global level. We must come to accept the fact that questions of morality and justice are not matter of opinion or fate but of *rational compromise*, and that in order to be upheld in a political community, they require equality. We are obviously far from such equality, which is why the reform I have put forth has, unfortunately, little chance of immediate realization. However, my hope is that in rethinking the foundations of State and institutionalized Justice, we can pave the way for positive change. This dissertation aims to contribute to that movement.

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