

# Progressive Alternatives to Imprisonment in an Increasingly Punitive (and Self-Defeating) Society

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#### ABSTRACT

Criminal sanctions are a necessary and appropriate response to crime. But extremism, especially when coupled with a slavish and unthinking adherence to traditional practices, nearly always produces unfortunate consequences. Such is the case with the rapid growth in prison numbers in the United States over the past two decades. The prime purpose of imprisonment is to punish serious offenders and to prevent them from reoffending during the period of detention. The overuse of imprisonment has resulted in the violation of the most cardinal moral prohibition associated with imprisonment: punishing the innocent. The runaway cost of the prison budget has resulted in the community being needlessly punished to the tune of tens of billions of dollars annually. This is money that cannot be spent on profoundly important social services such as health and education. This Article offers a solution to this abhorrent public policy failing. We propose new forms of punishment that are more cost efficient than jail and that achieve all of the purported benefits of imprisonment: incapacitation and deterrence. The proposed sanctions are in two main forms. The first sanction is twenty-four-hour technological monitoring of every movement by an offender. The second sanction targets educational and employment pursuits of offenders in combination with disgorgement and clawback remedies. It is suggested that one or both of these sanctions can replace imprisonment as the sanction of choice for all current prisoners except serious sexual and violent offenders. This would result in an approximate halving of the number of offenders in United States prisons. If this solution is not effective and United States political sentencing realities compel the continuing addiction to imprisonment at the expense of all alternatives, there is still a better way forward. The United States should open up the housing of its prisoners to price based competition: states and emerging economies should be allowed to compete to provide prison accommodation in an efficient manner. We propose that this may be undertaken subject to binding and enforceable commitments made by these states to adhere to basic human rights standards and appropriate levels of accommodation and amenities.

#### INTRODUCTION

The United States sentencing system has remained remarkably resistant to change. Technological advances have resulted in profound changes to every human endeavour. Standing stubbornly outside this trend is the manner in which the criminal justice system deals with

criminals. Confining criminals behind large walls remains the orthodox method for punishing serious offenders, as it has since the British colonization of the Americas more than 500 years ago. As former Attorney General Eric Holder said, “too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason. It’s clear, at a basic level, that 20<sup>th</sup> century criminal justice solutions are not adequate to overcome our 21<sup>st</sup> century challenges.”<sup>1</sup> Moreover, imprisonment in the U.S. has stark implications for racial equality and for innocent families. As an influential study by the National Research Council noted “[i]n 2010, blacks were incarcerated at six times and Hispanics at three times the rate for non-Hispanic whites,”<sup>2</sup> and “the number of children with an incarcerated father increased from about 350,000 to 2.1 million—about 3 percent of all U.S. children” in the two decades between 1980 and 2000.<sup>3</sup>

The continued emphasis on imprisonment as the dominant method of punishment represents an abject failure of intellect and a profound social and political policy mistake. Technological advances provide more efficient and humane techniques to achieve most of the appropriate and attainable objectives of imprisonment. This error is compounded dramatically by the unprecedented surge in the growth in imprisonment numbers of the past two decades in the U.S. The increase in the use of imprisonment in the U.S. is staggering by any measure. The U.S. imprisons more of its citizens than any country on earth—and by a large margin.<sup>4</sup>

Criminals elicit little, if any, community empathy, and hence in a democracy it is not surprising that political and public policy reforms that involve sterner punishments are developed and implemented in a largely unabated manner. Theoretical concerns regarding the legitimacy

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1. Eric Holder, Attorney General, Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> [<https://perma.cc/FJ7C-PT26>]. He went on to note that “[w]hile the entire U.S. population has increased by about a third since 1980, the federal prison population has grown at an astonishing rate—by almost 800 percent. . . . [F]ederal prisons are operating at nearly 40 percent above capacity. Even though this country comprises just 5 percent of the world’s population, we incarcerate almost a quarter of the world’s prisoners. More than 219,000 federal inmates are currently behind bars. Almost half of them are serving time for drug-related crimes, and many have substance use disorders. Nine to 10 million more people cycle through America’s local jails each year. And roughly 40 percent of former federal prisoners—and more than 60 percent of former state prisoners—are rearrested or have their supervision revoked within three years after their release.”

2. NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2* (2014) [hereinafter *GROWTH OF INCARCERATION*].

3. *Id.* at 260.

4. *See infra* Part V.

or desirability of harsher sanctions have not curtailed the rise in imprisonment numbers. Pragmatic considerations might be capable of having a greater influence. The massive amount of public spending on prisons is a significant incursion into the public revenue and a deviation from cardinal community enhancing reforms, such as health and education.

Moreover, the empirical evidence regarding the efficacy of state-imposed sanctions to achieve established sentencing goals indicates that most of them are unattainable.<sup>5</sup> Punishment does not meaningfully deter; it rarely reforms and often does not prevent offenders from committing serious crime. In short, the obsession with imprisonment rarely has a beneficial outcome and it comes at a striking cost to the community. This is acknowledged by the 2014 National Research Council Report, which concluded:

[An] increase in incarceration may have caused a decrease in crime, but the magnitude of the reduction is highly uncertain and the results of most studies suggest it was unlikely to have been large. . . . The incremental deterrent effect of increases in lengthy prison sentences is modest at best.<sup>6</sup>

The unthinking and unbridled use of imprisonment has led to a lamentable irony. The strongest theoretical prohibition associated with punishment is punishing the innocent—many jurists regard this as an absolute limitation. Theoretical arguments have been utterly ineffective at reducing prison numbers.<sup>7</sup> This has resulted in a heavy fiscal burden on the community, one that is arguably so weighty (and so lacking in redeeming features) that the community is now unwittingly punishing itself. This Article sets out reasons and mechanisms to cease this macro self-inflicted harm.

We are not advocating for the closure of prisons. The key advantage of jail is that it ensures that an offender does not offend during his or her term of imprisonment. The second main benefit of

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5. See *infra* Part IV.

6. GROWTH OF INCARCERATION, *supra* note 2, 4–5.

7. Scholars have argued for many years that massively increasing prison numbers is without justification, yet as we have seen, the last few decades have seen incarceration levels reach record highs. See, e.g., MICHAEL TONRY, SENTENCING MATTERS 134 (1996); Albert W Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 92–93 (2005); Richard Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571 (2005); Richard Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363 (1997); Cassia Spohn, *Twentieth-Century Sentencing Reform Movement: Looking Backward, Moving Forward*, 13 CRIMINOLOGY & PUB. POL’Y 535, 536 (2014); Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration*, 13 CRIMINOLOGY & PUB. POL’Y 503 (2014); GROWTH OF INCARCERATION, *supra* note 2, at 116–17, 121–22.

imprisonment is that it constitutes a considerable hardship. We do not contend that any single sanction or combination of sanctions can or should completely replace imprisonment as an instrument of criminal punishment. Rather, we propose that certain cohorts of prisoners should be subjected to new forms of sanctions. These cohorts fall into two main groups. The first group would be comprised of offenders guilty of crimes that are not sufficiently serious to warrant incarceration, as we argue that the current sentencing regime is too harsh against certain forms of offenders, namely nonsexual and nonviolent offenders. The second group would be comprised of prisoners who have committed relatively serious offences but do not present a strong risk of reoffending. This group would consist mainly of first-time, mid-range sexual and violent offenders. This entails that prisons be used mainly for recidivist sexual and violent offences, unless one's first offence is particularly serious. For both groups, we advocate alternative sanctions including the greater use of electronic monitoring and active Global Positioning Systems (GPS) (sometimes coupled with Closed Circuit Television) surveillance. Other dangerous violent and sexual criminals should be subjected to incapacitation in conventional prisons. However, we argue that there should be competition for locating these prisons based on price (and subject to nonnegotiable standards of comfort, cleanliness, and range of amenities)<sup>8</sup> in order to achieve incapacitation in a cost-efficient manner.

Thus, we recommend fundamental and wide-ranging reform in the manner in which we punish criminal offenders. The reforms will make the criminal justice system fairer and more efficient and would result in massive public expenditure savings by slashing tens of billions of dollars from the annual cost of running prisons. They will also ensure that community safety is not diminished and, in fact, if some of the savings from the prisons' budget are spent on providing a greater visible police presence, the crime rate will almost certainly drop.

If it transpires that theoretical arguments cannot negate or soften the "tough on crime agenda," the only rational course is to make housing prisoners as least damaging as possible to the community, while ensuring a high baseline level of accommodation for prisoners. This entails that we should consider outsourcing prisoners to other nations who can provide the service far more economically without reducing the conditions in which prisoners are housed.

We will first begin with an overview of the current use of imprisonment as a criminal sanction. Part II then examines the theoretical nature of punishment and provides the backdrop to Part III

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8. *See infra* Part III.

where we propose a number of new sanctions that will reduce the reliance on imprisonment. We will also consider possible objections to our proposal, in that it will undercut the efficacy of the criminal justice system to achieve the objectives of incapacitation, deterrence, and rehabilitation in Part IV. This is followed in Part V by a proposal to situate jails in cheaper states within the U.S. or to outsource much of the imprisonment program to developing countries.

#### I. THE CURRENT PICTURE OF IMPRISONMENT: NUMBERS, DOLLARS, AND HARSHNESS

Imprisonment is the cornerstone of criminal punishment and the harshest sanction in most developed countries, except the United States and Japan, which still impose the death penalty in rare instances. Imprisonment has one clear benefit: it is an effective means of depriving offenders of their liberty<sup>9</sup> and protecting the community from further criminal acts during the period of incarceration.

The U.S. has embraced imprisonment with more enthusiasm than any other nation on Earth. Presently, more than two million Americans are in confinement,<sup>10</sup> which equates to more than seven prisoners per one thousand adults in the population.<sup>11</sup> This rate has more than doubled over the past two decades.<sup>12</sup>

Most developed countries have rates of imprisonment profoundly lower than the U.S. It has recently been noted that:

U.S. incarceration is . . . striking when compared to incarceration in other countries. In fact, the United States incarcerates over 20 percent of the world's prisoners despite having less than 5 percent of the world's population. . . . [The] U.S. incarceration rate is over four times the world average rate (Walmsley 2016).<sup>13</sup>

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9. For an account of the development and use of imprisonment as a criminal sanction, see CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE, AND PRACTICE 193–98 (1989).

10. LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SER. NO. NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012, 3 (2013). The exact number of prisoners is 2,228,400. *Id.*

11. See E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SER. NO. NCJ 243920, PRISONERS IN 2012, TRENDS IN ADMISSIONS AND RELEASES 1991–2012, (2013).

12. Albert Hunt, *A Nation of Inmates*, N.Y. TIMES (Nov. 20, 2011), <http://www.nytimes.com/2011/11/21/us/21iht-letter21.html?pagewanted=all&r=0>.

13. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 23 (2016) [hereinafter ECONOMIC PERSPECTIVES].

The dramatic relative overuse of imprisonment in the U.S. has resulted in increasingly commonplace and loud calls for radical change.<sup>14</sup> Vivien Stern, Secretary General of Penal Reform International, states, “Among mainstream politicians and commentators in Western Europe, it is a truism that the criminal justice system of the United States is an inexplicable deformity.”<sup>15</sup>

The main drawback of imprisonment, from the community perspective, is the cost. Costs have been creeping up gradually over the past few decades, and it is only in recent years that the tipping point has been such that several commentators have expressly noted that every dollar spent on prisons is a dollar lost for spending on activities such as health and education.<sup>16</sup> This calculation is not new. What is new and has compelled attention is the magnitude of the sums involved. In terms of expenditure, it costs taxpayers in the U.S. on average \$31,000 in direct expenditures to house a prisoner for one year.<sup>17</sup> The total spending on prisons is now more than \$80 billion annually.<sup>18</sup> The scale of this, even for the world’s largest economy, is considerable, especially when overall the total expenditure on the U.S. criminal justice system is \$270 billion—equating to \$870 per capita.<sup>19</sup>

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14. It is widely accepted that the United States has a “serious over-punishment” and “mass incarceration” problem. See ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: RE-ENTRY, RACE, AND POLITICS* (2009); Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 96 (Charles J. Ogletree, Jr. & Austin Sarat, eds., 2012); Lynn Adelman, *What the Sentencing Commission Ought to Be Doing: Reducing Mass Incarceration*, 18 *MICH. J. RACE & L.* 295 (2013); David Cole, *Turning the Corner on Mass Incarceration?*, 9 *OHIO ST. J. CRIM. L.* 27 (2011); Bernard E. Harcourt, *Keynote: The Crisis and Criminal Justice*, 28 *GA. ST. U. L. REV.* 965 (2012); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 *OHIO ST. J. CRIM. L.* 133 (2011); Anne Traum, *Mass Incarceration at Sentencing*, 64 *HASTINGS L.J.* 423 (2013).

15. Vivien Stern, *The International Impact of U.S. Policies*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 279, 280 (Meda Chesney-Lind & Marc Mauer, eds., 2002).

16. See, e.g., Rebecca Klein, *States Are Prioritizing Prisons over Education, Budgets Show*, *HUFFINGTON POST* (Oct. 31, 2014, 2:29 AM), [http://www.huffingtonpost.com.au/entry/state-spending-prison-and-education\\_n\\_6072318.html?section=australia](http://www.huffingtonpost.com.au/entry/state-spending-prison-and-education_n_6072318.html?section=australia) [https://perma.cc/Q3HN-TTJD]; Steven Hawkins, *Education vs. Incarceration*, *AM. PROSPECT* (Dec. 6, 2010), <http://prospect.org/article/education-vs-incarceration> [https://perma.cc/CU38-TFR6].

17. According to a study by the Vera Justice Center, the average cost of a prisoner is \$31,000/year. This is higher in some states and cities; for example, in NY State the average cost is \$60,000/year, and in NYC it is \$168,000 per year. See Marc Santora, *City’s Annual Cost Per Inmate is \$168,000, Study Finds*, *N.Y. TIMES* (Aug. 23, 2013), [http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html?\\_r=0](http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html?_r=0).

18. Melissa Kearney & Benjamin Harris, *Ten Economic Facts About Crime and Incarceration in the United States*, *BROOKINGS* 13 (May 1, 2014), <http://www.brookings.edu/research/reports/2014/05/10-crime-facts> [https://perma.cc/JJ5M-PQBP]. This is \$260 per capita. *ECONOMIC PERSPECTIVES*, *supra* note 13, at 5.

19. *ECONOMIC PERSPECTIVES*, *supra* note 13, at 5.

California and ten other states spend more on prisons than higher education.<sup>20</sup> There is now an increasing recognition that something needs to be done.<sup>21</sup> Change is happening, but painstakingly slowly. In the past few years, there has been a small drop in imprisonment numbers. From 2010 to 2012 there was a reduction of approximately three percent in prison numbers. This was followed by a slight rise in 2013<sup>22</sup> and then another slight drop in 2014; however, this was largely offset by an increase in local jail numbers.<sup>23</sup>

In the federal jurisdiction, the Sentencing Reform and Corrections Act of 2015 aims to implement a number of other measures that will reduce prison numbers, including reduced sentences for certain offences, such as drug offences. These changes would apply retroactively in some cases.<sup>24</sup> A number of Republican states, including Oklahoma<sup>25</sup> and

20. Hansook Oh, *California Budgets \$1 Billion More to Prisons than to Higher Education and Leaves Students Hanging*, SUNDIAL (Sept. 19, 2012), <http://sundial.csun.edu/2012/09/california-budgets-1-billion-more-to-prisons-than-higher-education-and-leaves-students-hanging/> [<https://perma.cc/RYK3-S7VX>]; ECONOMIC PERSPECTIVES, *supra* note 13, at 44.

21. For example, in July 2015, President Barack Obama “called for lowering—if not ending—mandatory minimum sentences for nonviolent drug offenses, restoring the voting rights of ex-felons, revisiting hiring practices that require applicants to list criminal activity, and expanding job training programs so inmates are better prepared to reintegrate into society.” Sabrina Siddiqui, ‘An Injustice System’: Obama’s Prison Tour Latest in Late-Term Reform Agenda, GUARDIAN (July 16, 2015, 6:43 PM), <http://www.theguardian.com/us-news/2015/jul/16/barack-obama-prison-tour-criminal-justice-race-reform> [<https://perma.cc/3S3J-R4XB>].

22. Press Release, Bureau of Just. Stat., US Prison Population Declined for Third Consecutive Year During 2012, (July 25, 2013, 10:00 AM), <http://www.bjs.gov/content/pub/press/p12acpr.cfm> [<https://perma.cc/G4GH-XKYC>]. The decline only focused on prisoners completing terms of one year of more in prisoners and fell from a high of 1,615,487 prisoners in 2009 to 1,571,013 in 2012. *See id.*

23. *See* Matthew Friedman, *The U.S. Prison Population is Down (A Little)*, BRENNAN CENTER FOR JUST. (Oct. 29, 2015), <http://www.brennancenter.org/blog/us-prison-population-down-little> [<https://perma.cc/XB75-XP28>]. State and federal prison numbers decreased by 15,400 people from December 31, 2013 to December 31, 2014. *Id.* However, county and city jail numbers increased by 13,384 inmates from midyear 2013 to midyear 2014. *Id.*

24. For a summary of the provisions, see Douglas A. Berman, *Basic Elements of Sentencing Reform and Corrections Act of 2015*, SENT’G L. & POL’Y (Oct. 1, 2015, 10:33 AM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2015/10/basic-elements-of-sentencing-reform-and-corrections-act-of-2015.html](http://sentencing.typepad.com/sentencing_law_and_policy/2015/10/basic-elements-of-sentencing-reform-and-corrections-act-of-2015.html) [<https://perma.cc/94YQ-WGVP>]; *see also* Editorial Board, *Toward Saner, More Effective Prison Sentences*, N.Y. TIMES (Oct. 3, 2015), [http://www.nytimes.com/2015/10/04/opinion/sunday/toward-saner-more-effective-prison-sentences.html?\\_r=0](http://www.nytimes.com/2015/10/04/opinion/sunday/toward-saner-more-effective-prison-sentences.html?_r=0) (lauding the Sentencing Reform and Corrections Act of 2015). The bill was introduced in the U.S. Senate on October 1, 2015, and approved by the U.S. Senate Judiciary Committee on October 22, 2015. Changes were made to it on April 28, 2016. A similar bill has been introduced into the House of Representatives. *See* Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015).

25. Barbara Hoberock, *Criminal Justice Reform Bills Signed into Law by Oklahoma Governor* (Apr. 28, 2016, 12:01 AM), [http://www.tulsaworld.com/news/capitol\\_report/criminal-justice-reform-bills-signed-into-law-by-oklahoma-governor/article\\_842d52ae-4512-5311-899c-665f31f2e90b.html](http://www.tulsaworld.com/news/capitol_report/criminal-justice-reform-bills-signed-into-law-by-oklahoma-governor/article_842d52ae-4512-5311-899c-665f31f2e90b.html) [<https://perma.cc/SQB4-MNU2>].



Texas,<sup>26</sup> have introduced recent changes that reduce the severity of mandatory sentences for nonviolent and nonsexual offences. These changes are desirable, but they are piecemeal. This Article proposes changes that will provide a more impactful and principled solution.

Before suggesting ways in which to accelerate the move away from imprisonment, we will set out some of the less obvious disadvantages of imprisonment.

This Article so far has focused on the cost of the imprisonment and its ineffectiveness at achieving most of the objectives of punishment. There is one other reason to curb the use of imprisonment: in many cases the degree of punishment is too severe. Prison is not meant to be pleasant. However, a closer look at the conditions that inmates endure indicates that it is more traumatic than is intended or desirable. The most direct and obvious negative impact of imprisonment is the deprivation of liberty. In addition to this, there are other “pains” of imprisonment, including deprivation of the following: access to goods and services;<sup>27</sup> sexual relationships;<sup>28</sup> and security.<sup>29</sup>

There are also long-term deprivations stemming from imprisonment that transcend the period inmates spend behind bars. The negative consequences of imprisonment include significantly reducing life expectancy;<sup>30</sup> vulnerabilities associated with financial matters; drug temptations; decision-making and social interactions;<sup>31</sup> difficulty experienced by former inmates in meeting their own basic needs, including hunger, homelessness, and lack of access to health care;<sup>32</sup> negative impacts on family members of prisoners, including higher rates

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26. Ken Cuccinelli, *Texas Shows How To Reduce Both Incarceration and Crime*, NAT'L REV. (May 18, 2016, 4:00 AM), <http://www.nationalreview.com/article/418510/texas-shows-how-reduce-both-incarceration-and-crime-ken-cuccinelli> [<https://perma.cc/HB78-KN5G>].

27. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 67, 68 (2007).

28. *Id.* at 70, 71; see also ROBERT JOHNSON & HANS TOCH, *INTRODUCTION TO THE PAINS OF IMPRISONMENT* (Robert Johnson & Hans Toch, eds., 1982).

29. *Id.* at 76, 77.

30. A study that examined the 15.5-year survival rate of 23,510 ex-prisoners in the U.S. State of Georgia, found much higher mortality rates for ex-prisoners than for the rest of the population. There were 2,650 deaths in total, which was a 43% higher mortality rate than normally expected (799 more ex-prisoners died than expected). The main causes for the increased mortality rates were homicide, transportation accidents, accidental poisoning (including drug overdoses), and suicide. See Anne C. Spaulding, *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOL. 479, 482 (2011); see also GROWTH OF INCARCERATION, *supra* note 2, at 220–26.

31. MICHAEL ROGUSKI & FLEUR CHAUVEL, *THE EFFECTS OF IMPRISONMENT ON INMATES' AND THEIR FAMILIES' HEALTH AND WELLBEING* 61 (2009). A limitation of this research is that it had a small sample size—consisting only of 63 participants. *Id.* at 3.

32. *Id.*

of divorce;<sup>33</sup> homelessness;<sup>34</sup> higher rates of depression, anxiety, and antisocial behaviour among children of inmates;<sup>35</sup> and difficulty in securing employment and lower rate of life time earnings.<sup>36</sup>

It is pertinent to note that the prison experience does not necessarily need to be so harsh. Prisons could be designed and managed in a manner where the main deprivation is the denial of liberty and still achieve the key objectives of punishing offenders and protecting the community. Something close to this approach is endorsed in Scandinavia, where imprisonment rates are considerably less than one person per one thousand adults compared to the seven per one thousand adults in the U.S., i.e., about 15% of the rate in the U.S.<sup>37</sup> Additionally, and more importantly for the purposes of this Article, when offenders are sentenced to imprisonment in Scandinavian countries, they are treated far more humanely than in the U.S. As noted by Matthew DeMichele from the Penn State Justice Center for Research:

Scandinavian prisons operate under the philosophy of normalization in which the punishment is the removal of liberty; that is, incapacitation is the punishment (Pratt, 2008). The incarceration experience should resemble normal life as closely as possible to prepare the individual for release. In the United States, being incarcerated is only one aspect of the punishment; the rough living conditions and treatment of the inmate are another. . . . Numerous differences exist between U.S. and Scandinavian criminal justice systems: Recruitment, training, and health care are provided in the community (not in the prisons); inmates have input in prison policies; there is limited violence; and inmates are given individual cells (Christie, 2000; Pratt, 2008). Essentially, then, many Scandinavian inmates are working toward reentry after their admission to prison, whereas in the United States, inmate reentry is just beginning to gain serious traction.<sup>38</sup>

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33. GROWTH OF INCARCERATION, *supra* note 2, at 2.

34. *Id.* at 267.

35. *Id.* at 270.

36. *Id.* at 247. One study estimated the earnings reduction to be as high as forty percent. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 13 (2010).

37. Peter Wagner & Alison Walsh, *States of Incarceration: The Global Context 2016*, PRISON POL'Y INITIATIVE (June 16, 2016), <http://www.prisonpolicy.org/global/2016.html> [<https://perma.cc/EQ39-DCS3>].

38. Matthew DeMichele, *Electronic Monitoring: It Is a Tool, Not a Silver Bullet*, 13 CRIMINOLOGY & PUB. POL'Y 393, 394–95 (2014).

Moreover, conjugal relations are encouraged, and most prisons provide accommodation where the partners and children of inmates can stay without charge for weekends.<sup>39</sup>

The exemplar of the nonpunitive, integrative approach to imprisonment is Halden Prison in Norway, which houses maximum security prisoners. Each cell has unbarred windows and designer furniture.<sup>40</sup> Guards are not armed and prison conditions are maintained with the assistance of questionnaires completed by inmates regarding their experience in prison and what can be done to improve it.<sup>41</sup> The same approach applies in Finland. The Finnish Sentences Enforcement Act of 2002 states: “punishment is a mere loss of liberty. The enforcement of the sentence must be organised so that the sentence is the *only* loss of liberty. Other restrictions can be used to the extent that the security of custody and the prison order require.”<sup>42</sup> The approach of making the prison experience as close as possible to the outside environment is achieving outstanding results, with recidivism levels of prisoners after they are released as low as 20%.<sup>43</sup> This compares to a recidivism rate in the U.S. of approximately 50%.<sup>44</sup>

In theory, the U.S. could move towards less harsh prison conditions. However, the reality is that any such change would take decades to evolve. The current trend in the U.S. is towards increasingly harsh prison conditions, which are consistent with the punitive approach to criminal sentencing.<sup>45</sup>

The greatest single change to the prison landscape in the U.S. over the past two decades, apart from the massive increase in the size of the industry, has been the emergence and growth of “super-maximum

39. John Pratt & Anna Eriksson, *CONTRASTS IN PUNISHMENT: AN EXPLANATION OF ANGLOPHONE EXCESS AND NORDIC EXCEPTIONALISM* 12 (2012).

40. Sonya Smith, *Halden: A Luxury Norwegian Prison That’s Made to Rehabilitate Inmates*, SOULFULBEAUTY.COM (Oct. 5, 2015), <http://soulfulbeauty.com/halden-a-luxury-norwegian-prison-thats-made-to-rehabilitate-inmates/> [https://perma.cc/EY7B-F7E3].

41. Sunanda Creagh, *Nordic Prisons Less Crowded, Less Punitive, Better Staffed*, CONVERSATION (Mar. 18, 2013, 6:49 PM) <http://theconversation.com/nordic-prisons-less-crowded-less-punitive-better-staffed-12885> [https://perma.cc/YQ9U-YN7R].

42. John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess: Part 1*, 8 BRIT. J. CRIMINOLOGY 119, 120 (2008).

43. *Recidivism Studies, Norway*, COUNCIL OF EUROPE (2010) <http://wp.unil.ch/space/publications/recidivism-studies> [https://perma.cc/H8VK-7NGJ].

44. Kim S. Hunt & Robert Dumville, *Recidivism Among Federal Offenders: A Comprehensive Overview*, U.S. SENTENCING COMMISSION (Mar. 2016), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf) [https://perma.cc/T4QR-TJJZ].

45. For observations regarding this theme, see Bettina Muenster & Jennifer Trone, “*Why Is America So Punitive?*”, CRIME REP. (Mar. 24, 2016, 12:01 PM), <http://www.thecrimereport.org/news/articles/2016-03-why-is-america-so-punitive> [https://perma.cc/VRP2-VXAE].

[security]” or “super-max” prisons.<sup>46</sup> These facilities normally consist of “jails within prisons.”<sup>47</sup> There is no uniformity to such conditions, but in general they involve “incarcerating inmates under highly isolated conditions with severely limited access to programs, exercise, staff or other inmates.”<sup>48</sup>

One of the first super-maximum prisons was the “rock fortress,” Alcatraz, in San Francisco Bay, which was operated by the U.S. Federal Bureau of Prisons from 1934 until its closure in 1963.<sup>49</sup> The number of such facilities has grown rapidly since that time. More than forty U.S. states now have super-maximum prisons.<sup>50</sup> These prisons, or units within prisons, house at least 25,000 prisoners.<sup>51</sup>

Unlike regular prison, there is no consistency regarding the exact daily regimes of super-max prisoners, but it can include being locked in a cell for up to 23 hours per day.<sup>52</sup> When prisoners are out of their cells they move to what is, in effect, no more than another (larger) cell where they normally have contact with no more than one other prisoner.<sup>53</sup> Inmates often do not have access to fresh air, direct sunlight, or educational facilities, and have limited visiting rights and access to communications facilities.<sup>54</sup> In some circumstances, the regime is less restrictive but it always involves being warehoused in a concrete room and the time spent out of a cell is, in effect, spent in a slightly larger concrete cell.

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46. For a discussion of the operations in each of these countries, see *THE GLOBALIZATION OF THE SUPERMAX PRISON* (Jeffrey Ian Ross, ed., 2013).

47. CHASE RIVELAND, U.S. DEP'T OF JUST. NAT'L INST. OF CORRECTIONS, *SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS* 1(1999).

48. *Id.* They have also been defined as “a free-standing facility, or a distinct unit within a facility, that provides for the management and secure control of inmates who have been officially designated as exhibiting violent or seriously disruptive behavior while incarcerated. . . . [T]heir behavior can only be controlled by separation, restricted movement, and limited direct access to staff and other inmates.” Roy D. King, *The Rise and Rise of Supermax: An American Solution in Search of a Problem?*, 1 *PUNISHMENT & SOC'Y* 163, 170 (1999).

49. King, *supra* note 48, at 166.

50. AMNESTY INTERNATIONAL, *ENTOMBED: ISOLATION IN THE FEDERAL PRISON SYSTEM* 2 (July 2014).

51. *Id.*

52. See *R v Benbrika & Ors* [2008] 18 VR 410 (Austl.).

53. Liz Hobday, *High-Security Prison 'Driving Remand Prisoners Mad'*, ABC ONLINE (Sept. 22, 2009, 9:19 PM), <http://www.abc.net.au/news/2009-09-22/high-security-prison-driving-remand-prisoners-mad/1437474> [<https://perma.cc/G4BF-KFUS>].

54. Michael Walton & Pauline Wright, *Inquiry into Issues Relating to the Operations and Management of the NSW Department of Corrective Services*, NEW SOUTH WALES COUNCIL FOR C.L. (Jan. 30, 2006), [https://d3n8a8pro7vhm.cloudfront.net/nswcccl/pages/601/attachments/original/1418076466/2006\\_submission\\_NSW\\_department\\_of\\_corrective\\_services.pdf?1418076466](https://d3n8a8pro7vhm.cloudfront.net/nswcccl/pages/601/attachments/original/1418076466/2006_submission_NSW_department_of_corrective_services.pdf?1418076466) [<https://perma.cc/6VCH-EMAZ>].

Super-maximum prisons are not only considerably more physically onerous than normal prisons, but there is also significant evidence establishing that they cause psychological damage to inmates. A relatively recent report by Amnesty International notes,

There is a significant body of evidence that confining individuals in isolated conditions, even for relatively short periods of time, can cause serious psychological and sometimes physiological harm, with symptoms including anxiety and depression, insomnia, hypertension, extreme paranoia, perceptual distortions and psychosis. This damaging effect can be immediate and increases the longer the measure lasts and the more indeterminate it is. Isolation has been found to have negative effects on individuals with no pre-existing illness and to be particularly harmful in the case of those who already suffer from mental illness.<sup>55</sup>

Thus, while the human rights concerns associated with prison conditions in the U.S. are theoretically surmountable, pragmatically, it is unlikely that prison conditions will improve in the foreseeable future. It is clear that imprisonment has two key disadvantages: cost and punitiveness. The rest of this Article attempts to find solutions in order to ameliorate the extent of these problems.

## II. DOCTRINAL FRAMEWORK FOR DEVELOPING NEW CRIMINAL SANCTIONS

### *A. Punishment: The Infliction of a Hardship*

In order to advance (as opposed to merely change) the current response to criminal behaviour, it is important to develop a doctrinal framework for developing criminal sanctions. Logically, this commences with an understanding of the nature and objectives of criminal sanctions.

At the most basal level, sentencing involves the imposition of punishment. A number of definitions of punishment have been advanced. Professor Andrew von Hirsch, Director of Centre for Penal Theory & Penal Ethics, believes that “[p]unishing someone consists of doing something painful or unpleasant to him, because he has purportedly committed a wrong.”<sup>56</sup> Professor C.L. Ten, from the National University of Singapore, finds that “[p]unishment involves the infliction of some unpleasantness on the offender, or it deprives the offender of something

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55. AMNESTY INTERNATIONAL, *supra* note 50, at 31; *see also* Jesenia Pizarro & Vanja M. K. Stenius, *Supermax Prison: Their Rise, Current Practices and Effect on Inmates*, 84 PRISON J. 248, 256 (2004).

56. ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 35 (1985).

valued.”<sup>57</sup> McTaggart, a former philosopher from Cambridge University, defines punishment as “the infliction of pain on a person because he has done wrong.”<sup>58</sup> Other scholars, in defining punishment, have placed more emphasis on the hurt that punishment seeks to bring about.

Most pointedly, punishment has been described as pain delivery.<sup>59</sup> Nigel Walker, a former Professor of Criminology at Cambridge University, is more expansive in his definition regarding the type of treatment that can constitute punishment. According to him, punishment involves “the infliction of something which is assumed to be unwelcome to the recipient: the inconvenience of a disqualification, the hardship of incarceration, the suffering of a flogging, exclusion from the country or community, or in extreme cases death.”<sup>60</sup>

The common thread that emerges from these definitions is that punishment is a hardship or deprivation, the taking away of something of value for a wrong that has been committed. Thus, punishment necessarily involves the infliction of some inconvenience or hardship on an offender. The concept of hardship comes in degrees. Not all pain or hardship is equivalent and the intensity can vary considerably. This is reflected in the fact that most jurisdictions have a hierarchy of sanctions, which in crude terms (in increasing severity) ranges from a fine to parole, with imprisonment being the harshest disposition.<sup>61</sup>

It is on the basis of this first criterion that imprisonment is an ideal sanction: we can be almost certain that it will inflict pain. “The loss of freedom imposed upon a prisoner deprives him or her of a finite resource, namely time. . . . Death is a certainty for everyone, and it can therefore be argued that all prisoners must inevitably experience an irreplaceable loss of time.”<sup>62</sup>

In order for criminal sanctions to hurt in each instance, they should be designed to target the most widely coveted human interests. Due to the diversity of human nature, there is no guarantee that any type of criminal sanction will bite in every case; even prison does not harm all people.<sup>63</sup> For many people, prison deprives them of much that is

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57. C. L. TEN, *CRIME, GUILT AND PUNISHMENT* 2 (1987).

58. JOHN MCTAGGART, *STUDIES IN HEGELIAN COSMOLOGY* 111 (1901).

59. NILS CHRISTIE, *LIMITS TO PAIN* 19, 48 (1981).

60. NIGEL WALKER, *WHY PUNISH?* 1 (1991).

61. As noted above, the obvious exception to imprisonment as the most severe sanction is the death penalty.

62. Andrew Ashworth & Elaine Player, *Sentencing, Equal Treatment and the Impact of Sanctions*, in *FUNDAMENTALS OF SENTENCING THEORY* 251, 259–60 (Andrew Ashworth & Martin Wasik eds.) (1998).

63. For example, “a career criminal, Eric Cahill, on being released from jail after serving more than 13 years for a series of rapes, embarked on a fragrant offending spree to get back in jail. On one occasion he received a one-month term of imprisonment, and appealed, claiming that it was too

meaningful in life—it cuts them off from their friends and family and prevents them from pursuing projects that give their lives purpose and enjoyment. For a small portion of offenders, however, prison is merely a hiccup in a generally aimless life. Anomalies of this nature do not prevent there being better and worse assessments concerning the pervasiveness and depth of common human interests.

*B. Punishment Should Also Be Efficient and  
Not Violate Important Moral Limits*

Apart from being effective in delivering pain, there are two other important guiding principles that are relevant in formulating criminal sanctions. First, criminal sanctions should be as economical as possible to administer, monitor, and enforce. From the financial perspective, it is important that the response to crime should not be more damaging than the crime itself. It is self-defeating to develop and implement sanctions that are prohibitively expensive. The absence of an accepted precise methodology for ascribing a dollar amount to crime<sup>64</sup> does not provide a basis for excluding the imposition on public finances in assessing the desirability of reforms to the criminal justice system.

The last criterion in developing criminal sanctions is that it is important they do not violate cardinal moral proscriptions. There is, of course, a considerable degree of uncertainty regarding the exact content of moral principles.<sup>65</sup> However, there are some basal norms that have evolved. To this end, important moral prohibitions apply equally to offenders as other members of the community. The manner in which society treats offenders says as much about the standards of the community as it does about the criminals it is punishing: “a society that fails to deal with cruelty will probably also need to develop mechanisms to desensitize itself to suffering. In so doing, it will diminish itself.”<sup>66</sup>

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lenient.” MIRKO BAGARIC, PUNISHMENT & SENTENCING, 217 (2001) (quoting S. Paxinos, *Bizarre Rapist Returns to Jail*, THE AGE (Oct. 16, 1999)).

64. For a discussion of some approaches, see STEVEN RAPHAEL & MICHAEL A. STOLL, DO PRISONS MAKE US SAFER? THE BENEFITS AND COSTS OF THE PRISON BOOM (2009); Chris Doucouliagos, et. al., *Are Estimates of the Value of a Statistical Life Exaggerated?*, 31 J. HEALTH ECON. 197 (2012); ECONOMIC PERSPECTIVES, *supra* note 13.

65. Mirko Bagaric, *A Utilitarian Argument: Laying The Foundation for A Coherent System of Law*, 10 OTAGO L. REV. 180 (2002) (N.Z.).

66. See John I. Kleinig, *The Hardness of Hard Treatment*, in FUNDAMENTALS OF SENTENCING THEORY 283 (Andrew Ashworth and Martin Wasik eds.) (1998). Kleinig argues that even imprisonment compromises the human regard to which offenders are entitled. *Id.* This comment is made in the context of imprisonment, but applies even more so in the context of corporal punishment.

It follows that two potentially effective and efficient forms of punishment are excluded. The first is corporal punishment.<sup>67</sup> The deliberate infliction of pain to the body should no longer be a form of punishment. The abolition of corporal punishment has been instrumental to the supposed “civilisation” of punishment.<sup>68</sup> Inflicting a hardship on members of an offender’s family could also constitute an efficient and potentially effective means of punishment; however, this is intolerable given the proscription against punishing the innocent.<sup>69</sup> These moral proscriptions are both likely to be reflected in the constitutional prohibition against “cruel and unusual” punishment in the Eighth Amendment of the U.S. Constitution, although the matters have not been directly litigated.<sup>70</sup>

In light of the above exclusions, the starting point in developing criminal sanctions is to identify which interests most people highly value. The severity of a sanction can then be determined by evaluating “how much [the] sanction intrudes upon the interests a person typically needs to live a [happy] life.”<sup>71</sup> It is clear that two highly coveted interests are physical integrity and liberty—these interests are recognised in most

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67. For an overview of the nature of corporal punishment, see CHRISTOPHER HARDING & RICHARD W. IRELAND, PUNISHMENT: RHETORIC, RULE, AND PRACTICE 187, 193 (1989).

68. MICHEL FOCALUT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 11 (1977). It has been contended that this civilisation process is slowly being eroded with the employment of such measures as curfews, boot camps, chain gangs, and three strike laws. See John Pratt, *Towards the “Decivilizing” of Punishment?*, 7 SOC. & LEGAL STUD. 487, 499–507 (1988).

69. H. J. MCCLOSKEY, META-ETHICS AND NORMATIVE ETHICS 180–81 (1969). A similar example to McCloskey’s is provided in E. F. CARRITT, ETHICAL AND POLITICAL THINKING 65 (1947).

70. The prohibition against cruel and unusual punishment has been applied sparingly in the sentencing domain. To the extent that it has been applied in this area, it has been mainly in relation to proscribing the death penalty to certain forms of crimes (non-homicide offences) and criminals (juveniles). *Kennedy v. Louisiana*, 554 U.S. 407 (2008). In determining the scope of this limitation the U.S. Supreme Court has taken into account international standards relating to appropriate levels of punishment. See *Graham v. Florida*, 560 U.S. 48 (2010); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988). In relation to noncapital sentences, the Supreme Court has endorsed the concept of proportionality as being a constraint on the level of punishment, but the concept has not been developed with any degree of precision and can only be invoked to prohibit sanctions that contain “gross disproportionality.” It has been observed that gross disproportionality is a threshold requirement to the application of the proportionality principle, and if this is satisfied, the Court will apply two further tests: “The second and third parts call for an intrajudicial review of sentences received within the state for more and less serious crimes, and an interjurisdictional review of sentences received in other states for the same crime.” Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 529 (2008). See also *Ewing v. California*, 538 U.S. 11 (2003); *Lockyer v. Andrade*, 538 U.S. 66 (2003). The other key cases are: *Pepper v. United States*, 562 U.S. 476 (2011); *Solem v. Helm*, 463 U.S. 277 (1983); *Hutto v. Davis*, 454 U.S. 370 (1982); *Rummel v. Estelle*, 445 U.S. 263 (1980). See also John. F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011).

71. ANDREW VON HIRSCH, CENSURE AND SANCTIONS 60 (1993).



moral codes.<sup>72</sup> Other important interests can be identified by reference to activities to which people commonly and frequently devote their time and resources. It follows that other important interests are (not necessarily in this order): (i) relationships with family and friends, (ii) financial wealth, (iii) work, and (iv) education.

As noted above, it is inappropriate to target the family and friends of offenders in imposing criminal sanctions. Prisons already target liberty, while fines target the financial assets of offenders. We will now argue that liberty should be curtailed in ways other than imprisonment and that criminal sanctions should be developed that would limit the work and educational pursuits of offenders.

### III. NEW FORMS OF SANCTIONS

#### *A. Opening the Prison Gates: Introducing the Criminal Justice System to Technology*

As noted above, the main benefit of prison is that it imposes an almost total constraint on the liberty of the offender and hence ensures that the offender cannot again damage the community by reoffending during the term of imprisonment. The confinement and containment process can now be effectively achieved by far less expensive means.

The key to this is the more effective and frequent use of round-the-clock monitored electronic bracelets, which can be supplemented by a global position system (GPS) and close-circuit television (CCTV) surveillance. This is known as electronic monitoring (EM).

Reports indicate that more than 100,000 people are under EM in the U.S.<sup>73</sup> EM, which originated in the U.S. in the early 1980s, is used in a number of countries, including the United Kingdom.<sup>74</sup> However, problems have reduced the enthusiasm for electronic tagging in the

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72. Bagaric, *supra* note 65, at 180.

73. Mike Nellis, *Electronic Monitoring: Exploring the Commercial Dimension*, 58 CRIM. JUST. MATTERS 12 (2008); MATTHEW DEMICHELE & BRIAN K. PAYNE, BUREAU OF JUSTICE ASSISTANCE, OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY: COMMUNITY CORRECTIONS RESOURCE (2nd ed., 2009). For a summary of its introduction and use in the United States, see Lars H. Andersen and Signe H. Andersen, *Effect of Electronic Monitoring on Social Welfare Dependence*, 13 CRIMINOLOGY & PUB. POL'Y 349 (2014); see also Brian K. Payne, *It's a Small World, but I Wouldn't Want to Paint it: Learning from Denmark's Experience with Electronic Monitoring*, 13 CRIMINOLOGY & PUB. POL'Y 381 (2014); DeMichele, *supra* note 38, at 393.

74. Mike Nellis, *Surveillance and Confinement: Explaining and Understanding the Experience of Electronically Monitored Curfews*, 1 EUR. J. PROBATION 41, 41 (2009).

United Kingdom. Some estimates put the number of offenders on some form of electronic tagging in the U.K. at 180,000.<sup>75</sup>

The massive growth in use of EM is owed largely to the fact that it offers significant economic advantages over jail because the device itself costs far less than the cost of building a prison cell, and the ongoing monitoring costs are lower than the operating costs of jail.<sup>76</sup> The potential for cost savings ranges from six to ten times when compared to the alternatives. Therefore, when applied to hundreds of thousands of offenders, the potential savings for the system could be in the billions of dollars.

In the U.K., EM is primarily done via radio devices, and GPS is used only for terrorism related offenders. In relation to GPS, the subject is monitored 24/7 by satellites receiving transmitted information which is then triangulated to provide data on location and movement. When the subject enters a forbidden territory or leaves a geographic limit, the surveillance officers and the offender are alerted via an alarm. If the offender does not take corrective action, the authorities can order intervention in order to bring him into conformity. The key advantage of EM is its flexibility and adaptability to the profile of the individual offender. For instance, the exclusion zones for child sex offenders would include schools, playgrounds, and shopping malls, whereas a domestic violence offender might only be excluded from the premises of his spouse or other victim. Offenders under EM might also be required to check in regularly with authorities.<sup>77</sup>

Some forms of EM are passive in the sense that a computer or other device makes calls to the prisoner at random times to check in but otherwise leaves him alone, whereas others are active and entail 24/7 monitoring of movement via satellite. Regardless of the form employed, the objective of EM is to transfer confinement from a costly limited space owned and managed by the state to one under the limited control of the offender. It is widely used in pre-trial and post-release situations,

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75. Rona Epstein, *Electronic Monitoring of Offenders*, 177(6) CRIM. L. & JUST. WKLY. (Feb. 9, 2013), <http://www.criminalawandjustice.co.uk/features/Electronic-Monitoring-Offenders> [https://perma.cc/EHK5-77FA].

76. A review in 2006 of the electronic monitoring of offenders found that the cost is about one-fifth that of imprisonment and 'robust' in detecting violations of the term of the order. See U.K. National Audit Office, *The Electronic Monitoring of Adult Offenders* (Feb. 1, 2006), <https://www.nao.org.uk/wp-content/uploads/2006/02/0506800.pdf> [https://perma.cc/UD3S-8PN8]; see also Natasha Alladina, *The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical Yet Incomplete Alternative to Incarceration*, 28 ALASKA L. REV. 125, 144 (2011).

77. *Location Monitoring/Home Confinement (Tether Program)*, PRETRIAL SERVS. AGENCY E. DIST. OF MICH., <http://www.miept.uscourts.gov/index.cfm?pagefunction=serLocationMonitor> [https://perma.cc/9VDH-MLL2].

and we advocate for its greater use for nonviolent and nonsexual offenders in lieu of custodial sentences.

Similarly, GPS tracking has received increasing attention in recent years particularly in light of highly publicised sexual offences involving children. One important advancement is the adoption of Jessica's Law in many states in the U.S. The law is named after Jessica Lunsford, a nine-year-old Floridian child who was raped and murdered by a neighbour with a record of crimes against children who lived across from her house. A recent survey showed that thirty-nine states have adopted some version of the law requiring GPS or EM of sex offenders.<sup>78</sup> Thus, it is clear that EM is very much a tool in the modern correctional landscape for certain kinds of offenders.

In relation to offences which are relatively serious but do not necessarily require a prison term (for example, low level violent offences), the offender could be restricted to a relatively small area (for example his or her home and outside yard area), and EM could be coupled with around-the-clock CCTV surveillance.<sup>79</sup> This would not only provide a surer basis for knowing the whereabouts of the offender at every point in time, but would also constitute a harsher form of punishment given the incursion into personal privacy.

Studies indicate that active electronic monitoring supplemented by GPS technology reduces recidivism.<sup>80</sup> For example, a study of recidivism rates of Argentinian offenders comparing those who had been jailed versus those who had been tagged with EM showed that the former's recidivism rate was 22% compared to 13% for the latter.<sup>81</sup> An important study of 516 sex offenders in California showed that parole revocation and recidivism were 38% higher for those on traditional parole when compared with those under GPS monitoring.<sup>82</sup> Notably, the study only

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78. NAT'L CONF. OF STATE LEGISLATURES, SUMMARY OF STATE STATUTES RELATED TO JESSICA'S LAW, [http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs\\_Jessicas\\_Law\\_Summary.pdf](http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf) [https://perma.cc/HFH8-MRQG].

79. In order for this sanction to be imposed, it would be necessary to obtain the informed consent of other people who were to live with the offender.

80. U.S. DEPT. OF JUST., ELECTRONIC MONITORING REDUCES RECIDIVISM, NCJ 234460, 2 (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf> [https://perma.cc/G6QX-75KW]; see also Fredrik Marklund and Stina Holmberg, *Effects of Early Release From Prison Using Electronic Tagging in Sweden*, 5 J. EXPERIMENTAL CRIMINOLOGY 41 (2009).

81. Rafael Di Tella & Ernesto Schargrodsy, *Criminal Recidivism After Prison and Electronic Monitoring*, 121 J. POL. ECON. 54 (2013); see also William Bales, et al., *A Quantitative and Qualitative Assessment of Electronic Monitoring*, FLA. ST. UNIV. COLL. OF CRIMINOLOGY & CRIM. JUST. CTR. FOR CRIMINOLOGY & PUB. POL'Y RES. (Jan. 2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf> [https://perma.cc/32BG-AZHS].

82. Stephen V. Gies, et al., *Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of California's Supervision Program*, REP. FOR NAT'L INST. OF JUST. vii (Mar. 31, 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf> [https://perma.cc/4JHR-FYXE].

covered high-risk sex offenders on parole and found that GPS monitoring was actually more expensive in these circumstances than traditional parole supervision.<sup>83</sup> Another study of high-risk gang offenders monitored by GPS in California conducted over a two year period found that the number of arrests both for general offences and violent offences were lower for those under GPS monitoring.<sup>84</sup> However, these offenders were more likely to be in violation of their parole both in technical and nontechnical terms. Moreover, GPS monitoring costs \$21.20/parolee/day whereas the traditional method (in the form of regular meetings with a parole officer) only costs \$7.20/parolee/day.<sup>85</sup>

Another study to have undertaken cost-benefit analyses of EM programs was conducted by the District of Columbia Crime Policy Institute. Investigators conducted a review of prior research comparing EM to probation and found that EM results in a reduction in the average number of arrests per participant, yielding a societal benefit of \$3,800 per participant.<sup>86</sup> The study estimated a net social benefit of between \$4,600 and \$4,800 per person for EM programs serving 800 people.<sup>87</sup>

Our proposal for increased deployment of EM (especially when accompanied by CCTV monitoring) as a sanction in lieu of jail will encounter objections. First, attaching an EM device and subjecting an offender to constant surveillance entails an infringement of privacy. This type of objection is likely to be advanced in conjunction with familiar critiques about the expansion of the surveillance state. However, the criticism is without substance in this context because offenders have little or no privacy in prison. Surveillance is constant and prison conditions mean that the offender is likely to be sharing space at all times with other inmates or guards who have the ability to observe him. Therefore, electronic surveillance does not represent an invasion of privacy beyond what is already accepted in the alternative of imprisonment. Moreover, privacy is a dynamic concept that is constantly evolving, and the expectations of privacy held by prisoners is conditioned by their experiences of the alternatives, meaning that as these devices become more common, the idea of less privacy becomes less objectionable.<sup>88</sup>

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83. *Id.* at xvii. The report found the daily cost of GPS monitoring to be \$35.96/day/parolee, whereas the alternative was \$27.45, which was a significant difference.

84. STEPHEN V. GIES, ET AL., MONITORING HIGH-RISK GANG OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM FINAL REPORT, REP. FOR NAT'L INST. OF JUST. (Sept. 30 2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/244164.pdf> [<https://perma.cc/7Q95-JBV4>].

85. *Id.* at vii.

86. John K. Roman, et. al., *The Costs and Benefits of Electronic Monitoring for Washington D.C.*, D.C. CRIME POL'Y INST. 3 (2012).

87. *Id.*

88. See also *United States v. Knights*, 534 U.S. 112, 120 (2001).

Besides, the state has a strong legitimate interest in monitoring individuals deemed dangerous to society and a legal challenge is unlikely to be successful.<sup>89</sup>

Second, increased deployment of EM might be attacked as a violation of the ex post facto clause of the Constitution.<sup>90</sup> As Justice Chase wrote in *Calder v. Bull*,

The prohibition against their making *any ex post facto laws* was introduced for *greater* caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws. . . . [In some] cases, they inflicted greater punishment, than the law annexed to the offence. The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender: as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions, the advocates of *such* laws were stimulated by ambition, or personal resentment, and vindictive malice.<sup>91</sup>

Justice Chase sought to define what constituted an ex post facto law and ruled that “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed”<sup>92</sup> fell into that category.

To that end, the Supreme Court laid down a test to determine when a sanction is to be regarded as punitive in *Kennedy v. Mendoza-Martinez*.<sup>93</sup> The apex tribunal ruled that courts have to consider

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]<sup>94</sup>

Under this standard, it is clear that GPS devices are not an affirmative disability or restraint because it merely involves a small tag attached to the body of a person. Also, the attachment of a device has not been historically regarded as a punishment not just because it is a new

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89. *People v. Adams*, 115 Cal. App. 4th 243, 258 (Cal. Ct. App. 2004).

90. U.S. CONST. art. I, § 9.

91. *Calder v. Bull*, 3 U.S. 386, 389 (1798) (emphasis added).

92. *Id.*

93. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

94. *Id.*

technology, but also because its relative inconspicuousness does not subject the offender to stigma.<sup>95</sup> Further, to the extent that the GPS monitoring continues to subject the offender to disability or restraint, as recognized by the Supreme Court in *Smith v. Doe*, a case concerning sex offender registration requirements, “these consequences flow not from the Act’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record.”<sup>96</sup> Additionally, the employment of GPS tracking protects both the community and the individual, and the behavior it is seeking to protect against is a crime. Moreover, aside from deterrence, the alternative justifications—protection of the offender from further harm and public safety—are reasonable based on the evidence of recidivism, which has been recognized as an acceptable regulatory objective.<sup>97</sup> Finally, GPS monitoring is not excessive when weighed against the alternative, namely imprisonment.<sup>98</sup>

The third objection that is likely to be addressed is that the technology is not foolproof and offenders might be able to remove or disable the device. Some studies have shown that the devices malfunctioned or did not transmit signals in inclement weather.<sup>99</sup> Moreover, some geographic locations might impose limitations on the technical abilities of the devices. Nonetheless, technology continues to improve and despite its limitations the competing alternative—imprisonment—also has serious deficiencies.

There are a number of issues that have been raised, some of which have resulted in a decline in the recent use of EM. Lars Andersen and Signe Andersen summarise key problems as follows:

First, the money saved on imprisonment thanks to the use of electronic monitoring was now spent on testing and supervising the electronically monitored people (e.g., alcohol tests). Second, electronic monitoring and other noncustodial alternatives to imprisonment tended to widen the punitive system by putting more people under the purview of the criminal justice system. Third, the more intensive testing and supervision increased detection rates for recidivism and technical violations, which in turn sent even more

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95. Michael T. Charles, *Research Notes: Juveniles on Electronic Monitoring*, 5 J. CONTEMP. CRIM. JUST. ONLINE 167 (1989).

96. *Smith v. Doe*, 538 U.S. 84, 101 (2003).

97. *Id.* at 87.

98. The “pains” of EM have been noted as follows: “monitored offenders reported that they were deprived of goods and services; lost certain rights as a result of the monitoring; lost their autonomy; and were, at least in some ways, deprived of their traditional heterosexual relationships.” Payne, *supra* note 73, at 384–85.

99. Andersen, *supra* note 73.

people into custody. This led some policy makers to view electronic monitoring and other noncustodial alternatives to imprisonment as failed social experiments, and the popularity of these programs faded in the United States.<sup>100</sup>

These potential problems can be easily circumvented in the context of our proposal. There is imperative to spend considerable resources testing prisoners for drug and alcohol use. The criticism that implementing monitoring sanctions more frequently will result in the criminal justice system becoming more punitive is without merit. Critics may claim that EM would result in the placing of more people under the purview of the criminal justice system. However, this can be debunked by ensuring that the sanction is only imposed in circumstances where the offender would otherwise have been sentenced to imprisonment. Further, EM orders should not necessarily result in more testing and thus frequent imprisonment as a result of breaches resulting from testing, which often has no productive basis.

Despite the advantages of EM devices (with or without CCTV), it is not contended that its use and implementation should result in the emptying of prisons. While EM can restrain the activities of all prisoners, some offences are too serious for any sanction other than imprisonment. Any new sanctions must give deference to fundamental aspects of sentencing. And to this end, a foundational requirement is the proportionality principle, which, in its crudest form, is the view that “the punishment should fit the crime.”<sup>101</sup>

The proportionality principle is more fully set out by the High Court in Australia in *Hoare v The Queen*.<sup>102</sup> The Court found that “a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.”<sup>103</sup> Proportionality is a requirement of the sentencing regimes of ten states in the U.S.<sup>104</sup> The precise

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100. *Id.* at 351 (citing Joan Petersilia, *Beyond the Prison Bubble*, 75 FED. PROBATION 1, 1–4 (2011)).

101. Richard S. Frase, *Theories of Proportionality and Desert*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS (2012).

102. 167 CLR 348, 354 (1989) (Austl.).

103. *Id.*

104. This is discussed in Gregory Schneider, *Sentencing Proportionality in the States*, 54 ARIZ. L. REV. 241–42 (2012). The article focused on the operation of the principle in Illinois, Oregon, Washington, and West Virginia. *See also* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS (Oxford University Press 2009) [hereinafter PROPORTIONALITY PRINCIPLES].

considerations that inform the proportionality principle vary in those jurisdictions, but generally there are six relevant criteria:

1. Whether the penalty shocks a reasonable sense of decency;
2. The gravity of the crime;
3. The prior criminal history of the offender;
4. The legislative objective relating to the sanction;
5. A comparison of the sanction imposed on the accused with the penalty that would be imposed in other jurisdictions; and
6. A comparison of the sanction with other penalties for similar and related offences in the same jurisdiction.<sup>105</sup>

In addition to this, a survey of state sentencing law by E. Thomas Sullivan and Richard S. Frase shows that at least nine U.S. states have constitutional provisions relating to the prohibition of excessive penalties or treatment<sup>106</sup> and twenty-two states have constitutional clauses that prohibit cruel and unusual penalties, including eight states with a proportionate-penalty clause.<sup>107</sup>

Broken down to its core features, logically, proportionality has two limbs. The first is the seriousness of the crime and the second is the harshness of the sanction. Further, the principle has a quantitative component—the two limbs must be matched. In order for the principle to be satisfied, the seriousness of the crime must be equal to the harshness of the penalty.

Some commentators have argued that proportionality is so vague as to be meaningless, in light of the fact that there is no stable and clear manner in which the punishment can be matched to the crime. Jesper Ryberg notes that one of the key, most damaging criticisms of proportionality is that it “presupposes something which is not there, namely, some objective measure of appropriateness between crime and punishment.”<sup>108</sup> The most obscure and unsatisfactory aspect of proportionality is that there is no stable and clear manner in which the punishment can be matched to the crime. Ryberg further notes that to give content to the theory, it is necessary to rank crimes, rank punishments, and anchor the scales.<sup>109</sup>

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105. Schneider, *supra* note 104, at 250.

106. PROPORTIONALITY PRINCIPLES, *supra* note 104, at 155–56.

107. *Id.*

108. JESPER RYBERG, THE ETHICS OF PROPORTIONATE PUNISHMENT: A CRITICAL INVESTIGATION 184 (2004).

109. *Id.* at 185. Even retributivists have been unable to invoke the proportionality principle in a manner that provides firm guidance regarding appropriate sentencing ranges. *See, e.g.*, ANDREW VON HIRSCH & A. ASHWORTH, PROPORTIONATE SENTENCING 122 (2005).



There is some merit in Ryberg's critique. And as noted by Ian Leader-Elliott and George Fletcher, the application of the proportionality principle is especially difficult in the case of offences, such as drug offences, where there is no direct, clear, and observable harm caused by the crime:

The ruling principle of proportionality applies to offenders who traffic in drugs no less than it does to offenders who inflict injury or death. In the trafficking offences, however, there is not the same intuitive, retributive ground for determining a punishment to fit the offence. There is no natural measure of proportionality in offences that are supposed to secure the common good. The American theorist George Fletcher makes the point in his discussion of crimes of *lese majeste*:

Just punishment requires a sense of proportion, which in turn requires sensitivity to the injury inflicted. . . . The more the victim suffers, the more pain should be inflicted on the criminal. In the context of betrayal, the gears of this basic principle of justice, the *lex talionis*, fail to engage the problem. The theory of punishment does not mesh with the crime when there is no tangible harm, no friction against the physical welfare of the victim.<sup>110</sup>

While doctrinally it has been argued that there is a manner in which firmer content could be accorded to the proportionality doctrine,<sup>111</sup> an exact matching of offence severity and penalty harshness is not feasible in light of the current understanding of proportionalism.

However, this is not an issue that needs to be settled and resolved for the purposes of this Article. Irrespective of the precise manner in which harmfulness is assessed, it is clear that a cardinal criterion is the extent to which it sets back the interests and welfare of victims. Accordingly, homicide offences are the most serious. This is followed by other crimes against the person. Studies show victims of violent and sexual crime have their well-being more significantly set back than other types of crime. For example, a review of the existing literature regarding the effects of violent and sexual crimes on key quality of life indices<sup>112</sup> demonstrated that many victims suffered considerably across a range of

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110. Ian Leader-Elliott, *Sentencing by Weight: Proposed Changes to the Commonwealth Code Serious Drug Offences*, 36 CRIM. L.J. 265 (2012) (quoting GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 43 (1993)) (footnotes omitted).

111. Mirko Bagaric, *Injecting Content into the Mirage that is Proportionality in Sentencing*, 25 N.Z.U. L. REV. 411 (2013).

112. Rochelle Hanson et al., *The Impact of Crime Victimization on Quality of Life*, 23 J. TRAUMATIC STRESS 189, 189 (2010).

well-being indicia, well after the physical signs had passed.<sup>113</sup> The report concluded:

In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these relationships and differences among types of crime victimization, gender, and racial/ethnic groups.<sup>114</sup>

Findings showed that victims of violent and sexual crimes in particular have diminished parenting skills;<sup>115</sup> difficulty in being involved in intimate relationships and higher divorce rates;<sup>116</sup> higher levels of unemployment;<sup>117</sup> and less engagement and participation in social and leisure activities.<sup>118</sup> A United Kingdom study showed that victims of sexual and violent crimes were 2.6 times more likely to suffer from depression than other individuals,<sup>119</sup> and one in twenty women who had been seriously sexually assaulted attempted suicide.<sup>120</sup>

Another study examined the effects of either violent or property crime on the health of 2,430 respondents.<sup>121</sup> Lead author Chester L. Britt noted, "Victims of violent crime reported lower levels of perceived health and physical well being, controlling for measures of injury and for socio demographic characteristics."<sup>122</sup> Further, these findings were not confined to violent crime. Victims of property crime also reported reduced levels of perceived well-being, but it was less profound than in the case of violent crime.<sup>123</sup>

Given the damage inflicted by serious violent and sexual offences, there is a sound argument that imprisonment is the only proportionate response to these offences. Any softer sanction would fail to reflect the gravity of such offences. Accordingly, we do not propose that the new

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113. *Id.* at 194–95.

114. *Id.* at 194.

115. *Id.* at 190–91.

116. *Id.* at 191–92.

117. *Id.* at 192–93.

118. *Id.* at 193–94.

119. Mike Dixon, et al., *The Unequal Impact of Crime*, INST. OF PUB. POL'Y RES. 25 (Apr. 2006), [http://www.ippr.org/files/images/media/files/publication/2011/05/crimeshare\\_1500.pdf?noredirect=1](http://www.ippr.org/files/images/media/files/publication/2011/05/crimeshare_1500.pdf?noredirect=1) [<https://perma.cc/3GQ8-837D>].

120. *Id.* at 17.

121. Chester L. Britt, *Health Consequences of Criminal Victimization*, 8 INT'L REV. VICTIMOLOGY 63, 63 (2001).

122. *Id.*

123. *Id.* at 69–70; see also Adriaan J.M. Denkers & Frans Willem Winkel, *Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study*, 5 INT'L REV. VICTIMOLOGY 141, 155–56 (1998).

sanctions should be targeted at such offending. This, however, does not undermine the enormous utility of our proposal. Approximately half of the offenders in U.S. state and federal prisons are not detained for sexual or violent offences and hence could potentially be dealt with by way of the alternative sanctions proposed in this Article, constituting a saving of billions of dollars in misspent prison expenditures.<sup>124</sup>

*B. Targeting Other Important Human Interests:  
Employment and Education Sanctions*

The increased use of monitoring devices is an illustration of technology positively shaping the development of the criminal justice system. However, potential improvements in this domain are not totally reliant on scientific advancements. Different theoretical perspectives can have similar outcomes. To this end, it is proposed that a fresh and wide-ranging approach to the nature of criminal punishment and core human interests supports the establishment of a number of new criminal sanctions, namely the “employment sanction” and the “education sanction.”<sup>125</sup>

Many people spend an enormous amount of time, energy, and resources obtaining an education and working. The widespread nature and intensity of the desires to obtain an education and career makes these interests prime targets for inflicting hardships on offenders. We now outline how the proposed sanctions could operate.

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124. In 2014, there were 1,325,305 prisoners in U.S. state prisons. The most serious offence categories for these prisoners were: violent 704,800; property 255,600; drug 208,000; public order 146,300; other 10,600. There are 192,663 prisoners in U.S. federal prisons. Their most serious offences were: violent 14,100; property 11,600; drug 96,500; public order 69,100; and other 21,400. Thus, less than half of the total inmates (47%) in federal and state prisons are imprisoned for sexual and violent offences. *Prisoners in 2014*, NCJ 248955, BUREAU OF JUST. STAT., 7 (Sept. 2015). In addition to this, there were an estimated 744,600 inmates in local jails. *The Nation’s Jails Held Fewer Inmates At Midyear 2014 Compared to Their Peak Count in 2008*, BUREAU OF JUST. STAT. (June 11, 2015, 10:00 AM), <http://www.bjs.gov/content/pub/press/jim14pr.cfm> [<https://perma.cc/3HQS-EFE7>]. This data is not as accurate: “Collects data from a nationally representative sample of local jails on jail inmate populations, jail capacity, and related information. The collection began in 1982 and has been conducted annually, except for years 1983, 1988, 1993, 1999, and 2005, during which a complete census of U.S. local jails was conducted.” DATA COLLECTION: ANNUAL SURVEY OF JAILS, BJS.GOV, (June 11, 2015) <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=261> [<https://perma.cc/V9CJ-GHLV>].

125. These sanctions were first canvassed in the Australian and UK context over a decade ago. See Mirko Bagaric, *New Criminal Sanctions: Inflicting Pain Through the Denial of Employment and Education*, CRIM. L. REV. 184–204 (2001). The environment in the United States is now more conducive to implementation of the sanctions given the high incarceration rates and costs associated with them, as we have noted above. The circumstances in which these sanctions should be imposed have changed in light of emerging empirical evidence regarding the efficacy of state imposed sanctions to achieve the orthodox aims of sentencing.

### 1. The Features of the Employment Sanction

The employment sanction would consist of an order prohibiting an offender from engaging in employment where the offender derives income in excess of that which is necessary to provide for the necessities of life for a defined period. In pragmatic terms, this means that for the duration of the sanction the offender would not be permitted to earn an income in excess of the level of poverty.<sup>126</sup>

This could constitute a considerable unpleasantness to potentially a large number of people. Currently, there are approximately 253 million Americans in the adult civilian (noninstitutional) population.<sup>127</sup> More than 158 million of this population has employment.<sup>128</sup> Approximately 94 million are not in the labor force (for example, because they are caring for children or are retired).<sup>129</sup> There are 7.9 million people, about five percent of the adult population, who are unemployed.<sup>130</sup>

The inability to derive a meaningful income would obviously set back the economic and financial interests of offenders. It would also curtail the freedom that is associated with financial wealth. Thus, offenders would be limited in their spending options and experience a greatly diminished capacity to, for example, travel and socialise.

In addition to this, for many people the deprivation associated with the employment sanction would go beyond that associated with having no or little income. This is because many individuals, at least in part, define themselves by their jobs. “Humans realize themselves through activity, and though that activity need not be work, productive work activity represents one of the major ways in which we break the bonds of solipsistic subjectivity and are able to influence the world beyond us.”<sup>131</sup> The association between work, identity, and flourishing is supported by empirical studies into human well-being, which establish

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126. In the United States, 15% of the population live in poverty. See CARMEN DENAVAS-WALT ET AL., INCOME, POVERTY AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2012, U.S. CENSUS BUREAU 13 (Sept. 2013), <http://www.census.gov/prod/2013pubs/p60-245.pdf> [<https://perma.cc/E95G-YDX4>]. This is defined as an annual income of 50% of the official poverty line; for an individual this amounts to \$11,720 annually, and for a family of four it is \$23,492. *Id.* at 51. In 2012, 20.4 million Americans reported an income “below one-half of their poverty threshold.” *Id.* at 18.

127. Press Release, U.S. Dep’t of Labor, Bureau of Labor Stat., The Unemployment Situation, (April–May 2016).

128. *Id.*

129. *Id.*

130. *Id.*

131. Kleinig, *supra* note 66, at 293.

that the more challenged a person is—whether by a job, hobby, or sport—the happier he or she is likely to be.<sup>132</sup>

In order for the employment sanction to be effective, it is important that it be monitored and enforced relatively efficiently. In order for this to occur, existing government systems that are used to track and identify individuals should be used to record the existence of any work sanction. For example, each American citizen and permanent resident has a unique social security number, which is used not only for social security payments but also for taxation identification and payment purposes.<sup>133</sup> These details must be provided to prospective employers in order for an employer to deduct the appropriate amount of taxation and pay the employee.<sup>134</sup> It would be a relatively simple measure for court orders relating to employment sanctions to be linked to an individual's social security number. In this way a “clean” social security number would serve as a “licence” to work and earn income above the designated income threshold.

## 2. The Features of the Education Sanction

Education is a highly desired commodity. Not only does it empower and enable people to make better and more informed choices and decisions, but it also provides people with the credentials that are a threshold requirement for a range of jobs and professions. The importance and value that people place on obtaining an education is illustrated by the high number of people in the United States with a formal education and the number currently progressing toward that goal. It is also shown through the lengths that people go to in order to secure an education.

Currently, there are more than 20 million Americans attending American colleges and universities.<sup>135</sup> Further, there are approximately 70 million Americans with a bachelor's (or higher) degree.<sup>136</sup> The cost of undertaking a bachelor's degree in the United States can readily exceed \$10,000 in tuition fees alone.<sup>137</sup> Despite such fees, most people have a

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132. See M. Bagaric & J. McConville, *Goodbye Justice, Hello Happiness: Welcoming Positive Psychology to the Law*, 10 DEAKIN L. REV. 1 (2005) (Austl.).

133. 26 U.S.C. § 6109 (2012).

134. *Form W-4, Employee's Withholding Allowance Certificate*, IRS, <https://www.irs.gov/uac/About-Form-W4> [<https://perma.cc/9WCU-YH4X>].

135. *Fast Facts: Back to School Statistics*, NAT'L CENTRE FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=372> [<https://perma.cc/MV4T-XE3J>].

136. *Educational Attainment in the United States: 2014 - Detailed Table*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/socdemo/education/data/cps/2014/tables.html> [<https://perma.cc/E98J-XEEF>].

137. *Fast Facts: Tuition Costs of Colleges and Universities*, NAT'L CENTER FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=76> [<https://perma.cc/9YCR-K9KY>]; see also Laura

strong desire to attain a formal education, with demand greatly outstripping the availability of places in many programs. Thus, there is no question that limiting the utility of people's educational achievements would considerably set back their interests.

The education sanction would come in two, broad forms. The milder form of the sanction would prohibit people from enrolling in or continuing with any course in which they are enrolled for the duration of the court order.<sup>138</sup> The harsher version of the sanction would be applicable to people with a formal college, university, trade, or other degree or certificate. It would operate in two ways. Most commonly, it would suspend the work privileges that are associated with the qualification or credential for a designated period. This would mean that for the period of disqualification, the offender could not work in any field where a formal qualification of the relevant type was necessary. In its most punitive form, the sanction would operate to permanently void the qualification, thereby forever depriving the offender of the pragmatic functionality of his or her education.

As with the employment sanction, it is important to ensure that any compliance and monitoring costs associated with the education sanction are minimal. There are a number of ways in which educational deprivations could be recorded and promulgated. One measure would be to simply record them as part of the information contained with an individual's social security number and IRS details. Alternatively, an "Education Termination and Suspension" (or similar) register could be established, which would keep records of all people disqualified from study and of any suspensions or disqualification of credentials. The information should be publicly available so that it could be accessed by educational institutes and prospective employers.

Some aspects of the education (and employment) sanction are already effectively imposed in some jurisdictions. Many professional bodies have a process whereby members who are convicted of criminal offences risk losing their licence to practice—for example, the medical and legal professions. The advantage of the education sanction, however, is that it makes this process more wide-ranging and integrated.

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Bridgestock, *How Much Does it Cost to Study in the US?*, TOPUNIVERSITIES (Jan. 30, 2015, 12:00 AM), <http://www.topuniversities.com/student-info/student-finance/how-much-does-it-cost-study-us> [<https://perma.cc/GQC6-RS5F>].

138. For reasons discussed below, this sanction should only be imposed where EM and the employment sanction are not appropriate.

*C. The Circumstances in Which the Sanctions Are Appropriate*

The circumstances in which the new sanctions should be imposed can be summarised as follows: The new sanctions should be available as a sentencing option in all cases where a term of imprisonment would otherwise be imposed, except where one of the following two preconditions applies:

- (a) The offence is such that only a jail term is commensurate with the gravity of the crime; or
- (b) The personal circumstances of the offender are such that neither an employment deprivation nor an education suspension or cancellation will inconvenience him or her.

We will now expand further on each of these considerations.

The first consideration involves gauging the severity of the respective sanctions. This principally turns on the extent to which the interests of the offender would be frustrated or set back as a result of being subjected to the sanctions.<sup>139</sup> There is no clear answer to this given the diversity of human preferences and activities. However, in light of the considerable time, energy, and resources that people spend pursuing educational and vocational pursuits, it is clear that these interests are generally highly coveted. It follows then that the deprivation of or interference with these interests would constitute significant unpleasantness to most people.

In crude terms, the hardship resulting from having one's degree cancelled would be similar to a term of imprisonment of about the same length that it took to acquire the degree. Thus, cancellation of a three-year law degree would have a similar negative impact on a person as a three-year jail term. As we have seen, the pains of imprisonment often extend beyond the time an offender spends behind bars, but so too would the deprivation associated with an annulment of a formal educational qualification. Such a sanction would not only largely negate the utility of past endeavours but also deny the offender the future benefit of the qualification, which in many cases may relate to a period of several decades.

Suspending one's educational qualification does not totally deny an offender the utility of the qualification, given that the qualification shall return after the disqualification period has lapsed, and hence it is not tenable to rate this as equivalent to the hardship stemming from the cancellation of an educational sanction. Accordingly, it is proposed that suspending one's educational qualifications is half as burdensome as

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139. Bagaric, *supra* note 111.

annulling the qualification. Relatively speaking, disqualifying an offender from participating in a formal course of education is less burdensome than either cancelling or suspending an educational qualification. Being enrolled in an educational program provides the student with an opportunity to attain the relevant credential. Denial of this opportunity should be regarded as being approximately half the deprivation stemming from suspension of a qualification.

The employment sanction is not as harsh as the education sanction because the employment sanction only impacts the future aspirations of an offender. Despite this, it would still constitute considerable unpleasantness for most people based on the fact that it deprives them of the capacity to earn a meaningful amount of income and the ability to fully explore and develop their workplace potential. Given that most individuals who have the opportunity to work spend about half of their productive time (not including weekends) doing so,<sup>140</sup> the employment sanction is approximately half as severe as imprisonment.

We now expand on precondition (a). As noted above, the principle of proportionality is the main determinant regarding the severity of criminal punishment, and it is necessary to match this with the harm caused by the offence. As we saw, empirical evidence establishes that sexual and violent crimes inflict the most harm to victims. The damage caused by serious offences of this nature is often so profound and enduring that imprisonment is the only appropriate response. However, as is the case with EM (with or without CCTV), there is no basis for asserting that other offences cannot be dealt with by alternative sanctions, including the proposed employment and education sanctions.

At first glance, it may appear that the proportion of offenders who are suitable candidates for the education sanction is limited, given that many people appearing before the criminal courts have no formal educational. The National Research Council recognised that “[one-third of] white male high school dropouts born in the late 1970s . . . are estimated to have served time in prison by their mid-30s. . . . [A]mong black male high school dropouts, about two-thirds have a prison record by that same age.”<sup>141</sup> Notably, the correlation between low educational attainment and incarceration is very high for racial minorities: “African American men born since the late 1960s are more likely to have served time in prison than to have completed college with a 4-year degree.”<sup>142</sup>

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140. Benjamin Snyder & Stacy Jones, *Americans Work Hard, But People in These 15 Countries Work Longer Hours*, FORTUNE (Nov 11, 2015, 11:10 AM), <http://fortune.com/2015/11/11/chart-work-week-oecd/> [https://perma.cc/DYG6-CAZG].

141. GROWTH OF INCARCERATION, *supra* note 2, at 5.

142. *Id.* at 13 (citing Pettit and Western, 2004; Pettit, 2012).



However, at least ten percent of prisoners have postsecondary education.<sup>143</sup>

Further, people are disadvantaged not only by the denial of a concrete commodity, but also by the denial of the opportunity to pursue and explore their preferences and projects. It is largely for this reason that formal barriers to access, by certain groups, of social goods and services is unacceptable. Although there are often disparities along racial, ethnic, and gender lines in terms of enrollment in educational courses (and employment in elite professions), communities are often willing to tolerate these disparities provided that there are no formal barriers to minority and disadvantaged groups participating in such practices.

Opportunity or potential—though neither may ever be realised—are desirable virtues. This observation is especially appropriate in relation to the employment sanction. Few people have no desire to engage in employment that will provide them with a meaningful level of income. Therefore, even offenders who are not employed at the time of sentencing are likely to be harmed by the imposition of a formal obstacle to securing meaningful employment. Thus, the employment sanction is suitable even for the unemployed. However, offenders who are employed at the time of sentencing suffer a greater hardship than those who are unemployed. The additional hardship stemming from loss of an existing job could be accommodated by a deduction, of twenty percent for example, from the length of the employment sanction.

The education sanction is obviously relevant to all offenders with a formal qualification and to those enrolled in an educational program. Moreover, it would also be potentially suitable to offenders who are relatively young and presumably aspirational and ambitious. By contrast, the sanction is not likely to cause any pain to an offender who has not enrolled in a course of education for, say, more than twenty years and has displayed no genuine interest in ever doing so. Offenders with such a profile would not be suitable for the education sanction, and the more appropriate alternative sanction would either be the employment sanction or EM monitoring.<sup>144</sup>

In summary, the main interests that are targeted by criminal sanctions are liberty and financial wealth. These do not fully encompass

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143. Stephanie Ewert & Tara Wildhagen, *Educational Characteristics of Prisoners: Data from the ACS 3* (U.S. Census Bureau, Housing and Household Economic Statistics Division, Working Paper No. 2011-8, 2011), <http://www.census.gov/hhes/socdemo/education/data/acs/>.

144. As discussed below, these sanctions in most circumstances should be preferred over a disqualification relating to future study even in relation to offenders who are enrolled in an educational course.

the important areas of human concern or endeavour. People, through their conduct, demonstrate that they have a strong desire to attain educational qualifications and to work. These interests should also be targeted by criminal sanctions. Key advantages with a reform of this nature are that (i) monitoring and enforcement costs are relatively low and (ii) the sanctions could provide an alternative to imprisonment in relation to all offence types, except serious sexual and violent offences.

We now address possible objections to these proposed reforms.

#### IV. PROPOSED REFORMS WILL NOT LEAD TO MORE CRIME

The proposed new sanctions could be criticized on the basis that they may lead to more crime by undermining the goal of incapacitation, diluting the deterrent effect of criminal sanctions and diminishing the rehabilitative prospects of offenders. However, a close assessment of the goals of sentencing, the efficacy of the criminal justice system to achieve the orthodox objectives of sentencing, and a strategic approach to the applicability of the new sanctions (which is adapted in light of the appropriate and attainable objectives of sentencing) can surmount any possible unintended adverse consequences associated with implementing the proposed new sanctions. The discussion below focuses centrally on the employment and education sanction (given its novelty), but is also applicable to EM (with or without CCTV).

General deterrence and incapacitation have been widely used to justify the move toward harsher criminal sanctions. The main reason for increased incarceration levels has been the imposition of longer sentences.<sup>145</sup> Specific deterrence has been invoked to a lesser degree to justify the same objective. In exploring the impact of new sanctions on these objectives, the logical starting point is the efficacy of punishment to achieve these goals. If it transpires that criminal sanctions, and in particular imprisonment, cannot attain these goals, then it is untenable to argue against the new sanctions on the basis of frustration of existing sentencing aims.

We now examine whether these objectives are achievable. There is a vast body of literature regarding these sentencing objectives, and these topics have been the subject of extensive recent analysis.<sup>146</sup> The

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145. See ECONOMIC PERSPECTIVES, *supra* note 13, at 3 (noting that “[c]hanges in the severity of sentencing and enforcement, which have led to longer sentences and higher conviction rates for nearly all offenses, have been the primary drivers of the incarceration boom”).

146. See Mirko Bagaric & Theo Alexander, *The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications For Sentencing*, 36 CRIM. L.J. 159 (2012) [hereinafter *The Capacity of Criminal Sanctions*]; Mirko Bagaric & Theo Alexander, *The Fallacy That Is Incapacitation: An Argument for Limiting Imprisonment Only to Sex and Violent Offenders*, 2 J. COMMONWEALTH CRIM. L. 95 (2012)

discussion below summarizes the main studies in relation to each relevant sentencing objective and the current state of knowledge. This is made easier by the fact that there is a relatively clear consensus in regards to each of the areas. We start with the objectives in relation to which the evidence is most clear-cut.

### A. The Deterrence Objective Will Not Be Undermined

#### 1. Specific Deterrence Does Not Work

Specific deterrence aims to reduce crime by punishing individual offenders for their crimes and thereby convincing them that crime does not pay. It attempts to deter offenders from reoffending by inflicting a hardship on them, which presumably they will seek to avoid in the future.<sup>147</sup> However, the empirical data focusing on this theory suggests that it is flawed. It is a case of common sense being rebutted by research findings.

There have been numerous studies across a wide range of jurisdictions and different time periods that reject the theory of specific deterrence.<sup>148</sup> Two theorists<sup>149</sup> observed the reoffending of 1,003 offenders who were initially sentenced for drug-related offences between June 2002 and May 2003 by a number of different judges whose sentencing approaches varied significantly (some were described as “punitive,” others as “lenient”), resulting in differing terms of imprisonment and probation.<sup>150</sup> The study concluded that neither the length of imprisonment nor the probation had an effect on the rate of reoffending during the four-year, follow-up period.<sup>151</sup>

A different but extensive wide-ranging analysis of the relevant literature on specific deterrence was undertaken in 2009.<sup>152</sup> The team

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[hereinafter *The Fallacy that is Incapacitation*]; Mirko Bagaric & Theo Alexander, (*Marginal General Deterrence Doesn't Work—And What it Means for Sentencing*, 35 CRIM. L.J. 269 (2011)). Most recently, one of us summarised the literature in Mirko Bagaric, *The Punishment Should Fit the Crime—Not the Prior Convictions of the Person that Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343 (2014) [hereinafter *The Punishment Should Fit the Crime*].

147. *The Capacity of Criminal Sanctions*, *supra* note 146, at 159.

148. See *The Capacity of Criminal Sanctions*, *supra* note 146 for a review of the studies.

149. See Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism Among Drug Offenders*, 48 CRIMINOLOGY 357, 357–58 (2010).

150. *Id.*

151. *Id.*

152. See Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment & Reoffending*, 38 CRIME & JUST. 115, 145 (2009); see also Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, SENT'G ADVISORY COUNCIL (Apr. 18, 2011), <https://www.sentencingcouncil.vic.gov.au/publications/does-imprisonment-deter>

reviewed the impact of custodial sanctions versus noncustodial sanctions and the effect of sentence length on reoffending. The review examined six experimental studies where custodial versus noncustodial sentences were randomly assigned,<sup>153</sup> eleven studies that involved matched pairs,<sup>154</sup> thirty-one studies that were regression based,<sup>155</sup> and seven other studies that did not neatly fit into any of those three categories and included naturally occurring social experiments that allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.

These theorists concluded that offenders who are sentenced to imprisonment do not have a lower rate of recidivism than those who receive a noncustodial penalty.<sup>156</sup> In fact, some studies show the rate of recidivism among offenders sentenced to imprisonment to be higher.<sup>157</sup> This review concluded that:

Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic [that is, the possible corrupting effects of punishment] rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant.<sup>158</sup>

This is consistent with more recent analysis, which suggests an even stronger link between imprisonment and an increased risk of reoffending. A report published in 2016 that surveyed the data regarding the connection between incarcerations and recidivism notes:

[A] growing body of work has found that incarceration increases recidivism. This research compares outcomes of defendants with similar characteristics and offenses and uses the random assignment of defendants to judges to predict a defendant's assigned sentence, based only on the judge's historical sentencing behavior. For instance, one recent study that uses highly detailed data from Texas uses this design and finds that although initial incarceration prevents crime through incapacitation, each additional sentence year causes an increase in future offending that eventually outweighs the

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[<https://perma.cc/446X-PSZU>]; Don Weatherburn et al., *The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending*, AUSTRALIAN INST. OF CRIMINOLOGY (2009), <http://www.aic.gov.au/publications/current%20series/tbp/21-40/tbp033.html> [<https://perma.cc/Z5F8-PTN4>].

153. Nagin, Cullen & Jonson, *supra* note 152, at 144–45.

154. *Id.* at 145–54.

155. *Id.* at 154–55.

156. *Id.*

157. *Id.*

158. *Id.* at 145.

incapacitation benefit. Each additional sentence year leads to a 4 to 7 percentage point increase in recidivism after release.<sup>159</sup>

Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment is unlikely to increase the prospect that they will become law-abiding citizens in the future. It follows that the goal of specific deterrence cannot be achieved by the imposition of criminal sanctions and should not influence sentencing practice, particularly the nature, structure, and content of proposed criminal sanctions.

## 2. General Deterrence (Also) Does Not Work

The other form of deterrence is general deterrence. This is the theory that harsh penalties will reduce crime because many potential offenders will not engage in conduct that can result in them being subject to criminal sanctions. There are in fact two forms of general deterrence: marginal and absolute. Marginal general deterrence is the view that there is a connection between offence severity and the crime rate. Absolute general deterrence is the more modest claim that the mere existence of criminal sanctions, irrespective of their severity, will reduce crime.<sup>160</sup> The empirical data on general deterrence suggests that absolute general deterrence is a valid theory. However, marginal general deterrence seems to be flawed.

This seems to be the case in relation to all penalty types. There has been a considerable degree of debate regarding the efficacy of capital punishment to deter crime.<sup>161</sup> However, the weight of evidence and informed sentiment<sup>162</sup> suggests that there is no firm basis for believing that capital punishment reduces crime. The most wide-ranging recent analysis of the impact of the death penalty on crime is by the National Research Council of the National Academies, which was released in 2012. The report concluded:

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159. ECONOMIC PERSPECTIVES, *supra* note 13, at 39.

160. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 14 (1973).

161. Dale O. Cloninger & Roberto Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 *APPLIED ECON.* 569 (2001) suggested that capital punishment can deter crime, but contrary conclusions are reached in a number of other studies. See, e.g., John K. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 *CRIMINOLOGY* 107, 129 (1994); Richard Berk, *New Claims about Executions and General Deterrence: Déjà Vu All Over Again?*, 2 *J. EMPIRICAL LEGAL STUD.* 303, 328 (2005). For an overview of the numerous studies, see Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 *OHIO ST. J. CRIM. L.* 255 (2006).

162. Michael Booth, *No Credible Evidence on Whether Death Penalty Deters, Experts Say*, *DENVER POST* (June 2, 2013, 2:11 PM), <http://www.denverpost.com/2013/06/02/no-credible-evidence-on-whether-death-penalty-deters-experts-say/> [<https://perma.cc/9J9C-SDJJ>].

[R]esearch to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide. Consequently, claims that research demonstrates that capital punishment decreases or increases the homicide rate by a specified amount or has no effect on the homicide rate should not influence policy judgments about capital punishment.<sup>163</sup>

The National Research Council, in a more recent report published in 2014, analysed a large number of studies that examined the connection between harsh criminal sanctions (other than capital punishment—and especially longer prison terms stemming from mandatory minimum penalties) and the crime rate and noted that the weight of evidence does not support the view that harsh penalties reduce crime. The report states:

Ludwig and Raphael (2003) find no deterrent effect of enhanced sentences for gun crimes; Lee and McCrary (2009) and Hjalmarsson (2009) find no evidence that the more severe penalties that attend moving from the juvenile to the adult justice system deter offending; and Helland and Tabarrok (2007) find only a small deterrent effect of the third strike of California's three strikes law. As a consequence, the deterrent return to increasing already long sentences is modest at best.<sup>164</sup>

The extract above, while doubting the link between harsher penalties and less crime, suggests that there is a connection between lower crime and the perception in people's minds that if they commit an offence, they will be apprehended and subjected to some form of a criminal sanction. This is consistent with the theory of absolute general deterrence and the orthodox understanding about the considerations that reduce crime.

Perhaps the strongest evidence substantiating absolute general deterrence comes from crime-rate and policing patterns in the United States over the past thirty years. The past three decades have seen a significant reduction in crime<sup>165</sup> and a big increase in police numbers.<sup>166</sup> This connection is not necessarily causative because of the many other

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163. NATIONAL RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 102 (Daniel S. Nagin & John V. Pepper eds., 2012).

164. GROWTH OF INCARCERATION, *supra* note 2, at 139–40.

165. *Id.*

166. See Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPECTIVES 163, 177 (2004) (estimating the increase to be about fourteen percent).

changes that occurred during this period, which may also have impacted the crime rate, such as better police methods, increased penalties, or greater incarceration numbers. However, the evidence suggests that the increased perceived likelihood of detection has contributed substantially to the reduction in crime.<sup>167</sup>

After evaluating the large number of surveys analysing the connection between more police and the crime rate, Professor Raymond Paternoster at the University of Maryland concludes:

What we are left with, then, is that clearly police presence deters crime, but it is probably very difficult to say with any degree of precision how much it deters. Let us take Levitt's estimate as a reasonable guess, that increasing the size of the police force by 10% will reduce crime by about 4% or 5%.<sup>168</sup>

Accordingly, marginal general deterrence seems to be a flawed theory, while absolute general deterrence is a sound theory. The keys to reducing crime are (i) ensuring that criminal sanctions (which people would want to avoid) exist and (ii) putting in place processes whereby potential offenders perceive they will be apprehended if they commit a crime. The proposed new sanctions are adequate in this regard, given that people would seek to avoid them and that they can be implemented relatively easily.

### 3. Incapacitation

Incapacitation is often used interchangeably with the objective of community protection. Incapacitation protects the community by imprisoning offenders, thus ensuring that during their period of incarceration they cannot commit other offences in the community. It is important to understand that the effectiveness of incapacitation cannot be evaluated solely by reference to the inability of offenders to commit crime while in prison. Incapacitation is only effective as a form of community protection if offenders would have engaged in criminal conduct had they not been imprisoned.<sup>169</sup>

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167. For further discussion, see John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence*, in *THE CRIME DROP IN AMERICA* 207, 248 (Alfred Blumstein & Joel Wallman eds., 2000); *ECONOMIC PERSPECTIVES*, *supra* note 13, at 38.

168. Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 *J. CRIM. L. & CRIMINOLOGY* 765, 799 (2010).

169. See Kevin Bennardo, *Incarceration's Incapacitative Shortcomings*, 54 *SANTA CLARA L. REV.* 1 (2014) (noting that some incapacitative models assume that prison is not part of society); see also Colin Murray, *'To Punish, Deter and Incapacitate': Incarceration and Radicalisation in UK Prisons after 9/11*, in *PRISONS, TERRORISM AND EXTREMISM* (Andrew Silke ed., 2013) (noting that for incapacitation to work, it is important that inmates do not corrupt other prisoners).

There are two types of incapacitation: selective and general. Selective incapacitation targets individual offenders. It contends that offenders who will reoffend should be imprisoned. Its effectiveness is contingent upon the accuracy of predicting which offenders will reoffend. Much of the research in this area has been focused on offenders who have committed serious offences.<sup>170</sup>

A wide-ranging analysis in the 1990s of the data regarding the capacity of any discipline to predict future criminal behaviour noted that predictive techniques “tend to invite overestimation of the amount of incapacitation to be expected from marginal increments in imprisonment.”<sup>171</sup> More recent actuarial tools have been developed to score a person’s level of risk by mapping his or her profile to variables that are known risk factors. Structured professional judgment and criminogenic risk assessment also use a range of variables,<sup>172</sup> which are designed to be more nuanced than actuarial tools because they aim to not only predict the likelihood of violence, but also the imminence, severity, and possible targets of the risk.<sup>173</sup> These more recent attempts to accurately predict dangerousness in the context of violent and sexual offences have also proven to be deficient.<sup>174</sup>

The other form of incapacitation is general incapacitation.<sup>175</sup> This is a much cruder theory and approach. It involves imprisoning offenders simply because they have committed a criminal offence on the basis that while in prison they cannot inflict harm in the general community. Little or no effort is normally made to predict future offending patterns,

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170. See *The Fallacy That Is Incapacitation*, *supra* note 146, at 104–05 (discussing research predicting which serious offenders will reoffend).

171. FRANK E. ZIMRING & GORDON J. HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 86 (1995).

172. The LSI-R assessment model, which is used in New South Wales, has 54 variables. See NEW SOUTH WALES SENTENCING COUNCIL, *HIGH-RISK VIOLENT OFFENDERS: SENTENCING AND POST-CUSTODY MANAGEMENT OPTIONS* 23 (2012), [http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing\\_Serious\\_Violent\\_Offenders/online%20final%20report%20hrvo.pdf](http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf) [<https://perma.cc/V9ES-2NAW>].

173. For a discussion of these tools, see *id.* at 20–24.

174. See BERNADETTE MCSHERRY & PATRICK KEYZER, *SEX OFFENDERS AND PREVENTIVE DETENTION: POLITICS, POLICY AND PRACTICE* (2009); Jessica Black, *Is the Preventive Detention of Dangerous Offenders Justifiable?*, 6 J. APPLIED SEC. RES. 317, 322–23 (2011). See generally DANGEROUS PEOPLE: POLICY, PREDICTION, AND PRACTICE (Bernadette McSherry & Patrick Keyzer eds., 2011). Most recently it has been suggested that habitual criminals and serious offenders have a different brain anatomy compared to other people. Neuroimaging of the brain showed that such offenders have less brain activity in certain areas of the brain, including the ventromedial prefrontal cortex and the dorsolateral prefrontal cortex, which are associated with self-awareness, learning from past experiences, and emotions. See ADRIAN RAINE, *ANATOMY OF VIOLENCE: THE BIOLOGICAL ROOTS OF CRIME* (2013).

175. For a discussion regarding the distinction between special and collective incapacitation, see ZIMRING & HAWKINS, *supra* note 171, at 60–75.



whether on the basis of previous criminal history or other considerations.<sup>176</sup> There is no clear line between selective and general incapacitation, and the difference is often simply one of degree. While selective incapacitation focuses on individual offenders and general incapacitation is population-based, once large numbers of offenders are imprisoned on the basis of predictive criteria (such as prior criminality), which is demonstrably flawed, then a process that may have initially had the appearance of selective incapacitation turns into a system of general incapacitation. All jurisdictions punish recidivists more severely than first-time offenders.<sup>177</sup> Often the extent of the premium is so significant that this has effectively evolved into a process of general incapacitation.<sup>178</sup>

Theoretically, general incapacitation should work because the more people there are in prison, the fewer people there are who could commit crime in the general community. Accordingly, it should follow that this will reduce the crime rate. And indeed, the weight of evidence supports the view that general incapacitation works.

In the United States between 1993 and 2010, the rate of violent victimization rates decreased by 76% and the decline in total household property crime victimization was 64%.<sup>179</sup> During this period, the imprisonment rate rose from 1.37 million to 2.27 million prisoners.<sup>180</sup> At face value, these figures suggest a causal link between imprisoning greater numbers of offenders and an effective reduction in the crime rate.

Professor William Spelman has calculated that up to 21% of crime reduction is attributable to the increased rate of imprisonment.<sup>181</sup> Other studies support the success of incapacitation but remain equally unclear

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176. An exception is the Dutch law aimed at recidivists with ten prior convictions and which only had minor enhancements for recidivists. For a discussion of this, see Ben Vollaard, *Preventing Crime Through Selective Incapacitation*, 123 *ECON. J.* 262 (2013).

177. See *The Punishment Should Fit the Crime*, *supra* note 146, at 343.

178. *Id.*

179. See JANET L. LAURITSEN & MARIBETH L. REZEY, MEASURING THE PREVALENCE OF CRIME WITH THE NATIONAL CRIME VICTIMIZATION SURVEY 1 (2013), <http://www.bjs.gov/content/pub/pdf/mpncvsv.pdf> [<https://perma.cc/48ML-DUCE>].

180. *Correctional Populations in the United States*, 1993, BUREAU OF JUSTICE STATISTICS, iii (1995) <http://www.bjs.gov/content/pub/pdf/cpop93bk.pdf> [<https://perma.cc/4RW5-AKE6>] (the 1.37 million figure includes inmates in local jails (456,000) and state and federal prisons (909,000)); *Correctional Populations in the United States*, 2010, BUREAU OF JUSTICE STATISTICS 3 (2011), <http://www.bjs.gov/content/pub/pdf/cpus10.pdf> [<https://perma.cc/76VC-PJW5>] (The 2.27 million figure also includes inmates in local jails (749,000) and state and federal prisons (1,518,000)).

181. See William Spelman, *What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime*, 27 *CRIME & JUST.* 419, 486 (2000); see also William Spelman, *The Limited Importance of Prison Expansion*, in *THE CRIME DROP IN AMERICA* 98 (Alfred Blumstein & Joel Wallman eds., 2000).

about its precise impact.<sup>182</sup> A recent report from the Executive Office of the President of the United States, titled *Economic Perspectives on Incarceration and the Criminal Justice System*,<sup>183</sup> notes:

Criminal sanctions have the capacity to reduce crime through deterrence and incapacitation; however, marginal increases in incarceration may have small and declining benefits. Despite a large expansion in the prison population over the last several decades, a large body of research has generally found that the aggregate impact of incarceration on crime is modest and that it declines as the prison population grows. Researchers who study crime and incarceration believe that the true impact of incarceration on crime reduction is small, with a 10 percent increase in incarceration decreasing crime by just 2 percent or less.<sup>184</sup>

A similar conclusion was reached by the National Research Council in its 2014 survey of the data regarding the impact of incapacitation policy in the United States in recent decades. The panel concluded:

Many studies have attempted to estimate the combined incapacitation and deterrence effects of incarceration on crime using panel data at the state level from the 1970s to the 1990s and 2000s. Most studies estimate the crime-reducing effect of incarceration to be small and some report that the size of the effect diminishes with the scale of incarceration. Where adjustments are made for the direct dependence of incarceration rates on crime rates, the crime-reducing effects of incarceration are found to be larger. Thus, the degree of dependence of the incarceration rate on the crime rate is crucial to the interpretation of these studies. Several studies influential for the committee's conclusions in Chapters 3 and 4 find that the direct dependence of the incarceration rate on the crime rate is modest, lending credence to a small crime-reduction effect on incarceration. However, research in this area is not unanimous and the historical and legal analysis is hard to quantify. . . . On balance, panel data studies support the conclusion that the growth in incarceration rates reduced crime, but the magnitude of the crime reduction remains highly uncertain and the evidence suggests it was unlikely to have been large.<sup>185</sup>

While general incapacitation seems to have some validity, one constant finding is that it is usually most effective in relation to minor

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182. See LAURITSEN & REZEY, *supra* note 179, at 3–4; Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585, 594 (2009).

183. ECONOMIC PERSPECTIVES, *supra* note 13, at 36.

184. *Id.*

185. GROWTH OF INCARCERATION, *supra* note 2, at 155.

crime, although some success can also be achieved in relation to more serious crimes.<sup>186</sup> This is because minor offenders reoffend more frequently than serious offenders.

The effectiveness of general incapacitation for relatively minor offences is supported by an Australian study published in 2006 titled, *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison On Burglary*.<sup>187</sup> The study measured the impact of imprisonment on burglary rates. It concluded:

[A]t least so far as burglary is concerned, prison does seem to be an effective crime control tool. Our best estimate of the incapacitation effect of prison on burglary (based on the assumption that burglars commit an average of 38 burglaries per year when free) is 26 percent. This estimate does not appear to be overly sensitive to the value of offending frequency we assume. . . . These percentage effects might not seem large but in absolute terms an incapacitation effect of 26 per cent is equivalent to preventing over 44,700 burglaries per annum.<sup>188</sup>

However, the report then noted that the cost associated with using imprisonment as a tool to reduce the burglary rate was too high:

The fact that prison is effective in preventing a large number of burglaries raises the question of whether increased use of imprisonment would be an effective way of further reducing the burglary rate. Our findings on this issue, like those of incapacitation studies in Britain and the United States (Cohen 1978; Tarling 1993), are not that encouraging. They suggest that a doubling of the sentence length for burglary would cost an additional \$26 million per annum but would only reduce the annual number of burglaries by about eight percentage points. A doubling of the proportion of convicted burglars would produce a larger effect (about 12 percentage points) but only if those who are the subject of our new penal policy offend as frequently as those who are currently being imprisoned. Given what we know about the frequency of offending amongst burglars who do not currently receive a prison sentence, this seems highly unlikely.<sup>189</sup>

Thus, in relation to relatively minor offences, incapacitation works. However, while confining repeat minor criminals clearly disables them

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186. See, e.g., Vollaard, *supra* note 176.

187. Don Weatherburn, Jiuzhao Hua & Steve Moffatt, *How Much Crime Does Prison Stop? The Incapacitation Effect of Prison on Burglary*, 93 N.S.W. CRIME & JUST. BULL. 1 (2006), <http://www.bocsar.nsw.gov.au/Documents/CJB/cjb93.pdf> [<https://perma.cc/E6RF-6JDE>].

188. *Id.* at 8.

189. *Id.* at 8–9.

from committing further offences in the community for a period of time, it almost certainly does not justify the unrestrained use of imprisonment to combat nonserious crime.<sup>190</sup> These offenders should be subjected to an incapacitative penalty, but governments need to develop more intelligent alternatives to imprisonment that can monitor the activities of recidivist minor offenders at a fraction of the cost of imprisonment.<sup>191</sup> It follows that the education and employment sanction would, in many cases, not be appropriate for offenders who are habitual criminals. Instead, EM would be most suitable for this type of offender.

Given the limits of predicting serious offending on the basis of prior convictions, selective incapacitation for serious offences, on the other hand, seems to be flawed. However, there is stronger evidence that general incapacitation does work in relation to such offences. While most serious offenders do not reoffend, individuals with previous convictions for serious offences commit such crime at a much greater frequency than the rest of the criminal population.<sup>192</sup> Thus, there is some evidence supporting the current incapacitative regime for serious sex and violent offenders. They could theoretically also be subjected to monitoring sanctions. However, it is not clear that this would be a desirable reform. While such sanctions could monitor the activities of these offenders, as noted above, arguably this response would undercut the goal of proportionality.

#### 4. Rehabilitation

Unlike the other key sentencing goals that have been analysed above, rehabilitation (if it is effective) serves normally to decrease rather than increase penalty severity<sup>193</sup> and hence ostensibly cannot be used as a counter to proposals to substitute imprisonment with less severe forms of sanctions. However, an argument can be mounted that the education sanction can have a negative impact on offender reform. Thus, an assessment of the rehabilitative ideal is necessary.

Following extensive research conducted between 1960 and 1974, Robert Martinson, a former sociologist, concluded in an influential paper that empirical studies had not established that any rehabilitative

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190. It is notoriously difficult to undertake an accurate cost-benefit analysis of imprisonment given the large number of speculative figures involved. See, e.g., David S. Abrams, *The Prisoner's Dilemma: A Cost Benefit Approach to Incarceration*, 98 IOWA L. REV 905, 915–16 (2013).

191. For suggestions, see *The Fallacy That Is Incapacitation*, *supra* note 146, at 114.

192. *The Punishment Should Fit the Crime*, *supra* note 146, at 410.

193. This generalization is not necessarily correct. As noted below, it seems that rehabilitation programs can in some instances be effective in a custodial setting.

programs had worked in reducing recidivism.<sup>194</sup> The Panel of the National Research Council in the United States, several years after this work, also noted that there were no significant differences between the subsequent recidivism rates of offenders regardless of the form of punishment. They concluded, “This suggests that neither rehabilitative nor criminogenic effects operate very strongly.”<sup>195</sup>

A more recent wide-ranging Australian study regarding the effectiveness of rehabilitation for the Australian Institute of Criminology<sup>196</sup> focused on changes and improvements to prison-based correction rehabilitation programs in the custodial environment since 2004, when the previous report was issued.<sup>197</sup> The report summarized recent cross-jurisdictional studies into the effectiveness of certain rehabilitation programs. It noted that while there were mixed results, there were some programs that reported positive outcomes.<sup>198</sup>

This was especially the case in relation to sexual offender programs, where some studies showed that the recidivism rate of offenders completing the program was about half that of other offenders.<sup>199</sup> The results of programs directed toward violent offenders were less positive, but a wide-ranging review of studies focusing on United Kingdom programs noted that reductions in offending for violent offences by around seven to eight percent had occurred.<sup>200</sup> There is no cogent evidence supporting the effectiveness of domestic violence or victim awareness programs.<sup>201</sup> However, drug and alcohol programs have

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194. Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 PUB. INTEREST 22, 25 (1974).

195. See DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 66 (Alfred Blumstein, Jacqueline Cohen & Daniel Nagin eds., 1978).

196. Karen Heseltine et al., *Prison-Based Correctional Offender Rehabilitation Programs: The 2009 National Picture in Australia*, in AIC REPORTS: RESEARCH AND PUBLIC POLICY SERIES 112 (2011), [http://www.aic.gov.au/media\\_library/publications/rpp/112/rpp112.pdf](http://www.aic.gov.au/media_library/publications/rpp/112/rpp112.pdf) [<https://perma.cc/879L-LPET>].

197. *Id.* at 2.

198. *Id.*

199. See LEON BAKKER, AND THERE WAS LIGHT . . . : EVALUATING THE KIA MARAMA TREATMENT PROGRAMME FOR NEW ZEALAND SEX OFFENDERS AGAINST CHILDREN (2007), [http://www.corrections.govt.nz/\\_data/assets/pdf\\_file/0004/665635/kiamarama.pdf](http://www.corrections.govt.nz/_data/assets/pdf_file/0004/665635/kiamarama.pdf) [<https://perma.cc/X4J3-FSR6>]; R. Karl Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders*, 14 SEXUAL ABUSE 169 (2002).

200. Darrick Jolliffe & David P. Farrington, *A Systematic Review of the National and International Evidence on the Effectiveness of Interventions with Violent Offenders*, in MINISTRY OF JUSTICE RESEARCH SERIES iii (2007), <http://webarchive.nationalarchives.gov.uk/20100505212400/> [<https://perma.cc/P8X8-QZ5R>].

201. *Id.* at 13–14.

been shown to be effective at reducing substance abuse and reoffending.<sup>202</sup>

This assessment is consistent with the findings of Ojmarrh Mitchell, David B. Wilson, and Doris L. MacKenzie, who undertook a major analysis of studies into the effectiveness of drug treatment programs in prison.<sup>203</sup> The studies they focused on related to drug users and compared reoffending patterns of offenders who completed a drug rehabilitation program with those who did not complete a program, or completed only a minimum program between the years 1980 and 2004. They analysed sixty-six studies in total.<sup>204</sup> The report concluded: “Overall, this meta-analytic synthesis of evaluations of incarceration based drug treatment programs found that such programs are modestly effective in reducing recidivism.”<sup>205</sup> Moreover, it noted that programs that dealt with the multiple problems of drug users (termed therapeutic communities) were the most successful, whereas there was no evidence to support good outcomes associated with “boot camp” programs.<sup>206</sup>

Thus, the weight of empirical data (though it is far from uniform or consistent) suggests that rehabilitative programs can reduce the likelihood of recidivism, especially for certain forms of offences, such as sex-offences. However, the actual level of knowledge regarding the impact of rehabilitative programs on recidivism rates is slight, and arguably, no policy or legal changes should be heavily influenced by the availability of these programs. If firm evidence emerges that offender or offence-specific programs can considerably reduce recidivism, then there is no reason that offenders subjected to the education or employment sanction cannot be permitted or required to undertake such programs.

However, one activity that is known to meaningfully lower reoffending levels is participation and completion of a generalized educational program (in contrast to offence or offender specific courses).<sup>207</sup> There is relatively persuasive evidence that offenders who complete postsecondary education programs recidivate at considerably lower rates than other offenders. It has been noted that:

Studies clearly demonstrate that prisoners who participate in post-secondary correctional education have lower recidivism rates than those who do not have access to higher education while

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202. *Id.* at 20.

203. Ojmarrh Mitchell et al., *The Effectiveness of Incarceration-Based Drug Treatment on Criminal Behaviour*, in CAMPBELL SYSTEMATIC REVIEWS 2006:11 (2006), [www.campbellcollaboration.org/lib/download/98/](http://www.campbellcollaboration.org/lib/download/98/) [<https://perma.cc/P9S8-2HQ6>].

204. *Id.*

205. *Id.* at 17.

206. *Id.* at 13.

207. ECONOMIC PERSPECTIVES, *supra* note 13, at 63.

incarcerated. For example, one analysis examined 15 different studies conducted during the 1990s and found that 14 of these studies showed reduced recidivism for former prisoners who had participated in postsecondary correctional education. Recidivism rates for these individuals were, on average, 46 percent lower than for ex-offenders who had not taken college classes (Chappell 2004). Such studies indicate that providing higher education to prisoners can help ensure that they will not return to prison after release.<sup>208</sup>

The completion of such courses also enhances the job prospects of offenders and increases their average earnings after they are released from prison.<sup>209</sup>

In light of this, it could be countered that stripping educational qualifications from offenders will have a negative impact on their prospects of rehabilitation. However, this criticism is not sound. The process of attaining an education is not simply related to obtaining employment-related skills and knowledge. Learning assists people in developing their cognitive capacities and problem-solving skills. It also enhances their judgment. None of these capacities are diminished by the suspension or removal of their formal qualifications. Accordingly, it is doubtful that the education sanction would lead offenders to make poorer choices regarding their future conduct.

A stronger argument can, however, be made that offenders (who do not have existing educational qualifications) should not be denied the opportunity to pursue an education given the link between postsecondary education and lower offending. This is a powerful argument, in the context of a move towards a more progressive sentencing system. Accordingly, this form of the education sanction should be used sparingly. It should only be used in circumstances when the employment sanction and EM monitoring are not suitable because, for example, the offender has no existing employment and has previously breached EM restrictions. However, even in those circumstances, it is important to note that the offender's prospects of reoffending are probably not increased given that but for the availability of this sentencing option, the offender would have been incarcerated. As emerging evidence has shown, one effect of imprisonment is that it increases future offending levels.

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208. Jeanne B. Contardo & Wendy Erisman, *Learning to Reduce Recidivism*, in THE INSTITUTE FOR HIGHER EDUCATION POLICY 9 (2005); see also David Skorton & Glenn Altschuler, *College Behind Bars: How Educating Prisoners Pays Off*, FORBES (Mar. 25, 2013, 5:43 AM), <http://www.forbes.com/sites/collegeprose/2013/03/25/college-behind-bars-how-educating-prisoners-pays-off/#465501993b0f>.

209. *Id.*

*B. Refining the Use of the Proposed New Sanctions in Light of the Appropriate Aims of Sentencing*

Accordingly, an examination of the efficacy of the sentencing system to achieve the objectives of specific deterrence, general deterrence, incapacitation, and rehabilitation suggests that none of these aims will be frustrated by the development and implementation of the new proposed sanctions. However, evaluating the suitability of the sanctions through the lens of the appropriate objectives of sentencing has resulted in some refinements regarding the optimal use of the sanctions. Thus, it emerges that for recidivist minor offenders the most appropriate alternative sanction is EM. Further, the prohibition on an offender from undertaking a formal course of education should be used sparingly as a sanction—only when the employment sanction and EM are not suitable.

V. ADDICTION TO IMPRISONMENT: COST EFFICIENCY BY OFFSHORING TO EMERGING ECONOMIES

If it is necessary to jail offenders—and we recognise that public safety impels the imprisonment of violent and sexual offenders—this has to be done in a cost-efficient and humane way. The evidence indicates that many states are not achieving these goals: U.S. prisons are both costly and overcrowded. As the U.S. Supreme Court noted in scathing language in *Brown v. Plata*:

The degree of overcrowding in California's prisons is exceptional. California's prisons are designed to house a population just under 80,000, but at the time of the three-judge court's decision the population was almost double that. The State's prisons had operated at around 200% of design capacity for at least 11 years. Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet.<sup>210</sup>

If that is the reality, then expediency must be consistently applied at all relevant levels. This means that the cost of imprisonment should be minimised. One option is to take advantage of differences in prison costs across the U.S. and locate incarceration facilities in states with low costs. Then, prisoners could be housed in these cheaper states regardless of where they were convicted and sentenced. Such practices appear to be widespread and are increasingly employed as states have seen their corrections budget increase by nearly four-fold in the past two

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210. *Brown v. Plata*, 563 U.S. 493, 502 (2011).



decades.<sup>211</sup> In some instances, prisoners are being housed 1,000–3,000 miles away from their home state.

We suggest that corrections authorities be provided with the autonomy to shop for jail beds with price as a relevant consideration. This will open up a robust market for prison spots and areas currently suffering from economic deprivation will be able to compete for jail provisions. Indeed, there is evidence that officials make good choices when provided with some autonomy, ultimately increasing net social welfare. For instance, in Washington State, because of incentives provided by the payment system and a budget deficit, the *News Tribune* documents:

Tacoma pays Fife \$65 per day for each inmate, plus a \$20 booking fee. Fife sends some of those inmates to Yakima, and pays \$52.75 a day to house them, with no booking fee (because booking has already taken place). Thus, for each Tacoma inmate, Fife gains \$12.25 in profit per day. Yakima picks up the cost of transporting inmates. Fife's contracts with other jails show similar profit margins.<sup>212</sup>

The legal regime for interstate transfers is provided primarily by the National Interstate Compact for Corrections, the New England Corrections Compact, and the Western Corrections Compact. California had more than 8,300 of its prison inmates in facilities in Arizona, Mississippi, and Oklahoma at the end of 2013.<sup>213</sup> Following the 2011 Supreme Court ruling that overcrowded prison conditions were in violation of the Eighth Amendment,<sup>214</sup> California had little choice but to seek the transfer of some prisoners out of state. However, this policy seems to have run into trouble with the court directing the state to not enter into any more contracts with private providers to transfer prisoners

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211. VERA INSTITUTE, *The Price of Prisons What Incarceration Costs Taxpayers* (2012): <https://www.vera.org/publications/the-price-of-prisons-what-incarceration-costs-taxpayers> [https://perma.cc/5GJX-DWV4]. The Idaho Department of Correction is housing prisoners at the Kit Carson Correctional Center in Colorado; Hawaii is housing prisoners in Eloy and Florence in Arizona, some 3,000 miles away. Vermont houses prisoners in Florence, Arizona, some 2,500 miles away. Holy Kilby, *Locked up and Shipped Away: Interstate Prisoner Transfers and the Private Prison Industry*, GRASSROOTS LEADERSHIP (Nov. 18, 2013), <http://grassrootsleadership.org/locked-up-and-shipped-away> [https://perma.cc/4TE9-NDZZ].

212. Sean Robinson, *Washington State Counties, Cities Compete for Cheaper Jail Beds*, TACOMA NEWS TRIBUNE (Nov. 12, 2013 6:03 AM), <http://www.mcclatchydc.com/news/politics-government/article24758833.html> [https://perma.cc/SS3C-5QVC].

213. Victoria Law, *California Ships Prisoners Out of State to "Reduce" Its Prison Population*, TRUTH-OUT.ORG (July 8, 2016, 10:02 AM), <http://www.truth-out.org/news/item/20405-california-ships-prisoners-out-of-state-to-reduce-its-prison-population> [https://perma.cc/3VRU-S27Y].

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

out of state.<sup>215</sup> Judicial interference in transfers is largely unnecessary as long as strict criteria are followed.

Transfers should ideally be voluntary. In situations where inmates decline to be transferred, the jail authorities should be able to effect transfer subject to the fulfilment of clear criteria. The Emergency Proclamation issued in California in 2006 offers a good guideline for involuntary transfers.<sup>216</sup> It provided that inmates who satisfied the following requirements would receive priority in transfer decisions:

1. Inmates who: (a) have been previously deported by the federal government and are criminal aliens subject to immediate deportation; or (b) have committed an aggravated felony as defined by federal statute and are subject to deportation.
2. Inmates who are paroling outside of California.
3. Inmates who have limited or no family or supportive ties in California based on visitation records and/or other information deemed relevant and appropriate by the CDCR Secretary.
4. Inmates who have family or supportive ties in a transfer state.
5. Other inmates as deemed appropriate by the CDCR Secretary.<sup>217</sup>

We advocate for the employment of such criteria by prison officials in selecting prisoners for transfers to out of state locations.

Aside from the in-country relocation of prisoners, there have been proposals in the U.S. to situate prisons in cheaper locations abroad. For instance, when Arnold Schwarzenegger was Governor of California, he vetoed a proposal to locate prisons in Mexico to house illegal immigrants.<sup>218</sup> He is quoted to have said:

California give [sic] Mexico the money . . . We pay them to build a prison down in Mexico and then we have those undocumented immigrants be down there in a prison and with their prison guards and all this. It will halve the costs to build the prisons and halve the

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215. *Id.* See also *California May Have to Export 4,000 Inmates If Feds Don't Postpone Population Cap*, CBS L.A. (Jan 8, 2014, 5:05 PM), <http://losangeles.cbslocal.com/2014/01/08/california-may-have-to-export-4000-inmates-if-feds-dont-postpone-population-cap/> [<https://perma.cc/99GS-G55R>].

216. CA Executive Proclamation, *Prison Crowding State of Emergency Proclamation* (Oct. 6, 2006), <http://gov.ca.gov/news.php?id=4278> [<https://perma.cc/8ZQQ-GEQU>].

217. *Id.*

218. Mary L. Carnevale & Jim Carlton, *Schwarzenegger's Novel Spending Cut: Send Inmates South*, WALL ST. J.: WASH. WIRE (Jan. 27, 2010, 7:30 AM), <http://blogs.wsj.com/washwire/2010/01/27/schwarzeneggers-novel-spending-cut-send-inmates-south/> [<https://perma.cc/WA2S-ULCR>].

costs to run the prisons. That is money—again, a billion dollars right there—that can go into higher education.<sup>219</sup>

This proposal is not as novel as it was made out to be. In 1997, the Correctional Services Corporation proposed, with the support of the governor of Arizona and other officials, to build a prison in Mexico to house 1,600 of Arizona's illegal immigrant offenders.<sup>220</sup> There may be good policy reasons, in addition to financial exigency for transferring immigrant offenders to their home states. For instance, there are language and cultural factors that might make the period of incarceration in the home state preferable to serving time in the U.S. In turn, this might translate into rehabilitation of the offender. This thinking is embodied in international instruments on the transfer of prisoners. For instance, paragraph 1 of the United Nations Model Agreement states:

The social resettlement of offenders should be promoted by facilitating the return of persons convicted of crime abroad to their country of nationality or of residence to serve their sentence at the earliest possible stage. In accordance with the above, States should afford each other the widest measure of cooperation.<sup>221</sup>

Similarly, the Inter-American Convention on Serving Criminal Sentences Abroad notes in the preamble that “it is advisable that the sentenced person be given an opportunity to serve the sentence in the country of which the sentenced person is a national.”<sup>222</sup>

Although not common, there are instances of nations entering into agreements for the transfer of prisoners for financial reasons. Belgium and the Netherlands entered into a convention on October 31, 2009, in order to establish a prison in the Netherlands for the execution of criminal sentences imposed in Belgium under Belgian law.<sup>223</sup> The

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219. *Id.*

220. *Correctional Services Corporation History*, FUNDINGUNIVERSE.COM, <http://www.fundinguniverse.com/company-histories/correctional-services-corporation-history> [https://perma.cc/Z4LF-MG68]; see also James Brooke, *With Jail Costs Rising, Arizona Wants to Build Private Prison in Mexico*, N.Y. TIMES (Apr. 20, 1997), <http://www.nytimes.com/1997/04/20/us/with-jail-costs-rising-arizona-wants-to-build-private-prison-in-mexico.html>.

221. United Nations Seventh Crime Congress, Milan, It., Aug.26–Sept. 6, 1985, *UN Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners*, <http://www.prisonwatch.org/assets/un-model-agreement-on-the-transfer-of-foreign-prisoners-and-recommendations-on-the-treatment-of-foreign-prisoners.pdf> [https://perma.cc/M7DG-4P4K].

222. *Inter-American Convention on Serving Criminal Sentences Abroad*, DEP'T OF INT'L L., AOS, <http://www.oas.org/juridico/english/treaties/a-57.html> [https://perma.cc/7PS3-QCSW]. The convention has eighteen ratifications/accessions.

223. See COUNCIL OF EUROPE, REPORT TO THE GOVERNMENTS OF BELGIUM AND THE NETHERLANDS ON THE VISIT TO TILBURG PRISON CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT)

agreement entered into force in February 2010 and was originally for a duration of three years. It is supplemented by an agreement for cooperation between the two countries, providing the nuts and bolts of the operation of the prison in relation to the transferred prisoners. Belgium sought to renew the convention for another year following its successful implementation.<sup>224</sup> The incentives for the Dutch are clear: With falling prison populations, there are pressures to close jails with negative consequences for those employed in such facilities.<sup>225</sup> For instance, the Tilburg facility which houses more than 650 inmates pursuant to the agreement with Belgium employs 481 people, and the convention appears to have saved some of these jobs because of the new rental income of over \$38 million.<sup>226</sup>

Several aspects of the Belgium–Netherlands convention are noteworthy. First, transfers to the Netherlands are not voluntary, and there is no requirement for the prisoner to consent to being moved.<sup>227</sup> In fact, “most of the prisoners had been notified in the morning or the night before their transfer, except in a few cases when they had been informed two or three days previously.”<sup>228</sup> When the European Committee for the Prevention of Torture visited the prison there were a total of 675 inmates, of whom 40% were Belgian nationals; 353 out of the 390 foreign nationals were not legal Belgian residents.<sup>229</sup> Although there were no allegations of ill treatment against the Dutch prison officials, inmates did experience materially different conditions in a number of respects. Their food provisions were different (frozen food instead of food cooked there); rehabilitation, vocational, cultural, and recreational opportunities were limited; and wages were lower by a third compared to Belgium because of fewer working hours. There were differences in terms of the force used and the disciplinary sanctions employed as well: while pepper spray was not legal in Belgium, it could be used in the Netherlands. Disciplinary proceedings against prisoners encountered language problems, and French-speaking prisoners did not appear to comprehend

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FROM 17 TO 19 OCTOBER 2011 7 (2012), <http://www.cpt.coe.int/documents/bel/2012-19-inf-eng.pdf> [<https://perma.cc/4MPC-ZWRA>] [hereinafter CPT REPORT].

224. *Id.*

225. Sammy Said, *Netherlands Shuts Down Prisons Due to Lack of Criminals*, RICHEST (July 9, 2013), <http://www.therichest.com/expensive-lifestyle/location/netherlands-shuts-down-prisons-due-to-lack-of-criminals/> [<https://perma.cc/4T4A-D8UL>] (noting that 1,200 jobs were cut in 2009 due to the closure of 8 prisons).

226. *State Secretary Teeveen Wants to Lease Tilburg Prison to Belgium for Longer*, GOV. OF THE NETH. (Dec. 27, 2012, 11:43), <http://www.government.nl/news/2012/07/27/state-secretary-teeveen-wants-to-lease-tilburg-prison-to-belgium-for-longer.html> [<https://perma.cc/4B9Z-43LQ>].

227. *Id.*

228. CPT REPORT, *supra* note 223, at 10.

229. *Id.* at 11.

the proceedings or their appeal rights.<sup>230</sup> Importantly, despite the lack of consent at the time of transfer, most prisoners wanted to remain there.<sup>231</sup>

Following this example, Norway is reportedly in talks to lease space in the Netherlands to house its prisoners in that country.<sup>232</sup> The two countries are considering a treaty whereby the prisoners would serve time in the Netherlands under Norwegian law and would not be released into that country upon the end of their jail terms. Financial imperatives are again driving the agreement: in the words of the Norwegian Justice Minister, “The situation is urgent, and we must consider short-term measures. Leasing prison capacity abroad may contribute to alleviating the situation. That is why we have started talks with the Netherlands.”<sup>233</sup> On the other side, the Dutch view the agreement as an economic opportunity beneficial to their citizens. The justice minister has said that taking on the Norwegian prisoners would result in 700 jobs being saved.<sup>234</sup>

In the U.K., where an average prisoner costs about £40,000 per year, there is a considerable effort to send foreign prisoners to their country of origin even against their consent because imprisoning the 10,600 foreigners is costing the state more than £400 million.<sup>235</sup> The Prime Minister has spoken out publicly in this regard.<sup>236</sup> He recently stated that “[the U.K. would be] using all of the influence we have to sign prisoner transfer agreements with those countries. Even if necessary □rankly helping them to build prisons in their own country so we can

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230. *Id.*

231. *Id.* at 15.

232. *The Netherlands Is Turning Its Empty Prison Cells into an Export Industry*, BUS. INSIDER AUSTRALIA (Sept. 10, 2014, 3:43 PM), <http://www.businessinsider.com.au/r-norway-to-rent-dutch-prisons-to-cut-convict-queue-2014-9> [https://perma.cc/DTR6-JDK9 ] (quoting the Dutch state secretary with responsibility for prisons, Fred Teeven, stating, “In Norway there is a capacity shortage, and right now we have a surplus”).

233. *Norway to ‘Export’ Inmates to Dutch Jails to Cut Queues*, BBC NEWS (Sept. 9, 2014), <http://www.bbc.com/news/world-europe-29123468> [https://perma.cc/XG7S-A3RN].

234. Bruno Waterfield, *Holland Rents Out Empty Jail Cells to Ease Overcrowded Jails*, TELEGRAPH (Sept. 9, 2014, 6:41 PM), <http://www.telegraph.co.uk/news/worldnews/europe/netherlands/11085575/Holland-rents-out-empty-jail-cells-to-ease-overcrowded-jails.html> [https://perma.cc/J9L6-KUBL].

235. Sian Boyle, *Jamaica Snubs Prisoner Transfer Deal: Hundreds to Stay in UK Costing Taxpayer £27million Per Year After Their Government Refuses to Take Them Back*, DAILY MAIL (Apr. 1, 2014, 7:50 PM), <http://www.dailymail.co.uk/news/article-2594776/Jamaica-snubs-prisoner-transfer-deal-Hundreds-stay-UK-costing-taxpayer-27million-year-government-refuses-back.html>.

236. James Chapman, *Thousands of Foreign Convicts Will Be Sent Home: Cameron Vows to Stop Overseas Inmates Clogging Jails*, DAILY MAIL (Nov. 8, 2010, 2:11 AM), <http://www.dailymail.co.uk/news/article-1327586/Foreign-convicts-sent-home-stop-overseas-inmates-clogging-jails.html>.

send the prisoners home.”<sup>237</sup> The justice secretary reportedly wants more than 20,000 prisoners to work like regular employees within ten years in an effort to boost prison income to £130 million a year by 2021.<sup>238</sup>

There are legitimate questions to be raised about the legality of involuntary transfers. In the U.S., the Supreme Court ruled in *Olim v. Wakinekona* that “[j]ust as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State.”<sup>239</sup> The case involved the transfer of a prisoner from Hawaii to California, and the Court went on to say that because of overcrowding, “[s]tatutes and interstate agreements recognize that, from time to time, it is necessary to transfer inmates to prisons in other States.”<sup>240</sup> In *Burke v. Romine*, the Third Circuit Court held that “the transfer of a prisoner for reasons related to a legitimate penological interest is a matter within the discretion of the prison authorities. Burke has no constitutional basis on which to ground his lawsuit.”<sup>241</sup> If such transfers between states at significant distances to each other have been recognized to be legal, we posit that international agreements to house prisoners abroad may also be legal, provided basic human rights standards are adhered to. The agreements might incorporate monitoring

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237. Jack Doyle, *UK to Pay for Foreign Jails in a Bid to Repatriate More Prisoners*, DAILY MAIL (Apr. 26, 2013, 6:07 PM), <http://www.dailymail.co.uk/news/article-2315548/UK-pay-foreign-jails-bid-repatriate-prisoners.html> (noting that the foreign inmate population was topped by the Jamaicans, Polish, Irish, and Nigerians—in that order).

238. Oliver Wright, *Plan for Cheap Prison Work 'May Cost Thousands of Jobs'*, INDEPENDENT (June 4 2012), <http://www.independent.co.uk/news/uk/politics/plan-for-cheap-prison-work-may-cost-thousands-of-jobs-7815140.html> [<https://perma.cc/2UFY-7G54>]. The article notes that prisoners are paid less than £2 per hour for the work. Cost considerations have also operated to facilitate international agreements for the transfer and housing of prisoners in unusual contexts. For instance, during the height of the piracy menace in 2008–2010, states most affected by pirate attacks against ships transiting the Horn of Africa were wealthy EU countries and the U.S. Although piracy is an international crime, and any state capturing pirates is entitled to prosecute and punish them, these states were concerned both about the cost of prosecution and imprisonment and outsourced the job to cheaper locations like Kenya and the Seychelles. While there were predictable concerns raised about the human rights of captured pirates and the poor prison conditions in Kenya, the approach adopted by the EU appears to be working. Given that the pirates are Somalis, there have been agreements between that country and the Seychelles to transfer prisoners to their country of origin to serve time there. See *Counter-Piracy Programme, Support to the Trial and Related Treatment of Piracy Suspects*, UNITED NATIONS OFFICE ON DRUG AND CRIMES, 8 Counter-Piracy Programme (2012); *Counter-Piracy Programme, Support to the Trial and Related Treatment of Piracy Suspects*, UNITED NATIONS OFFICE ON DRUG AND CRIMES, 6 Counter-Piracy Programme (2011); *Counter-Piracy Programme, Support to the Trial and Related Treatment of Piracy Suspects*, UNITED NATIONS OFFICE ON DRUG AND CRIMES, 5 Counter-Piracy Programme (2011). Therefore, these arrangements show that offshoring prisoners based on financial exigencies are viable and consistent with precedent.

239. *Olim v. Wakinekona*, 461 U.S. 238, 245 (2003).

240. *Id.* at 246.

241. *Burke v. Romine*, 85 F. App'x 274, 277 (3d Cir. 2003), 2003 WL 23173709 No. 01–2569.

provisions and require periodic inspections by U.S. prison officials to ensure compliance with standards. If our proposal is adopted, states with high average costs per prisoner, like New York and California, will save billions of dollars by offshoring prisoners to cheaper locations. The money saved could then be invested in more beneficial social projects, such as education and infrastructure.

A corollary consequence of the impetus to locate prisons in countries offering comparative advantages in terms of price might be the reduction of prison costs at home. Evidence from countries that engaged in bidding and contracting with private prison providers shows that the public prisons became more efficient as a result of the resultant benchmarking with the private sector.<sup>242</sup>

To be sure, several objections can be raised against our model for housing offenders in prisons located in cheaper countries. First, transferring offenders to facilities in other countries separates them from their families and local communities. This imposes expenses upon family members who might wish to visit their relatives in jail. For instance, even if a prisoner is moved from California to Mexico, a family member might have to spend more than \$1,000 in order to visit him in jail.<sup>243</sup> This is likely to be a prohibitive expense for many families with the result that the number of overall visitations might decline, which could contribute to the isolation of the prisoner from the few potentially positive relationships he might actually possess. In turn, this has collateral consequences including depression for both innocent family members and prisoners.

Nevertheless, this concern does not necessarily apply in every situation, and many prisoners may not have familial connections with an interest in regular visits. The precise nature of the family relationship may also have to be assessed. If the prisoner is single and does not have any dependents, the transfer decision might be straightforward. A prisoner with a spouse might be in a different position to one with just a parent or distant family member. Similarly, prisoners with adult children who are living separately are in a different position than those with minor

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242. Will Tanner, *The Case for Private Prisons*, in REFORM IDEAS No. 2 1–27 (2013), [http://www.reform.uk/wp-content/uploads/2014/10/Reform\\_Ideas\\_No\\_2\\_-\\_The\\_case\\_for\\_private\\_prisons.pdf](http://www.reform.uk/wp-content/uploads/2014/10/Reform_Ideas_No_2_-_The_case_for_private_prisons.pdf); Nehal Pancharia, *Competition for Prisons*, 2012 INST. FOR GOV'T (2012), <http://www.instituteforgovernment.org.uk/sites/default/files/publications/Prisons%20briefing%20final.pdf> [https://perma.cc/9E35-ZXD4].

243. An article on Salon.com quotes Danielle Rigney, the mother of a California prisoner who was transferred to a jail in Arizona: “because he is 15 hours away, each trip costs close to \$1,000 . . . his father hasn’t been able to visit.” See Josh Eidelson, *Humans Shipped Across the Country: How America Exports Inmates to Private Prisons*, SALON NEWS (Nov 22, 2013 05:29 AM), [http://www.salon.com/2013/11/22/humans\\_shipped\\_across\\_the\\_country\\_how\\_america\\_exports\\_inmates\\_to\\_private\\_prisons/](http://www.salon.com/2013/11/22/humans_shipped_across_the_country_how_america_exports_inmates_to_private_prisons/) [https://perma.cc/R559-ZVVD].

children who were living with the prisoner. Therefore, a case-by-case approach to transferring prisoners to cheaper jails could alleviate these problems. Indeed the Inter-American convention suggests this approach in Article V:

In taking a decision on the transfer of a sentenced person, the states parties may consider, among other factors . . . the state of health of the sentenced person; and the family, social, or other ties the sentenced person may have in the sentencing state and the receiving state.<sup>244</sup>

Further, visitation does not necessarily have to be in the flesh. With the advances in video conferencing and internet chatting, offshore prisons can be required to provide these facilities to an adequate level in order to meet visitation needs of prisoners with families. It is common for family members to interact with each other via such technology in contemporary society because of work and other reasons for living at a distance, and prisoners need not be an exception. Moreover, there is no reason in principle that prisoners cannot be provided with internet access. Of course, there is a risk that they could abuse this, for example, by contacting past victims; however, it is possible to monitor every activity and communication undertaken by an individual on the internet. Thus, this risk for abusing this facility can be significantly curtailed. Internet access by prisoners would enable them to have regular and extensive communication with relatives and friends, but it would also enable prisoners to stay informed of changes to the communities they will enter upon release.<sup>245</sup> Thus, objections relating to distancing prisoners and relatives are not overwhelming.

A second objection would likely be that prison conditions in other countries might vastly differ from our own and pose adverse human rights consequences for prisoners. Jails in cheaper, third-world countries might be over-crowded, unhygienic, prone to violence from other inmates and guards, and corrupt. In addition, these jails might suffer from poor health care facilities and low investments in rehabilitation opportunities. However, these issues can be addressed by including minimum requirements in the inter-state agreement.

The Inter-American convention states in Article VII(2) that “the sentence of a sentenced person who is transferred shall be served in accordance with the laws and procedures of the receiving state, including

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244. *Inter-American Convention on Serving Criminal Sentences Abroad*, *supra* note 222.

245. This issue of prisoner Internet access is dealt with at length in Mirko Bagaric et al., *The Hardship That Is Internet Deprivation and What It Means for Sentencing: Development of the Internet Sanction and Connectivity for Prisoners*, 51 AKRON L. REV. (forthcoming).



application of any provisions relating to reduction of time of imprisonment or of alternative service of the sentence.” The Convention Against Torture might also come into play where there is a record of torture in a state’s prisons. Specifically, Article III states that no party “shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>246</sup> In determining whether there are substantial grounds warranting such a belief, the state “shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”<sup>247</sup> These requirements would ensure that prisoners in another country are treated humanely and not sent to prisons with a history of torture or inhumane treatment. Further, ongoing monitoring of the conditions in the prisons would reduce the likelihood of prisoners being subjected to unacceptable conditions.

Lastly, critics may claim that transferring prisoners to offshore locations might impinge on a prisoner’s right to counsel and legal representation. In addition to physical distance as a prohibitive factor in maintaining contact with existing legal representation, those who might need a lawyer to pursue legal recourse while in jail will not have easy access to trained lawyers because the legal system is likely to be different in another jurisdiction. While this poses challenges, the offshore prison can be required to provide video conferencing facilities and a list of U.S. lawyers who can be accessed by prisoners in a confidential environment. For instance, a room with privacy that can be booked by a prisoner might satisfy the requirement of providing access to counsel.

Thus, there are considerable financial savings that could be made if correction authorities had greater capacity to house prisoners in the most cost-effective locations. Moreover, potential risks associated with this are foreseeable and, with sensible planning, can be mitigated.

#### CONCLUSION

Punishment is an essential part of the criminal justice system. Many offenders are deserving of severe punishment. The reflex that criminals deserve to be punished and imprisoned is understandable. What is unjustifiable is the massive increase in prison numbers over the past few decades. This growth in the prison industry has occurred, but it has not been planned nor has it been deliberate.

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246. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/RES/39/46, at Article 2 (Dec. 10, 1984), <http://www.un.org/documents/ga/res/39/a39r046.htm> [<https://perma.cc/G2RQ-D8TF>].

247. *Id.* at Article 3(2).

The massive expenditure on prisons requires a strategic and forensic analysis about the nature of criminal punishment and the most efficient and effective means to achieve attainable and appropriate objectives of sentencing. This Article has undertaken such an analysis. Most offenders who are currently imprisoned should be punished through other forms of sanctions. The new sanctions come in two main forms: employment/education and monitoring. The employment and education sanctions have been developed against the backdrop of a theoretical examination of the nature of criminal punishment: the interests that individuals covet and the principle of proportionality. The monitoring sanction invokes new technology to provide a more effective solution to the centuries-old problem of finding an effective means to punish serious offenders while ensuring they do not reoffend.

The implementation of both of these sanctions could reduce prison numbers in the United States by more than two-thirds. This would result in massive public revenue savings, while increasing the fairness and effectiveness of the criminal justice system. A resistance to the development of these new sanctions and retention of the status quo regarding the use of imprisonment would constitute a grievously misplaced political decision.

However, the criminal justice system does not have a proud history of being driven by evidence-based practices. In this realm, expediency, most typically manifesting in the “tough on crime” mantra, is the pervasive ideology. Our represented political representatives owe it to the community to minimise the cost of mass incarceration and consider offshoring and outsourcing. Under our proposals, prison officials would adopt a case-by-case analysis to transfer prisoners to locations in cheaper states or developing countries. This would drastically reduce prison costs, providing governments with funds to redress shortcomings in important social services, such as health and education. It is to be emphasised, however, that this proposal is a fallback position to the most desirable solution to reducing the cost of imprisonment—reducing prison numbers—and it is hoped that the reforms proposed in this Article will assist in achieving this outcome.