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Systems of Crime and Castigation: A Reevaluation of the Punishment Bureaucracy

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Systems of Crime and Castigation:
A Reevaluation of the Punishment Bureaucracy

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Abstract

Models of reform within the criminal justice system often operate from a top-down perspective, affecting change on surface levels to attempt to better the system. One example of such a reform is Scotland's Presumption Against Short Sentences. These kinds of changes, as I will illustrate in this paper, both fall short of achieving genuine change and often produce negative side effects. However, a few countries have made deeper changes to the ways their systems both view and handle crime and punishment; one such system is Norway. Through rehabilitation and restorative justice, Norway has greatly decreased rates of recidivism, increased social wellbeing and shifted attitudes around criminality. This paper thus presents an argument as to why top-down models of reform such as Scotland's are not effective, and why systems must be addressed from the bottom-up to effectuate actual change by examining efficacy and reasoning behind the institution of punishment. Further, I argue that that the United States system of law and order specifically both does not operate objectively and has been wielded as a historical tool of political oppression; I thus posit that small reforms will always fall short when proposed within the context of a system built off of economic and racial oppression. Due to the foundations of injustice within the American criminal justice system, I thus conclude that we must pursue deeper changes instead of peripheral reforms.

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Introduction:

Modern thought on punishment, finding its roots deep within human history, divides societies' approaches to dealing with those convicted of crimes broadly into two philosophical schools: 1. Embracing punishment as retributive justice as set forth in Kantian philosophy and 2. Rejecting retributive justice and focusing instead on rehabilitation and restitution. Proponents of both approaches claim to base their theory in restoring and repairing the society and individuals harmed by the crime. However, although there is little objective research proving the utility of the retributive model, many modern societies continue to adhere to structures of punishment. When these societies recognize injustices or inefficiencies in the criminal justice system, they often attempt to implement reforms that address only the identified problem, without addressing the faulty basis of a system built on the idea of retributive justice. Therefore, these well-intentioned reforms often have unintended consequences that result in either a failure to address the identified problem or even worsen systemic issues. This paradigm is particularly true in countries, such as the United States of America, in which the penal system was constructed to reinforce existing racial and economic disparities and injustices.

In this paper, I will examine two countries, Scotland and Norway, each of which represents a different viewpoint on the role of punishment and how that view affects reforms to their respective criminal justice systems. I will also briefly discuss the philosophical underpinnings of punishment and look at the empirical data supporting either system based on retribution or a system based on rehabilitation and restoration. I finally will examine the ways in which the U.S. criminal justice system in particular must resist superficial reforms such as those

posed within Scotland due to foundational inequalities of race and class based in the design of the system itself.

I. Scotland and Norway

Historical Basis of the Scottish Legal System:

In 1707, Scotland and England were unified under the title of the new state of the United Kingdom. The Act of Union allowed for Scotland to maintain its legal system, permitting the retainment of independent courts, police forces and criminal justice system¹. When the Scottish devolution occurred in 1998, the Parliament of Westminster passed the Scotland Act, a mandate creating a distinct Scottish legislative body (the Scottish Parliament) and granting legislative powers to the reformed Scottish parliamentary body. Although the Parliament of Westminster still retained competencies over 'supreme legislature,' under the terms of the Scotland Act, all powers that did not explicitly reside within the hands of the centralized government were to be devolved down to Scottish institutions. A central devolved power was thus the administration and regulation of the Scottish legal system in all areas excluding matters of supreme legislation, such as national security and terrorism. In 2008, executive powers were granted to the Scottish executive, and a justice committee, falling under parliamentary powers, has been the primary administrator of executive scrutinization in relation to criminal justice since.

¹ The Scottish Criminal Justice System - sccjr.ac.uk. (n.d.). Retrieved from <https://www.sccjr.ac.uk/wp-content/uploads/2019/10/3-The-Scottish-Criminal-Justice-System.pdf>.

The Scottish Legal system, referred to as ‘Scots Law’ operates under a mixed system of civil and common law², in that Scottish law derives from both written legislation and common law (law that is not codified in a document such as a constitution but is rather builds upon legal precedent). The Scottish criminal courts and criminal prosecution thus fall under Scots Law, as criminal justice was devolved to Scotland in all cases barring those concerning national security terrorism, firearms and drugs, over which the the Supreme Court of the United Kingdom retains competency. Proceedings with the Scottish criminal courts are therefore heavily based on common law due to the extensive body of developed legal precedent.

Scotland’s criminal court system provides three levels of adjudicatory bodies, to which cases are assigned based on the severity of the crimes alleged. They are, in decreasing levels of severity: the High Court of the Judiciary, the Sheriff Courts and the Justice of the Peace Courts. The High Court of the Judiciary (and occasionally the Sheriff Courts) deal with what is called solemn procedure. Solemn procedure, one of the two types of Scottish criminal procedure, involves the most extreme of cases, and trials of solemn procedure are always conducted with a jury. The other form of Scottish criminal procedure, known as summary procedure, is used to address less serious offences that are generally tried before a sheriff or justice of the peace court.

Policing Force:

² The Scottish Criminal Justice System - sccjr.ac.uk. (n.d.). Retrieved from <https://www.sccjr.ac.uk/wp-content/uploads/2019/10/3-The-Scottish-Criminal-Justice-System.pdf>.

Established under the Police and Fire Reform Act of 2012, the current national police force -Police Scotland- has been in place since 2013. However, before 2013, the post-devolution system of policing was mostly decentralized, placing powers of enforcement into the hands of subsidiary local structures. Although certain regions turned to a more community-driven and prevention-focused style of policing, others turned to a more antisocial approach: the region of Strathclyde (roughly the region in and around Glasgow) became infamous for its heavy-handed, enforcement-driven style of law enforcement. In 2010 for example, Strathclyde's rate of stop-and-search was the highest in the entire United Kingdom (at 168 per 1,000 individuals), while in many other regions of Scotland the average was about 40 per 1,000 individuals³. Strathclyde also adopted a zero-tolerance policy in relation to low-level crime, rejecting alternative policing styles adopted in other regions of Scotland based on community well-being, partnership and prevention. This intra-national tension over policing practices sparked debates about waste and ineffectiveness between the subsidiaries, and soon these tensions became equated with the concept of localization itself. Thus, in 2013, the government centralized Scottish law-enforcement and retired the localization of policing.

However, this centralization had almost the opposite effect of that intended; instead of merging and mediating the policing of the eight districts, the new single-style policing instead adopted the methodology of Strathclyde. This exceptionally anti-social period of Scottish policing history, termed 'Strathclydification' represented a harsh turn in national policing and, subsequently, incarceration; during this period, Scotland's incarceration rate increased from 116

³ Morrison, K. (2017). The criminal justice system in Scotland. Retrieved from <https://oup-arc.com/protected/files/content/file/58ef756a38ec0a0f0070a186-1492507123348-cas-e-chapter-scotland.pdf>.

to 150 people per 100,000 incarcerated⁴. Although liberals within the Scottish Parliament have pushed for more moderate policies since the resignation of Steven House, the former Chief Constable of Police Scotland, in 2015, the harsh and punitive framework established in the late 20th and early 21st centuries bequeathed to Scotland exceedingly punitive attitudes around, and models of, criminal justice that created the problem of over-incarceration the nation faces today.

Problems In The Traditional Model:

Scotland's post-devolution systems of both policing and imprisonment also became markedly harsher. The onset of devolution was contextualized by the period of 'New Labour' in both the Scottish parliament and the greater U.K parliament from the mid 1990s to 2010⁵. Although New Labour claimed to repudiate harsh methods of policing that had resulted in increased prison populations across the United Kingdom, their underlying "law and order" view of crime and punishment was largely traditional, promoting the same policing methodologies that had resulted in large prison populations throughout the UK. Under the New Labour rule, the general prison population increased to 76,000 due mostly to the increasing length of sentencing and anti-social policing. Although the Labour Party began pursuing strategies to reduce anti-social policing practices and behavior, the Scottish criminal justice system, based on theories of punitive justice and exacerbated by 'Strathclydification', remained largely punishment-oriented.

⁴ World Prison Brief, 2000-2010

⁵ Morrison, K. (2017). The criminal justice system in Scotland.

Although the current Scottish government has repudiated the New Labour's late 20th century vision of law and order since the end of the coalition of New Labour and the Liberal Democrats in 2007, the foundations built by the post-devolution government, both at Westminster and in Edinburgh, have created a system which incarcerates people at a higher rate than any other country in Western Europe⁶. Moreover, despite efforts taken by the Scottish National Party to remedy the inefficacy and injustices of the Scottish criminal justice system, specifically in relation to over-incarceration, the Scottish rate of incarceration is still greater than that of both England and Wales.

The era of 'Strathclydification' established an approach to prosecution and incarceration which has not since been dismantled. Attempts at reform have thus been circumscribed by the harsh sentencing and extraordinarily high numbers of individuals incarcerated from the 1990s and 2000s, in addition to the persisting effects of the New Labour Movement and the centralization of the police force. Even with reforms made after the rise of the Scottish National Party, public opinion and policy remains tied to outdated and unproven theories on the effectivity of harsh approaches to crime and punishment.

Reform Throughout the Years:

Since devolution, Scotland has attempted many reforms, aimed mostly at reducing rates of imprisonment and reoffending. The reforms have primarily fallen into three categories: implementation of direct measures within summary justice; the development of new criminal

⁶ Morrison, K. (2017). The criminal justice system in Scotland.

justice bodies; and the development of legislation aimed at directly reducing incarceration⁷.

Summary justice reform in the form of direct measures (eg. warnings, fines) change the sentencing associated with a crime itself, which allow less serious cases to avoid ever even going to court. The bodies established through legislation are aimed largely at decreasing the rate of reoffending, and have included eight different authorities of community justice.

The final method of reform, decreasing the rate of incarceration through legislation, is best exemplified by the 2010 Presumption Against Short Sentences, introduced in an attempt to combat Scotland's intransigent problem with over-incarceration. Yet, while the legislation was designed with the goal of eradicating inefficiencies and inequities inherent in the existing criminal justice system, in practice it perpetuates - and perhaps worsens- the problems it seeks to solve.

Presumption Against Short Sentences

In 2008, the Scottish Prisons Commission made a recommendation for the implementation of legislation to reduce the numbers of incarcerated persons for short prison sentences. The commission stated:

“(i)mprisonment should be reserved for people whose offences are so serious that no other form of punishment will do and for those who pose a threat of serious harm to the

⁷ Protecting Scotland's Future: the Government's Programme for Scotland 2019-2020. (2019, September 3). Retrieved from <https://www.gov.scot/publications/protecting-scotlands-future-governments-programme-scotland-2019-20/pages/8/>.

public...and that paying back the community should become the default position in dealing with less serious offenders⁸.

In 2010, this recommendation was turned into a piece of legislation known as the Criminal Justice and Licensing Act. The 2010 version of the legislation mandated that if a conviction entailed a sentence of three months or less, a court may only impose incarceration if they strongly and justifiably believe that there is no other course of action appropriate for the individual's case. Thus, although it did not fully ban short sentences, the new legislation attempted to decrease the number of individuals incarcerated for less serious crime by making sentencers provide justification for incarcerating the accused in court.

In the summer of 2019, the Scottish Government committed to the extension of this presumption from three to 12 months after the protections for victims in the Domestic Abuse Scotland Act of 2018 were put into action⁹.

Legislative Rational

The Presumption Against Short Sentences (PASS), among many other prior Scottish reforms, was passed in an attempt to help correct Scotland's continual problem of prison overcrowding and over-incarceration. The reasons provided for the implementation of PASS were primarily the following:

⁸ The Scottish Prisons Commission: Ten Years On. (2008, August 18). Retrieved from <https://www.sccjr.ac.uk/projects/the-scottish-prisons-commission-ten-years-on/>.

⁹ Presumption against short sentences extended. (2019, June 26). Retrieved from <https://www.gov.scot/news/presumption-against-short-sentences-extended/>.

1. To decrease the number of individuals in the prison system: As stated by the commission, the theoretical foundations of the reform were to decrease overcrowding in the system and create more breathing room, literally and financially, for those remaining in prison for more serious crimes. Moreover, as previously quoted, the commission stated that community payback should become the default punishment and that prison should be reserved for only the most severe of cases.
2. To reduce rates of reoffending and dismantle the “revolving-door” system created by a high number of short sentences: Citing multiple data sets, the Scottish government stated that sentencing “often disrupts factors that can help prevent offending, including family relationships, housing, employment and access to healthcare and support¹⁰.” Moreover, those who have been incarcerated once have a markedly higher chance of reoffending in the future. By preventing incarceration in the first place, PASS would thus decrease both the overall number of individuals in the prison system and the rate of recidivism itself.
3. To better the situation of women involved in the criminal justice system: According to the Scottish Prison Service Women in Custody report, around 90% of women convicted of crimes are given custodial sentences of under a year. Thus, if figures remain the same, the 2019 adaption of PASS would greatly decrease the number of women within the system and allow for many more families and communities to remain together.

¹⁰ Presumption against short sentences extended. (2019, June 26).

However, although all of the issues cited behind the reform and within its legislative language are entirely legitimate, Scotland's initial 2010 reform had unforeseen detrimental impacts.

Issues with the Presumption Against Short Sentences

Reforms such as the Presumption Against Short Sentences are the most prevalent and mainstream type of reform within the field of criminal justice. These reforms, while appearing to address institutional-level issues within the system, operate entirely upon the surface. Although they articulate foundational issues and propose solutions that on the surface appear to remedy, or begin to remedy, those identified issues without uprooting the entire foundation of the system, they are unable to reach the entirety of the problem. The Presumption Against Short Sentences, for example, aims to both reduce overall numbers of people incarcerated and to shift the overall culture around incarceration of less-serious offenses. Yet, although appearing helpful upon first glance, reforms such as the Presumption Against Short Sentences inevitably generate negative side effects when implemented to remedy issues that can only be addressed at a foundational level. This is because reforms such as PASS operate within the framework of a system that inherently equates severity of punishment with its effectiveness.

Negative Side Effects of PASS

Since its initial implementation in 2010, sentencing policy in Scotland has become more punitive. Although the crime in Scotland in 2019 is at one of its lowest levels since 1974 *and* the nature of those crimes has remained relatively stagnant, the average custodial sentence in Scotland has risen from 7 ½ months (2005) to 9 ½ months (2015)¹¹. This means that following the implementation of the PASS, sentencing became significantly more punitive. Although a direct causal connection between the adoption of the reform and the increase in custodial sentencing has not been empirically demonstrated, the fact that the length of custodial sentences increased dramatically within that period is noteworthy. Moreover, in addition to the data itself, many citizens and campaigners also attest to an increase in harsher sentencing, citing the cuts that have been made in other parts of the system, such as bail supervision, to support these longer and harsher sentences¹².

By explicitly stating that short sentences are not effective forms of punishment, the Scottish Parliament implicitly stated that what *does* therefore work is longer, harsher sentences; fundamentally, the idea embodied by PASS is that harsher sentencing is required for punishment to be effectual. The entirety of the reform model is thus driven by longer minimum terms and lengthier sentences; it is founded on the idea that punishment as a response to offense *is* effective and *is* the proper way to orient a criminal justice system, and that for punishment to actually work, individuals need to be kept in the system for longer periods of time.

¹¹ Morrison, K. (2017). The criminal justice system in Scotland.

¹² Brooks, L. (2019, July 15). Scotland's prisons under pressure as inmate numbers rise. The Guardian. Retrieved from <https://www.theguardian.com/society/2019/jul/15/scotland-prisons-under-pressure-inmate-numbers-rise>

Although the original intention of the legislation was to decrease incarceration for offences that would entail sentences of less than 12 months, its long-term effects are possibly more harmful to Scotland's already over-crowded system. Legislation such as PASS attempts to deal with an issue such as mass-incarceration without restructuring the foundations of the way a society views punishment, and therefore ultimately further institutionalizes ineffectual retributive and punitive systems of justice. It has been proven that severity and length of sentencing has absolutely no link to a countries crime rate¹³; thus, without addressing the fundamental way a system and a society view punishment, seemingly positive reforms such as PASS can end up widening the net, keeping those who would have been in prison for a shorter amount of time (and, as the theory behind the legislation articulated well, shouldn't even be in prison in the first place) in the system for longer sentences. Although the intention of the reform was to reserve prison for severe cases only, what instead happened when applied in the context of a punishment-oriented system was that custodial sentences were lengthened rather than eradicated.

Consequences like these are the heart of the problem with top-down reforms. Even if the theory behind a reform is inherently non-problematic, creating systemic changes by tweaking the surface level aparati only forces issues to manifest somewhere else within the system (for example, an increase in harsher sentencing). Institutionalizing the validity of harsh prison sentencing therefore effectively perpetuates the problems within the system that the original reform attempted to eradicate. The PASS reform, by trying to solve a systemic issue with patchwork legislation, thus caused deeper systemic repercussions in terms of the way that Scotland views punishment and prosecutes crime.

¹³ Longer prison sentences may win votes but they won't stop crime. (2019, October 16). *Prison Reform Trust* . Retrieved from prisonreformtrust.org.uk

For the reasons articulated above, legislation like PASS, although well intended, will never fully be able to “support reintegration and rehabilitation¹⁴.” To work towards and achieve actual systemic change and a true shift in attitudes around crime and punishment, much more foundational shifts in policy, attitudes, and beliefs must therefore be pursued.

Norway

The Norwegian system of criminal justice was for many years similar to that of Scotland (or the United States). Focused primarily, and emphatically, on punishment until the latter half of the 20th Century, the Norwegian system was finally reevaluated in the 1960s; prior to that, all five Nordic countries had largely punitive systems of justice. However, with the establishment of the Scandinavian Research Council for Criminology in the 1960s and the establishment of Norway’s system of mediation in the 1970s, Norway began developing criminal justice policies based on restoration and rehabilitation rather than punishment and retribution¹⁵.

Mediation:

Norway’s system of mediation, restorative justice dealing with victim-offender reconciliation, is one of the criminal justice practices for which it is best known today. It was established following the publishing of Nils Christie’s seminal article ‘*Conflicts as Property*’ in 1977 and the Norwegian government’s subsequent criminal justice report published in 1978. Nils

¹⁴ Presumption against short sentences extended. (2019, June 26).

¹⁵ Cornwell, D., Blad, J., Wright, M., & Andersen, P. (2013). *Civilising Criminal Justice: an International Restorative Agenda for Penal Reform* London: Waterside Press.

Christie, a prominent criminologist and vehement proponent of restorative justice, believed in the community model and interpersonal justice, placing the local community at the center of the society and working outwards. His paper '*Conflicts as Property*' argued that inter-personal conflict had been "stolen" by the government, and he desired a return to making conflict between only the parties involved. This idea of localization was translated into community-based mediation services, implemented throughout the Norwegian criminal justice system in 1991 with the passing of Parliament's Act on Mediation through the Mediation Service. However, these community-based programs were scaled up to state-ownership in 2004 due to a lack of responsibility on the part of the municipalities. It was this initial establishment of municipal-level mediation in 1991 however that allowed for their singular implementation a decade later. Moreover, although the process itself has been centralized, the implementation remains based in community values. In line with Nils Christie's vision of a decentralized system of justice, all of the lay mediators live in the communities in which the case originated. In the present day, every region has access to a multitude of mediation services that can be used with the consent of all involved parties, and may be either requested by the parties or recommended by the prosecutor.

Alternative Penalties:

Another way Norway has structured its system to de-institutionalize the efficacy of punishment and promote genuine rehabilitation is through community sentencing. Instead of serving time in jail, many offenders are sentenced to a penalty in society such as engagement in social work, treatment, or change programs. These sentences both keep the individual out of the

prison system and effectively help, at least more so than incarceration, rehabilitate and prepare the individual for re-entry into the community and the labor market.

Rehabilitation within prisons: moving away from the punitive model

"Every inmates in Norwegian prisons are going back to the society. Do you want people who are angry — or people who are rehabilitated?"- Are Hoidel, Director of Halden Prison

Mediation and community-sentencing were not the only fundamental changes made to the criminal justice system. In addition to legislature and reforms focused on keeping individuals out of the penal system in the first place, Norway has also fundamentally transformed the way its system incarcerates.

In 1968, the Norwegian Association for Criminal Reform was formed to address the unsatisfactory conditions within the Norwegian prison system and, on a much wider level, its penal system. With a recidivism rate of 91%, it was evident that the punitive self-supply model of justice was not only non-functional but also possibly counter-productive, making it more likely that individuals would end up within the system again by isolating them completely from societal resources such as proper healthcare or education during their time incarcerated¹⁶. In 1970, Christie thus impelled the abolition of the self-supply and, in its place, instituted the import model. Built off of the belief that the traditional punitive model fails to properly rehabilitate prisoners or prepare them for re-integration, the import model asserts:

¹⁶ Papendorf, K. (2006). 'The Unfinished.' *Acta Sociologica*, 49(2), 127–137. doi: 10.1177/0001699306064767

“(p)risons inmates should not lose their right to social services such as education just because they are in prison. Furthermore, the services should be offered by the same organizations as in society as a whole” (St. Meld, 1991-92).

Christie believed that the most harmful part of the self-supply model was its isolation of prisoners from the outside world, causing incarcerated individuals further lose contact with the society for which their incarceration was supposedly supposed to benefit. Instead of growing and rehabilitating, prisoners would often therefore regress due to isolation and lack of humanism in regards to their treatment while incarcerated. The import model thus both allowed prisoners to use all societal resources (save those restricted for reasons of security or feasibility) that would be available to them when not incarcerated, constructively preparing them for reintegration and providing comprehensive and functional rehabilitative services, while simultaneously dismantling the harmful model of self-supply.

Today, Norway’s prisons have one of the lowest recidivism rates globally, 20%, and an incarceration rate 1/10th of the United States¹⁷. Fewer people are incarcerated in the first place, and those who are incarcerated aren’t likely to return after their first sentence. The restorative model of justice, based upon rehabilitation and reconciliation instead of punishment and retribution, has thus created a society with less crime by changing the way the system views and handles the idea of punishment itself. A tangible example of this is Norway’s maximum sentencing; since 2009 with the passing of an anti-terrorism law, the maximum sentence allowed to be administered to an individual is 30 years (and only for crimes against humanity). For example, in 2012, mass murder Anders Behring Breivik was given only 21 years in prison; this

¹⁷ World Prison Brief.

was the maximum sentence for the nature of his crime, and most citizens felt satisfied in his sentence. Although it is possible to add on years as seen fit, this rarely has happened. By lowering and limiting sentencing even for the most heinous of crimes, the Norwegian system thus denounces the innate potency of punishment as a response to crime. The goal of the system is truly therefore not to punish, but to rehabilitate.

Although there seems to be a human instinct for punishment, especially as a response to the violation of societal codes (often represented through legislation), Norway has shifted the purpose of incarceration from punishment in the name of societal retribution to genuine individual rehabilitation in the name of societal good. Although no system is without flaws, Norway has fundamentally delegitimized the punitive approach to criminal justice and replaced it with a system focused on the holistic restoration of the individual and the community.

Meanwhile, many other western democracies, including Scotland and the United States, still firmly subscribe to the efficacy of punitive sentencing. Yet, comparatively, Norway's system of restorative justice is performing much better in decreasing crime, lowering rates of incarceration, and almost eradicating recidivism. As a matter of achieving the goal of increasing societal safety, the Norwegian model is demonstrably superior. Thus, if restorative justice objectively works better at promoting wellbeing and decreasing crime, why are systems based in the severity of punishment still so prevalent? Although able to be explored within a broader context, questioning the rationale of punishment within the context of the United States is a matter specifically important to examine.

II. Punishment and Systems of Criminal Justice

Whether inherent to human nature or passed down through precedent and embedded in societal convention, punishment has become the historical default and orthodox response to societal misconduct. The origins of the retributive system of justice are thus almost impossible to trace, as humans have displayed an institutional propensity for punishment since the beginning of recorded history¹⁸. However, the moral function of the punishment model has been most strongly articulated and supported by Immanuel Kant, an 18th century Prussian philosopher and an ardent advocate for the efficacy of punishment.

Kant believed that punishment in response to a crime was the only way to restore equilibrium between the perpetrator, the victim, and the state itself¹⁹. Viewing morality through ‘categorical imperatives’ - moral obligations derived from logic and reason that must be followed regardless of individual situations or desires- Kant believed that breaching an imperative is an offense justified to be met with punishment. By equating morality of law with morality of the categorical imperative, Kant posited that anyone who violated these societal codes of conduct, necessary to preserve order and cohesion, was thus not only deserving of punishment but *must* receive punishment in order to restore a societal balance and pay back the debt to society created by through the act.

The Kantian perspective still fundamentally guides systems of retributive justice and societal perspectives globally around the rule of law. Even within the context of mainstream

¹⁸ A. Warren Stearns, Evolution of Punishment, 27 Am. Inst. Crim. L. & Criminology 219 (1936-1937)

¹⁹ Marson, Jennifer (2015) "The History of Punishment: What Works for State Crime?,"The Hilltop Review: Vol. 7: Iss. 2, Article 4.
Available at: <http://scholarworks.wmich.edu/hilltopreview/vol7/iss2/4>

political discourse, there is a general acceptance that our laws reflect objective moral truths, and that in order to uphold society's moral code and restore equilibrium, those who violate those truths should be punished in accordance. However, an examination of this perspective raises two issues: 1. Are criminal laws really objective and unbiased indicators of morality, and 2.

Regardless of the answer to the prior question, is punishment the correct or most effective response?

To answer those questions, we must first examine the efficacy of punishment within our current system of justice and establish a working basis of understanding about the equitability and objectivity of the American systems of law and punishment.

The Efficacy of Punishment

Punishment, in terms of contingency, can be defined as the “administering a punisher or an aversive stimulus after the response has been made²⁰.” While Kantians believe in incarceration on grounds of morality, many other advocates for punishment within the criminal justice system believe that punishment, regardless of moral attachment, is the most effective method of behavior modification. If preventing and repairing harm to social life (by preventing and repairing harm caused by criminal behavior) is truly the goal of criminal justice systems and those who perpetuate them, this perspective of punishment thus should be supported by proof of its success.

²⁰ Cherrington, David J., "Crime and Punishment: Does Punishment Work?" (2007). All Faculty Publications. 954.
<https://scholarsarchive.byu.edu/facpub/954>

However, The United States government has spent over \$1 trillion on ‘tough on crime policies (2018 figure) and an estimated additional \$1 trillion on the war on drugs. Yet, these punitive efforts to deal with ‘criminality’ have been extraordinarily unfruitful: presently, almost half a century after the onset of the U.S government’s war on drugs, drug use has yet to decrease, and teenagers are “(u)sing dangerous drugs at twice the rate that they did in the 1980s.²¹” Moreover, even though there has been an overall decrease in crime over the past few decades, only a mere 10-15% of that decrease can be estimated to have been attributed to an increase in law enforcement²².

Although the U.S government has never sponsored a study investigating the efficacy of punishment a large body of inverse evidence shows that using punishment as a deterrent for crime is “largely ineffective and can even be damaging” (Cullen&Gendreau, 2000; McGuire, 1995). Furthermore, studies show that using punishment as a response to crime actively increases rates of recidivism over non-punishment-based models (Gendreau et al., 1999, McGuire, 1995). Overall findings consistently show that punitive measures have a “net destructive effect and tend to worsen recidivism rates” and that “on average, punishment-based programs increase re-offense rates by twenty-five percent over control groups.²³”

In addition, field work conducted in the U.S criminal justice system can also prove the damaging effects of incarceration. In 2015, Michael Muller-Smith from the University of

²¹ Karakatsanis, A. (2019). The Punishment Bureaucracy: How to Think About "Criminal Justice Reform". *The Yale Law Journal Forum*.

²² Brennan Center for Justice, cited through Lind, D., & Lopez. (2015, May 20). 16 theories for why crime plummeted in the US. Retrieved from <https://www.vox.com/2015/2/13/8032231/crime-drop>.

²³ Cherrington, David J., "Crime and Punishment: Does Punishment Work?"

Michigan conducted an investigation of the impacts of incarceration on ‘criminal behavior and labor market activity’ using data sourced from Harris County, Texas. Through empirical, data-driven research, Muller-Smith found the following to be true for Harris County:

1. There is a net increase in criminal activity after incarceration.
2. Incarceration actually encourages more *serious* criminal behavior after an individual’s release, especially drug and property offenses.
3. Incarceration negatively impacts a number of non-crime-related elements of the individual’s life, such as post-release economic self-sufficiency and barriers to societal re-entry.

In short, Muller found that incarceration increases both the intensity and frequency of recidivism, in addition to negatively impacting the economy by decreasing potential for post-release self-sufficiency and increasing use of welfare.

Moreover, out of all of the crimes for which people are incarcerated in the United States, drug offenses constitute about 45.2% of the total offenses, making substance possession and use the single greatest offense for which people are incarcerated (twice as large as its runner up: weapons, explosives, and arson, which constitute 19.1% of inmates²⁴). Yet, The National Center on Addiction and Substance Abuse estimates that only 11% of individuals in need of treatment for substance abuse receive it while incarcerated; thus, while the system has no issue incarcerating individuals for the use of drugs, it refuses to facilitate their recovery and rather

²⁴ Federal Bureau of Prisons. (2019, December 7). Retrieved from https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

perpetuates a system that relies on isolationism instead of providing actual treatment to deal with what are fundamentally public health issues, even despite the mounting body of evidence showing the negative impacts of incarceration upon individuals incarcerated for drug use.

It is thus apparent that the punitive system of criminal justice is not perpetuated in the interest of rehabilitation, social well being or overall civil prosperity. Incarceratory punishment has been proven, both theoretically and tangibly, to fail in its supposed goal of restoration of public order and increase in overall wellbeing. Yet, despite concrete evidence proving its comparative lack of success to other less-punitive systems (such as that of Norway's), the United States continues to incarcerate more individuals per capita than any other developed nation. Thus, it is clear that systems of crime and punishment in the United States are not based off of good public-policy and a desire to decrease crime or keep communities safe; if so, systems of punishment surely would have been dismantled by this point and replaced with demonstrably more effective responses to offenses, especially those involving substance abuse. The question must therefore be asked: why is the punishment system still kept in place?

The Myth of Objectivity of Law

The general framework within which society operates is one of legal objectivity; laws function objectively and truthfully, and law enforcement fairly prosecutes as such. Yet, a closer examination shows that these structures are far from objective or fair. The two examples I cite are two of the largest and most systemic examples of the criminal justice system exercising the

supposed neutrality of the rule of law as a form of oppression, but there are many other equally potent examples.

1. Forced labor within the criminal justice system:

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” - 13th Amendment

Passed by Congress on January 31, 1865, the 13th amendment was established to abolish slavery and involuntary servitude. One exception was built in to the amendment however: slavery is illegal- *except* as a punishment for crime. The economy of the slavery-driven south had become reliant upon slave labor as a foundational element of the market. Thus, when the abolition of slavery was enacted through the 13th Amendment, white politicians immediately exploited the loophole within the amendment for free labor. Since explicit slavery had been abolished, policymakers created a system of crime and punishment specifically targeting and criminalizing black people through fabricated crimes such as loitering and vagrancy in order to legally exploit the 13th Amendment's escape clause. As soon as an individual was found guilty of one of these newly-fabricated 'crimes,' they were then legally able to be used for free labor. Due to this system of convict leasing and Black Codes, the restrictive laws governing free black to ensure their labor, black bodies therefore continued being enslaved after the supposed abolition of slavery.

Yet, this system of forced and disproportionately racialized free labor is not an artifact of the past. With few exceptions, incarcerated individuals in U.S state and federal prisons are still required to work without compensation, and are punished if they refuse to do so. The Constitution's 13th Amendment still stands with the exact wording with which it was created; incarcerated persons still legally have no constitutional right to refuse serving as free labor. One of the most extreme examples existing today is Angola Prison. Sitting on a plot of Louisiana plantations larger than Manhattan, the penitentiary is specifically known for its use of brutal violence and harsh working conditions. Inmates, 80% of whom are black men²⁵, are forced to work long hours on the field surrounding the penitentiary under the threat of punishment if they refuse to do so.

The punishment exception in the 13th Amendment institutionalized the disproportionate exploitation of black and brown bodies for free labor. By repurposing laws to create false criminalization, the system itself created- and then perpetuated- a view of black people as inherently more criminal. If we misapprehend criminal law as an objective arbiter of justice instead of as the racial tool of oppression that it is and was created to be, we misunderstand the nature of the system. It is clear that the system's roots are inexorably embedded in the oppression of black and brown communities, and not indeed in objectivity or truth.

2. The War on Drugs

²⁵ Goldberg, J. (2015, September 9). A Rare Look Inside Angola Prison. Retrieved from <https://www.theatlantic.com/politics/archive/2015/09/a-look-inside-angola-prison/404377/>.

“The Nixon campaign in 1968, and the Nixon Whitehouse after that, had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.” – John Ehrlichman, Nixon Advisor

Started in 1971 by Richard Nixon, the infamous war on drugs was an effort undertaken by the U.S. government to supposedly stop illegal drug use and trade in the United States. By the 1980s however, this ‘war’ had resulted in the onset of mass-incarceration and the extraordinary disproportionate incarceration of black men over any other group²⁶. This was largely attributed to one drug in particular: crack cocaine.

In the 1980s, crack cocaine first began showing up in American communities. Inexpensive and able to be sold in small portions, it began to grow in usage, particularly within the African American community. While merely a different form of cocaine, mandatory minimum sentencing linked to possession amounts of crack cocaine was introduced in the Anti-Drug Abuse Act of 1986 in the name of being ‘tough on crime.’ This established a 1:100 ratio for the punishment mandated for the possession and/or distribution of crack cocaine vs. powder cocaine (i.e, distribution of 5 grams of crack cocaine mandated the same sentence as the distribution of 500 grams of powder cocaine). This legislation, while legitimized under the name

²⁶ The Drug War, Mass Incarceration and Race. (2018). *Drug Policy Alliance*.

of the war on drugs, was used to effectively disenfranchise and subjectate communities of color, especially black men. As crack was considerably more prevalent in communities of color, while powder cocaine was more prevalent in white communities, these provisions institutionally exacerbated the existing disparities in enforcement such that African Americans, while comprising 15% of illicit drug users in the U.S, comprise 74% of those sentenced to prison for a drug offense (2006)²⁷.

The consequences of this law, purportedly designed to help eradicate the scourge of drug use and addiction, were devastating for black communities and furthered existing injustices. Prior to the law, the average prison sentence for an African American convicted of a drug crime was 11% higher than the average sentence for a white person convicted of the same crime. By 1990, the average sentence of incarceration for a black person was 49% higher.

Thus, white politicians orchestrated a ‘war on drugs’ in the name of societal well-being by playing on the fear of white American voters and effectively disenfranchising black voters; in order to win elections and maintain power structures, unfair laws were created that disproportionately targeted black and brown people. It is thus with this era of law and order that the concept of crime truly starts to intertwine with the concept of race, and drug usage is met with punitive measures rather than the necessary response of treatment and healthcare.

Moreover, the supposed purpose of the war on drugs- decreasing drug use and making communities safer- was a complete failure. Drug usage remained stagnant overall *and* the number of young people using drugs increased over the following decades²⁸. Furthermore, in the

²⁷ Vagins, D. J., & McCurdy, J. (2006). Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law. *ACLU*.

²⁸ Karakatsanis, A. (2019). The Punishment Bureaucracy: How to Think About "Criminal Justice Reform". *The Yale Law Journal Forum*.

early 1970s, U.S prisons held fewer than 300,000 people; after the war on drugs took full effect, that number has increased to 2.2 million²⁹. The war on drugs was thus obviously not about drugs; it was about the disenfranchisement and oppression of black and brown communities.

...

These examples barely scratch the surface. There are so many more examples of law and enforcement being inherently structured to oppress communities, and there is much more nuance in each issue discussed. But the point proven remains the same: it is a mistake to think that the rule of law in the United States is an objective administrator of justice, for it is not. It is rather a selective administrator, creating concepts of crime and doling out punishment as a tool of racial and socio-economic oppression.

The concept of a criminal is created and contextualized by the concept of the law. When law is portrayed and believed to operate independently of the environment in which it was made, those who break those laws are thus seen to be making the autonomous choice to engage in illegal behavior, and punishment is justified as such. But many of our criminal laws do not reflect objectivity or fairness. They instead reflect and legitimize the power structures in which they were created or for which they were created to maintain. Criminal law is not an objective judge of morality or goodness- it is, and in many cases was created to be- a tool of racial and socioeconomic persecution.

²⁹ Stevenson, B. (2019, August 14). Why American Prisons Owe Their Cruelty to Slavery. Retrieved from <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html>.

Moreover, the use of punishment itself as a response to these ‘crimes’ has been proven to be ineffectual, specifically in cases involving substance use. This raises the central paradox of criminal law, outlined by Alec Karakatsanis in his essay *The Punishment Bureaucracy*: “in order to put a person in prison we have to prove by overwhelming evidence that she merits punishment in a narrow factual sense; but in order to put millions of people in prison, we do not need to show that doing so would do any good.” Both punishment itself and the reasons behind which we punish are thus left unchallenged within a system that uses these very same structures as instruments of oppression.

It is therefore a system that both institutionally promotes racism and punishment that is accepted as equitable and unbiased. When we speak of prison reform in the United States, it is thus usually within the context of maintaining a system that itself is built off of oppression. Surface level reforms thus will never truly address the issues within our systems, because these issues -such as mass incarceration- come not from a malfunctioning of the system but from the foundations of the system itself.

III. The Dangers of Surface-Level Reforms

When looking at attempting reforms like Scotland’s Presumption Against Short Sentences, we must thus be conscious and careful in our understanding of the foundations of criminal justice. Although passed with intentions of reducing the number of individuals within the system, Scotland’s PASS legislation implicitly further promoted an ineffective and actively harmful system of punishment by delegitimizing the use of shorter term sentences. By attempting

to fix a systemic issue with a reform that fails to address the system of punishment itself and merely attempts to reduce the number of short term inmates, the Scottish government thus advocated, whether intentionally or not, for the increase in and the efficacy of longer sentencing.

Reforms like these become even more dangerous in the context of the United States. Although punishment bureaucracies exist globally, it is within the context of the United States that this bureaucracy has been historically used as a tool of oppression. It is thus remiss to attempt to modify an inherently biased system. While a reform such as PASS is fundamentally ineffectual (as it promotes and tightens the false efficacy of the punishment system), it would become further problematic when applied in the context of the U.S. system of punishment.

This is the problem with many current proposed reforms. They attempt to address - or worse, draw attention away from- foundational issues with superficial fixes. Reforms such as PASS that operate on the outside of the system, if applied in the United States, still would leave our country as the greatest incarcerator in the world (and, in the specific case of PASS, would most likely increase punishment severity). By making small changes that appear to address systemic issues, politicians are able to look like they are truly reforming while still protecting the legitimacy of a system that privileges and maintains those in positions of power. As said by Bryan Stevenson in a New York Times article:

“We are too practiced in ignoring the victimization of any black people tagged as criminal...too many Americans are willing spectators to horrifying acts, as long as we’re assured they’re in the interest of maintaining order³⁰.”

³⁰ Stevenson, B. (2019, August 14). Why American Prisons Owe Their Cruelty to Slavery. Retrieved from <https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html>.

By believing that law and enforcement is objective and fair, society thus allows for the perpetuation of systems that oppress in the name of perceived social-wellbeing and order. Yet claiming our system of law enforcement, with many of its roots in alarmism and racial oppression, could ever be objective is a contradiction in and of itself. It is thus only a complete bottom-up reworking of the American criminal justice system that can ever prove truly unbiased in its foundations and inherently in that restructuring is the abandonment of violence and punishment as responses to crime.

The Restorative Model

“While perhaps not completely devoid of punishment, most forms of restorative justice do not follow the logic of punishment. Punishment and violence are not the goal or the means.

Restoring people is the goal and means” - Jarem Sawatsky

The Norwegian model of restorative justice provides an example of a bottom-up reworking of the concept of crime and punishment. Restorative justice, in its full implementation, both removes the premise of violence and delegitimizes punishment as a response to criminality. Restorative justice, for this reason, cannot therefore be implemented alongside a continuing system of punishment. For restorative justice to truly work, it must fully replace punitive systems of justice, not serve as a companion. Many of the restorative attempts in the United States have thus remained widely unsuccessful, as they have served as additions rather than as an overhaul of the system itself. A true bottom-up restructuring of the way our

society views crime and punishment and a shift from emphasis on the intention of the punisher to the perception of the punished is thus the only way to truly transform the structure of the system.

The U.S.'s current attempts at restorative practices have been therefore piecemeal and incomplete thus far. A full reworking of the system, as is required by restorative justice, is at odds with the existence of tough on crime politics, beliefs about law and order, and our stagnant and unchanged ideas of punishment that dominate the system today. Yet, as discussed prior, these very same structures both have been proven not to work as a response to crime, and are continued and perpetuated as a way to maintain power dynamics. Restorative justice, on the other hand, would both change the way the U.S system responds to prosecution, the way in which crime is prosecuted, and the definitions of crime itself.

Benefits of Restorative Justice

1. Restorative justice helps make responsibility an active choice and not a passive imposition. If the goal of the U.S criminal justice system is truly to prevent crime and strengthen communities, restorative justice does a much better job at this than does punishment. Central to the restorative model is the individual's accountability and retroactive responsibility for their actions. Punishment as a response to crime however does not include any aspect of active responsibility; rather, individuals are subjected. Through restorative justice however, offenders actively participate in the assumption of responsibility in order to rehabilitate and reintegrate into social life. Punishment only indicates what was wrong; restorative justice indicates, and helps individuals move

towards, what is right. Thus, unlike punishment, through restoration, mediation, and rehabilitation, restorative justice indicates and facilitates true pathways for growth. By orienting justice towards repairing the individual and the harm caused by their offense, restorative justice thus refocuses the lens of the system from the punishment/punisher to the individual.

2. Restorative Justice encourages pro-social instead of anti-social behavior by prioritizing correction over punishment. In punitive models of justice, the offender is perceived as a willful deviant of the law and thus should be subjected to antisocial forms of correction. Restorative justice on the other hand focuses on the rehabilitation of the individual rather than their punishment, making individuals less likely to reoffend after their release and more likely to be able to re-engage with their communities.
3. Restorative justice addresses the need for retributivism more constructively: One very legitimate aspect of the Kantian perspective on crime and punishment is the societal need to feel as if the offense is truly being corrected (this is known as retributivism). The two retributive arguments for punishment are as follows:
 - a. Punishment is necessary to enforce the law.
 - b. Punishment “must channel moral indignation and feelings of revenge provoked by the offence into the principles of a constitutional democracy³¹.”

Restorative justice however deals with these needs in a much more constructive way than does punitive justice, and dismantles systems of law and punishment that unfairly operate. By establishing systems of rehabilitation and mediation, prisoners actively engage in reparation for

³¹ Cornwell, D., Blad, J., Wright, M. (2013). *Civilising Criminal Justice: an International Restorative Agenda for Penal Reform*. London: Waterside Press.

their offense. The feeling of needing to correct a societal wrong, though valid, is therefore best handled not through a mere increase in total suffering but rather through genuinely constructive practices that truly teach, rehabilitate, and- when it comes to interpersonal conflicts- mediate.

A point that is often brought up when comparing the Norwegian and American systems of criminal justice is the fact that Norway operates as a welfare state, meaning that people have universal access to healthcare, education and paid benefits. Thus, as the government has many more resources to utilize in the Norwegian system, it is prudent to analyze the cost-benefit relationship between a possible restorative justice system in the United States and its fiscal expense. Due to its focus on resource provision, rehabilitation and liveable conditions, the Norwegian system spends almost three to four times more on each prisoner than the United States³². However, these costs are offset by two factors: the positive post-release contribution that rehabilitated inmates will have on society, and the current spending allotment of the United States penal system. After being released, inmates in countries with restorative justice have a much higher chance of post-release employment (thus contributing to the labor market and the national economy) and commit fewer crimes (saving taxpayer money on expenditures such as law enforcement). Moreover, the Norwegian model of restorative justice has decreased recidivism to 20%, while the United States still stands at a staggering 76.6% rate for state prisons³³. Yet it was estimated that the United States could save \$200 billion over 10 years if 40% of the country's inmate population was reduced³⁴. Thus, not even taking into account the positive social

³² What the rest of the world can learn from Norway's prison system. (World Economic Forum). Retrieved from <https://www.weforum.org/agenda/2019/03/incarceration-can-be-rehabilitative>.

³³ Bolen, J. (2018). *Fixing this broken thing ... the american criminal justice system*. Page Publishing Inc.

³⁴Eisen, L.-B. (2016, December 9). How Many Americans Are Unnecessarily Incarcerated? Retrieved from

impacts, the cost of restorative justice would be largely offset by the decrease in prison populations, freeing up fiscal resources to put into systems of restoration and rehabilitation. Thus, although a more expensive system per-capita, the ensuing positive fiscal benefits of a restorative justice system would prevail long-term.

Of course, all of these positive aspects described about restorative justice only truly work in a system where the law itself criminalizes fairly. Although restorative justice itself does not affect preceding systems of law and order that place individuals within criminal justice systems in the first place, it does dismantle the system of punishment that has allowed for the law to be used and manipulated as a tool of oppression. Thus, restorative justice takes important steps towards dismantling and defectualizing the institutional biases that prevail within the system today.

IV. Conclusion

As we have seen, criminal justice systems built upon retributive justice can be reformed in two primary ways: by making reforms seeking to rectify discrete, identified injustices and inefficiencies in the system (as has occurred in Scotland), or by overhauling the system in its entirety and rejecting the retributive justice model (as has occurred in Norway). While the retributive justice model persists, empirical data supporting the necessity and even the rationality of such models is lacking. Rather, what we do observe is that as such systems fail their stakeholders, well-meant reforms such as PASS often fail to meet their objectives and can even

have further unintended consequences that exacerbate existing problems. The issue of unintended consequences is worsened when reforms are made to systems which were designed to perpetuate existing models of economic and/or racial oppression, as is the case in the United States.

It is therefore incumbent upon all stakeholders in such a system to fully explore the possible impact of piecemeal reforms to such a system. As seen in the case of the Anti-Drug Abuse Act of 1986, such reforms may radically worsen the problems they purportedly seek to solve. Superficial reforms thus are dangerous because they attempt to address problems stemming from flaws inherent in the design of the system without analyzing the foundation.

Although foundational reform is a much larger issue to handle, we must have discussions about why larger systemic change is necessary. It is unacceptable to make compromises in regards to a system that is built off of economic and racial oppression. In this way, top-down reforms like Scotland's Presumption Against Short Sentences do not satisfy. The only way to shift the historically biased lense through which we view crime and punishment and dismantle systems of racial oppression are through bottom-up transformative reforms.

Central to these discussions will be the dismantlement of anglo-saxon ideas about revenge and punishment. Restorative justice and punitive justice cannot coexist within the same space, and much of what has institutionalized our system of punishment today are attitudes and myths around the nature of punishment within the criminal justice system. To effectively rebuild a system based off of restoration, we must first dismantle myths around the objectivity of law and order and the efficacy of punishment. By continuing to pretend our system fairly punishes on grounds of objectivity, we only further institutionalize racism and classism within our criminal

justice system and allow for the maintenance of power within the hands of wealthy, and predominantly white, groups of people.

Prosecutors and politicians have long socialized society into believing in the objective truth of law and punishment. Yet criminal laws, in terms both of their foundation and implementation, are not an impartial measurement of justness or an effective mechanism for increasing overall social well-being. If we ever want to approach a society that truly espouses equality and social wellbeing through structures of justice, it is thus crucial that we begin to apply change not the surface of the system, but to the foundation of the system itself.

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