

# ABOLITIONISM NOW

MARCELA PRIETO RUDOLPHY\*

## ABSTRACT

*Although legal academia has recently turned its attention towards abolitionism, there is disagreement as to what abolitionism is and widespread skepticism exists about its plausibility.*

*This Article aims to make two contributions to discussions about penal abolitionism. First, it provides a novel theorization of different kinds of abolitionism. Second, it argues that, contrary to widespread skepticism, the case in favor of complete and short-term decarceration is extremely difficult to resist. This is true even accounting for the problem of “the dangerous few,” that is, the problem of releasing individuals who might potentially harm others. This problem has been discussed but not satisfactorily resolved by the relevant literature up to this point.*

*Part I of the Article discusses what it means to be an abolitionist. It distinguishes abolitionism from minimalism and then provides three categorizations that are useful to understand the abolitionist movement. Part II argues that complete and short-term decarceration (that is, abolitionism now, or what the Article refers to as “non-ideal prison abolitionism”) does not deserve the skepticism with which it is often met.*

*The Article starts from two assumptions, which make the argument in favor of decarceration harder. If prison abolitionism is plausible under these exacting conditions, the case presented in the Article becomes stronger. The first assumption is that—even though there is a relatively widespread consensus among scholars that this assumption is at least partially false—all individuals currently incarcerated in the U.S. have been justly punished and the length of their incarceration is proportionate. The second assumption is that imprisonment could be justified in ideal conditions, that is, in a just society where prisons are safe, treat individuals humanely, and provide adequate access to physical and mental health resources, as well as to educational and recreational activities.*

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\* Associate Professor of Law and Philosophy, University of Southern California Gould School of Law, Los Angeles, CA, USA, mprieto@law.usc.edu. Profesora Adjunta Extraordinaria, Universidad Adolfo Ibáñez, Escuela de Derecho, Santiago, Chile. I am thankful to Scott Altman, Ángel Díaz, Aya Gruber, Felipe Jimenez, Greg Keating, Mugambi Jouet, Tomer Kenneth, Erin Miller, Jeesoo Nam, Jonathan Quong, Stephen Rich, Rhys Southan, Raff Donelson and the attendants of the USC Philosophy Conference, the attendants of the USC-Rutgers-KCL Law and Philosophy workshop, and Pía Chible Villadangos, Ana Diaz Azcunaga, and Raphael Grenier-Benoit and the attendants of the Oxford Public Law Discussion Group for their comments and feedback. A special thanks to Pallavi Adapa and Lauren Mattice for their excellent assistance with research and to the editors of the Washington University Jurisprudence Review for their outstanding work.

*U.S. prisons are, however, generally far from being “ideal prisons.” They thus impose further harmful effects on those who are imprisoned, which have been extensively documented in the literature and are canvassed in the Article. The Article then argues that, given how unfeasible it is to fix prisons in the short term so that they achieve their “ideal form,” the case in favor of decarceration is extremely difficult to resist, even accounting for the problem of “the dangerous few.”*

*There are two strategies that might be used to justify the continued incarceration of the so-called “dangerous few.” First, one could argue that continued incarceration of the dangerous few is justified because it is necessary to defend innocent parties from serious harm. Second, one could argue that continued incarceration of the dangerous few can be justified because (1) they committed a criminal offense in the past and (2) their incarceration contributes to eliminating harm to innocent parties by deterring crime. However, the conditions required for each justification are difficult to support. If we account for this uncertainty, that is, the fact that we cannot be sure that these justifications can or will succeed, continued incarceration becomes impermissible. In fewer words, we should close prisons.*

*This might seem like a radical conclusion. However, there is no need to embrace a radical vision of the world to embrace it. This conclusion follows, in fact, from basic liberal commitments that reasonable people already support. Ultimately, it might be the case that we should all be (non-ideal) prison abolitionists.*

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*These days, corrections practitioners sin boldly, with little compunction, as they go about their destructive tasks. . . . Compassion has no place in modern correctional management. Give us more razor wire, more prisons, more buildings, more staff, more uniforms, more Mace, more modern holes, more managers; and, if you do send us any helpers, make sure they are the psychojusters of an H.G. Wells fantasy—"experts" who do their business without disturbing or questioning anything we might do.*<sup>1</sup>

## INTRODUCTION

In the 1970s, Jerome Miller closed the reform schools in Massachusetts.<sup>2</sup> He tried to change them. He tried to make them more humane. He failed. Repeatedly:

But whenever I'd thought we'd made progress, something happened—a beating, a kid in an isolation cell, an offhand remark by a superintendent or cottage supervisor that told me what I envisioned would never be allowed. Reformers come and reformers go. State institutions carry on. Nothing in their history suggests that they can sustain reform, no matter what money, staff, and programs are pumped into them. The same crises that have plagued them for 150 years intrude today. Though the casts may change, the players go on producing failure.<sup>3</sup>

Prisons carry on, too, and the players, it seems, continue to produce failure. On December 9th, 2024, Robert Brooks was beaten to death by prison officials while handcuffed.<sup>4</sup> On November 27th, 2024, a federal judge found New York City in contempt for failing to stem violence and excessive force at Rikers Island jail complex.<sup>5</sup> The judge noted a “troubling lack of urgency about the unconstitutional level of security and safety problems in the jails.”<sup>6</sup>

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1. See JEROME G. MILLER, *LAST ONE OVER THE WALL: THE MASSACHUSETTS EXPERIMENT IN CLOSING REFORM SCHOOLS* (1991).

2. *Id.* at 244.

3. *Id.* at 18.

4. Kate Holland, ‘Shocking’ Footage Shows Handcuffed Inmate Who Died After Prison Guards Beat Him, ABCNEWS (Dec. 27, 2024, 6:23 p.m.), <https://abcnews.go.com/US/shocking-footage-shows-handcuffed-inmate-died-after-prison/story?id=117150189>.

5. Hurubie Meko & Jan Ransom, *Judge Finds New York in Contempt, Clearing the Way for Rikers Takeover*, N.Y. TIMES (Nov. 27, 2024), <https://www.nytimes.com/2024/11/27/nyregion/rikers-contempt-receivership.html?smid=nytcore-ios-share&referringSource=articleShare>.

6. *Nunez v. New York City Dep't of Corr.*, 758 F. Supp. 3d 190, 219 (S.D.N.Y. 2024).

Fifteen years ago, in *Brown v. Plata*, the Supreme Court of the United States wrote: “This case arises from serious constitutional violations in California’s prison system. The violations have persisted for years.”<sup>7</sup> “Needless suffering and death have been the well-documented result.”<sup>8</sup> It then ordered California to reduce its prison population.<sup>9</sup> Today, the California prison system is operating at 10% over capacity.<sup>10</sup>

Litigation over prison conditions and misconduct of prison officials persists.<sup>11</sup> One individual had boiling water emptied on him by another inmate in 2021.<sup>12</sup> In *United States v. Colucci*, the judgment cites “the dangerous, barbaric conditions” that have existed at Brooklyn’s Metropolitan Detention Center.<sup>13</sup> In 2019, the 4th Circuit found that conditions of solitary confinement in death row created “a substantial risk of serious psychological and emotional harm.”<sup>14</sup> In *Kalu v. Spaulding*, in 2024, the 3rd Circuit declined to extend Kalu’s *Bivens* claim: Kalu had been sexually assaulted by a prison guard on three separate occasions and was placed in solitary confinement after reporting the first two incidents.<sup>15</sup>

As prisons carry on, legal scholars have increasingly turned their attentions toward penal abolitionism.<sup>16</sup> However, there is widespread skepticism that, whatever abolitionism is, it can be a plausible or tenable position.<sup>17</sup> “Few people,” Jim Thomas and Sharon Boehlefeld note, “take

7. *Brown v. Plata*, 563 U.S. 493, 499 (2011).

8. *Id.* at 501.

9. *Id.* at 545.

10. The Colleges of Law, *Breaking the Cycle: Addressing Overcrowding in California Prisons*, THE COLLEGES OF LAW (Oct. 30, 2024) <https://www.collegesoflaw.edu/blog/2024/10/30/prisons-overcrowding-california-edvnts/>.

11. *See, e.g.*, *Williams v. Sec’y Pa. Dep’t of Corr.*, 117 F.4th 503 (3d Cir. 2024) (involving an Eighth Amendment claim due to prolonged solitary confinement of an individual with a serious mental illness); *Thurmond v. Andrews*, 972 F.3d 1007 (8th Cir. 2020) (finding that a right to be free from allergens, in this case, black mold, during imprisonment was not clearly established in the law); *Wade v. McDade*, 106 F.4th 1251 (11th Cir. 2024) (suit on behalf of an imprisoned individual, who suffered two seizures that caused permanent brain damage, against prison officials for deliberate indifference to the inmate’s medical needs); *In re Pers. Restraint of Williams*, 198 Wn.2d 342 (2021) (finding that an individual’s incarceration conditions violated Washington state’s constitutional provision against cruel punishment).

12. *Lacy v. Coughlin*, 177 N.E.3d 945, 947 (Mass. App. Ct. 2021).

13. *United States v. Colucci*, 743 F. Supp. 3d 452, 453 (E.D.N.Y. 2024).

14. *Porter v. Clarke*, 923 F.3d 348, 349 (4th Cir. 2019).

15. *Kalu v. Spaulding*, 113 F.4th 311, 312 (3d Cir. 2024).

16. *See, e.g.*, Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199 (2022); Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://jacobin.com/2017/08/prison-abolition-reform-mass-incarceration>; Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 265–66 (2023); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 6 (2019); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1160–61 (2015).

17. Some skeptics of abolitionism are Michael Davis, *The Abolition of Punishment*, in THE

prison abolitionists seriously.”<sup>18</sup> But we should. In fact, I will argue that all of us have strong reasons to be abolitionists about prisons in the current circumstances.

In order to make this argument, I will first discuss what it means to be an abolitionist in the penal context. Penal abolitionism—both as a social movement and as the object of scholarly attention—means, and has meant, different things to different people.<sup>19</sup> Abolitionism in the criminal context need not be—and historically has not always been—about prisons. More radical versions of abolitionism have put into question the permissibility of state punishment itself, even beyond the confines of the prison. Yet, despite Tommie Shelby’s careful examination of the idea of prison abolition,<sup>20</sup> and despite the increased attention that penal abolitionism has received in U.S. legal academia in the past years, we still lack a sufficiently robust theorization of what it means to be an abolitionist.

Part of the problem is that there is no consensus among authors who self-identify as abolitionists as to what, exactly, abolitionism is and entails.<sup>21</sup> In 1986, Scheerer had already questioned whether abolitionism was “a theory in the strict sense of the term,” given that the approach lacked, at the time, “precise and unambiguous descriptive concepts.”<sup>22</sup> Thomas and Boehlefeld note that “abolitionism is a vague term that cannot be readily collapsed into a coherent, unified philosophy.”<sup>23</sup> And discontent about the level of theorization of abolitionism and skepticism towards it seems widespread outside abolitionist circles.<sup>24</sup>

This Article aims to make two contributions to discussions about abolitionism. First, it provides a theorization of different kinds of abolitionism as applied to the criminal system. In order for the abolitionist

PALGRAVE HANDBOOK ON THE PHILOSOPHY OF PUNISHMENT 579, 581 (Matthew C. Altman ed., 2023), and R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME AND JUST. 1, 67 (1996). Duff is more sympathetic towards what I will call non-ideal abolitionism.

18. Jim Thomas & Sharon Boehlefeld, *Rethinking Abolitionism: What Do We Do with Henry?*, 18 SOC. JUST. 239 (1991).

19. Barkow and Roberts make this point regarding prison abolitionism. Barkow, *supra* note 16, at 265–66; Roberts, *supra* note 16, at 6.

20. See TOMMIE SHELBY, *THE IDEA OF PRISON ABOLITION* (2022).

21. See, e.g., Sebastian Scheerer, *Towards Abolitionism*, 10 CONTEMP. CRISES 5, 9 (1986) (in 1986, noting that “among the authors to whom the label ‘abolitionist’ can be applied, one will find little consensus”). For this point regarding the contemporary discussion, see Daniel Fryer, *Idealizing Abolition*, 17 CRIM. L. AND PHIL. 553, 559 (2023); Elena Larrauri, *Criminología Crítica: Abolicionismo y Garantismo* [*Critical Criminology: Abolitionism and Legal Guarantees*], 50 *Anuario de Derecho Penal y Ciencias Penales* 133 (Spain 1997); and Youngjae Lee, *Is Prison Abolitionism Self-Defeating?*, CRIMINAL LAW AND PHILOSOPHY (2024), <https://doi.org/10.1007/s11572-024-09743-6> (noting that “[t]here is a lot of confusion around the term ‘prison abolitionism.’”).

22. Scheerer, *supra* note 21, at 9.

23. Thomas & Boehlefeld, *supra* note 18, at 240.

24. See McLeod, *supra* note 16, at 1160–61. She notes that in the academy, “[a]bandoning carceral punishment and punitive policing remains generally unfathomable.” *Id.*

critique to make sense, we ought to, first, try to understand what abolitionism is (or should be). Second, it argues that at least one variety of abolitionism (what I call “non-ideal prison abolitionism”) is, contrary to widespread sentiment, difficult to resist.

Part I of the Article is thus largely conceptual in nature. It asks what abolitionism is and can be, and how we might categorize different kinds of abolitionism. My attempt at systematization builds upon previous attempts, made by scholars like Barkow, Donelson, Shelby, Frampton, Carrier, Piche and Walby, and Davis, among others,<sup>25</sup> but it is the first one to focus on abolitionism generally (rather than prison or police abolitionism). It also uses philosophical distinctions and conceptual tools common to theories of punishment and political philosophy. Having conceptual clarity is fundamental to discussions about abolitionism, in an area where much of the discussion is muddled by conceptual incoherence. Perhaps this conceptual incoherence partially explains the widespread skepticism with which abolitionism is often met.

Once conceptual clarity is achieved, it is easier to appreciate that different varieties of abolitionism are plausible moral and political positions. They are not misguided, confused, or wildly implausible, as the widespread sentiment in legal academia seems to be.<sup>26</sup> In fact, even abolitionists shy away from complete decarceration as a short-term solution. They shouldn’t. This is what Part II of the Article is devoted to.

A growing number of moral philosophers and criminal law scholars accept that most—if not all—the punishment meted out by the U.S. today is morally unjustified, in different ways. There are concerns about overcriminalization, over-punishment, lack of political legitimacy, and overly harsh prison conditions. If some of these arguments are correct, the U.S. criminal system is currently engaged in the systematic and widespread violation of individuals’ most fundamental rights: rights to personal freedom, political participation, equality, and dignified treatment.<sup>27</sup>

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25. Davis, *supra* note 17; Raff Donelson, *The Inherent Problem with Mass Incarceration*, 75 OKLA. L. REV. 51 (2022); SHELBY, *supra* note 20; Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2021); Nicolas Carrier, Justin Piché & Kevin Walby, *Abolitionism and Decarceration*, in *THE HANDBOOK OF SOCIAL CONTROL* 319 (Mathieu Deflem ed., 1st ed. 2018). Others, like Levin, have attempted to do the same regarding criminal law minimalism as an alternative to abolitionism. See Benjamin Levin, *Criminal Law Minimalisms*, 101 WASH. U. L. REV. 1771, 1774-75 (2024).

26. See McLeod, *supra* note 16, at 1160–61.

27. These arguments, in different versions, have been made by others. See SHELBY, *supra* note 20, at 19; McLeod, *supra* note 16; CHRISTOPHER HEATH WELLMAN, *RIGHTS FORFEITURE AND PUNISHMENT* (2017). But their implications have not been seriously considered or theorized within the context of the abolitionist critique, with limited exceptions. In the context of police abolitionism, see Fryer, *supra* note 21. In the context of punishment, see WELLMAN, *supra*.

However, in attempting to show that at least one version of prison abolitionism is plausible, I will not assume that these claims are correct. I will not even assume that imprisonment would be unjustified in an ideal society. As a consequence of these assumptions, each person's imprisonment in the U.S. would be justified *if it took place in something like an "ideal" prison*—by which I mean a prison that is safe, treats individuals humanely, and provides adequate access to physical and mental health resources, as well as to educational and recreational activities. I will simply assume that this type of imprisonment, which would still entail complete confinement in an institutional setting due to punishment (and, thus, we can confidently call it “imprisonment” or “incarceration”) could be justified.

U.S. prisons are not, however, “ideal prisons.” As Shelby writes, “prisons as we know them, now and in the past, are often dehumanizing, horrid, even torture chambers.”<sup>28</sup> They thus impose further harm on those who are imprisoned, which have been extensively documented in the literature and are briefly canvassed in the Article. I will argue that, given how unfeasible it is to fix prisons in the short term so that they achieve their “ideal” form, the moral case in favor of shutting down prisons in the short-term is difficult to resist, even accounting for the problem of “the dangerous few,” that is, the problem of releasing individuals who might potentially harm others. This problem has been discussed by abolitionists, but it has not been entirely resolved so far.<sup>29</sup>

There are two strategies that might be used to justify the continued incarceration of the so-called “dangerous few.” First, one could argue that the continued incarceration of the dangerous few is justified because it is necessary to defend innocent parties from serious harm. This argument relies on other-defense and lesser-evil justifications, which are usually used in philosophy to justify the imposition of non-consensual harm on others. Second, one could argue that continued incarceration of the dangerous few can be justified because (1) they committed a criminal offense in the past and (2) their incarceration contributes to eliminating harm to innocent parties by deterring crime.

The Article argues that the conditions required for these justifications to succeed are difficult to meet and the evidence available on the effects of incarceration does not clearly support them. If we account for this uncertainty, that is, the fact that we cannot be sure that these justifications can succeed, continued incarceration becomes impermissible in light of the evidence available to us.

In other words, what I will call “non-ideal prison abolitionism” is not an

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28. SHELBY, *supra* note 20, at 84.

29. See Frampton, *supra* note 25; Thomas & Boehlefeld, *supra* note 18.



implausible position, and the skepticism with which it is often met is unwarranted. That is, just as Jerome Miller did in the 70s with the Massachusetts reform schools, we should close prisons.

Although this might seem like a radical conclusion, one need not embrace a radical vision of the world to endorse it. This conclusion follows, in fact, from basic liberal assumptions to which reasonable people are already committed. Certain forms of abolitionism are not “radical,” in the sense that they do not follow from a commitment to materialistic or Marxist visions of the world. The demand for immediate and complete decarceration follows from commitments to fundamental rights that garner widespread consensus in our society. What is radical is the fact that the U.S. penal system fails to abide by even the most minimal liberal commitments.

The remainder of the Article proceeds as follows. Part I theorizes the concept of abolitionism. It puts forward a conception of abolitionism and then discusses three different ways in which abolitionism can be categorized. First, it distinguishes between negative and positive abolitionism and explains why the focus of the Article is on negative abolitionism. Second, it distinguishes between negative ideal and non-ideal abolitionism. Briefly, ideal abolitionism aims to terminate a penal practice, even in an (ideally) just society. By contrast, non-ideal abolitionism aims to terminate a penal practice, given society’s current (non-ideal) unjust conditions. Third, it distinguishes between different kinds of abolitionism depending on their substantive scope. Part II argues that non-ideal prison abolitionism is extremely difficult to resist. Therefore, complete and immediate decarceration might be the only morally appropriate alternative in the short term, even accounting for the problem of the “dangerous few.” It begins (Subsection II.A) by canvassing the harmful effects of imprisonment on those who are incarcerated. It then discusses two possible strategies to justify the continued incarceration of the “dangerous few”: defending others from harm (Subsection II.B.1) and Tadros’s theory of punishment (Subsection II.B.2). In Subsection II.B.3, it argues that these justifications cannot succeed if we consider the available evidence and the prevailing uncertainty regarding who the dangerous few are and the effects and necessity of imprisonment for achieving defensive or punishment-related goals. Finally, Part III discusses some possible objections.

## I. ABOLITIONISM(S)

Abolitionism in the penal context is not new. Already in the 70s, abolitionists were organizing against the criminal system, both in the U.S.

and in other countries.<sup>30</sup> Picking up its term from the anti-slavery movement, abolitionism, as its name says, aims to ‘abolish’ something.<sup>31</sup> As Davis notes, abolitionism is about “ending, stopping, eliminating, terminating, or doing away with the practice in question.”<sup>32</sup> I will come back to this definition later in order to refine it. At the moment, “the practice in question” might refer to a particular penal practice, a subset of them, or the entire criminal system.

There are three main ways in which we can classify penal abolitionism. First, we can distinguish between negative and positive abolitionism based on whether abolitionism aims to terminate a practice or advance the provision of certain goods through social reform.<sup>33</sup> Second, negative abolitionism can be categorized as non-ideal or ideal depending on whether abolitionism is advocated given the current non-ideal conditions and functioning of the criminal system or given any ideally just society. Third, we can distinguish a wide range of negative abolitionist theories depending on the scope of the abolitionist critique.

The first distinction, between negative and positive abolitionism, operates as a master classification. The two other distinctions allow us to distinguish between different varieties of negative abolitionism, helping us understand and classify authors’ theories and commitments along these three axes.<sup>34</sup>

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30. For the history of abolition, see, e.g., Gabriel I. Anitua & Alexis Alvarez-Nakagawa, *Mestizo Penal Abolitionism: The Case of Argentina*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF PENAL ABOLITION 291 (Michael J. Coyle & David Scott eds., 2021); Thomas Mathiesen, *The Politics of Abolition*, 10 CONTEMP. CRISES 81 (1986); Scheerer, *supra* note 21.

31. Barkow, *supra* note 16, at 265–66.

32. Davis, *supra* note 17, at 580.

33. Barkow, *supra* note 16, at 269.

34. For example, Angela Davis’s theory of abolition is positive in some dimensions and negative in others. Davis’s negative abolitionist project is ideal and centered on the prison industrial complex. Or, briefly, Davis is a negative ideal PIC abolitionist. Similarly, Allegra McLeod’s (negative) abolitionism can be understood as (negative) ideal prison abolitionism, and Amna Akbar’s can be understood as (negative) ideal prison and police abolitionism. See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544 (2022); McLeod, *supra* note 16.

Developing these categories will inevitably bring about the question of what, exactly, a negative abolitionist theory is, or, alternatively, when we should call a theory ‘abolitionist,’ as opposed to ‘minimalist’ or reformist. Given that no one is currently content with the state of imprisonment in the U.S., distinguishing between abolitionism and other reformist projects is particularly relevant. The distinction between ideal and non-ideal abolitionism will help us answer this difficult conceptual question.

Let us take each category in turn.

#### *A. Negative and Positive Abolitionism*

The abolitionist project can be a positive or negative one. In its negative dimension, abolitionism aims to terminate a certain penal practice.

Negative abolitionism can be expansive in its scope, particularly when understood as a critique of the “prison industrial complex” (PIC) and its relation to capitalism. Although negative abolitionism is focused on the penal system, in its PIC-variety, it ultimately aims to abolish all structures of oppression that exist in a given society, including capitalism.<sup>35</sup>

In its positive dimension, abolitionism aims to build a certain kind of society, where the conditions of justice are such that prison or punishment are no longer necessary. Positive abolitionism is, ultimately, a theory about justice.

Most contemporary abolitionists are hybrid, embracing both positive and negative forms of abolitionism. However, some abolitionists are explicitly reluctant to provide positive constructions of what alternative societies would look like, and Scheerer, for example, claims that “[t]he abolitionist perspective is an essentially negative one.”<sup>36</sup>

By contrast, Jamelia Morgan, building upon Mariame Kaba’s work, refers to the positive dimension of abolitionism as “foundational,” focused on “what we’re building” rather than on what abolitionism aims to dismantle.<sup>37</sup> Allegra McLeod also puts great emphasis on positive abolitionism, understood as a project of “substitutive social—not penal-regulation.”<sup>38</sup> This positive version of abolitionism aims to imagine and create a new world where harm can be addressed without relying on the prison-industrial complex and structural forms of oppression.<sup>39</sup> Some

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35. Barkow provides a list of structures and/or institutions that abolitionists aim to end: borders, racism, patriarchy, militarism, ableism, imperialism, colonialism, capitalism, and the wage system. Barkow, *supra* note 16, at 270.

36. Scheerer, *supra* note 21, at 10.

37. Morgan, *supra* note 16, at 1202–03.

38. McLeod, *supra* note 16, at 1163.

39. Morgan, *supra* note 16, at 1202–03.

abolitionists even perceive the negative abolitionist project as having serious shortcomings, particularly in the context of abolishing the police, where those worse off would be most severely affected.<sup>40</sup> Indeed, as Fryer notes, some abolitionists are even dismissive of the negative project and want to shift focus to positive abolitionism, understood as a project about building a new social order.<sup>41</sup>

Generally speaking, positive abolitionism will focus on the development of institutions that will eliminate oppression and, as a result, will make the penal system or an aspect of it unnecessary or “peripheral,”<sup>42</sup> and hence, I would add, morally unjustified. Positive abolitionism also aims to find alternative means to respond to social conditions and behaviors that are currently criminalized and punished, problematizing the categories of “criminal” and “criminal justice.”<sup>43</sup>

Because positive abolitionism overlaps with more general questions about justice, and because those who write in the academic abolitionist canon have not yet provided a complete version of what the positive project looks like, the remaining categorizations will focus entirely on negative abolitionism.

Admittedly, it is somewhat odd to refer to social justice projects as “abolitionists,” instead of, simply, what they are: social justice projects which aim at the construction—not merely the abolition—of a more just society. Perhaps, it would be better to reserve the “abolitionist” label for *negative* abolitionism.

This is not to dismiss the value of the positive “abolitionist” project or to disparage abolitionists for not providing a complete theory of justice. On the contrary, providing a complete theory of justice for any given society is a worthy goal, and abolitionists themselves acknowledge the ambitiousness of such a project.<sup>44</sup> However, despite the importance of this project, what justice requires—unlike negative abolitionism—has been widely theorized, categorized, and discussed,<sup>45</sup> so that further theorization is not urgently required.

Negative abolitionism is, however, tightly related to positive abolitionism among contemporary self-identified abolitionists. Many of them claim that achieving the ends of positive abolitionism will make the

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40. Fryer, *supra* note 21, at 556.

41. *Id.* at 557.

42. McLeod, *supra* note 16, at 1163.

43. Carrier, Piché & Walby, *supra* note 25, at 319–20.

44. *See, e.g.*, Morgan, *supra* note 16, at 1203.

45. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (Rev. ed. 1999); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); David Estlund, *Utopophobia*, 42 PHIL. & PUB. AFFS. 113 (2014); AMARTYA SEN, THE IDEA OF JUSTICE (2009).

penal system or prisons unnecessary or obsolete,<sup>46</sup> and hence, morally unjustified. This claim will be easier to parse once we understand the distinction between ideal and non-ideal abolitionism.

### *B. Ideal and Non-Ideal Abolitionism*

Negative abolitionism can be ideal or non-ideal. Before discussing this distinction, it is necessary to solve a preliminary question, conceptual in nature: when should we refer to a theory as “abolitionist,” in the negative sense? That is, what features should a theory have in order for it to be understood as a variety of abolitionism, as opposed to, say, minimalism or some other reformist approach to the penal system?

#### *1. What is Negative Abolitionism?*

This definitional issue requires engaging in what philosophers call “conceptual analysis.” It is basically a question of “what is *X*?”—in this case, “what is negative abolitionism?” I do not aim to foreclose the discussion on what abolitionism is, but I will draw some lines that limit the scope of what we ought to understand by an “abolitionist” theory, in the penal context.

There are different, although often complementary, approaches to “what is *X*?”-questions. First, conceptual approaches involve investigating a certain concept using methods like reflective equilibrium.<sup>47</sup> Second, descriptive projects focus on the extension of the term and often involve empirical investigation.<sup>48</sup> And third, ameliorative projects “involve trying to formulate a concept that best suits the *point* of having such a term.”<sup>49</sup>

As Haslanger notes, ameliorative projects are particularly important in the context of social movements, given their focus on what the point of having the concept is, what tasks and goals a concept helps us to accomplish, and whether other answers would more effectively help us accomplish those goals.<sup>50</sup> An ameliorative approach requires us then to consider what sort of work we require the concept of “abolitionism” to do for us, in the penal

46. Barkow, *supra* note 16, at 270. On the relationship between negative and positive abolitionism, see also Christopher Lewis and Adaner Usmani, *Abolition of What?*, 114 J. CRIM. L. & CRIMINOLOGY 525, 528 (2024) (noting that “abolitionists defend a negative ambition (the literal abolition of prisons and police) and a positive one (the reconstruction of our social order)”).

47. KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY* 42 (2019); SALLY HASLANGER, *RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE* 222–23 (2012). For a definition of reflective equilibrium, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

48. MANNE, *supra* note 47, at 42; HASLANGER, *supra* note 47, at 222–23.

49. MANNE, *supra* note 47, at 42; HASLANGER, *supra* note 47, at 222–23.

50. HASLANGER, *supra* note 47, at 224.

context.<sup>51</sup> Thus, in a way, we get to decide what abolitionism is and isn't.<sup>52</sup>

The question of terminology is, then, primarily a pragmatic and political one.<sup>53</sup> However, it is not necessary to drop the ordinary usage of the concept (to a certain extent). On the contrary, the concept's ordinary usage can be appropriated for theoretical purposes.<sup>54</sup> According to Haslanger, whether such appropriation is legitimate depends on a semantic and a political condition.<sup>55</sup> The semantic condition is met if the new concept retains central functions of the ordinary term.<sup>56</sup> The political condition depends "on the acceptability of the goals being served, the intended and unintended effects of the change, the politics of the speech context, and whether the underlying values are justified."<sup>57</sup>

As a starting point, we can examine how the term "abolitionism" is ordinarily used and understood. There seems to be some consensus among scholars that theories are abolitionist if they aim at the complete termination of a given penal practice.<sup>58</sup> By contrast, theories that reserve a role for penal institutions are not a type of abolitionism, but may be a type of minimalism. Barkow, for example, suggests that it does not make sense to use the term "abolitionism" to refer to theories that do not endorse the complete end of prisons.<sup>59</sup> Langer holds a similar view and, like Barkow, would prefer the label "minimalism" for those theories, understood as a position that aims to radically reduce (but not eliminate) the scope of penal institutions, such as prisons or the police.<sup>60</sup> Slobogin also understands minimalism as retaining, but limiting, the use of imprisonment.<sup>61</sup> And Carrier, Piché, and Walby see minimalism as a strategy of limitation of the penal system, positing that "criminal law ought to be restrained and used only as a last resort."<sup>62</sup>

Other authors adopt a narrower conception of abolitionism, which requires more than just a demand for the termination of a penal practice. Shelby, for example, seems to require that a theory call for the abolition of

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51. See *id.* at 225.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. SHELBY, *supra* note 20; Christopher Slobogin, *The Minimalist Alternative to Abolitionism: Focusing on the Non-Dangerous Many*, 77 VAND. L. REV. 531 (2024); Barkow, *supra* note 16; Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. 42 (2020); WELLMAN, *supra* note 27, at 172.

59. Barkow, *supra* note 16, at 266. Lippke also makes a similar point: that most prison abolitionists don't actually call for the complete abolition of prisons. RICHARD L. LIPPKE, *RETHINKING IMPRISONMENT* 250 (2007).

60. Langer, *supra* note 58, at 44–46, 67.

61. Slobogin, *supra* note 58, at 534–35.

62. Carrier, Piché & Walby, *supra* note 25, at 319.

prisons (or a given penal practice) “for all time and in all places” in order to deserve the term “abolitionist.”<sup>63</sup> Shelby holds, then, what I understand as an “absolutist” conception of abolitionism which, I will argue later, we should reject, for several reasons.

Abolitionists themselves have defined the term in different ways. McLeod states that in contrast to reform efforts, abolitionism “entails a rejection of the moral legitimacy of confining people in cages”<sup>64</sup> and is “oriented toward displacing criminal law as a primary regulatory framework.”<sup>65</sup> Dan Berger, Mariame Kaba, and David Stein define abolitionism as “connecting a radical critique of prisons and other forms of state violence with a broader transformative vision.”<sup>66</sup> Stahly-Butts and Akbar state that abolitionist approaches are “not geared toward improvement of the criminal legal system itself,” but “aim to divest resources, legitimacy, and power from the criminal legal system in service of its eventual elimination.”<sup>67</sup> Angela Davis states that the abolitionist movement is “antiracist, anticapitalist, antisexist, and antihomophobic” and “calls for the abolition of the prison as the dominant mode of punishment” while at the same time acknowledging the need for solidarity with those behind bars.<sup>68</sup> India Thusi identifies three organizing principles underlying the abolitionist critique: legacy, which requires acknowledging the history of institutions and its importance in evaluating them; futility, which rejects incremental reforms that maintain the logic of the current (violent) system; and possibility, which focuses on what is possible in a society that is not limited by our current constraints, structural or otherwise.<sup>69</sup> Dorothy Roberts also identifies three core claims common to abolitionism, all of which lead to the conclusion that the PIC should be abolished: 1) that the carceral system can be traced back to slavery and “the racial capitalist regime it relied on and sustained”; 2) that the criminal system serves to oppress marginalized groups in order to maintain a racial capitalist regime; and 3) that we can imagine and build a more humane society that does not rely on incarceration as a way of solving social problems.<sup>70</sup> Carrier, Piche,

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63. SHELBY, *supra* note 20, at 113.

64. McLeod, *supra* note 16, at 1164.

65. *Id.* at 1207.

66. Berger, Kaba & Stein, *supra* note 16.

67. Stahly-Butts & Akbar, *supra* note 34, at 1550.

68. DAVIS, *supra* note 34, at 103.

69. India Thusi, *The Racialized History of Vice Policing*, 69 UCLA L. REV. 1576, 1579–93 (2023).

70. Roberts, *supra* note 16, at 7–8.

and Walby posit that abolitionism “invites us to go well beyond a reduction in the use of the prison.”<sup>71</sup>

We can take these definitions, along with the purported goals of negative penal abolitionism and the contrast with minimalism, as a starting point. We should also aim for a relatively thin concept, so that it can accommodate different conceptions of abolitionism. Let us start with the following:

Negative abolitionism: a theory will count as (negative) abolitionism when it holds that a penal practice, or a subset of them, should be terminated.

This definition is, however, excessively thin. Abolitionism is a social movement, and several commentators refer to it as “an ethos” or talk about the “abhorrent” conditions of the U.S. criminal system.<sup>72</sup> As a result, a theory that calls for the abolition of, say, solitary confinement because it is too expensive or aesthetically displeasing ought not to qualify as “abolitionist,” in the relevant sense.

Thus, we should include some sort of normative commitment in the definition:

Negative abolitionism: a theory will count as (negative) abolitionism when it holds that a penal practice, or a subset of them, should be terminated *because* it lacks moral justification (or is morally prohibited) or it is likely to lack such a justification (or is likely prohibited).

This definition works better in making sense of actual abolitionist commitments, as they are understood by activists and scholars, who employ moral language to refer to our penal practices.<sup>73</sup>

A second question we must resolve is whether abolitionism needs to be absolutist for it to count as abolitionism. By “absolutist,” I mean a conception that demands that a certain penal practice should be terminated or abolished, as Shelby puts it, “for all time and in all places.”<sup>74</sup> Abolitionists themselves don’t seem to hold such an absolutist conception of abolitionism. Davis, for example, calls for the abolition of prisons “as we

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71. Carrier, Piché & Walby, *supra* note 25, at 320.

72. See, e.g., Morgan, *supra* note 16; McLeod, *supra* note 16; Akbar, *supra* note 34; SHELBY, *supra* note 20.

73. See, e.g., McLeod, *supra* note 16; Akbar, *supra* note 34; Morgan, *supra* note 16; Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2018). Of course, concerns about expenditure can be couched in moral terms if, say, someone wants to abolish prisons because they divert resources from meeting basic social needs.

74. SHELBY, *supra* note 20, at 113.



know them.”<sup>75</sup> McLeod argues that “prison abolition seeks to end the use of punitive policing and imprisonment as the primary means of addressing what are essentially social, economic, and political problems.”<sup>76</sup>

There are two important reasons to reject absolutism as a requirement for a theory to count as (negative) abolitionism. First, because it necessitates a commitment to (deontological) moral absolutism for a theory to be labeled “abolitionist.” This seems unwarranted, as there might be abolitionists who reject moral absolutism generally but, through consequentialist reasoning, conclude that a penal practice ought to be abolished. Indeed, requiring absolutism of abolitionism makes the latter into too thick of a concept, bringing with it a commitment to a variety of non-consequentialist moral theories that abolitionism can do without. If one of the goals of abolitionism is to upend the criminal system in a pluralistic society, then we ought to avoid burdening the concept with unnecessary moral commitments.

Second, moral absolutism about *anything* is a notoriously difficult position to defend.<sup>77</sup> Thus, demanding that abolitionism is absolutist seems to condemn abolitionism to becoming a fringe moral position in society. This is something that anyone committed to the reform of the criminal system should want to avoid. We ought not to dismiss radical critiques of the system as non-abolitionist simply because they leave open the possibility of imprisonment under certain rare and currently non-existing circumstances. If someone says, “punishment ought to be abolished because, as a society, we lack the ability to achieve perfect knowledge of someone’s guilt,” that person would still count as an *abolitionist*, even if, under certain circumstances (perfect knowledge), they might be supportive of punishment. Similarly, someone who believes that prisons should be eliminated in the U.S. but remains agnostic regarding ideal prisons in ideally just societies would also count as an abolitionist.

The definition I have provided also satisfies, I believe, the semantic and political conditions required by ameliorative projects. Recall that the definition is:

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75. ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT 90 (2016).

76. McLeod, *supra* note 16, at 1172.

77. See SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS (1994).

Negative abolitionism(s): a theory that holds that a given penal practice, or a subset of them, lacks moral justification (or is morally prohibited) or is likely to lack such justification (or is likely to be morally prohibited) and, for that reason, should be terminated.

The semantic condition is met because this definition retains the central functions of the ordinary term: to call for the termination of a certain penal practice.<sup>78</sup> And the political condition is hopefully met, given that the underlying values (terminating an unjustified practice) can be justified as well.<sup>79</sup> One of the main goals of the (negative) abolitionist movement is to radically upend the U.S. criminal system, and, at a general level, the concept of abolitionism should include all varieties that can be effective tools in fighting against injustice, even if they vary in their underlying moral commitments.<sup>80</sup>

A helpful concept of abolitionism should also be able to do the following things.<sup>81</sup> First, it should be able to explain why the elimination of a certain penal practice is warranted. The current definition does so: because the practice “lacks moral justification or it is likely to lack such justification.” Second, it should provide a framework that is sensitive to differences between theories regarding the scope of elimination, allowing punishment, prison, and police abolitionism to be understood under the same umbrella concept. My proposal satisfies this condition as well, and it also allows for both ideal and non-ideal abolitionists to be understood as abolitionists, as discussed in the following section. And third, a helpful concept should provide a plural umbrella term for different theorizations of the concept. This is also achieved, since the concept I have proposed is sufficiently thin to accommodate a wide range of underlying moral commitments concerning the ethics of punishment and self-defense.

The latter, which I see as an advantage, is admittedly in contradiction with at least some abolitionist writings, which argue that abolitionism is “in deep tension” with retributivist theories of punishment.<sup>82</sup> I don’t think this is correct, as retributivism can, in fact, support non-ideal abolitionism regarding punishment and both ideal and non-ideal abolitionism regarding imprisonment.<sup>83</sup> There is no need for even strong retributivists to be committed to imprisonment as the main form of punishment.

It is true that retributivist theories will struggle to explain what is wrong

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78. HASLANGER, *supra* note 47, at 225.

79. *Id.*

80. See, e.g., regarding gender and race, *id.* at 226–27.

81. This discussion loosely follows HASLANGER, *supra* note 47, and MANNE, *supra* note 47.

82. McLeod, *supra* note 16, at 1232.

83. See generally Douglas Husak, *Retributivism and Over-Punishment*, 41 LAW & PHIL. 169, 176 (2022); Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123 (2019).

with mass incarceration when no individual rights violations can be identified (which, of course, is not the case in the U.S.).<sup>84</sup> But this is so because retributivist theories can struggle with aggregation. Yet the fact that they struggle with aggregation is precisely what makes them protective of individual rights, since retributivists would not, for example, endorse punishing an innocent person to achieve goals of deterrence or a reduction in mass incarceration. By contrast, consequentialist theories, which can deal better with aggregation, struggle precisely in explaining what is wrong with punishing the innocent.<sup>85</sup> It is thus a mistake to exclude retributivist views from the concept of abolitionism, as it unnecessarily narrows the ability of abolitionism to garner consensus among those who disagree regarding the best justification of punishment.

This concept of abolitionism is also thin enough to allow for certain core elements of the abolitionist canon, like Marxist, functionalist, and genealogical critiques of the system, to fall under it.<sup>86</sup> Note, however, that the concept is thin enough to also incorporate liberal critiques of the system. In other words, a theory need not embrace the functional or genealogical critique to count as abolitionist. Again, although this is in tension with many abolitionist accounts, which do rely on those critiques, I believe it is an advantage of the definition that it can encompass different theories with different underlying moral commitments, insofar as they are all committed to the termination of a penal practice for moral reasons.

This concept of abolitionism, however, is sufficiently thick to exclude minimalism, as it requires a call for the *termination* of a penal practice (because it lacks or is likely to lack moral justification). Thus, theories that call for the *restriction* or *reform* of a penal practice will not count as abolitionism, but, most likely, as a form of penal *minimalism*. Penal minimalism, however, is not simply *any* restriction of a penal practice; it aims at “a radically reduced, reimagined, and redesigned role” of them.<sup>87</sup> For example, Husak posits a theory of criminalization that is minimalist.<sup>88</sup> Langer and Shelby would also likely qualify as committed to minimalism.<sup>89</sup>

84. See Ekow N. Yankah, *Punishing Them All: How Criminal Justice Should Account for Mass Incarceration*, 97 RES PHILOSOPHICA 185, 194 (2020).

85. See, e.g., DEIRDRE GOLASH, *The Case against Punishment: Retribution, Crime Prevention, and the Law* 48 (2005). (“The deeper problem, however, is that utilitarianism is inherently flawed: it requires that we use individuals as mere means to the good of others, provided only that the total good outweighs the total harm. Punishment, conceived simply as the doing of harm to some in order to prevent harm to others, is as morally suspect as quiet euthanasia of the unsightly homeless.”)

86. Thusi and Roberts emphasize and develop these kinds of critiques. Thusi, *supra* note 69, at 1579–93; Roberts, *supra* note 16, at 7–8.

87. See Langer, *supra* note 58, at 44, 57.

88. DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

89. Langer, *supra* note 58; SHELBY, *supra* note 20.

And, surprisingly, as we will see below, some well-known self-described abolitionists are (non-ideal) minimalists.<sup>90</sup>

Theories that aim for minor reforms of our penal practices are, thus, not minimalist. There are, of course, difficult questions regarding what degree of reform is required for a theory to count as minimalist,<sup>91</sup> but we can leave that momentarily open, as the working definitions we have are sufficiently thick to draw a line between minimalism and abolitionism.<sup>92</sup>

The exclusion of views that aim at radical reduction from the concept of abolitionism is warranted, for at least two reasons. First, because as a political movement, abolitionism has a rhetorical role to play: to mobilize people who have become accustomed to the penal system to rethink our current practices and not be content with modest reforms.<sup>93</sup> Barkow also suggests that “the radical frame of abolition” may have an impact in the long term in “disrupting the entrenched idea that prisons bring about public safety.”<sup>94</sup>

Preserving minimalism for more limited reforms also serves the goals of penal reform more effectively, as abolitionism might be perceived as too radical, while minimalism might be able to garner a wider consensus. This helps to ameliorate one of the dangers that Barkow perceives from increased calls for abolition, mainly, that the rhetoric of abolition might alienate certain members of the public from needed reforms.<sup>95</sup>

Second, because the term “abolition” deliberately draws a parallel to the abolition of slavery, we should exclude views that aim at reform from the concept of abolitionism.<sup>96</sup> If we aim to preserve that parallelism, abolition should require *abolition* or *termination*, as opposed to *restriction* or *reform*. We would not refer to someone who wants to make slavery “more humane” as an abolitionist. As Barkow notes, unlike some prison abolitionists, who leave space for the use of imprisonment as a tool in today’s society, slavery abolitionists aimed for “the complete demise of slavery.”<sup>97</sup> In the same way, we ought not to refer to those who wish to make a penal practice more humane or severely restricted as “abolitionists.” This is consistent with the

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90. See *infra* Subsection II.B.2.

91. See, e.g., Levin, *supra* note 25, at 3–4.

92. For a more complete, yet slightly skeptical, theory of minimalism, see Levin, *supra* note 25.

93. See Barkow, *supra* note 16, at 250–51, 266 (discussing the rhetorical role of abolitionist theories).

94. *Id.* at 252.

95. *Id.* at 252–53.

96. *Id.* at 265.

97. *Id.*

philosophical usage of abolitionism in the penal context,<sup>98</sup> and with the ordinary use of the term “abolition” in the penal context by different authors.<sup>99</sup>

With this definition in mind, let us go back to the distinction between ideal and non-ideal abolitionism. When discussing this categorization, I will refer to the conceptual discussion when needed.

## 2. *Back to Ideal and Non-Ideal Abolitionism*

Negative abolitionism can be ideal or non-ideal, depending on whether the abolitionist critique applies only in non-ideal conditions (i.e., non-ideal abolitionism) or in ideal ones (i.e., ideal abolitionism).<sup>100</sup>

The distinction between ideal and non-ideal theory traces back to John Rawls’s *A Theory of Justice*, where he distinguished between two different ways in which we can approach questions of justice. In ideal theory, we presume the existence of a well-ordered society, where “everyone is presumed to act justly and to do his part in upholding just institutions.”<sup>101</sup> That is, we presume something like “strict compliance” with the principles of justice,<sup>102</sup> where nearly “everyone strictly complies with, and so abides by” them.<sup>103</sup>

Ideal theory is not meant to be unrealistic or unattainable. On the contrary, an ideal theory about justice must take “the circumstances of justice” into consideration.<sup>104</sup> The circumstances of justice refer to objective and subjective features or natural limitations that are inescapable to human society (as opposed to a society of angels).<sup>105</sup> They include shortcomings in knowledge and judgment, conflicts of interest, moderate scarcity, and so

98. See Zachary Hoskins & Antony Duff, *Legal Punishment*; in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta & Uri Nodelman eds., Spring 2024 ed.), <https://plato.stanford.edu/archives/spr2024/entries/legal-punishment/> (discussing abolitionism and criminal punishment).

99. See, e.g., Stanley Cohen, *Alternatives to Punishment—The Abolitionist Case*, 25 ISR. L. REV. 729, 733 (1991); Davis, *supra* note 17, at 581.

100. Duff prefers the terms “contingent” and “absolute” abolitionism to distinguish between those who hold that punishment cannot be justified, even in ideal conditions, and those who hold that punishment cannot be justified given the present conditions of our society. I prefer the ideal/non-ideal distinction for two reasons: first, given its immediate connection to Rawls and the vast literature on ideal and non-ideal theory; and, second, because “contingent” suggests that non-ideal conditions are temporary, yet they have been the conditions of our society since time immemorial. Nonetheless, the label is, ultimately, irrelevant. Duff, *supra* note 17, at 68–69.

101. RAWLS (1999), *supra* note 45, at 8.

102. *Id.*

103. RAWLS (2001), *supra* note 45, at 13.

104. RAWLS (1999), *supra* note 45, at 110.

105. *Id.* at 110, 118, 126.

on.<sup>106</sup> Within the limits provided by these circumstances, but presuming strict compliance, we develop a theory about justice or an aspect of it.

Charles Mills famously criticized this method as ideological.<sup>107</sup> More recently, others have also questioned the usefulness of ideal theory, pointing out that abstracting from the current conditions of our society can distort their non-ideal features and might have no place in theorizing about injustice.<sup>108</sup> After all, an assumption of formal full compliance, although helpful, can also make questions about institutional design irrelevant: given full compliance, the need for institutions seems to disappear almost entirely.<sup>109</sup> As Hamlin and Stemplowska note, “this would imply—implausibly—that the nature of the problem of institutional design in ideal theory is necessarily radically different from the nature of the problem of institutional design in non-ideal theory.”<sup>110</sup> Even so, the method of idealization can be useful in answering certain political and moral questions.<sup>111</sup>

In non-ideal theory (which Rawls calls “partial compliance”), and in contrast with ideal theory, the presumption of strict compliance is lifted.<sup>112</sup> Non-ideal theory poses the question, then, of what to do given that people are not doing what they ought to do. Or, in different words, non-ideal or partial compliance theory asks how we ought to deal with injustice.<sup>113</sup> Questions of non-ideal theory are, in an important sense, questions of transition from a state of affairs that falls short of our ideals to one that meets them.<sup>114</sup>

As Rawls acknowledges, the problems of non-ideal theory “are the pressing and urgent matters” in society.<sup>115</sup> One might thus wonder what the value of ideal theory is. For Rawls, ideal theory provides a starting point and “the only basis for the systemic grasp” of the more pressing problems of non-ideal theory.<sup>116</sup> This has been referred to as “the target role” of ideal theory, whereby it guides our actions by providing the ideal endpoint that we want to achieve.<sup>117</sup> In its target role, a political ideal (e.g., the abolition

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106. *Id.* at 109–10.

107. See Charles W. Mills, “*Ideal Theory*” as Ideology, 20 HYPATIA 165 (2005).

108. Fryer, *supra* note 21, at 554.

109. Alan Hamlin & Zofia Stemplowska, *Theory, Ideal Theory and the Theory of Ideals*, 10 POL. STUD. REV. 48, 50 (2012).

110. *Id.*

111. See Jacob T. Levy, *There Is No Such Thing as Ideal Theory*, 33 SOC. PHIL. & POL’Y 312 (2016).

112. RAWLS (1999), *supra* note 45, at 308.

113. *Id.*

114. JOHN RAWLS, *THE LAW OF PEOPLES* 90 (1999).

115. RAWLS (1999), *supra* note 45, at 88.

116. *Id.*

117. Zofia Stemplowska, *What’s Ideal about Ideal Theory?*, 34 SOC. THEORY & PRAC. 319, 376 (2008).

of prisons) presents a well-defined target of reform, serving “as an important reference point for our specification of normative political principles.”<sup>118</sup> Ideal theory can also provide guidance on how to identify which wrongs are more grievous and urgent to correct.<sup>119</sup>

The distinction between ideal and non-ideal theory can be useful in discussions about abolitionism because it can help us parse different abolitionist theories. Although it is generally accepted that questions about the penal system are questions firmly located in non-ideal theory—understood as partial compliance with the demands of justice<sup>120</sup>—the distinction between ideal and non-ideal theory is still applicable to questions regarding the justification (or lack thereof) of our penal practices. When thinking about the penal system, it is possible to idealize certain features of society and then ask, “what would the penal system look like in a just society, if it would exist at all?” Idealization and non-idealization can work in a fragmented fashion, whereby we idealize some background conditions or features of society (thus assuming full compliance with a subset of norms about justice) while non-idealizing questions about intentional and reckless compliance with moral and criminal rules (thus assuming partial compliance in this respect).

Having this in mind, we can now go back to the distinction between ideal and non-ideal (negative) abolitionism.<sup>121</sup> Abolitionism will be ideal when arguing that a particular feature of the penal system should be abolished, even under ideal background societal conditions. That is, ideal abolitionists will argue that, even if we assume strict compliance with the principles of justice, a given feature of the penal system would remain unjustified and immoral and should be eliminated. By proving this, some versions of ideal abolitionism will also prove that said feature of our actual penal practices is, by default, also prohibited in current, non-ideal circumstances.

Legal scholars and activists who are abolitionists tend to be ideal abolitionists in the following sense: they posit that in a reasonably just society, some or all of our penal practices would become obsolete or unnecessary, and because unnecessary, morally unjustified. Note that they do not hold that the problem of non-compliance associated with the criminal

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118. David Wiens, *Political Ideals and the Feasibility Frontier*, 31 *ECON. & PHIL.* 447, 449 (2015).

119. RAWLS (2001), *supra* note 45, at 13.

120. See, e.g., RAWLS (1999), *supra* note 45, at 7, 308. Rawls himself saw questions about punishment in the realm of non-ideal theory, understood as partial compliance theory. *Id.* at 8.

121. Shelby also makes this distinction concerning prison abolitionism. See SHELBY, *supra* note 20, at 4. This distinction in the context of punishment theories is well-known to philosophers and political theorists. See e.g., Duff, *supra* note 17, at 4. Note, also, that theories of justice can also be ideal or non-ideal.

system would disappear in a just society; that is, they do not hold that *all* crime would disappear in a just society. They only point out that in a just society, certain penal features, like punishment or imprisonment, would be obsolete or unjustified. They thus think that the *positive* abolitionist project would achieve a just society in which the *negative* abolitionist project would become morally obligatory.

McLeod, Akbar, and Davis all seem committed to this kind of (negative) ideal abolitionism. McLeod, for example, writes that (prison) abolitionism is “an aspirational, ethical, institutional, and political framework that aims to fundamentally reconceptualize security and collective social life, rather than simply a plan to tear down prison walls. As such, abolition seeks to ultimately render prisons “obsolete.”<sup>122</sup> Morgan also defines abolitionism as an ambitious and long-term project that aims at “the abolition of a society that could have prisons.”<sup>123</sup> Dylan states that abolitionism “provides a useful and necessary departure from the liberal assumption that either the carceral state or carceral power is an inevitable and permanent feature of the social formation.”<sup>124</sup> And Jody Armour has recently embraced doubts concerning free will and thus, the appropriateness of punishment as a response to wrongdoing.<sup>125</sup>

Langer is not convinced that a fair society would be a society without punishment.<sup>126</sup> This is, of course, open to debate and would also depend on our definition of punishment and our underlying moral commitments. But note that ideal prison abolitionists tend to be committed to an ideal society without *imprisonment* or without the PIC. It is not implausible to think that such a society, where punishment would not take the form of imprisonment, is possible and desirable.

Ideal abolitionists are not necessarily absolutists. Davis and McLeod tend to endorse forms of non-ideal *minimalism*, as we will see below.

By contrast to ideal abolitionism, non-ideal abolitionism holds that a feature of our penal practices should be abolished given a set of non-ideal (also current) background societal conditions. The sets of relevant non-ideal circumstances that render our existing penal practices unjustified vary, but they generally refer to issues of over-criminalization; the state’s legitimacy or political authority over its citizens; due process; inhumane prison conditions; and so on.

The case for non-ideal penal abolitionism (about prisons, punishment, or

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122. McLeod, *supra* note 16, at 1167–68, 1207–08, 1232.

123. Morgan, *supra* note 16, at 1203.

124. Rodríguez, *supra* note 73, at 1577.

125. See Jody Armour, *Radical Imagination*, 19 CRIM. LAW & PHIL. 477 (2025); see also GREGG D. CARUSO, *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice* 12 (2021).

126. Langer, *supra* note 58, at 45.



the penal system) will hold anytime any of these conditions obtain and only to the extent that they do.<sup>127</sup> Note, however, that there are difficult questions about how these features relate to each other. For example, it is plausible that a state where imprisonment conditions are inhumane has, for that reason alone, lost its political authority over some or all of its citizens, regardless of whether other conditions obtain.

Non-ideal abolitionism is thus contingent, in the sense that it demands abolitionism only to the extent that some background social conditions reach a certain level of injustice. Once those background conditions change, the argument for abolitionism loses its force. The fact that non-ideal abolitionism is contingent in this way does not imply that it is vacuous or, even, short-lived. If ideal conditions are difficult or extremely unlikely to obtain in a given society, the case in favor of non-ideal abolitionism will be extremely robust. And given that we are yet to achieve perfect compliance with the principles of justice in any existing society, non-ideal abolitionism will certainly not be short-lived, in any sense of the word.

Finally, some scholars who don't write in the abolitionist canon might provide a partial argument in favor of non-ideal abolitionism when the conditions they require for punishment to be justified are demanding and, thus, unmet in current circumstances. Duff, for example, acknowledges that his communicative account of punishment is an ideal account that is far removed from actual conditions,<sup>128</sup> and that one "can hardly deny that the criminal law practices we have are so far removed from what criminal law should be as to raise real questions about the viability of such a hope."<sup>129</sup> To make the jump towards non-ideal abolition as a result of non-ideal conditions is, although not logically *necessary*, warranted and, in fact, difficult to resist, as I will argue in Part III.

Non-ideal abolitionists are abolitionists under the concept of abolitionism I have defended. This is because I have excluded the requirement that a theory ought to be in favor of the termination of a penal practice in all times and circumstances for it to be a form of abolitionism. By contrast, Shelby would seemingly understand non-ideal abolitionism as *not* abolitionism. Although he agrees that current practices of punishment and imprisonment are often unfair and unjust,<sup>130</sup> he believes that the fact that these practices have these characteristics "do[es] not constitute a

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127. See, e.g., SHELBY, *supra* note 20, at 84–86.

128. Antony Duff, *Punishment, Communication and Community*, in *Debates in Contemporary Political Philosophy* 387, 388 (Derek Matravers & Jonathan Pike eds., 2005).

129. Antony Duff, *Defending the Realm of Criminal Law*, 14 CRIM. L. & PHIL. 465, 497 (2020).

130. SHELBY, *supra* note 20, at 84–86.

compelling case for abolishing the general practice of imprisonment.”<sup>131</sup> Further, he argues that putting “a moratorium” on the use of prisons, given current non-ideal conditions, “is not tantamount to abolition, because it would not rule out prisons for all times and in all places. Prisons could still be legitimate under certain circumstances or in some locales, particularly when the social order is just or nearly so. It would, however, entail regarding their current use in places like the U.S. as illegitimate and intolerable.”<sup>132</sup> Shelby himself is supportive of a limited moratorium on prisons, given the current conditions in the U.S. (he is, thus, a non-ideal minimalist).

I think Shelby is correct that non-ideal abolitionism does not make a complete case for abolishing the practice of imprisonment, if we understand the requirement of “completeness” as requiring abolition in both our current society and in an ideal, imagined one. But requiring abolition in *our current society* is a form of abolitionism, since the imagined ideal society does not actually exist—and may, in fact, never exist.

This does mean—and perhaps this is what Shelby has in mind regarding the requirement of completeness—that the ultimate goal of ideal and non-ideal abolitionists differs. While ideal abolitionists want the penal practice in question terminated, non-ideal abolitionists will want it terminated *as it currently is* or until ideal societal conditions are achieved. Ideal abolitionists might thus have different reform goals from non-ideal abolitionists, and they might also differ regarding what things to prioritize and how.

The difference between ideal and non-ideal abolitionists is, thus, significant. Although their commitments overlap in the short term and they might agree regarding certain necessary reforms of the penal system, they aim for different things in the long term. Ideal abolitionism’s end goal is abolition; it is not—it cannot be—reform or minimization. By contrast, non-ideal abolitionists demand complete abolition *now* but leave open or accept that in a just society certain aspects of the penal system could be justified.

Take the example of prison abolitionism. Both non-ideal and ideal abolitionists might agree that imprisonment, as it exists today in the U.S., is a moral catastrophe and should be terminated. However, although non-ideal abolitionists would support the abolition of prisons as they are today, they would ultimately aim for the kind of social reform that would bring about the kind of imprisonment that is morally justified. By contrast, ideal abolitionists aim to see imprisonment terminated once and for all. Although, like non-ideal prison abolitionists, they can support the termination of imprisonment in current conditions, their ultimate goal is not to improve upon the practice of imprisonment so that it matches its ideal form (that is,

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131. *Id.*

132. *Id.* at 113.

the form that would hence make it justified). Their ultimate goal is for the practice of imprisonment to cease to exist.

Non-ideal abolitionism has, however, some important advantages over ideal abolitionism, particularly for those who worry about the dangers of idealization.<sup>133</sup> Fryer, for example, argues that ideal forms of abolitionism are inconsistent with abolitionism's activist agenda, and points out that grand idealization has often been thought incompatible with social movements because it can help perpetuate oppression.<sup>134</sup> Further, the kind of ideal abolitionism espoused by some legal scholars, whereby imprisonment only becomes unjustified when we achieve a perfectly just society, diverts focus from current penal practices by requiring us to imagine a society that does not exist and is far from existing.<sup>135</sup> Yet our penal practices exist and demand our moral attention now. Whether they would become obsolete in a perfectly just society seems to, in a sense, miss the point entirely. Finally, non-ideal abolitionism, at least when it pertains to imprisonment in the U.S., is morally difficult to resist, even for those who are not committed to ideal abolitionism. That is, ideal minimalists, ideal reformists, and, generally, anyone committed to seeing fundamental moral rights as constraints on state action, have reasons to embrace non-ideal prison abolitionism. I will come back to this in Part II.

The distinction between ideal and non-ideal abolitionism can be useful for categorizing different scholars' commitments to abolitionism. It might come as a surprise that many so-called abolitionists in legal academia are ideal abolitionists but *non-ideal minimalists*. That is, they posit that if we improve societal background conditions so that we achieve an ideally or reasonably just society, penal practices would either disappear or become unnecessary.<sup>136</sup> This is what makes them *ideal* abolitionists. Nonetheless, they often slide towards non-ideal *minimalism* by pointing out that in current, non-ideal circumstances, certain penal practices must be preserved, albeit severely restricted. The categorization is, however, somewhat difficult, as some abolitionists are ambiguous about whether they are committed to the complete termination of a practice, its reduction, or reimagination. Those committed to reduction, even in extreme forms, are not, however, abolitionists.

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133. See Mills, *supra* note 107; Fryer, *supra* note 21.

134. Fryer, *supra* note 21, at 555, 562.

135. For example, Lee argues that prison abolitionism, understood as positive abolitionism and negative ideal abolitionism is, first, not as radical as it appears and, second, self-defeating. Lee, *supra* note 21, at 2.

136. See, e.g., Lisa Guenther, *These Are the Moments in Which Another World Becomes Possible: Lisa Guenther on Abolition*, Abolition (July 10, 2015), <https://abolitionjournal.org/lisa-guenther-abolition-statement>; DAVIS, *supra* note 34, at 104.

Take, for example, the work of Allegra McLeod. In some of her work, she seems to be committed to both ideal and non-ideal minimalism. However, in other parts of her work, she seems to be committed to ideal *abolitionism* but also to non-ideal *minimalism*. Indeed, Barkow reads McLeod as a minimalist, given that the latter concedes that there might be some individuals who are too dangerous and “cannot live safely among us.”<sup>137</sup> By contrast, Donelson interprets McLeod as opposed to all instances of incarceration.<sup>138</sup> McLeod herself is somewhat ambiguous about the use of incarceration and the penal system in ideal conditions: she talks about ending the use of punitive policing and imprisonment as “the primary means” of addressing social problems.<sup>139</sup> This leaves open the possibility of imprisonment as a secondary means of doing so, thus making her an ideal *minimalist*.

However, other parts of her work are more suggestive of ideal abolitionism, such as when she states that abolitionism is committed to “building the social institutions and conceptual frameworks that would render incarceration unnecessary.”<sup>140</sup> This seems like a statement in favor of ideal (prison) abolitionism. Nonetheless, in non-ideal conditions, McLeod is quite explicitly a minimalist, stating that she understands the abolitionist project as one aimed at “dramatically *reducing* reliance on incarceration.”<sup>141</sup> She also suggests that some (few) individuals who “pose a severe, demonstrated danger to others” must be convicted and contained as the lesser of two evils, at least in current, non-ideal circumstances.<sup>142</sup>

Angela Davis also seems to be an ideal (prison) abolitionist.<sup>143</sup> She talks about abolitionist strategies that “question the place of the prison in our future”<sup>144</sup> and states that an abolitionist approach “would require us to imagine a constellation of alternative strategies and institutions, with the ultimate aim of removing the prison from the social and ideological landscapes of our society.”<sup>145</sup> The prison would be replaced and crowded out by a wide variety of strategies and institutions.<sup>146</sup> In this ideally just society, the “dangerous few” would be dealt with through different alternatives—but not via imprisonment.<sup>147</sup>

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137. Barkow, *supra* note 16, at 268.

138. Donelson, *supra* note 25, at 61.

139. McLeod, *supra* note 16, at 1172.

140. *Id.*

141. *Id.* (emphasis added).

142. *Id.*

143. Barkow and Shelby also read Harris in this way. See Barkow, *supra* note 16, at 267.

144. DAVIS, *supra* note 34, at 104.

145. *Id.* at 107.

146. *Id.* at 107–08.

147. *Id.* at 113–15.

Fryer, when discussing police abolitionists, also points out that most do not aim for “[a]n immediate destruction of police departments that would leave our communities vulnerable to violence.”<sup>148</sup> That is, we also find many scholars who are ideal abolitionists but remain non-ideal minimalists regarding police.

I will later argue (Part II) that ideal prison abolitionists should not so easily concede to minimalism in non-ideal conditions. On the contrary, prison abolition, as a non-ideal demand, is difficult to resist.

### C. *The Scope of Negative Abolitionism*

There is notable variety in terms of “the site of the abolitionist critique.”<sup>149</sup> We can thus distinguish between different kinds of abolitionism based on which penal institution(s) they aim to abolish. For example, abolitionism might aim to end a subset of penal practices or just one of them: imprisonment, the police, surveillance, the “carceral state,” criminal punishment, criminal law as a concept,<sup>150</sup> etc.<sup>151</sup> Accordingly, we can distinguish between 1) punishment abolitionism; 2) prison industrial complex abolitionism; 3) prison abolitionism; and 4) police abolitionism.

Punishment abolitionism is more common among philosophers than legal scholars.<sup>152</sup> Recent attention in legal scholarship has been focused on the latter three kinds of abolitionism, which I will address briefly.

#### 1. *Prison Abolitionism*

Prison abolitionism has been a common focus in discussions of abolitionism among legal scholars and activists.<sup>153</sup> It can be traced back to the 1970s, with Mathiesen’s work, and then the establishment in 1983 of the biannual International Conference on Prison Abolitionism (later changed to

148. Fryer, *supra* note 21, at 556.

149. See, e.g., Barkow, *supra* note 16, at 267; Carrier, Piché & Walby, *supra* note 25, at 320; Nicolas Carrier, *Monstrosity, Correctional Healing, and the Limits of Penal Abolitionism*, 19 CRIME, MEDIA, CULTURE 95, 97 (2023) [hereinafter Carrier, *Monstrosity*].

150. See Evan D. Bernick, *Eliminating Criminal Law* (Sept. 5, 2023) (unpublished manuscript) (on file with author), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4562398](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4562398).

151. Barkow, *supra* note 16, at 267.

152. See, e.g., CARUSO, *supra* note 125; MICHAEL J. ZIMMERMAN, THE IMMORALITY OF PUNISHMENT (2011); Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFFS. 217, 221 (1973); DAVID BOONIN, THE PROBLEM OF PUNISHMENT 1 (2008); Gregg D. Caruso & Derk Pereboom, *A Non-Punitive Alternative to Retributive Punishment*, in THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY AND SCIENCE OF PUNISHMENT 355 (2020); Nathan Hanna, *Against Legal Punishment*, in THE PALGRAVE HANDBOOK ON THE PHILOSOPHY OF PUNISHMENT 559, 559–60 (Matthew C. Altman ed., 2023); DEIRDRE GOLASH, THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW 48 (2005).

153. See, e.g., Barkow, *supra* note 16, at 248; Carrier, *Monstrosity*, *supra* note 149, at 97.

*Penal Abolitionism*), marking its birth.<sup>154</sup> Perhaps surprisingly, it is far from being the most radical kind, as it retains the adjudication of blame by the state and practices of accountability or punishment different from imprisonment.

The scope of prison abolitionism depends on one's conception of imprisonment. Shelby, for example, understands imprisonment as a type of involuntary confinement or incarceration.<sup>155</sup> Incarceration refers to "the institutionalized practice of forcibly confining people within an enclosed space, segregating them from the general public, claiming custodial guardianship over them, and subjecting them to institutional rules of order."<sup>156</sup> A prison, according to Shelby's definition, is an incarceration facility that functions to impose punishment, including jails, penitentiaries, and prisons.<sup>157</sup>

Some abolitionists extend the scope of the critique beyond the prison, encompassing other forms of institutionalization, such as hospitals, psychiatric facilities, and so on.<sup>158</sup> Buss, for example, argues that we should abandon the separate juvenile-exceptionalist system and embrace a unitary approach.<sup>159</sup> This would reduce our reliance on incarceration and would lead to a decrease in those who continue to offend during middle age.<sup>160</sup>

## 2. *Prison-Industrial Complex Abolitionism*

American abolitionism has also centered around a critique of the prison-industrial complex ("PIC"),<sup>161</sup> which starts from a general critique of capitalism, as well as structural injustice.<sup>162</sup>

Roberts defines the PIC as a system "rooted in chattel slavery in the United States,"<sup>163</sup> which functions "to oppress black people and other marginalized groups in order to maintain a racial capitalist regime."<sup>164</sup> It also emphasizes the connection between capitalism and the prison by focusing on corporate involvement in the construction, operation, and administration of prisons. As Davis writes, "[b]ecause of the extent to which

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154. Carrier, Piché & Walby, *supra* note 25, at 320–21; Mathiesen, *supra* note 30, at 81.

155. SHELBY, *supra* note 20, at 62.

156. *Id.*

157. *Id.* at 49.

158. Barkow, *supra* note 16, at 268.

159. Emily Buss, *Kids Are Not So Different: The Path from Juvenile Exceptionalism to Prison Abolition*, 89 U. CHI. L. REV. 843, 845 (2022).

160. *Id.* at 848.

161. Carrier, Piché & Walby, *supra* note 25, at 320–21; SHELBY, *supra* note 20, at 121 (citing ANGELA DAVIS, *THE MEANING OF FREEDOM* 47–49 (City Lights Books, 2012)).

162. See SHELBY, *supra* note 20, at 138.

163. Roberts, *supra* note 16, at 7.

164. *Id.* at 7–8.

prison building and operation began to attract vast amounts of capital—from the construction industry to food and health care provision—in a way that recalled the emergence of the military industrial complex, we began to refer to a ‘prison industrial complex.’”<sup>165</sup>

As Shelby notes, critiques of the PIC tend to extend beyond imprisonment, as there is a direct connection between a critique of capitalism and a critique of other institutions and organizations that might be conceived as part of a capitalist system (e.g., schools, hospitals, banks, the military, etc.).<sup>166</sup> Functional or structural critiques can, indeed, be all-encompassing: given the ability of unjust social systems to reproduce themselves and the difficulties associated with challenging them, any practice that occurs within an unjust social structure is more likely than not to reproduce the existing hierarchies.<sup>167</sup>

Shelby identifies different forms the functional critique against the PIC can take depending on what the function of the prison is: economic exploitation, racial subordination, political repression, the concealment of social problems, and so on.<sup>168</sup>

The PIC critique can also expand to the idea of crime. Hulsman, for example, states that abolitionism’s first idea is to question that there is “an ontological reality of crime, independent of the defining activities of criminal justice.”<sup>169</sup>

It seems that most American legal scholars who are abolitionists are PIC or prison abolitionists and *not* punishment abolitionists, as they tend to support practices based on restorative justice and other forms of accountability.<sup>170</sup> And, as discussed in the previous section, they also tend to be ideal prison abolitionists but non-ideal prison minimalists, as they retain imprisonment for some individuals or in some form in current societies.

### 3. *Police Abolitionism*

The abolitionist movement has also focused on the abolition of the police. Carrier, Piche, and Walby suggest that police abolition is a more

165. DAVIS, *supra* note 34, at 12.

166. SHELBY, *supra* note 20, at 126.

167. See Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1385 (2022) (arguing that abolitionism should extend some of its critique beyond the criminal law system).

168. SHELBY, *supra* note 20, at 87.

169. Louk Hulsman, *The Abolitionist Case: Alternative Crime Policies*, 25 ISR. L. REV. 681, 683 (1991).

170. See, e.g., Vincenzo Ruggiero, *An Abolitionist View of Restorative Justice*, 39 INT’L J.L., CRIME & JUST. 100 (2011). He also notes the potential for non-penal practices to be coopted by the prison industrial complex.

logical place for abolitionists to begin, given its central role in criminalization.<sup>171</sup>

Police abolitionists are often ideal abolitionists, although some seem to be non-ideal *minimalists* about the police and prefer to focus on the positive abolitionist project instead. Fryer, for example, notes that most contemporary police abolitionists do not aim for the immediate elimination of police departments.<sup>172</sup>

Mariame Kaba argues that we cannot reform the police and that “the only way to diminish police violence is to reduce contact between the public and the police.”<sup>173</sup> However, she seems committed to the kind of ideal abolitionism I discussed in the previous section, where the aim of abolitionism is to achieve a society where police become “obsolete.” “We are not abandoning our communities to violence. We don’t want to just close police departments. We want to make them obsolete.”<sup>174</sup> The same holds true for Amna Akbar.<sup>175</sup> They are thus ideal abolitionists regarding police but non-ideal minimalists.

Among contemporary philosophers, the treatment of police and law enforcement is relatively sparse.<sup>176</sup> A notable exception is Jake Monaghan, but he is not an abolitionist regarding police. Instead, he provides an account of just policing in our current non-ideal conditions.<sup>177</sup>

## II. ABOLITIONISM NOW

As discussed in the previous section, some ideal prison abolitionists slide into non-ideal prison minimalism when confronted with the question of what to do with prisons in current, non-ideal circumstances. Prison abolitionism is, indeed, often met with skepticism.

Despite this widespread skepticism, most scholars today, abolitionists or not, agree that the current conditions in the U.S. are severely flawed. Wellman, who endorses a forfeiture-based theory of punishment, states that imprisonment in the U.S., due to overcriminalization, over-punishment, horrific prison conditions, and background conditions of injustice, “constitute[s] a widespread and systematic human rights atrocity.”<sup>178</sup>

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171. They also think that social anarchism is the best justificatory theory for abolitionist commitments. Carrier, Piché & Walby, *supra* note 25, at 329.

172. Fryer, *supra* note 21, at 556.

173. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. Times (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>.

174. *Id.*

175. Akbar, *supra* note 34, at 1787.

176. *But see* Policing, Policy, and Philosophy Initiative (3PI) Database, PENN. STATE UNIV., <https://3pi.la.psu.edu/database/> (last visited Oct. 6, 2025).

177. *See* JAKE MONAGHAN, JUST POLICING (2023).

178. WELLMAN, *supra* note 27, at 173.



Shelby, who is a minimalist, describes the use of imprisonment in the U.S. as “sometimes dehumanizing; frequently abused; poorly administered; inadequately funded; and too closely tied to corporate profit. Far too often, prisons are a vehicle for racial domination, economic exploitation, and political repression.”<sup>179</sup> Husak, who is a retributivist, writes that “[t]he criminal justice system that many commentators have worked so hard to improve is being used for perverse and immoral ends.”<sup>180</sup> Lippke, who is a prison minimalist, states that “defending most existing prisons may be a hopeless task.”<sup>181</sup> Murphy, who is a non-ideal abolitionist, concludes that “[i]nstitutions of punishment constitute . . . structural injustices and are, in the absence of major social change, to be resisted by all who take human rights to be morally serious.”<sup>182</sup> Lewis and Usmani proclaim that the “American criminal legal system is unjust and inefficient.”<sup>183</sup> As Wellman points out, “*no one* defends the status quo.”<sup>184</sup>

Despite their agreement, these scholars, including those writing in the abolitionist tradition, shy away from endorsing complete and immediate or short-term decarceration and endorse instead programs of gradual and limited decarceration coupled with radical reforms of society.<sup>185</sup> Shelby, for example, dismisses a complete moratorium on the practice of imprisonment and opts for a limited one, given that those oppressed might be left vulnerable to aggression.<sup>186</sup> Even Allegra McLeod, whom I have catalogued as an ideal abolitionist, writes that “[i]f prison abolition is conceptualized as an immediate and indiscriminate opening of prison doors—that is, the imminent physical elimination of all structures of incarceration—rejection of abolition is perhaps warranted.”<sup>187</sup> She then notes that imprisonment might be justified as “the lesser of two evils” in the case of those who pose “a severe, demonstrated danger to others.”<sup>188</sup>

The notable exceptions are Wellman, who, although not an ideal abolitionist, argues that both U.S. citizens and foreign parties would be justified in forcibly interfering with the U.S. criminal system,<sup>189</sup> and

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179. SHELBY, *supra* note 20, at 200.

180. HUSAK, *supra* note 88, at vii.

181. LIPPKE, *supra* note 59, at 7–8.

182. Murphy, *supra* note 152, at 221–22.

183. Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2 AM. J.L. & EQUAL. 85, 85 (2022).

184. WELLMAN, *supra* note 27, at 172.

185. See generally, e.g., Slobogin, *supra* note 58.

186. SHELBY, *supra* note 20, at 114. Shelby does say, however, that “[w]here prison conditions drop below human rights requirements prisoners should be moved or released until the prison in question has been suitably reformed and renovated.” *Id.* at 113.

187. McLeod, *supra* note 16, at 1161.

188. *Id.* at 1172.

189. WELLMAN, *supra* note 27, at 189–92.

Murphy, who briefly makes the case for resistance.<sup>190</sup> Perhaps this is because, as Ristroph writes, criminal law exceptionalism makes it difficult or impossible to imagine a world without it or without some of its features.<sup>191</sup>

Scholars disagree, however, as to what, exactly, makes the U.S. criminal system unjust. Some worry that the U.S. might lack moral standing to punish many individuals because it is complicit in their wrongdoing by creating criminogenic conditions (such as poverty) or because it has subjected them to grievous wrongdoing.<sup>192</sup> Others argue that, given the background conditions of social injustice, the U.S. lacks political authority over individuals who live in poverty or are oppressed by institutional racism, particularly for the commission of *mala prohibita* offenses.<sup>193</sup> Others focus on over-criminalization, that is, the fact that the U.S. criminal system punishes behaviors that ought not to be criminalized<sup>194</sup> (as an example, one in five people incarcerated in the U.S. are locked up for a drug offense<sup>195</sup>). Others worry that the criminal system unfairly targets poverty and race. Available data shows that incarcerated people had a median annual income, prior to their incarceration, that was 41% less than that of non-incarcerated people of similar ages.<sup>196</sup> The share of the imprisoned population that was in poverty prior to their arrests equals 57% for men and 72% for women (the national poverty rate is 11.8%).<sup>197</sup> Statistics about the

190. Murphy, *supra* note 152, at 221–22.

191. Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, 17 CRIM. L. & PHIL. 5, 7 (2023).

192. See e.g., Benjamin Ewing, *Do Unjust States Have the Standing to Blame? Three Reservations About Scepticism*, 43 OXFORD J. LEGAL STUD. 249, 251 (2023); R. A. Duff, *Blame, Moral Standing and the Legitimacy of the Criminal Trial*, 23 RATIO 123, 130 (2010); Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391, 393 (2009); Jeffrey W. Howard & Avia Pasternak, *Criminal Wrongdoing, Restorative Justice, and the Moral Standing of Unjust States*, 31 J. POL. PHIL. 42 (2021).

193. See, e.g., SHELBY, *supra* note 20, at 65; Gustavo A. Beade & Rocío Lorca, *¿Quién Tiene La Culpa y Quién Puede Culpar a Quién? Un Diálogo Sobre La Legitimidad Del Castigo En Contextos de Exclusión Social [Who is Blameworthy, and Who Can Blame Whom? A Dialogue About the Legitimacy of Punishment in the Face of Social Exclusion]*, *Isonomía* 135, 159–61 (Mex. 2017); Howard & Pasternak, *supra* note 192, at 46–47, 145; Rocío Lorca, *Punishing the Poor and the Limits of Legality*, 18 LAW CULTURE & HUMAN. 424 (2022); Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFFS. 126, 127, 136 (2007).

194. See HUSAK, *supra* note 88.

195. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POLICY INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html>. Overcriminalization is particularly troublesome for a state that might lack political authority over many of its subjects and whose citizens also lack norms to obey the law for its own sake, particularly in the case of *mala prohibita* offenses. See, e.g., WELLMAN, *supra* note 27, at 187 (describing the lack of authority of the state over the ghetto poor with respect to *mala prohibita* crimes).

196. Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>.

197. Tara O'Neill Hayes & Margaret Barnhorst, *Incarceration and Poverty in the United States*, AM. ACTION FORUM 30, 2020), at 4, <https://www.americanactionforum.org/research/incarceration-and-poverty-in-the-united-states>.

overrepresentation of Black men in prisons are well-known.<sup>198</sup> Finally, others point out that punishment in the U.S. is disproportionate because the length of criminal sentences is higher compared to other wealthy countries and/or higher than what is normatively desired.<sup>199</sup> Terms of incarceration in the U.S. are five to ten times as long as those imposed in France or Germany for similar crimes.<sup>200</sup>

If one or more of these arguments are correct, the U.S. criminal system involves the systematic and widespread violation of individuals' most fundamental moral rights. Indeed, if at least some of these arguments are correct, a majority of those imprisoned would have a moral claim against their confinement (and, perhaps, also their punishment). However, for most of the argument in favor of decarceration, I will not assume that these claims are correct. I will take the rather conservative position that the U.S. has standing and political authority to punish all individuals, that what is criminalized is correctly criminalized, and that the length of sentencing in the U.S. is morally proportionate. I will also assume that ideal prison abolitionism is *not* correct. As a consequence of these assumptions, each person's imprisonment would be justified *if it took place in something like an "ideal" prison*—by which I mean a prison that is safe, treats individuals humanely, and provides adequate access to physical and mental health resources, as well as to educational and recreational activities.

U.S. prisons are, however, generally far from "ideal prisons."<sup>201</sup> In fact, prison conditions are, on average, harsh enough that they impose serious harm on those imprisoned. As Shelby writes, "[p]risons as we know them, now and in the past, are often dehumanizing, horrid, even torture chambers."<sup>202</sup> Many facilities are poorly managed, and even those that are relatively well managed and maintained do not resemble the "ideal prison."

I will simply assume that this type of imprisonment, which would still entail complete confinement in an institutional setting due to punishment (and, thus, we can confidently call it "imprisonment" or "incarceration") could be justified.

The harm imposed by imprisonment is hard to separate from the harm

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198. See, e.g., Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project>.

199. HUSAK, *supra* note 82, at 178.

200. HUSAK, *supra* note 87, at 19.

201. Leo Carroll, Sharon Calci & Amber Wilson, *Mass Incarceration and Conditions of Confinement*, in THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT (John Wooldredge & Paula Smith eds., 2018) 53, 53. On the relationship between prison conditions and criminal justice reform, see, Andrea Craig Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. L. REV. 1 (2019).

202. SHELBY, *supra* note 20, at 20.

imposed by harsh or inhumane prison conditions. It is also hard to quantify. Nevertheless, we can provide a somewhat complete picture of the kinds of harms and risks entailed by imprisonment. Let us start with a brief overview of the effects of imprisonment on those who are incarcerated.

#### A. Imprisonment

Imprisonment is robustly correlated with a wide variety of negative effects on those who are incarcerated. It also subjects individuals to particular kinds of risks and harms. As Massoglia notes, “[t]here is perhaps no social institution that is both so pervasive and so damaging to the lives of individuals who come into contact with it as the penal system.”<sup>203</sup>

According to the Prison Policy Initiative, “[p]eople face extremely poor living conditions in practically every jail and prison.”<sup>204</sup> Prisons are characterized by routine failure to provide for individuals’ medical needs, poor material conditions, and harmful psychological effects.<sup>205</sup>

Violence is not only a pervasive feature of prison life, but also “the leading by-product of prisons.”<sup>206</sup> Although the actual extent of sexual assault in prison remains unknown,<sup>207</sup> individuals who are incarcerated are at a higher risk of being victims of violent and sexual crimes. Different estimates find that between 2% and 22% of inmates have been sexually assaulted in prison.<sup>208</sup> A female prisoner is 30 times more likely to be sexually assaulted than a woman outside of prison.<sup>209</sup> An estimated 80,600 inmates reportedly experience sexual violence while in prison or jail, 60% of which is perpetrated by jail or prison staff.<sup>210</sup>

Data from the Bureau of Justice Statistics (BJS) paint a similarly bleak picture. In 2020, correctional administrators reported 36,264 allegations of sexual victimization in prisons, jails, and other adult correctional

203. Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. HEALTH & SOC. BEHAV. 56, 66 (2008).

204. Sawyer & Wagner, *supra* note 195.

205. *Id.*

206. Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 588 (2007).

207. Robert W. Dumond, *Inmate Sexual Assault: The Plague that Persists*, 80 THE PRISON J. 407, 408 (2000).

208. *No Escape: Male Rape in U.S. Prisons*, HUMAN RIGHTS WATCH, Sec. VII. Anomaly or Epidemic: the Incidence of Prisoner-on-Prisoner Rape (2001), <https://www.hrw.org/reports/2001/prison/report7.html>; see also A.G. Blackburn et al., *Sexual Assault in Prison and Beyond: Toward an Understanding of Lifetime Sexual Assault among Incarcerated Women*, 88 PRISON J. 351, 351–377 (2008).

209. See Kylee Synovec & April N. Terry, *Prison Rape and Sexual Assault: Prevalence, Vulnerabilities, and System Responses*, FORT HAYES STATE UNIVERSITY, <https://scholars.fhsu.edu/cgi/viewcontent.cgi?article=1294&context=sacad> (last visited Sep. 28, 2025).

210. *Statistics: Victims of Sexual Violence*, RAINN, <https://rainn.org/statistics/victims-sexual-violence> (last visited Oct. 10, 2025).

facilities.<sup>211</sup> Substantiated inmate-on-inmate nonconsensual sexual acts resulted in injury to the victim in approximately 20% of incidents and major injury in 8% of incidents.<sup>212</sup> Only 52% of victims of substantiated inmate-on-inmate sexual victimization in prisons and 34% of those in jails were provided with counseling or mental health treatment.<sup>213</sup>

The risks of victimization are not evenly distributed among those imprisoned. Inmates with mental health disorders were more likely than those without mental health disorders to have been sexually victimized over a six-month period, and among those with mental disorders, victimization was three times as high among female inmates compared to their male counterparts.<sup>214</sup> Black and Hispanic inmates with mental disorders were also at higher risks compared to their white counterparts.<sup>215</sup>

Violence in prisons is also common. The rate of homicide in state prisons is two-and-a-half times greater than in the U.S. population when adjusted for age, sex, and race/ethnicity.<sup>216</sup> Unnatural causes of death, including suicide, homicide, drug or alcohol intoxication, and accidents, accounted for 17% of deaths in state prisons in 2018.<sup>217</sup> Twenty-one percent of incarcerated men were assaulted by staff over six months in 2005, and there were 26,395 inmate-on-inmate assaults in the same year.<sup>218</sup>

A study of three correctional institutions operating at design capacity found that 48% of inmates reported being victims of physical assault, theft, robbery, simple assault, or property damage.<sup>219</sup> Inmates who spent more hours in education, vocational training, and/or recreational activities were more likely to be victims of theft.<sup>220</sup> More time spent in recreation, however, appears to be correlated with a higher risk of being the victim of physical assault.<sup>221</sup> As the author notes, it is hard to determine what should be done

211. U.S. DEP'T OF JUST., *Sexual Victimization Reported by Adult Correctional Authorities, 2019–2020 – STATISTICAL Tables 1* (July 2024), <https://bjs.ojp.gov/document/svraca1920st.pdf>.

212. *Id.* at 11.

213. *Id.*

214. Nancy Wolff, Cynthia Blitz & Jing Shi, *Rates of Sexual Victimization in Prison for Inmates With and Without Mental Disorders*, 58 PSYCHIATRIC SERVS. 1087, 1090 (2007).

215. *Id.* at 1091.

216. Note that the BJS data does not separate homicide committed by incarcerated individuals from death “incidental to the use of force by staff,” or “resulting from injuries sustained prior to incarceration.” Leah Wang & Wendy Sawyer, *New Data: Note State Prisons Are Increasingly Deadly Places*, PRISON POLICY INITIATIVE (Jun. 8, 2021), [https://www.prisonpolicy.org/blog/2021/06/08/prison\\_mortality/](https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/).

217. *Id.* at 3.

218. Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POLICY INITIATIVE (Dec. 2, 2020), <https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence>.

219. John D. Wooldredge, *Inmate Lifestyles and Opportunities for Victimization*, 35 J. RES. CRIME & DELINQUENCY 480, 496–97 (1998).

220. *Id.* at 489.

221. *Id.* at 495.

to lower the risks of victimization in prison for both physical assault and theft.<sup>222</sup> Eliminating recreation or preventing inmates from having property would be inhumane.<sup>223</sup>

Another study found that the rates of physical assault for male inmates were 18 times higher than for males in the general population and 27 times higher for female inmates than for women in the general population.<sup>224</sup> Rates for poor communities (which might serve as better comparisons) are 10 times lower than the rates for those in prison.<sup>225</sup> Results also indicate that risks of victimization vary based on the institutional setting, with inmates in larger facilities being at higher risk of being victims of physical violence at the hands of staff than inmates at other facilities.<sup>226</sup>

Healthcare in prison is also deficient. It tends to be reactive rather than preventative, designed to treat acute issues rather than chronic disease.<sup>227</sup> Many inmates have previous mental health issues,<sup>228</sup> and many develop PTSD after witnessing incidents of violence behind bars.<sup>229</sup>

Current and previous incarceration are also associated with several health effects, both in the long and the short term. Individuals with a history of incarceration are more likely to suffer from infectious diseases, including HIV, hepatitis B, hepatitis C, and tuberculosis, as well as other conditions associated with stress.<sup>230</sup> Previously incarcerated individuals also have worse access to medical and dental care, even after controlling for insurance and health status,<sup>231</sup> and a higher prevalence of incident hypertension and other cardiovascular conditions, even after adjusting for smoking, alcohol, illicit drug use, and family income.<sup>232</sup> Current and recent incarceration is associated with the risk of major depression in fathers compared to non-incarcerated fathers.<sup>233</sup> Unlike some research in physical health, there is no

222. *Id.* at 489.

223. *Id.* at 496–97.

224. Wolff et al., *supra* note 206, at 595.

225. *Id.*

226. *Id.* at 596.

227. Leah Wang, *Chronic Punishment: The Unmet Health Needs of People in State Prisons*, PRISON POLICY INITIATIVE (June 2022), <https://www.prisonpolicy.org/reports/chronicpunishment.html>.

228. U.S. DEP'T OF JUST., INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS (June 2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/imhprpspi16st.pdf>.

229. WIDRA, *supra* note 219.

230. See MASSOGLIA, *supra* note 204. See also Theodore M. Hammett et al., *The Burden of Infectious Disease Among Inmates and Releases from US Correctional Facilities, 1997*, 92 AM. J. PUB. HEALTH 1789, 1789–94. (2002).

231. But see Sonali P. Kulkarni et al., *Is Incarceration a Contributor to Health Disparities? Access to Care of Formerly Incarcerated Adults*, 35 J. CMTY. HEALTH 268 (2010).

232. Emily A. Wang et al., *Incarceration, Incident, Hypertension, and Access to Health Care*, 169 ARCHIVES INTERNAL MED. 687–93 (2009).

233. Kristin Turney et al., *As Fathers and Felons: Explaining the Effects of Current and Recent Incarceration on Major Depression*, 53 J. HEALTH & SOC. BEHAV. 465, 477 (2012).

mental health benefit of recent or current incarceration.<sup>234</sup> Incarceration more than doubles the odds of twelve-month dysthymia and increases the odds of twelve-month major depression by 50%.<sup>235</sup>

Previous incarceration is also associated with short-term negative effects on life expectancy. A study of parolees found that each year of imprisonment results in a two-year decline of life expectancy.<sup>236</sup> A different study estimated the mortality excess associated with imprisonment to be at between four and five fewer years of life expectancy at age 40.<sup>237</sup>

Other studies have found long-term effects of imprisonment on premature mortality.<sup>238</sup> A study of Russian prisoners found that formerly incarcerated men were more than twice as likely to die prematurely compared to those who have not been incarcerated, with a higher likelihood of dying from infectious disease, respiratory diseases, non-alcohol-related accidental poisonings, and homicide.<sup>239</sup> Another study, focused in the U.S.,

234. *Id.* Note, however, one qualitative study of women in a maximum-security prison exists where effects on mental health were negative, positive, or nonexistent. Positive effects related to access to medication and lack of access to drugs, among other things. See Holly M. Harner & Suzanne Riley, *The Impact of Incarceration on Women's Mental Health: Responses from Women in a Maximum-Security Prison*, 23 QUAL. HEALTH RES. 26 (2013).

235. Jason Schnittker et al., *Out and Down: Incarceration and Psychiatric Disorders*, 53 J. HEALTH & SOC. BEHAV. 448, 458 (2012).

236. Evelyn J. Patterson, *The Dose-Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. PUBLIC. PUB. HEALTH 523, 523 (2013) [hereinafter Patterson, *The Dose*]; Sam McCann, *Health Care Behind Bars: Missed Appointments, No Standards, and High Costs*, Vera (June 29, 2022), <https://www.vera.org/news/health-care-behind-bars-missed-appointments-no-standards-and-high-costs>. See generally Christopher Wildeman, *Imprisonment and (In)equality in Population Health*, 41 SOC. SCI. RSCH. 74 (2012) (studying the consequences of mass imprisonment on population health); David L. Rosen, Victor J. Schoenbach & David A. Wohl, *All-Cause and Cause-Specific Mortality Among Men Released from State Prison, 1980–2005*, 98 AM. J. PUB. HEALTH 2278 (2008) (studying the effects of imprisonment (in North Carolina) on post-release mortality, finding an excess of death among former prisoners across a wide range of causes); Evelyn J. Patterson, *Incarcerating Death: Mortality in U.S. State Correctional Facilities, 1985–1998*, 47 DEMOGRAPHY 587 (2010) [hereinafter Patterson, *Incarcerating Death*] (finding incarceration was more detrimental to females than their male counterparts); Ingrid A. Binswanger et al., *Release from Prison — A High Risk of Death for Former Inmates*, 356 N. ENGL. J. MED. 157, 157–65 (2007) (finding risk of death for former inmates is 3.5 times higher than other state residents).

237. Sebastian Daza, Alberto Palloni & Jerrett Jones, *The Consequences of Incarceration for Mortality in the United States*, 57 DEMOGRAPHY 577, 591 (2020).

238. See, e.g., Michael Massoglia et al., *The Relationship Between Incarceration and Premature Adult Mortality: Gender Specific Evidence*, 46 SOC. SCI. RSCH. 142 (2014) (finding that, after controlling for age, race, health insurance, and other socio-economic factors, women who have a history of incarceration are more likely to die than those who have no such history; while there is no such relationship for men; see generally Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 ANN. REV. SOC. 291, 297–299 (2015) (providing an overview of studies on the issue).

239. William Alex Pridemore, *The Mortality Penalty of Incarceration: Evidence from a Population-Based Case-Control Study of Working-Age Males*, 55 J. HEALTH & SOC. BEHAV. 215 (2014).

also found a significant relationship between incarceration and long-term effects on health—in particular, lasting effects on midlife functioning.<sup>240</sup>

It is sometimes said that imprisonment has a “protective effect” (in terms of mortality) for Black men. A study in the state of Georgia found that Black men were the only subgroup to experience lower relative mortality while imprisoned, while white men experienced elevated mortality during incarceration.<sup>241</sup> This protective effect, however, was overwhelmed by the heightened mortality post-release.<sup>242</sup> Further, four causes of death (homicide, transportation, accidental poisoning, and suicide) accounted for 74% of the decreased mortality during incarceration, while six causes of death (HIV, cancer, cirrhosis, homicide, transportation, and accidental poisoning) accounted for 62% of the excess mortality following release.<sup>243</sup> This suggests that the low mortality in prisons can be explained by the unlikelihood of deaths taking place in the context of incarceration and by the compassionate release of severely ill prisoners—or, as put by the authors, a “healthy prisoner effect” does not exist.<sup>244</sup>

Prison effects regarding excess mortality also vary by gender. A study found that while “male prisoners lost 13% more years of life than male non-prisoners,” “female prisoners lost 76% more years of life than female non-prisoners” during the first period under study.<sup>245</sup>

A number of facilities employ solitary confinement, even against juveniles.<sup>246</sup> Some estimates suggest that approximately 20% of people in federal and state prisons and jails will experience some form of extreme isolation during their confinement.<sup>247</sup> On an average day, 5% of those in federal and state prisons are held in extreme isolation.<sup>248</sup> In recent decades, the trend has been towards greater and longer use of solitary confinement for less and less serious misconduct.<sup>249</sup> Further, solitary confinement—which, undoubtedly, is a form of severe punishment—is imposed by prison officials without a criminal trial.<sup>250</sup>

240. Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 LAW & SOC'Y REV. 275 (2008).

241. Anne C. Spaulding et al., *Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning*, 173 AM. J. EPIDEMIOLOGY 479 (2011); Patterson, *Incarcerating Death*, *supra* note 236 (finding white males in prison lost 32% more years of life than those outside prison).

242. Spaulding et al., *supra* note 241, at 485.

243. *Id.* at 484.

244. *Id.* at 485.

245. Patterson, *Incarcerating Death*, *supra* note 236, at 593 (2010).

246. Brielle Basso, *Solitary Confinement Reform Act: A Blueprint for Restricted Use of Solitary Confinement of Juveniles Across the States*, 48 SETON HALL L. REV. 1601, 1603 (2017).

247. Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 928–29 (2018).

248. *Id.* at 929.

249. *Id.*

250. *Id.* at 960.



In addition to the use of solitary confinement, “supermax” prisons “subject inmates to levels of social isolation, restriction of autonomy, and sensory deprivation heretofore unthinkable . . . for months or years at a time.”<sup>251</sup>

It is now well known that solitary confinement has substantial adverse effects on individuals, particularly regarding the increase in the rates of psychiatric and psychological health problems.<sup>252</sup> It can also lead to fantasies becoming aggressive and violent.<sup>253</sup> Many individuals placed in solitary confinement have a mental health disorder on arrival at the facility, which is likely to worsen in confinement.<sup>254</sup> Several studies show that healthy individuals will suffer serious symptoms a few days after isolation.<sup>255</sup> Some individuals recover after release, but others do not.<sup>256</sup>

Despite the negative effects of solitary confinement, supermax conditions—which typically involve solitary confinement 23 hours per day in a barren environment and under high-tech surveillance, with communication with the outside world and others kept at a minimum or nonexistent—are present in more than 60 supermax facilities in the U.S.,<sup>257</sup> which hold more than 20,000 people (amounting to 2% of the prison population).<sup>258</sup> Yet, the evidence that supermax prisons are effective at reducing violence remains speculative.<sup>259</sup>

In addition to these studies, there are many experiential accounts that depict the harm and risks that current conditions of imprisonment impose on individuals:

When the prison opens its massive, razor-wire-topped gates at 1:40 for a controlled mass-movement to the yard, I head inside like a fish swimming upstream through a river of convicts. Hundreds of them.

251. LIPPKE, *supra* note 59, at 8.

252. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 476 (2006); Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 NYU REV. L. & SOC. CHANGE 477 (1997); Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 622 (2008).

253. Smith, *supra* note 252, at 470, 490–91.

254. *Id.* at 493–94.

255. *Id.* at 494–95.

256. *Id.* at 495–97.

257. *Id.* at 443 (citing Rhodes, *Total Confinement: Madness and Reason in the Maximum Security Prison*, (1st ed. 2004)); Supermax Prisons: An Overview, HUMAN RIGHTS WATCH, <https://www.hrw.org/reports/2000/supermax/Sprmx002.htm> (last visited Sept. 17, 2025).

258. *See id.*; Smith, *supra* note 252, at 443.

259. Smith, *supra* note 252, at 443.

At times like these, I need to stay hyper-vigilant. In such a crowd, a man could get butchered and the guards wouldn't know it until they discovered his bloodless corpse lying crumpled on the walkway after the crowd had passed.<sup>260</sup>

Though I saw other unfortunate events like fights and stabbings; no one attempted suicide on my watch. But places like Brooklyn House breed mental instability and are unequipped to deal with the number of individuals who need help.<sup>261</sup>

For the first 15 years of my incarceration in Massachusetts, I didn't have much contact with health services. I had heard horror stories, especially after the private provider Wellpath took over the state's corrections healthcare in 2018, so I was thankful that I rarely needed anything beyond checkups. But my luck ended in 2020. That's when I started a slow, painful and endlessly frustrating health journey that still has me wondering if I am going to live or die. . . . I fear that through all these delays, requests and conflicting opinions, the doctor who will finally diagnose me will be the coroner.<sup>262</sup>

I told every guard, every member of the medical staff, every employee that I saw in that place, what was happening to me. I was spotting and I was cramping. The bleeding got worse each day. . . . They threatened me with punishment. While all I did was beg for help.<sup>263</sup>

#### B. Abolitionism Now?

It is assumed—correctly—that the answer to these flaws must be radical reform. A less explored question, however, is whether we can justify continued imprisonment, under the current circumstances, as the reforms materialize (if they do at all).

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260. Jerry Metcalf, *A Day in the Life of a Prisoner*, THE MARSHALL PROJECT (July 12, 2018), <https://www.themarshallproject.org/2018/07/12/a-day-in-the-life-of-a-prisoner>.

261. Rashon Venable, *I Had a Tough Job at My Brooklyn Jail: Keeping Men from Taking Their Own Lives*, THE MARSHALL PROJECT (Apr. 12, 2024), <https://www.themarshallproject.org/2024/04/12/brooklyn-jail-suicide-prevention-aide>.

262. James Keown, *Prison Healthcare Means Not Knowing What's Slowly Destroying My Body*, THE MARSHALL PROJECT (Aug. 18, 2023), <https://www.themarshallproject.org/2023/08/18/prison-mystery-illness-wellpath-appointment-delays>.

263. Lauren Kent, *A Texas Jail Delayed My Prenatal Care to Keep Costs Down. Then I Had a Miscarriage*, THE MARSHALL PROJECT (July 7, 2023), <https://www.themarshallproject.org/2023/07/07/texas-miscarriage-collin-county-jail-wellpath>.

In this section, I will rely on moral philosophy and the contemporary literature on the ethics of harm to show that the case in favor of short-term decarceration is, contrary to widespread sentiment, difficult to resist. This is true not only for those who are ideal abolitionists, but also for ideal minimalists and reformists and, generally, for anyone who believes that individuals' fundamental moral rights operate as constraints on the kinds and amount of harm that the state can impose on its citizens.

In other words, I will argue that there are powerful reasons for all of us, even those who are not committed to any kind of *ideal* prison abolitionism, to find the demand for non-ideal prison abolitionism difficult to resist—to find the demand for closing prisons plausible.

It is common for philosophical arguments to aim towards complete persuasion. But my aim is not to make a “slam-dunk” case in favor of non-ideal prison abolitionism nor to persuade anyone that non-ideal prison abolitionism is correct, morally speaking. My aim is, admittedly, both less and more ambitious. It is less ambitious because I do not aim at fully persuading everyone that non-ideal prison abolitionism is correct. The evidence that exists in favor of and against incarceration is not always conclusive and there is significant uncertainty about what would happen if prisons were closed. I only aim at showing that the case in favor of complete and immediate (or short-term) decarceration is difficult to resist because meeting the requirements of plausible justifications for imprisonment in the current circumstances is extremely unlikely, particularly if we account for the surrounding uncertainty about the effects and harms of imprisonment. If readers walk away with a doubt in place of what used to be a certainty regarding the implausibility of prison abolitionism, I will be satisfied. But my aim is more ambitious because I hope to plant this doubt not only in those who are already committed to ideal abolitionism but slide towards non-ideal minimalism in present circumstances, but also in those who are committed to the respect of individuals' fundamental rights. All of us have powerful reasons to embrace—or not to quickly dismiss—non-ideal prison abolitionism.

In order to make this conclusion appealing to as many individuals as possible, I will try to keep the underlying moral commitments relatively thin. However, I will start from the assumption that individuals have stringent moral rights against the intentional imposition of grievous non-consensual harm, including the loss of their personal freedom. Thus, even though consequences are relevant for the arguments I will put forward, I will not engage with *fully* consequentialist moral theories (in which rights are not taken seriously). Since full consequentialism is rare amongst contemporary theorists of punishment and abolitionists, this is not a significant omission.

Harsh prison conditions can be easily understood as an imposition of non-consensual harm on individuals. Assuming that the length of incarceration is proportionate, harm imposed in addition to confinement is, *prima facie*, disproportionate, and, thus, morally unjustified. When non-consensual harm cannot be justified, it constitutes a violation of individuals' fundamental rights against harm.

Harsh prison conditions exist right now. That is, the harm entailed by harsh prison conditions is being imposed, daily, on approximately 2 million individuals.<sup>264</sup> That harm cannot be justified as punishment, since it is harm that surpasses the level of harm imposed by what I have assumed is justified punishment. As a result, it is harm that is *prima facie* wrongful. It requires justification and, if one cannot be provided, it must cease.

The latter response—i.e., the demand for termination—does not require much explanation. Once it is established that an agent is engaged in the violation of fundamental rights, the moral demand is, naturally, to stop violating individuals' fundamental rights immediately. This is an uncontroversial statement that applies across the board: when doing something wrongful, the first thing one ought to do is stop.

Now suppose that A has imprisoned 2 million individuals with moral justification, but A has also confined them in extremely poor conditions: they are thus more likely to be raped, their material needs are not met, and they are not receiving adequate healthcare.<sup>265</sup> What should A do?

Given that we are not assuming that ideal prison abolition is correct, morality demands that A immediately improves the confinement conditions of those he is allowed to confine so that he reaches the "ideal" state of imprisonment. But what if A cannot actually do that? Perhaps he lacks resources to do so; perhaps it would take A several years to attain material conditions that are not wrongful. What then?

In cases like these, where the ideal demand cannot be met, the second-best moral demand cannot simply be "continue as things are, whereby you are daily imposing unjustified harm on individuals as you slowly improve incarceration conditions." The second-best moral demand will be whatever allows A to better approximate the ideal moral demand. Given that the ideal moral demand is to stop violating individuals' rights and given that A cannot do that by instantly improving confinement conditions, one possible response is to release everyone immediately. This would be the appropriate

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264. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POLICY INITIATIVE (Mar. 11, 2025), <https://www.prisonpolicy.org/reports/pie2025.html>.

265. This example builds from Wellman's similar example. See WELLMAN, *supra* note 27, at 189 ("Imagine that a dictator orders her secret police to round up a hundred citizens a day. Some of those who are seized are wrongdoers, some are political opponents, and some are merely innocent people to be raped by the dictator and /or her family and friends.").

response even if everyone who is imprisoned had no claim against their own punishment in the form of confinement. Given that A cannot actually justly confine them, and can only confine them in a way that imposes further harm on them, a natural second-best approach would be, simply, to terminate confinement.

At this point, one might object that although many people ought to be released, there are at least some of those imprisoned whose continued imprisonment in harsh conditions we would be able to justify, particularly in the case of those who might pose a grave threat of violence to others if released.

This problem for abolitionism is usually referred to as “the problem of the dangerous few.”<sup>266</sup> McLeod, for example, is sympathetic to lesser evil justifications as a solution to the problem of the dangerous few in current non-ideal conditions. She writes,

Even in those instances where imposing punishment remains perhaps necessary, as the lesser of two evils, when someone has committed and continues to pose a great threat of violence to others, an abolitionist ethic does not allow us to remain complacent in the rationalization of criminal law enforcement’s violence and neglect. In this, an abolitionist ethic does not necessarily deny that in some instances there may be people so violent that they cannot be permitted to live among others.<sup>267</sup>

She also thinks that the question of the dangerous few can be postponed as “decarceration could by political necessity only proceed gradually.”<sup>268</sup>

In the case of the dangerous few, we might rely on two different strategies to justify their continued incarceration.

The first strategy relies on anticipatory defensive harm. I have stipulated that currently incarcerated individuals have been punished justly and that the length of their imprisonment sentences is proportional. I realize that this is extremely unlikely to be the case, but it serves the purpose of making the case in favor of decarceration harder. As a result, if the case in favor of decarceration is plausible even under these constraints, the actual case for decarceration becomes even stronger.

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266. See, e.g., Carrier, *Monstrosity*, *supra* note 149, at 96 (quoting Nicolas Carrier & Justin Piché, *Blind Spots of Abolitionist Thought in Academia: On Longstanding and Emerging Challenges*, 12 PENAL FIELD (2015)) (internal quotation marks omitted); McLeod, *supra* note 16, at 1168–69; Frampton, *supra* note 25.

267. McLeod, *supra* note 16, at 1210.

268. *Id.* at 1171.

Given that I have stipulated that the length of punishment itself is proportionate, the additional harm imposed by prison conditions is unlikely to be justified as *punishment*, since it would make punishment morally disproportionate. To avoid this problem, we might try to understand continued imprisonment as an instance of anticipatory defensive harm, that is, harm that is non-consensually imposed on someone to defend others from harm. The thought, then, is as follows: although we can grant that many individuals ought to be released, the same cannot be true of the dangerous few. We can justify their confinement, even under current harsh conditions, on the basis of anticipatory self-defense or as the lesser evil.

The second strategy tries to justify continued imprisonment as *punishment* under a theory in which (1) rights operate as constraints and (2) punishment must deter crime. This strategy relies on Victor Tadros's theory of punishment, on account of which by committing a criminal offense, individuals have become liable to be used by the state to deter others from committing crimes.<sup>269</sup> Although Tadros's theory is controversial, it picks up on some ideas that are relatively widespread: that punishment against the guilty does not violate their rights and that punishment can be justified only insofar as it produces some good (e.g., deterrence). The idea, then, is that in the case of the dangerous few, we can justify their punishment under current harsh conditions because by committing a past offense, these individuals have made themselves liable to such criminal punishment. As a result of their liability to punishment, confinement in harsh conditions could be justified insofar as (1) it is proportionate and (2) deters others from committing crimes.

In discussing these two strategies, I will show what is required, in each case, for the argument in favor of continued incarceration (or the argument in favor of the *status quo*) to succeed. In both cases, as we will see, the requirements are hard to meet. Still, I am happy to concede that in some very rare cases, and as a matter of what is objectively true, the requirements could be met. However, it is almost impossible for us to *know* when that will be the case. That is, continued incarceration is morally risky. This makes it unjustified as a matter of the evidence available to us.

Let us take each of these in turn. In Subsection 1, I will discuss the first strategy, based on defensive harm. In Subsection 2, I will address the second strategy, based on punishment. Finally, in Subsection 3, I will address the argument from moral risk.

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269. See VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* (2011).

### 1. *The Dangerous Few and Anticipatory Defensive Harm*

In the ethics of harm, non-consensual impositions of harm can be justified in two ways: on account of liability-based justifications and lesser-evil justifications.<sup>270</sup> Liability-based justifications are those that justify impositions of non-consensual harm on the basis of having lost, through one's own behavior, a right against harm.<sup>271</sup> By contrast, lesser-evil justifications aim to justify non-consensual impositions of harm on those who are not liable, that is, those who retain their rights against harm. There will be a lesser-evil justification when non-consensually harming a non-liable individual is, all things considered, justified.<sup>272</sup> When someone has been harmed on account of a lesser-evil justification, harming them wrongs them, precisely because they retain their rights against harm.<sup>273</sup> As a result, they might be entitled to compensation, apology, or other reparatory measures. In this aspect, lesser-evil justifications have the potential of accounting for the conflicting moral stakes in imprisoning even the dangerous few—a feature that many abolitionists would like to see reflected in an abolitionist ethos.<sup>274</sup>

Lesser-evil justifications are not purely consequentialist.<sup>275</sup> They can account for moral differences that are significant to non-consequentialists, like the difference between doing and allowing harm, opportunistic and eliminative harming, and so on.<sup>276</sup> The classic example of a lesser-evil justification is the trolley problem: a trolley is careening down the path and will kill five people. Yet, you can press a switch that will divert the trolley down another path, where it will kill only one person.<sup>277</sup> Many philosophers agree that although that one person is not liable to harm, there is a lesser-evil justification for harming her.<sup>278</sup>

Admittedly, and even though incapacitation is a well-known aim of punishment, justifying continued confinement in terms of defensive harm runs somewhat afoul of punishment's ethos, which is to hold individuals accountable for past deeds—not to try and anticipate whether they will commit future offenses. Further, whether someone will commit a violent

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270. ADIL AHMAD HAQUE, *LAW AND MORALITY AT WAR* 7 (2017).

271. JEFF MCMAHAN, *KILLING IN WAR* 8–9 (2009).

272. *Id.* at 9; HAQUE, *supra* note 270, at 7.

273. HAQUE, *supra* note 270, at 7–8.

274. *See, e.g.*, McLeod, *supra* note 16, at 1210.

275. They do involve thinking about rights in a way that is not absolutist and is thus controversial. *See* ALEC WALEN, *THE MECHANICS OF CLAIMS AND PERMISSIBLE KILLING IN WAR* (2019).

276. Helen Frowe, *Lesser-Evil Justifications for Harming: Why We're Required to Turn the Trolley*, 68 *PHIL. Q.* 460 (2018).

277. Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 *MONIST* 204 (1976).

278. *See, e.g.*, Frowe, *supra* note 276.

offense in the future does not follow from whether they have committed one in the past. As a result, the notion of the “dangerous few” relies on identifying a subset of individuals who are at risk of committing a serious violent offense in the future, regardless of whichever offense they have committed in the past. Indeed, one might even posit that the idea of the dangerous few itself is antithetical to both abolitionist and liberal commitments.<sup>279</sup>

Still, let us try and see whether continued imprisonment can indeed be justified, by starting with liability-based justifications. One way of justifying the continued confinement of the dangerous few would be to argue that the dangerous few have made themselves liable to such confinement by forfeiting their rights against harm. Since defensive harm is prospective, it is not sufficient, nor even necessary, to argue that, in the past, they have committed a violent act. It is only necessary that they commit such harm in the future, among other requirements. Let us start with anticipatory self-defense.

#### *i. The Dangerous Few and Self-Defense*

For anticipatory self-defense (or defense of others) to be justified, several conditions must be met.<sup>280</sup> First, the individual must be morally responsible or culpable for a future threat of harm. Second, the harm imposed defensively must be necessary to avoid that threat. Third, the harm imposed on individuals must be narrowly proportionate, either to their degree of moral responsibility or to the threat they pose. Finally, the harm imposed defensively must be widely proportionate, so that it does not cause excessive collateral harm on innocent individuals.

In the case of the so-called “dangerous few,” it is difficult to meet each of these requirements. First, the individual must be morally responsible or culpable for a future threat of harm. In at least some cases, this will be doubtful. This is so because imprisonment is criminogenic, and many imprisoned individuals suffer from mental health disorders. Indeed, being a witness or a victim of violence during incarceration was found in one study to be significantly related to aggressive and antisocial behavioral tendencies, psychological distress, and the poorest adjustment rates after release.<sup>281</sup> These effects were not modified by violent offender status.<sup>282</sup> The

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279. See FRAMPTON, *supra* note 25.

280. These are the conditions widely accepted in the literature. See, e.g., MCMAHAN, *supra* note 271; HAQUE, *supra* note 270; JONATHAN QUONG, *THE MORALITY OF DEFENSIVE FORCE* (2020); HELEN FROWE, *DEFENSIVE KILLING* (1st ed. 2014).

281. Thomas J. Conklin et al., *Self-Reported Health and Prior Health Behaviors of Newly Admitted Correctional Inmates*, 90 AM. J. PUB. HEALTH 1939 (2000).

282. *Id.*



proportion of prisoners suffering from a mental disorder, based on self-reports, is around 56% of state prisoners and 45% of those in federal custody.<sup>283</sup> In the year preceding the interviews conducted for the study, approximately 40% of individuals displayed symptoms of mania, and around 15% had delusions or hallucinations.<sup>284</sup>

Second, it is uncontroversial that for defensive harm to be justified, the harm must be necessary to achieve the relevant defensive goal.<sup>285</sup> Roughly, in cases of self-defense, this means that when the victim has other alternatives available that would impose less cost on the attacker while imposing little or no extra cost on the victim, the victim acts wrongfully if she chooses the alternative that imposes more harm.<sup>286</sup> There are different theoretical accounts of necessity, but all of them attempt to capture why causing unnecessary harm to the attacker is wrong.<sup>287</sup> All conceptions of necessity also agree on the following example:

Albert is about to shoot Mary. Mary has two ways of preventing Albert's attack: killing him or hiding behind a table.

If Mary kills Albert, she clearly violates the necessity requirement: she had another alternative to prevent her death at no cost to herself. Of course, in the example above, Mary does not violate necessity if her options are, say, killing Albert or jumping out of a window and thus losing 50 years of life. Mary is not required to suffer exceedingly high costs to herself in order to prevent harm to Albert, provided that Albert is morally responsible for posing the threat and the threat is significant.

Applied to incarceration, continued imprisonment is not necessary if the defensive goals can be achieved through other means that both (1) impose less harm on individuals and (2) are not excessively costly in terms of causing disproportionate harm on others.

Understood like this, continued incarceration might have trouble meeting the necessity constraint. First, there are other alternatives short of imprisonment through which these future threats could be successfully avoided. These alternatives already exist; they are not unimaginable. They

283. Leo Carroll, Sharon Calci & Amber Wilson, *Mass Incarceration and Conditions of Confinement* in THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT (John Wooldredge & Paula Smith eds., 2016) 53, at 66.

284. *Id.*

285. MCMAHAN, *supra* note 271, at 9.

286. David James Clark, *The Demands of Necessity*, 133 ETHICS 473, 476 (2023).

287. See, e.g., Joanna Mary Firth & Jonathan Quong, *Necessity, Moral Liability, and Defensive Harm*, 31 L. & PHIL. 673, 673 (2012); Seth Lazar, *Necessity in Self-Defense and War*, 40 PHIL. & PUB. AFFS. 3 (2012); Clark, *supra* note 286.

may involve the use of police, electronic monitoring, or, in certain cases, inpatient treatment in appropriate mental health facilities.

If these alternatives are successful in preventing the threats from materializing, they would not impose excessive costs on future victims. Further, incarceration is much more costly, financially, than community-based alternatives. It is estimated to cost taxpayers \$29,000 annually to place a single person in prison.<sup>288</sup> By contrast, non-custodial sanctions amount to \$1,250 and \$2,750 per year.<sup>289</sup> Of course, this is an estimate that might not hold in the situation of everyone who is released. But the difference is so significant that we are likely to have a variety of options that will be cheaper than incarceration.

Second, in order for continued incarceration to be necessary, it must be instrumentally necessary—that is, it must successfully achieve (or be likely to successfully achieve) its defensive goal: protecting others from harm. Imprisonment, however, is unlikely to be instrumentally necessary in this sense, at least in certain cases, for two main reasons.

First, imprisonment is not effective in *eliminating* all future threats; in effect, it *redirects* some of the threats towards those who are imprisoned with the would-be perpetrator, as the heightened risks of violence in prison (Subsection II.A) suggest. It is far from clear that “more secure” prisons can solve this. A study measured misconduct in prison among two groups of inmates with similar classification scores: those sent to the lowest security prisons in California, and those sent to prisons one step down from the highest security level in California.<sup>290</sup> The study found that inmates were equally likely to commit misconduct in prison, irrespective of the security level of the prison they were placed in.<sup>291</sup>

Second, research shows that imprisonment and imprisonment in harsh prison conditions are *criminogenic* relative to other, non-custodial alternatives. A review of the impact of imprisonment on the reoffending of individuals sentenced to noncustodial sanctions compared to those sentenced to custodial sanctions, sentenced to shorter as opposed to longer sentences, and placed in harsher versus less harsh prison conditions finds that (1) the majority of systematic reviews have found that imprisonment has a null to slight criminogenic effect on subsequent reoffending, (2) custodial sanctions generally result in more post-release offending behavior than non-custodial sanctions, (3) the majority of reviews show that longer

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288. *Id.* at 683.

289. Cheryl Lero Jonson, *The Effects of Imprisonment*, in THE OXFORD HANDBOOK OF CRIMINOLOGICAL THEORY 672, 683–84.

290. Scott D. Camp & Gerald G. Gaes, *Criminogenic Effects of the Prison Environment on Inmate Behavior: Some Experimental Evidence*, 51 CRIME & DELINQ. 425 (2005).

291. *Id.*

sentences are associated with higher rates of recidivism relative to shorter sentences, (4) individuals sentenced to harsher prison conditions, based on security levels, have higher recidivism rates than those sentenced to less harsh conditions.<sup>292</sup>

If we look at the effects of prison conditions, a study found that individuals housed in above-minimum security facilities increased their probability of recidivism by 14–21%, relative to those housed in minimum-security facilities.<sup>293</sup> Harsher prison conditions, in terms of security levels, have been associated with a 13–15% increase in recidivism.<sup>294</sup>

A study of a thousand Italian former prison inmates found no compelling evidence of specific deterrent effects of harsh prison conditions, and the results suggest that harsh prison conditions increase post-release recidivism.<sup>295</sup> Some research even suggests that concentrated incarceration is criminogenic in its effects in the affected communities.<sup>296</sup>

If these studies are right, imprisonment in harsh conditions (and even imprisonment itself) might actually contribute to *creating* new threats. When it does so, imprisonment is not only unnecessary but self-defeating: it achieves the opposite of what it aims to achieve.

The third requirement of a self-defense justification is that the harm imposed by continued imprisonment must be narrowly proportionate to an individual's future threat or their moral responsibility for posing that threat. Regarding the latter, if an individual's moral responsibility is diminished due to mental illness (prevalent among those incarcerated) or due to excuses, the amount of harm that can be imposed on them diminishes.

Narrow proportionality is not, however, a particularly salient concern in the case of individuals who are morally responsible for the threats, mainly because self-defense allows for a significant amount of harm to be imposed on those who responsibly pose them.

The final requirement is that defensive action does not excessively harm innocent bystanders. Imprisonment, however, does impose harm on innocent individuals. The effects of incarceration extend far beyond those

292. Lero Jonson, *supra* note 289, at 673–74.

293. Sarah Tahamont and Aaron Chalfin, *The Effects of Prisons in Crime*, in THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT ), 637–38 (John Wooldredge & Paula Smith eds., 2016).

294. Lero Jonson, *supra* note 289, at 681.

295. Francesco Drago et al., *Prison Conditions and Recidivism*, 13 AM. L. & ECON. REV. 103 (2011). The results of the paper do not rule out the possibility that harsh prison conditions have a deterrent effect on individuals who have never been incarcerated, an issue that is not addressed in the study.

296. See generally Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97 (2008).

who are incarcerated.<sup>297</sup> Indeed, most research highlights the negative consequences of imprisonment on families and communities, though it must be noted that those negative effects are not universal.<sup>298</sup>

Imprisonment and mass incarceration can have negative effects on the families of those imprisoned. A study finds that the health of female partners of recently released male inmates is as least as poor as that of their partners.<sup>299</sup> Women whose sons were incarcerated were also found to experience psychological distress, mediated by the associated financial difficulties and greater burdens of caregiving.<sup>300</sup>

Women with family members who are incarcerated have 1.44–1.93 times the odds of having had a heart attack, stroke, or one of several other cardiovascular risk factors and diseases.<sup>301</sup> Of course, not all research on the effects of family member incarceration shows negative effects for women: whether the incarcerated partner struggled with drug addiction or engaged in domestic violence are relevant factors.<sup>302</sup>

These negative effects are also present among children. Currently, there are approximately one and a half million children in the U.S. with incarcerated parents.<sup>303</sup> Parental imprisonment is not evenly distributed; it is concentrated among Black children and children of parents with lower education levels.<sup>304</sup>

Although one study finds no effects of maternal incarceration alone,<sup>305</sup> other studies find that children exposed to parental incarceration have 1.26 times the possibility of having unmet health care needs—particularly, mental health needs—even after adjusting for demographic and socioeconomic factors.<sup>306</sup>

297. See generally Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANN. REV. L. & SOC. SCI. 271 (2007).

298. Nancy Rodriguez & Jillian J. Turanovic, *Impact of Incarceration on Families and Communities*, in THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT 194 (John Wooldredge & Paula Smith eds., 2016).

299. Christopher Wildeman et al., *A New Vulnerable Population? The Health of Female Partners of Men Recently Released from Prison*, 23 WOMEN'S HEALTH ISSUES e335 (2013).

300. Kerry M. Green et al., *Impact of Adult Sons' Incarceration on African American Mothers' Psychological Distress*, 68 J. MARRIAGE & FAM. 430 (2006).

301. Hedwig Lee et al., *A Heavy Burden: The Cardiovascular Health Consequences of Having a Family Member Incarcerated*, 104 AM. J. PUB. HEALTH 421 (2014).

302. *Id.* at 424.

303. When paroled and recently released parents are included, that number adds up to 3.2 million children. Anna R. Haskins, *Unintended Consequences: Effects of Paternal Incarceration on Child School Readiness and Later Special Education Placement*, 1 SOCIO. SCI. 141 (2014).

304. Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, 46 DEMOGRAPHY 265 (2009).

305. Christopher Wildeman & Kristin Turney, *Positive, Negative, or Null? The Effects of Maternal Incarceration on Children's Behavioral Problems*, 51 DEMOGRAPHY 1041 (2014).

306. Kristin Turney, *Unmet Health Care Needs among Children Exposed to Parental Incarceration*, 21 MATERNAL CHILD HEALTH J. 1194 (2017).

Incarceration also seems to place the children of previously incarcerated fathers at significant economic disadvantage: they receive less economic support than children whose fathers have not been imprisoned.<sup>307</sup> Recent paternal incarceration is also associated with an increased likelihood of food insecurity among five-year-old children who lived with their biological fathers before incarceration.<sup>308</sup>

In individuals whose biological fathers were first incarcerated during childhood or adolescence, incarceration is associated with increased depression and serious delinquency.<sup>309</sup> Parental incarceration is also associated with an increased risk of mental and physical health problems, with probability ratios ranging from 1.26 to 4.05 for father incarceration.<sup>310</sup> A study focused on early adult African American children with one incarcerated parent found positive associations with criminal justice involvement/contact as they age into early adulthood, drug use, and depressive symptoms.<sup>311</sup> Paternal incarceration is also associated with increased physical aggression for five-year-old boys, and the effects are concentrated on boys whose fathers were not violent offenders nor abusive to the boys' mothers.<sup>312</sup> Paternal incarceration by age five is also associated with lower non-cognitive school readiness.<sup>313</sup>

Imprisonment, and in particular, mass incarceration or prison growth, can also have far-reaching consequences, extending beyond the immediate relatives and loved ones of those imprisoned. For example, one study finds that imprisonment likely has negative consequences for population health and that these consequences are concentrated among individuals who have never been imprisoned.<sup>314</sup> Further, these negative effects are substantial on African Americans. Absent the growth of incarceration since 1980, African

307. Amanda Geller et al., *Paternal Incarceration and Support for Children in Fragile Families*, 48 DEMOGRAPHY 25, 26 (2011). This is explained partly due to the low earnings of previously incarcerated men and partly due to the fact that previously incarcerated fathers do not live with their children. *See id.*

308. Kristin Turney, *Paternal Incarceration and Children's Food Insecurity: A Consideration of Variation and Mechanisms*, 89 SOC. SERV. REV. 335 (2015).

309. Raymond R. Swisher & Michael E. Roettger, *Father's Incarceration and Youth Delinquency and Depression: Examining Differences by Race and Ethnicity*, 22 J. RSCH. ADOLESCENCE 597 (2012).

310. Rosalyn D. Lee et al., *The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults*, 131 PEDIATRICS e1188, e1191 (2013).

311. Albert M. Kopak & Dorothy Smith-Ruiz, *Criminal Justice Involvement, Drug Use, and Depression Among African American Children of Incarcerated Parents*, 6 RACE & JUST. 6, 107–08 (2016).

312. Christopher Wildeman, *Paternal Incarceration and Children's Physically Aggressive Behaviors: Evidence from the Fragile Families and Child Wellbeing Study*, 89 SOC. FORCES 285 (2010).

313. Haskins, *supra* note 303.

314. Wildeman, *supra* note 236. The study also finds a decrease in mortality rates for young Black men. *Id.* at 87.

Americans in 2004 would have had a life expectancy 0.6 years longer, and the Black infant mortality rate would have been 2.0 per 1000 lower.<sup>315</sup>

Another study, which examines the spill-over effects of growth in state-level incarceration rates on the functioning and quality of the U.S. healthcare system, finds that individuals who live in states with higher numbers of former prison inmates have diminished access to care, less access to specialists, less trust in physicians, and less satisfaction regarding the care they receive.<sup>316</sup> These effects are present even in those least personally affected by incarceration and likely reflect the burden of uncompensated care among former inmates.<sup>317</sup> Another study finds that penal expansion can be construed as a distal determinant of declining health and a deepening of health disparities or inequality in the U.S.<sup>318</sup>

A study on the potential consequences of incarceration in destabilizing communities found that rates of sexually transmitted diseases and teenage pregnancies consistently increased with increasing incarceration rates, even after controlling for race, age, and poverty.<sup>319</sup> Higher incarceration rates among Black men during 1982–96 were also a significant explanation of the racial disparity in AIDS infection among women.<sup>320</sup> A study of European and Asian countries found that an increase in incarceration rates is positively correlated with increases in tuberculosis in the population and multidrug-resistant tuberculosis burdens.<sup>321</sup>

Finally, the collateral effects of mass incarceration also disproportionately harm Black communities in what Dorothy Roberts calls (rightly) a “morally repugnant” phenomenon.<sup>322</sup>

The collateral effects of imprisonment should make us, at the very least, worry about wide proportionality. Of course, these studies are not necessarily conclusive. Indeed, some of them identify only correlations, and there might be methodological issues. Further, while some research focuses

315. Haskins, *supra* note 303, at 87.

316. Jason Schnittker et al., *The Institutional Effects of Incarceration: Spillovers from Criminal Justice to Health Care*, 93 MILBANK Q. 516 (2015).

317. *Id.*

318. Elias Nosrati et al., *Incarceration and Mortality in the United States*, 15 SSM-POPULATION HEALTH 100827 (2021).

319. James C. Thomas & Elizabeth Torrone, *Incarceration as Forced Migration: Effects on Selected Community Health Outcomes*, 98 AM. J. PUB. HEALTH S181 (2008).

320. Rucker C. Johnson & Steven Raphael, *The Effects of Male Incarceration Dynamics on Acquired Immune Deficiency Syndrome Infection Rates among African American Women and Men*, 52 J.L. & ECON. 251 (2009).

321. David Stuckler et al., *Mass Incarceration Can Explain Population Increases in TB and Multidrug-Resistant TB in European and Central Asian Countries*, 105 PROC. NAT'L ACAD. SCI. 13280 (2008).

322. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1273 (2004). *See also* Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 251 (2009) (documenting the effects of mass incarceration on Black families).

on imprisonment, other research focuses on mass incarceration or prison growth. But even if not conclusive, this research suggests that the collateral effects of imprisonment are significant and far-reaching. It is not obvious that wide proportionality can be met. More importantly, other alternatives might not have these effects. For example, community supervision does not result in spillover effects comparable to imprisonment.<sup>323</sup>

To sum up, in order for anticipatory self-defense to work we would need to establish, for each case of continued imprisonment that (1) an individual will pose a particular kind of violent threat in the future; (2) the individual will be morally responsible for it, in the relevant sense; (3) imprisonment for an  $X$  number of years meets the necessity requirement; (4) imprisonment for an  $X$  number of years is instrumentally effective at eliminating said future threat; (5) imprisonment for an  $X$  number of years is narrowly proportionate; and (6) imprisonment of that individual for  $X$  number of years does not have widely disproportionate effects.

Is it possible that these conditions are met? Yes, it is. Suppose that we are certain that (1) an individual will culpably kill one person in the next year; (2) that this individual is exceedingly smart and thus imprisonment—in a facility that is effective at *eliminating violence inside the prison* and does not have criminogenic effects on the person imprisoned—is necessary, in the relevant sense, to prevent the threat from materializing; (3) one year of continued imprisonment is narrowly proportionate to this individual's culpability or to the nature of the threat they will pose; and (4) this individual's imprisonment will cause no harm on third parties. In that case, continued imprisonment would be objectively justified.

Of course, continued incarceration is defensible under these conditions only if we know, for a fact, that each requirement is met. Such certainty is impossible to attain. Yet when uncertainty is too high, morally risky behaviors that might violate rights (such as imprisonment) should not be pursued. I will come back to this point about uncertainty and risk in Subsection II.B.3.

### *ii. The Dangerous Few and Lesser-Evil Justifications*

A second way in which continued imprisonment could be justified on the basis of anticipatory defensive harm would be by relying on lesser-evil justifications. A lesser-evil justification has the advantage that it doesn't require that an individual be morally responsible for a future threat of harm.

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323. Note, however, that it can have negative effects, particularly if health services are not provided to those under supervision. Schnittker et al., *supra* note 316, at 549.

It is sufficient that they will pose a threat of harm in the future.<sup>324</sup> This is helpful because imprisonment itself is criminogenic, and many individuals have mental health conditions that put into question whether they would be morally responsible for the threats they pose.

Lesser-evil justifications have not been extensively explored in the philosophical literature, but, generally speaking, there is some degree of consensus that it is justified to incidentally (not *intentionally*) kill one person in order to save ten or twenty others from death.<sup>325</sup> Let us stipulate a 1:10 ratio to make the case against decarceration harder.

Even with a 1:10 ratio, it is far from clear that the prolonged confinement of the dangerous few can be justified as the lesser evil (it is quite obvious that lesser-evil justifications cannot explain the continued confinement of those who are not “the dangerous few,” that is, the confinement of those who will not commit violent offenses in the future).

Lesser-evil justifications require us to weigh different harms. For example, they require us to weigh the harm of letting five die against the harm of enabling one person’s death by turning the trolley away from the five.

In the case at hand, one of the harms to be weighed is, obviously, continued incarceration. This makes the application of lesser-evil justifications somewhat tricky (the 1:10 ratio is usually conceived in terms of different numbers of deaths on each side) but not impossible. The harms imposed by imprisonment are significant and can have long- and short-term physical and psychological effects.

It is, of course, hard to quantify those harms and appropriately weigh them to meet the 1:10 ratio. One possibility is to rely on the study among parolees that found that each year of imprisonment results in a two-year decline of life expectancy.<sup>326</sup> There is at least one study that finds a loss of

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324. Let us go back to the trolley example: the trolley is careening down the road and, if left undisturbed, it will kill five people. A, however, can press a switch to divert the trolley so that it kills only one person. Under a lesser-evil justification, A would be, all things considered, justified in pressing the switch. Note, however, that in this example, the threat is not coming from the person who will die. This has the extremely implausible implication that we could justify the continued imprisonment of individuals *when they would pose no threats to anyone*, but their imprisonment would result in other individuals gaining years of life due to, say, deterrence of crime. I am not going to focus on this scenario and will instead assume that the threats need to be posed by those imprisoned in order for the justification to obtain.

325. Saba Bazargan, *Killing Minimally Responsible Threats*, 125 ETHICS 1, 27 (2014); Jeff McMahan, *Self-Defense Against Justified Threateners*, in HOW WE FIGHT: ETHICS IN WAR 104 (Gerald Lang & Helen Frowe eds., 1st ed. 2014).

326. Sam McCann, *Health Care Behind Bars: Missed Appointments, No Standards, and High Costs*, VERA (June 29, 2022), <https://www.vera.org/news/health-care-behind-bars-missed-appointments-no-standards-and-high-costs>; Patterson, *The Dose*, *supra* note 236.



between four and five years of life,<sup>327</sup> but let us use the more conservative estimate.

Admittedly, this is not an ideal number to use. First, it is impossible to separate harsh prison conditions from mere confinement. Second, an average fails to capture the variance in prison conditions across the U.S. and the difference in experience between individuals. Some individuals will suffer less; others will suffer more. Third, the study focuses on deaths that took place after release but does not identify causes of death nor was it able to identify the “pathways to higher mortality rates.”<sup>328</sup> Fourth, in this study, risks are at their highest upon release and decline over time, reaching their lowest point at approximately two-thirds of the time served in prison.<sup>329</sup>

Despite these limitations, we can use the study to have a sense of what would be required for a lesser-evil justification to succeed. Whatever the actual quantification of harm imposed by imprisonment, it will not be zero and will not amount to insignificant or negligible harm.<sup>330</sup> In fact, there are reasons to think that if we were to quantify the full extent of the harm caused by imprisonment, it would be more than the two years described in the study. This is so because there are additional studies that show long-term effects of imprisonment on premature mortality and health,<sup>331</sup> which are not included in the two-year calculation. One study finds that incarceration has negative long-term consequences on health (as a measure of severe functional limitations, that is, health problems that prevent the person from working) even after the most strenuous controls.<sup>332</sup> Imprisonment is also an acute and chronic stressor, and research consistently shows that stress is

327. Daza, Palloni & Jones, *supra* note 237, at 591.

328. Carroll, Calci & Wilson, *supra* note 201, at 65–66.

329. Patterson, *The Dose*, *supra* note 236.

330. Imprisonment can also have positive effects, if, for example, individuals get access to medical treatment that they would not have outside of prison. These effects, however, should be discounted from our calculation (which is a morally weighted calculation and not simply a cost benefit analysis): it is not a surplus to have basic rights respected inside of prison simply because they are lacking outside of prison.

331. See Massoglia & Pridemore, *supra* note 239, at 297–99 for an overview of studies on the issue; See also Massoglia et al., *supra* note 238 (finding that, after controlling for age, race, and family background, premature mortality in women who have been incarcerated relative to those who have not, remains significant. The same is not true for men: men who have been incarcerated do die prematurely, but after controlling for race and education, the differences between previously incarcerated men and non-incarcerated men disappears); Pridemore, *supra* note 239; Massoglia, *supra* note 240.

332. Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115 (2007) (contact with the prison system was found to be more important than the amount, but exceptionally long periods of incarceration showed statistically insignificant effects).

negatively associated with health outcomes.<sup>333</sup> Incarceration is also disruptive to social integration and prosocial bonds.<sup>334</sup>

If we quantify the harm imposed by imprisonment as a loss of two years of life for every year of prison, in order to justify the continued imprisonment of each person, we would have to demonstrate that *each year* of imprisonment for *each* individual saves *ten* other individuals from a harm equivalent to losing two years of life (or saves one individual from a harm equivalent to twenty years of life).

Note that this is just *one year* of continued imprisonment. Yet improving prison conditions to a tolerable degree is likely to take much longer than that. Suppose an extremely conservative estimate would be five years.<sup>335</sup> Now, in order to justify continued confinement, each person imprisoned would need to result in ten individuals being saved from harms equivalent to losing ten years of life (or one individual being saved from losing one hundred years of life—that is, a harm that is roughly equivalent to death.)

This 1:10 ratio, however, might be overly generous, due to several reasons. First, the ratio might be overly generous because lesser-evil justifications are conceived as appropriate justifications for non-intentional impositions of harm. Yet, prolonged imprisonment in current conditions would be a deliberate choice by government officials. It is not sufficient to say that harsh conditions are incidental to life in prison and that some harms do not come from the government but from fellow inmates. After all, the government does have an alternative: release. If it chooses to maintain confinement, it counts as an intentional imposition of harm. Intentional impositions of harm are harder to justify, as a result of which the 1:10 ratio might be far too generous. In order to justify intentional harm, it is likely that the ratio needs to be more demanding. This would make it even harder to meet.

One might object here that the choice that the state faces is not one between the intentional harm of prison conditions and letting harm come about as a result of release. Indeed, although the harms imposed by prison conditions can be understood as intentional, releasing potentially dangerous individuals is not just letting harm come about, but *enabling* harm.<sup>336</sup> And enabling harm is morally worse than letting harm come about. As a result,

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333. Massoglia & Pridemore, *supra* note 238, at 298–99.

334. *Id.* at 300.

335. See Jordan Hyatt & Synøve Nygaard Andersen, *A Pennsylvania Prison Gets a Scandinavian-Style Makeover – And Shows How the US Penal System Could Become More Humane*, THE CONVERSATION (Oct. 7, 2022, 8:21 a.m.), <https://theconversation.com/a-pennsylvania-prison-gets-a-scandinavian-style-makeover-and-shows-how-the-us-penal-system-could-become-more-humane-187834>.

336. For example, enabling threats can be understood as making a necessary contribution to an unjust threat. See HAQUE, *supra* note 270, at 74.

the 1:10 ratio I have suggested is too restrictive, and we might, instead, be in the presence of a lower ratio.

This is a plausible view, but it does not change things much for three reasons. First, because incarceration does not actually *eliminate* the harms posed by some individuals; instead, it redirects them towards their fellow inmates. In this subset of cases, the state is both intentionally imposing the harm of prison conditions on those who are incarcerated *and* enabling harm against fellow inmates by other inmates and prison officials. Further, if imprisonment is criminogenic, as some studies suggest, it also enables harm by creating new threats.<sup>337</sup>

Second, my argument does not require inaction on the part of the state after it decarcerates; indeed, the state *already* has moral duties to prevent harm against others in ways short of incarceration. My aim in this article is not to make a complete policy recommendation nor to provide a complete list of the moral duties the state has if it decides to decarcerate. My only aim is to establish a plausible moral argument in favor of complete decarceration.

Finally, the 1:10 ratio I have suggested would probably not change significantly. This is because the 1:10 ratio is used to justify *incidentally* (or collaterally) killing one individual to save 10 others from death. However, I have been using it to justify *intentional* impositions of harm on individuals. Even if enabling harm is much worse than letting harm come about, intentionally imposing harm is still much worse than enabling harm.<sup>338</sup> The final ratio might thus still be close to 1:10.

There are also some additional objections to the plausibility of lesser-evil justifications. First, as with self-defense justifications, it is unclear whether incarceration can meet any plausible understanding of a necessity constraint. Again, this is because at least some of the threats that imprisoned individuals will pose are not actually eliminated through incarceration but redirected at those who surround them. Imprisonment also seems to contribute to the creation of new threats.

Second, it is quite plausible that some of the harms imposed by current prison conditions are the kinds of harm that amount to something close to torture and, as a result, are precisely the kinds of harm that cannot be justified as the lesser evil barring some sort of emergency (or at all).<sup>339</sup> The same is true of some harms that are dignity-related in nature and are thus much harder, and perhaps impossible, to justify.

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337. See *supra* Subsection II.B.1.i.

338. See Adil Haque, who argues that our duties not to kill intentionally are much more stringent than our duties not to enable harm. HAQUE, *supra* note 270, at 74.

339. See Larry Alexander, *Deontology at the Threshold*, 37 S.D. L. REV. 893 (2000).

To sum up, in order to justify the imprisonment of one individual for one year under a lesser-evil justification, it would need to be the case that (1) incarceration for one year would result in 10 individuals being saved from a harm equivalent to losing two years of life (or one individual being saved from a harm equivalent to losing twenty years of life); (2) that imprisonment—in a facility that is effective at *eliminating violence inside the prison*—is effective/necessary in the relevant sense; (3) that one year of imprisonment only causes a loss equivalent to two years of life.

Once again, complete certainty is impossible. I will come back to this point about epistemic uncertainty in Subsection II.B.3.

## 2. *The Dangerous Few and Punishment*

In the previous section, I set out the conditions required for continued imprisonment to be justified under anticipatory self-defense and lesser-evil justifications. I have also shown some of the difficulties present in meeting some of those conditions.

At this point, one might object that relying on anticipatory defensive harm makes the case in favor of decarceration too easy. This might be because justifying imprisonment on the basis of anticipatory defensive harm distorts the nature and goals of imprisonment as punishment, given that it requires us to make difficult predictions about who might harm others if released. If we are to make the case in favor of decarceration plausible, one might say, we ought to rely on a justification that speaks to the nature and goals of punishment. This is precisely what this section will do. By relying on Victor Tadros's theory of punishment, I will argue that the case in favor of decarceration remains plausible.

Tadros's theory is, admittedly, controversial. However, it has the virtue of attempting to justify punishment based on the benefits that might obtain from punishment (such as deterrence) while still maintaining rights as a constraint on non-consensual impositions of harm. It is, in this sense, closer to a pluralistic theory of punishment than monistic views, which think that punishment can be justified *just* on the basis of retribution (even if punishment has *no* positive effects or even negative effects) or *just* on the basis of deterrence (which would condone punishing the innocent to obtain deterrence gains).

Tadros's theory of punishment relies on the idea that past offenders, through their wrongdoing, have acquired duties to protect others from future harm, as a result of which the state can harm them as a means to deter future threats.<sup>340</sup> That is, it is justified to punish them for reasons of general

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340. TADROS, *supra* note 269, at 2–3.

deterrence.<sup>341</sup> Punishment is thus justified only to the extent that it is effective in reducing crime and only insofar as it is more effective in reducing crime than other available methods that are less costly and harmful.<sup>342</sup>

Tadros's theory could thus support the idea that those who are imprisoned have enforceable duties—acquired through their own wrongdoing—to remain in prison under current harsh conditions for reasons of deterrence. This sort of justification is both narrower and broader than justifications based on anticipatory defensive harm.

It is narrower because continued imprisonment in harsh conditions is only likely to be proportionate in the case of individuals who have been rightfully found guilty of violent offenses in the past. It is not *predictive*, but rather backward-looking.<sup>343</sup> This immediately narrows the pool of individuals whose continued incarceration we can justify to those who have imposed significant harm in the past. In the case of the U.S. prison population, of the 1.8 million people currently incarcerated, 163,000 were convicted of murder and 168,000 of rape or sexual assault (for a total of 331,000).<sup>344</sup> It would also include individuals who imposed severe physical harm on others (e.g., those convicted of battery) and those who have attempted these serious offenses.

Tadros's theory is, however, broader, because it allows us to incorporate deterrence of future threats into the justification—thus no longer relying on whether individuals themselves will be responsible (morally or causally) for future threats of harm.<sup>345</sup> Further, it allows us to justify punishment itself. Thus, under this theory, the relevant question is whether we can justify each individual's punishment, understood as their imprisonment in current conditions, for a given period of time. To be justified, such punishment must be proportionate. If it is, then we have an argument against decarceration.

In Tadros's theory, the question of whether punishment is proportionate will be determined, at least partly, by proportionality in self-defense.<sup>346</sup> The same distinction between wide and narrow proportionality discussed in the context of self-defense also applies to Tadros's theory of punishment.

Whether punishing the offender is narrowly proportionate will depend on the gravity of their crime and also on the instrumental benefits of

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341. *Id.* at 40.

342. *Id.*

343. The gravity of the crime is an important factor. *Id.* at 334.

344. The Bureau of Justice Statistics for 2022 set the number at 1.8 million individuals incarcerated in state or federal prisons or local jails. See U.S. DEP'T OF JUST., *Correctional Populations in the United States, 2022 – Statistical Tables* (May 2024), <https://bjs.ojp.gov/document/cpus22st.pdf>.

345. TADROS, *supra* note 269, at 280.

346. *Id.* at 333.

punishing the offender, the most important of which is the reduction of crime that punishment may bring about.<sup>347</sup> The question of narrow proportionality is, then, as follows: “is the degree of harm imposed on the offender justified by the importance of the goods that punishment brings about?”<sup>348</sup> According to Tadros, “[t]he answer to this question depends on whether the offender has a duty to bring about the goods even if doing so would harm him to the same extent that he is harmed by the imposition of punishment.”<sup>349</sup> The extent to which someone can be harmed in this way depends, according to Tadros, on the scope of the duty to rescue.<sup>350</sup>

To justify a certain amount of punishment *X*, we must conclude that the person would have been liable to be harmed to an *X* degree in order to avert the threat that he posed to others in the past and for which he was rightfully convicted.<sup>351</sup> This entails that the amount of punishment that can be imposed on an individual *A* cannot exceed the degree of harm that *A* would have had to bear to avert the threat he wrongfully created.<sup>352</sup>

As the offense’s gravity and the individual’s criminal responsibility diminish, so does the degree of harm that can be imposed on them. Other factors that Tadros suggests are relevant for determining proportionality are (1) that the threats being averted are threats for which the offenders are not responsible, (2) the passing of time since the commission of the offense, and (3) the attitudes of the offender in question.<sup>353</sup>

This means that if someone has committed murder in the past, the amount of harm that can be imposed on them to deter threats is quite high. This is so because that person would have had a duty to die in order to rescue their victim from the threat they culpably created. However, since time, attitude, and responsibility for the threats are also relevant factors, it is probably the case that someone who has committed, say, first-degree murder could not be subjected to a harm equivalent to *death* in order to deter threats, but to a lesser—though still significant—harm.

Wide proportionality pertains to the side effects of punishment in terms of the harm that is imposed on other individuals, who are not liable to be punished.<sup>354</sup> For punishment to be widely proportionate, it needs to be shown that the good effects of punishment (mainly, deterrence in Tadros’s view) outweigh the bad effects that punishment causes.<sup>355</sup> Further, it is also

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347. *Id.* at 337.

348. *Id.*

349. *Id.*

350. *Id.* at 129.

351. *Id.* at 347.

352. *Id.*

353. *Id.* at 348.

354. *Id.* at 338.

355. *Id.*

necessary to show that the goods of punishment are sufficiently important to justify the resources required to punish offenders.<sup>356</sup>

Let us stipulate that someone has committed homicide. In Tadros's theory, that person would be liable to a significant degree of harm, provided that they have not repented, that they intended it, and that not a long time has passed since the commission of the murder. Let us stipulate that they would be liable to, say, a degree of harm that is equivalent to 90% of the harm imposed by death.

We can continue to use the fact that a year of imprisonment brings about two years of loss of life. The life expectancy at birth in the U.S. is 77 years. Ninety percent of that is 69.3 years of life. Thus, someone who has committed first-degree murder could suffer 69.3 years of loss of life (that is, thirty-five years of imprisonment if each year of imprisonment equals two years of life lost). That is the *maximum* harm this individual could suffer. Of course, individuals who have committed multiple murders might be liable to even more punishment. Tadros considers whether the death penalty could, in fact, be proportional under his theory.<sup>357</sup> The death penalty is, however, the maximum limit of harm that can be imposed.

Tadros's theory, then, allows for the imposition of a significant amount of harm, at least *prima facie*. There are, however, some difficulties to consider.<sup>358</sup> First, many of the so-called "dangerous few" are incarcerated in supermax prisons, where the harms imposed by imprisonment are more extensive, thus possibly amounting to more than two years of life for each year of imprisonment. Second, Tadros's theory is concerned with punishment. As a result, it is relevant for the theory that individuals who are currently imprisoned have already suffered some harm, in the form of punishment, that needs to be discounted from the total of thirty-five years (or whatever the number) I have suggested. Prison conditions were also much worse during the 70s and 80s, which means that the harm imposed on them might amount to more than two years of life per year of imprisonment.<sup>359</sup>

Even if this is true, the theory does allow for the imposition of significant harm, thus making the case in favor of complete decarceration seemingly less plausible. However, where the theory struggles the most is in meeting its instrumental or necessity constraint: imprisonment is justified only to the

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356. *Id.*

357. *Id.* at 349–51.

358. This is not an objection against Tadros's view. Tadros himself acknowledges that, in current conditions, his theory might well end up in abolitionism. See *id.* at 40.

359. Carroll, Calci & Wilson, *supra* note 283.

extent that it is more effective in deterring crime than other measures that could be taken to deter or reduce crime.<sup>360</sup>

There is, of course, no question that punishment in the form of imprisonment deters some crime. The data does not show that there is *no* deterrent effect. The most important question, however, is whether the deterrent effect is also cost-effective.<sup>361</sup> That is, the problem is that even if there are benefits that follow from imprisonment, the cost or burden that imprisonment imposes on individuals and society is extremely high. And that cost can only be justified if the benefits gained via imprisonment cannot be gained more effectively through other means—that is, if deterrence gains or reduction of crime could not be achieved through means that impose less harm on offenders, such as social housing, education, gun control, more effective policing, and so on.<sup>362</sup> An important point to consider is that some of these measures are already required by justice, regardless of their effects on crime.<sup>363</sup> As a result, citizens cannot complain that enacting these policies instead of using the death penalty would unreasonably burden them.<sup>364</sup> We are, in fact, obligated to bear these costs.

Understood like this, imprisonment is unlikely to meet this instrumental constraint. Research consistently shows that, even though imprisonment deters some crime, imprisonment does not reduce recidivism and, sometimes, increases it. Several studies on the effects of imprisonment conclude that prison is not more effective than non-custodial sanctions at reducing recidivism, and, in fact, the effects of prison are either null or slightly criminogenic.<sup>365</sup> Further, something as simple as health insurance can be protective against recidivism.<sup>366</sup>

Longer prison sentences are associated with a 3% increase in recidivism.<sup>367</sup> The same study found no evidence that prison sentences reduce recidivism, relative to community sanctions.<sup>368</sup> Further, lower risk

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360. Tadros seems to conceive of this constraint as an issue of narrow proportionality. Since narrow proportionality is also used to determine the amount of harm that can be imposed on someone, for simplicity, I refer to the constraint as instrumental or necessity-related. The substance of the argument is, in any case, the same.

361. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 230 (2013).

362. See TADROS, *supra* note 269, at 349–50.

363. *Id.* at 350.

364. *Id.*

365. Jennifer E. Copp, *The Impact of Incarceration on the Risk of Violent Recidivism*, 103 MARQ. L. REV. 775, 781–82 (2020).

366. See Stuart A. Kinner & Emily A. Wang, *The Case for Improving the Health of Ex-Prisoners*, 104 AM. J. PUB. HEALTH 1352, 1352–55 (2014). See *id.* at 1353 for a brief summary of those studies.

367. Paul Gendreau et al., *The Effects of Prison Sentences on Recidivism*, PUB. SAFETY CAN. (1999), <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-redvsm/index-en.aspx> (last visited Jan 13, 2025).

368. *Id.*



offenders who spent more time in prison had higher recidivism rates,<sup>369</sup> and the same is true regarding offenders incarcerated in “no frills” prisons, though the study admits to the limits of the data in this regard.<sup>370</sup> The study concludes that prisons “should not be used with the expectation of reducing future criminal activity. If further research supports the findings described herein, that time in prison increases offender recidivism by even “‘small’ amounts, then the costs accruing from the excessive use of prison could be enormous.”<sup>371</sup>

Another study on the effects of incarceration on individual offending trajectories concludes that incarceration has varied effects on offenders: sometimes it acts as a deterrent; other times it is criminogenic; and other times it is irrelevant.<sup>372</sup> Effects also vary depending on whether incarceration takes place at an early or late point in life.<sup>373</sup> In the study’s sample, 4% of those released returned to criminal offending at a rate higher than their rate prior to incarceration, while 40% returned to a trajectory lower than what was expected of them (showing here a specific deterrent effect).<sup>374</sup> The study also found that those with higher numbers of prior arrests were less likely to experience deterrent effects.<sup>375</sup>

Regarding the effects of imprisonment on violent reoffending, a recent study on the issue found no significant effects of imprisonment on violent reoffending compared to probation.<sup>376</sup> Copp states that “we have enough evidence to be fairly confident of the following: (1) prison does not seem to be any more effective than non-custodial sanctions at reducing recidivism, and (2) imprisonment is no more effective than community alternatives at reducing violent recidivism.”<sup>377</sup>

A review of the literature concludes that most studies on the impact of imprisonment on subsequent criminal activity (that is, whether imprisonment operates as a specific deterrent) find no effect or a criminogenic effect, and only a few studies have found a preventive effect.<sup>378</sup> Existing research, the article states, “is not nearly sufficient for

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369. *Id.*

370. *Id.*

371. *Id.* The authors note, however, that no one disagrees with the policy of “locking up chronic high risk offenders for a reasonable period of time.”

372. Avinash Singh Bhati & Alex R. Piquero, *Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect*, 98 J. CRIM. L. & CRIMINOLOGY 207, 218 (2007).

373. *Id.*

374. *Id.* at 249–50.

375. *Id.*

376. Copp, *supra* note 365, at 786–87.

377. *Id.* at 787.

378. Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 121 (2009).

making firm evidence-based conclusions for either science or public policy,” and that, “as imprisonment is used in contemporary democratic societies, the scientific jury is still out on its effect on reoffending.”<sup>379</sup>

Cheryl Lero Jonson states that “it is now becoming accepted knowledge that the prison experience does not have the expected specific deterrent effect on future criminal behavior,” and that researchers must try to understand what is occurring in “the black box” of prison in order to identify, and eliminate, those factors that make incarceration criminogenic.<sup>380</sup>

In terms of general deterrence, the effects of imprisonment are mixed. There is little evidence that increases “in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs.”<sup>381</sup> The same study also points out that there is “little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of non-custodial sanctions such as probation. Instead, the evidence suggests that . . . reoffending is either unaffected or increased.”<sup>382</sup> Another study focused on Tallahassee, Florida, finds that low rates of prison admissions have an uncertain impact on crime rates, moderate rates reduce crime, and higher rates increase crime.<sup>383</sup>

Another study points out that “there is little doubt that there is a sizable incapacitation effect with over two million people incarcerated, but it is still uncertain how much that affects the crime rate and how it is distributed among individual offenders.”<sup>384</sup>

One older study on prison conditions found that harsher prison conditions (the proxy for which was the death rate among prisoners) are negatively correlated with crime rates, which suggests a general deterrent effect.<sup>385</sup> An alternative explanation for the results is “that states that become better at identifying and locking up the most serious offenders experience both higher prison death rates (assuming that these serious offenders are more likely to die or to kill other prisoners) and decreases in crime (because scarce prison resources are being used more effectively)” could not be ruled out given the available data.<sup>386</sup> Although the results are

379. *Id.* at 121, 178.

380. Jonson, *supra* note 289, at 672, 682.

381. Nagin, *supra* note 361, at 201.

382. *Id.*

383. Todd R. Clear et al., *Coercive Mobility and Crime: A Preliminary Examination of Concentrated Incarceration and Social Disorganization*, 20 JUST. Q. 33, 33–34 (2003).

384. Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE 267, 268 (2007).

385. Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003).

386. *Id.* at 321.

robust, the authors strongly caution against the temptation of drawing public policy implications from their study, given that the aggregate impact of changing prison conditions on crime rates appears to be small, and there are also ethical considerations at stake.<sup>387</sup>

As for the relationship between incarceration and the crime rate (that is, general deterrence), the best estimate seems to be that doubling state prison capacity would probably reduce the Index Crime rate by between 20 and 40%.<sup>388</sup> This wide range means that we cannot be sure as to whether building more prisons would, indeed, be cost-effective.<sup>389</sup>

Results among different studies consistently show that a 1% increase in prison population reduces the aggregate Index Crime rate by between 0.16 and 0.31%.<sup>390</sup> Elasticities for violent crime tend to be somewhat less than for property crime, but we are, at the moment, unable to distinguish between different crimes.<sup>391</sup> We are, further, unable to determine how much crime each individual's incarceration deters. A study estimated that three-strikes laws in California deterred, during the two years after the legislation, approximately eight murders, 952 aggravated assaults, 10,672 robberies, and 384,488 burglaries.<sup>392</sup> However, there were substitution effects, on account of which the number of larcenies (a non-strikable offense) increased by 17,700.<sup>393</sup>

The study also suggests that the effects of imprisonment on deterrence might be non-trivial but small, given that imprisonment also generates incapacitation effects.<sup>394</sup> These incapacitation effects, however, could be achieved through different means, short of incarceration. And deterrence could also be achieved through different means, short of incarceration.

Again, it is not that prisons do not deter or reduce crime. For example, estimates regarding incapacitation have found that an increase of 5% in the prison population leads to a 1% reduction in crime.<sup>395</sup> And a study that measures the contemporaneous effect of harsh prison conditions on the crime rate estimates that moving all individuals from minimum- to above-minimum-security facilities would decrease annual murders by 0.03 per

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387. *Id.* at 340.

388. William Spelman, *What Recent Studies Do (and Don't) Tell Us about Imprisonment and Crime*, 27 CRIME & JUST. 419, 422 (2000).

389. *Id.* at 485.

390. *Id.* at 481.

391. *Id.* at 484.

392. Tahamont & Chalfin, *supra* note 293, at 627, 640.

393. *Id.*

394. *Id.* at 636.

395. Tahamont & Chalfin, *supra* note 293, at 627.

100,000 Americans, violent crime by 18, and property crimes by 40, for a total reduction in the crime rate of 58.<sup>396</sup>

The problem is that prisons are, at the same time, criminogenic: they tend to increase recidivism. The same study just described tried to account for the criminogenic effects of prison conditions and found that if all inmates were moved to above-minimum security facilities, they would be 41% more likely to be rearrested in the year following release.<sup>397</sup> When the authors estimate the impact of post-release crime on the crime rate, their estimates predict an increase in crime committed by those released of approximately 82 per 100,000 Americans, which suggests that the criminogenic effects of harsh conditions are either the same or large enough to outweigh the deterrence effect of harsh prison conditions.<sup>398</sup>

There is also little information about the substitution effects of imprisonment (that is, whether criminal groups might replace incarcerated individuals with new ones) and how and whether it varies across crime types, except for drug markets, where replacements are recruited.<sup>399</sup>

In light of all this evidence, does imprisonment serve the goals of deterrence in a cost-effective way or in ways we could not attain otherwise? Maybe, but it is hard to say. The most important question, to which I finally turn, is how we could know if that is the case.

### 3. *The Dangerous Few and Moral Risk*

I have repeatedly said that, even if some of the justifications I have suggested for continued incarceration can obtain in some rare circumstances, we lack complete certainty about whether that would be the case. That is, continued incarceration is morally risky.

Moral risk refers to the idea that some behaviors are risky because they have a non-negligible chance of violating individuals' rights. Generally speaking, we ought to avoid excessively morally risky behaviors; that is, there are some instances where uncertainty will be sufficiently high so as to counsel *against* action. For example, if I am quite unsure whether the man at my door is a serial killer, I should refrain from acting in self-defense until I can gain further knowledge. If I cannot gain that further knowledge, then I should simply refrain from imposing non-consensual harm on someone.

Roughly, each justification I have discussed so far requires us to establish, first, the amount of harm that imprisonment imposes on each

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396. M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1, 22 (2007).

397. *Id.*

398. *Id.* at 23.

399. Piquero & Blumstein, *supra* note 384, at 277.

individual and, second, the amount of harm that is deterred or eliminated via imprisonment.

However, imprisonment is in many ways both a black box of harm and a game of chance. We have no way of predicting who, among those imprisoned, is going to suffer which harms. Imprisonment in current conditions is like discharging an unknown weapon in a room full of people and hoping that the bullets—if they are bullets—will fall where they ought to: that when they fall, they will save others from harm in a cost-effective way.

Perhaps, someone might say that I am exaggerating the prevailing uncertainty. After all, we often act without one-hundred percent certainty, and we believe that doing so is permissible under some circumstances, even if it ultimately turns out that we were wrong. Indeed, moral philosophers distinguish between acts that are “objectively” and acts that are “epistemically” morally permissible. An act is objectively permissible when it is what I ought to do, given all the relevant moral facts.<sup>400</sup> For example, it is objectively permissible for John to kill Bob in self-defense if it is the case that Bob is morally responsible for posing an unjustified lethal threat of harm to John that John can only avert by killing Bob. An act is epistemically permissible when it is permissible in light of the available evidence to the agent.<sup>401</sup> For example, John might be epistemically permitted to kill Bob in self-defense if, in light of the available evidence to him, he reasonably believes that Bob is morally responsible for posing an unjustified lethal threat of harm to John and that he has no other way of averting the threat.

We might thus say that continued incarceration will often be epistemically permissible, at least when it pertains to the dangerous few. I don’t think this is true.

One important consideration is that there is an epistemic asymmetry between continued incarceration under current conditions and release. While the latter admittedly poses *risks* that individuals’ rights will be violated by those who are released, the former *presently* constitutes a rights violation. As a result, if all things are equal, we ought to prefer posing risks that a particular right *X* (or similarly weighty rights) will be violated over certainty that a particular right *X* (or similarly weighty rights) is violated.

Continued imprisonment under current conditions also puts individuals at a heightened risk of sexual assault and rape. Recall that inmates are more likely than the general public to be victims of sexual assaults and of violent crimes, and some of those risks come from prison officials.<sup>402</sup> If that is the

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400. HAQUE, *supra* note 270, at 119.

401. *Id.*

402. *See supra* Subsection II.A.

case, there is an asymmetry in the degree of risk that favors decarceration. This is so because decarceration is unlikely to increase risks to the general public to the point of reaching the risks that those imprisoned currently face.

Nonetheless, let us see what would be required for incarceration to be epistemically permissible. In the example above, much turns on what level of evidence John requires to be morally permitted to kill Bob; or, in different words, it is extremely important to determine when John's belief that Bob poses a threat against him will be reasonable, thus entitling him to act.

Let us stipulate 75% certainty. This is much lower than "beyond a reasonable doubt," which is closer to 90% and is the actual standard used by the criminal legal system. Ninety percent certainty has also been employed by philosophers discussing evidence-relative permissibility in the context of punishment and defensive harm.<sup>403</sup> Applied to incarceration, it would look something like this:

Epistemic permissibility: it will be epistemically permissible to keep *one* individual incarcerated if we are 75% certain that (1) they are liable to remain incarcerated under anticipatory self-defense; or (2) it is justified that they remain incarcerated under a lesser-evil justification; or (3) they are liable to be punished for the purposes of deterrence.

Each of these justifications has several requirements.

*Self-defense.* An individual's continued incarceration will be justified if:

1. The individual will pose a particular kind of violent threat in the future;
2. The individual will be morally responsible for it, in the relevant sense;
3. Imprisonment for *X* number of years is necessary/effective;
4. Imprisonment for *X* number of years is narrowly proportionate to the individual's moral responsibility for that future threat; and
5. Imprisonment of that individual for *X* number of years does not have widely disproportionate effects.

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403. See Seth Lazar, *In Dubious Battle: Uncertainty and the Ethics of Killing*, 175 PHIL. STUDS. 859, 865 (2018); Caruso, *supra* note 125, at 112; Adam J. Kolber, *Punishment and Moral Risk*, 2018 U. ILL. L. REV. 487 (2018).

*Lesser-evil.* One year of continued imprisonment will be justified if:

1. Incarceration for one year results in a loss equivalent to two years of life;
2. Incarceration for one year results in ten individuals being saved from a harm equivalent to losing two years of life (or one individual being saved from a harm equivalent to losing twenty years of life); and
3. Imprisonment is necessary/effective, in the relevant sense.

*Punishment.* *X* years of imprisonment will be justified if:

1. The individual was rightfully convicted of a crime;
2. *X* years of imprisonment is a narrowly proportionate sentence;
3. *X* years of imprisonment are necessary/effective for deterring crimes; and
4. Imprisonment of this individual is widely proportionate.

Let us use Kolber's approach to the question of uncertainty.<sup>404</sup> In order to reach a mere 75% confidence regarding each justification, and assuming that each proposition is independent of each other, in all cases we would need to have above 90% confidence about *each* proposition obtaining.<sup>405</sup> If we do not have that kind of certainty, then we cannot, permissibly, continue with incarceration. However, reaching above 90% certainty about several of these propositions seems downright impossible.

First, in the case of anticipatory defensive harm, we have no way of knowing whether an individual would commit a particular violent crime after release. The data on who reoffends indicates that making such predictions is extremely complicated. Further, most of the studies on recidivism focus on low-level and non-violent offenders. Jennifer Copp remarked, in 2020, that "the question of whether incarceration influences the risk of violent recidivism remains largely unexplored" and that "we know surprisingly little about the impact of incarceration on violent recidivism."<sup>406</sup>

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404. See Kolber, *supra* note 403, at 490.

405. *Id.* As Kolber explains, the probability of independent events happening simultaneously is calculated by multiplying the probability of each of the events together.

406. Copp, *supra* note 365, at 786.

Available data shows that offenders who are most likely to reoffend are minor property offenders.<sup>407</sup> Regarding violent offenders, according to a 2024 report, those released for violent offenses are actually the least likely to reoffend among other offenders, likely due to the fact that, as supported by evidence, people tend to “age out” of violent crime.<sup>408</sup> A 2021 report from the BJS finds that, although reoffending rates are high for everyone, people released from prison in 2008 after serving time for a violent offense were less likely to be arrested for *any* offense than prisoners released after serving time for other types of crimes within ten years.<sup>409</sup> Half of those released in 2008 were arrested for a drug offense within ten years, and 40% were arrested for a violent offense during that period of time, mostly for assault.<sup>410</sup> Only 1% were arrested for homicide and 3% for rape or sexual assault.<sup>411</sup> Prisoners released in 2008 after serving time for a violent offense were more likely to be arrested for a public order offense than other offenses, and more than four in ten prisoners released after serving time for a violent offense were arrested for a violent offense within ten years, with only 6% of prisoners released after serving time for rape or sexual assault arrested for rape or sexual assault within ten years.<sup>412</sup>

A study that tried to predict rearrest within a three-year window based on knowledge of an individual’s past crimes had mixed results: only two thirds of those projected to be arrested were actually rearrested, and three quarters of those predicted *not* to be arrested were not rearrested within the same period.<sup>413</sup> A 66% positive rate is well below 90% and does not even attempt to predict the *offense* individuals will be arrested for. Epistemic permissibility could simply not obtain in this case.<sup>414</sup>

This evidence suggests, first, that the percentage of individuals who reoffend by committing serious violent offenses is relatively low; second, that it is not exclusively nor primarily those who have been previously convicted of violent offenses who reoffend by committing violent offenses; and that predicting reoffending behavior with anything close to 90% certainty is, at the moment, impossible.

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407. Mirko Bagaric, Dan Hunter & Jennifer Svilar, *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 396–97 (2021).

408. Sawyer & Wagner, *supra* note 195, at 13.

409. LEONARDO ANTENANGELI & MATTHEW R. DUROSE, *Recidivism of Prisoners Released in 24 States in 2008: A 10-Year Follow-Up Period (2008–2018)*, U.S. DEP’T OF JUST. (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr24s0810yfup0818.pdf>.

410. *Id.* at 9.

411. *Id.*

412. *Id.* at 10.

413. Bhati & Piquero, *supra* note 372, at 249–50.

414. The resulting equations ( $0.66 \times x^4 \geq 0.75$  for self-defense,  $0.66 \times x^2 \geq 0.75$  for lesser-evil justifications, and  $0.66 \times x^3 \geq 0.75$  for punishment) give an  $x$  value of 1.028, 1.065, and 1.033 respectively, which is tantamount to requiring certainty.



Of course, “criminogenic risk assessment,” which uses statistical methods to predict an individual’s “legal system outcomes” in order to effectively manage carceral populations, already exists.<sup>415</sup> A meta-review of the literature on this issue concludes that although we know a lot about which individual-level factors are associated with recidivism, criminogenic risk assessment

1) does a poor to modest job differentiating among people at high versus low risk, 2) its predictive performance is often misinterpreted and overstated, and 3) many inferences drawn from its empirical evidence base are not supported by the data. Our findings suggest that we know comparatively little about criminogenic risk assessment’s actual predictive performance, in terms of false positives, false negatives, and other metrics derived from these measures.<sup>416</sup>

Regarding the prediction of prison misconduct, personal factors predict misconduct as well as situational factors.<sup>417</sup> This suggests that prison misconduct might be a result of both individuals’ characteristics and the prison setting itself.

A prediction tool that aimed to predict individuals with a high rate of crime commission only had a 60% accuracy rate at predicting levels of criminal behavior (high, medium, low), and, in addition, generated false-positive predictions for more than one third of the predicted “high rate” group.<sup>418</sup> In fact, some have noted that any classification of an individual as a high- or low-rate person “would be fraught with error.”<sup>419</sup>

The Structured Professional Judgment (SPJ), which is a widely used tool to evaluate the risk of violence posed by individuals, defines risk simply as low, moderate, or high.<sup>420</sup> It cannot, certainly, predict the kind of offense an individual will commit nor the timeline. While such tools might be useful for monitoring individuals, they are far from being capable of justifying imprisonment as it exists today.

Second, we don’t actually know what level of harm imprisonment imposes on each imprisoned individual and how that harm is distributed

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415. Seth J. Prins & Adam Reich, *Criminogenic Risk Assessment: A Meta-Review and Critical Analysis*, 23 PUNISHMENT & SOC’Y 578, 579 (2021).

416. *Id.* at 595.

417. Paul Gendreau et al., *Predicting Prison Misconducts*, 24 CRIM. JUST. & BEHAV. 414, 425 (1997).

418. Tahamont & Chalfin, *supra* note 293, at 627, 643.

419. *Id.*

420. Kevin S. Douglas, *Evaluating and Managing Risk for Violence Using Structured Professional Judgment*, in THE WILEY INTERNATIONAL HANDBOOK OF CORRECTIONAL PSYCHOLOGY 429, 431 (Devon L. L. Polaschek, Andrew Day, & Clive R. Hollin eds., 2019).

among them.<sup>421</sup> We might know that, on average, imprisonment causes certain harms and exposes individuals to certain risks. However, we do not know, nor can we predict, which ones.

This is relevant for establishing narrow proportionality in self-defense and punishment-based justifications and for establishing one of the harms that needs to be weighed in lesser-evil justifications. Yet again, we simply have no idea what amount of harm we are imposing on each individual and can certainly not calculate it with anything close to 90% certainty.

Third, we also have far too little confidence on the necessity and effectiveness of imprisonment regarding the elimination of threats and imprisonment's general deterrent effects. We can be fairly confident, however, that similar gains could be achieved through less costly means, both for the general population and for those imprisoned. And that some of those less costly means, like healthcare, are already required by justice.

Finally, whether wide proportionality would be met is also hard to say with any degree of certainty. The collateral effects of incarceration are far-reaching and significant, as previously discussed.

All throughout this article, I have been assuming (1) that the U.S. has standing to punish everyone who is incarcerated, (2) that the U.S. has political authority to punish and confine everyone who is incarcerated, (3) that individuals who are incarcerated have engaged in behavior meriting incarceration, and (4) that the current sentencing of each individual is proportionate to the crime they have committed. But we should seriously doubt that these assumptions are correct, for many of those who are presently incarcerated. If that is the case, justifying any kind of confinement of many of these individuals becomes harder, as it requires us to justify confinement itself.

Ultimately, we must conclude that continued incarceration is morally risky and, likely, epistemically impermissible. It seems impossible to justify each individual's continued imprisonment, even accounting for the problem of "the dangerous few,"<sup>422</sup> unless we are willing to severely relax the level of certainty required to justify imprisonment.

### III. SOME OBJECTIONS

Complete decarceration, some worry, might cause immense social instability. Slobogin, for example, writes that a system that rejected imprisonment as punishment (and police) would be "the type of routine and

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421. See, e.g., Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1562–66 (2022) (stating that "[m]any details of prison conditions remain generally unknown").

422. Cf. Frampton, *supra* note 25, at 2037–40 (making similar points regarding the difficulties of identifying the dangerous few from a different perspective).

extreme neglect of societal mores that *would* lead” to de-legitimization dangers and decreased compliance with the law, as well as a decrease in public safety and social stability.<sup>423</sup> He argues that only prison might provide the necessary disincentive in such situations.<sup>424</sup>

One significant reason for concern is that closing prisons would leave us with no credible threats against those who do not comply with the relevant norms.<sup>425</sup> That is, closing prisons would signify a loss not only of the ability to confine individuals but also of the ability to deter individuals from committing crimes.

Although we can acknowledge that there are reasons to worry, we might be overestimating them. First, it is important to note that in order for imprisonment to be justified as the lesser evil, the harms caused by decarceration would need to be ten times the harms caused by continued incarceration. I have already argued why this is difficult to establish. Further, imprisonment is not the only way of reducing or deterring crime. It is, however, one that is expensive and hard to justify. It might also cause collateral widespread harm and contribute to recidivism. The objection assumes that incarceration is the only way to maintain social order, but there is no reason to think this is true without evidence. There are other coercive alternatives that could potentially be justified, as they are less harmful and could have equivalent deterrent effects.<sup>426</sup>

Further, the argument I am making does not assume *ideal* prison abolitionism to be correct. The threat of imprisonment does not *disappear* in my argument—it is *postponed* until we achieve “ideal” prisons. For this reason, unlike ideal prison abolitionism, this version of non-ideal abolitionism is not so openly vulnerable to the deterrence-based objection.

Second, penal sanctions themselves can be a source of instability, not only because of the immense harm they cause to those incarcerated and their communities but because a society that puts penal sanctions to heavy use—as the U.S. does—may lose political legitimacy as a result.<sup>427</sup> This is also

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423. Slobogin, *supra* note 58, at 556.

424. *Id.* at 556.

425. See, e.g., Lee, *supra* note 21, at 7 (noting that “[p]rison abolitionism may be self-defeating because it makes a commitment to do away with credible threats of imprisonment as a tool to enable the operation of government programs that could serve as viable alternatives to the current criminal justice system”).

426. See Hanna, *supra* note 152, at 568 (making this objection regarding punishment). Of course, these measures rely on law enforcement or police, which generates a significant degree of tension between this version of prison abolitionism and police abolitionism.

427. Chad Flanders, *What Is Wrong with Mass Incarceration?*, in *THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY AND SCIENCE OF PUNISHMENT* 161, 170 (Farah Focquaert, Elizabeth Shaw & Bruce N. Waller eds., 2020).

true of widespread fundamental rights violations: they can also undermine social stability and political legitimacy.

As a result, it is possible that we might have to tolerate a higher crime rate, particularly if continued incarceration—and thus, the maintenance of a *status quo* that violates rights—can threaten societal stability in the long term.<sup>428</sup> Further, liberals will want a society to be stable “for the right reasons,” not due to the continued violation of fundamental rights.<sup>429</sup>

Third, although prison reform is unlikely to happen, if prisons were closed, it would be the state’s moral duty to take measures to prevent crime from happening. That is, it is not set once and for all that crime will rise if individuals are released. There are many measures that are less violative of rights than imprisonment under current conditions and that could potentially be justified under the frameworks I have provided, such as community-based sanctions, electronic monitoring, house arrest, in-patient treatment in mental health facilities, effective policing, and so on.

There is substantial evidence, for example, that increasing the visibility of police can have a positive effect in deterrence.<sup>430</sup> This might be so due to the association between perceived certainty of punishment and reduced self-reported or intended offending.<sup>431</sup> Indeed, Nagin concludes from a review of the literature that evidence in support of the deterrent effect of various measures of the certainty of punishment (particularly, the certainty of apprehension) is far more convincing and consistent than for the severity of punishment.<sup>432</sup> Of course, we don’t know whether and how these effects would vary in a society where incarceration does not exist or is postponed. But if it is the certainty of punishment that deters, community-based alternatives to punishment might still have similar effects.

Fourth, it is true that high crime rates and decarceration might more readily impact communities that are already marginalized.<sup>433</sup> Moreover, high crime rates, like incarceration, have negative consequences, such as the suppression of social mobility, exacerbation of poverty and disadvantage, and so on.<sup>434</sup> Ewing, for example, worries about the unjust under-protection of already marginalized communities and takes it as obvious that the need to protect people’s rights, especially the rights of those disadvantaged, is “a weighty presumptively decisive reason” in favor of an unjust state’s

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428. *Id.*

429. *Id.*

430. Nagin, *supra* note 361, at 201.

431. *Id.*

432. *Id.* at 201–02.

433. Langer, *supra* note 58, at 44. *See, e.g.,* Clear et al., *supra* note 383 (finding a positive relationship between the rates of release one year and the community’s crime rates the next year).

434. Lewis & Usmani, *supra* note 183, at 98–99.

obligation to punish individuals who violate the moral rights of others.<sup>435</sup> The problem is that while the continued harms of incarceration are certain, the increase in crime is only a risk. And, once more, there are measures that the state can (and must) take to ameliorate those risks.

Fifth, regarding an increased risk of vigilantism and, subsequently, the endangerment of the state's capacity to monopolize violence, as Lorca notes, there is reason to doubt assumptions that link these effects with lack of punishment, as we often leave crimes unpunished and examples of private justice do not seem to compare with the levels of violence and social instability that criminal punishment itself creates.<sup>436</sup> In the context of decarceration, the argument is even more powerful, as there are other forms of punishment that can serve to assuage some of these worries. When it comes to forceful means for realizing rights, imprisonment is certainly not the only tool the state has in its arsenal—not even punishment is.<sup>437</sup>

Finally, we might argue that if we liberate  $X$  percent of individuals, imprisonment conditions will get sufficiently better for those who remain imprisoned. At this point, we can stop decarcerating. In other words, we might posit that the argument I have provided is an argument in favor of *partial*, instead of *complete* decarceration. There are a couple of things to say in response.

First, overcrowding is not the only, nor the primary, reason why prison conditions in the U.S. are poor. Thus, there is no reason to think that mere decarceration would get us anywhere close to the “ideal prison” I have set as the baseline. Significant reforms would still be required. In fact, establishing a Scandinavian-based facility for approximately sixty-four residents took several years.<sup>438</sup>

Second, even if we concede that mere decarceration would get us to sufficiently humane prison conditions (which, again, is not true), the argument so far has proceeded on the basis that individuals have no claim against confinement itself. But this, of course, is also not true. Many individuals do have such claims, and mere improvement of prison conditions would not constitute an appropriate response to their situation. Only decarceration would.

Third, if all U.S. prisons effectively followed the Scandinavian model, although imprisonment would become easier to justify, it would still remain morally risky. Mere confinement is still a significant harm to justify, and

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435. Ewing, *supra* note 192, at 266.

436. Rocio Lorca, *Could We Live Together Without Punishment? On the Exceptional Status of the Criminal Law*, 17 CRIM. L. & PHIL. 29, 30–31 (2023).

437. *Id.* at 32.

438. Hyatt & Andersen, *supra* note 335.

doubts about who would commit violent offenses in the future (in the case of anticipatory defensive justifications) and whether prison is necessary and effective for eliminating and deterring crime (applicable to both kinds of justification) would remain.

Finally, I would point out that for this objection to have any plausibility, the percentage of the incarcerated population that would have to be released would be quite significant. If readers are willing to go this far, it seems that my argument has already shifted the baseline of the conversation: the question has become “how far we should go in the process of decarceration” rather than whether decarceration is a plausible response to the *status quo*. Nevertheless, for the reasons above, if what I have argued is correct, partial decarceration would still remain morally risky and thus epistemically unjustified.

#### CONCLUSION

In this Article, I hope to have made two contributions to discussions about abolitionism. First, to provide some conceptual clarity regarding what abolitionism is and can be. In doing so, I have tried to distinguish abolitionism from minimalism and have offered and discussed three categorizations of abolitionism.

Second, I have tried to defend non-ideal prison abolitionism against critiques that dismiss it as implausible. Even if we accept that the ideal demand is partial decarceration and immediate improvement of imprisonment conditions for those who can be justifiably confined, we are unlikely to achieve that in the short term. Yet continued imprisonment in current conditions is extremely difficult to justify.

This conclusion might be uncomfortable or hard to accept. But the fact that it is does not alter the moral demand of decarceration, even if we know that it will not come true.<sup>439</sup> There is, after all, a limit to how much a moral theory can concede to feasibility constraints, and moral rights provide one of those limits. It is extremely unlikely that the U.S. will close prisons. Most probably, it will continue to violate the fundamental rights of those imprisoned while obtaining few gains. However, we should not be content thinking that the status quo is morally preferable to decarceration as the lesser of two evils or as justified punishment of the dangerous few. It is likely not.

This conclusion might also appear radical, and, in a way, it is. But the conclusion does not follow from a commitment to ideal abolitionism—it could be, in fact, endorsed by non-ideal abolitionists and ideal and non-ideal

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439. See, e.g., Estlund, *supra* note 45.

minimalists, and, more broadly, by anyone committed to fairly basic liberal principles. It is true that eliminating imprisonment might not be the long-term goal for those who are not committed to ideal prison abolitionism. But immediate decarceration might be the only feasible way of complying with the relevant moral demands.

The argument I presented does not establish that incarceration wouldn't be justified in an ideal society, with "ideal prisons." It is not, thus, a case in favor of what I have called "ideal prison abolitionism." It does, however, raise some questions about imprisonment ever being necessary. And, perhaps, if we closed prisons and replaced them with community-based alternatives and in- and out-patient mental health treatments, we would have no desire to go back. We would have no need. That is, maybe we would realize that, after all, imprisonment is morally unjustified because it is unnecessary.

When Jerome Miller sent his account of the closure of the reform schools in Massachusetts to an editor, the editor responded by telling him that it was "too compassionate" for the times. Miller wrote:

I think of the hundred-pound teenager who killed two others and now awaits sentencing as an adult—a piece of fresh meat to inmates who, outside prison, wouldn't consider abusing him sexually—and I try to find ways to delay his sentence, cajoling and manipulating with a faith grounded in the incompetence of the system, gaining time while fashioning some alternative for the court to consider, and winning a melancholy prize—he is sent to a caring treatment facility until he can grow big enough to survive assault in the twenty years of prison which will follow his rehabilitation. I thought of all these things when I recalled the editor's comment that all this was "too compassionate for the times"—and I'm not sure what that means.<sup>440</sup>

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440. MILLER, *supra* note 1, at 239.

