



REIMAGINE JUSTICE

**EXECUTIVE SESSION
ON THE FUTURE OF
JUSTICE POLICY**

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Daryl Atkinson,
Forward Justice

Jeremy Travis,
Arnold Ventures

THE POWER OF PARSIMONY

The Square One Project aims to incubate new thinking on our response to crime, promote more effective strategies, and contribute to a new narrative of justice in America.

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**MEMBERS OF THE
EXECUTIVE SESSION
ON THE FUTURE OF
JUSTICE POLICY**

INTRODUCTION: PARSIMONY AND THE SOCIAL CONTRACT

As our country comes to terms with the damage caused by our excessive reliance on punishment as a response to crime, the use of the criminal law to sustain racial hierarchies, and the ways the justice system has undermined our democracy and weakened communities, we must ask: what principles should guide this fundamental reexamination of a seemingly immovable status quo? In this paper we propose that the principle of parsimony—if re-considered while recognizing the historical racist underpinnings of the American criminal legal system—can provide a framework that serves as both critique of that history and an elevating aspiration for a reimagined approach to justice.

We begin with the classic formulation of the principle of parsimony: under traditional social contract theory, the state is only authorized to exercise the lightest intrusion into a person's liberty interest that is necessary to achieve a legitimate social purpose. Any intrusion beyond what is necessary is inherently illegitimate and may even constitute state violence. We define "liberty interest" as a person's right to be left alone—free from harmful state intervention.¹ Determining the extent to which any intrusion is necessary, ascertaining the legitimacy of the social purpose, and recognizing the value of beneficial state support require pragmatic calculations, but the power of parsimony lies in its emphasis on the primacy of the liberty interest and its limitation on state power.

This traditional social contract theory envisions a mutuality of obligations—a "contract"—between the state and its residents. Under the social contract, the state is obligated to provide its inhabitants with safety, security, and an opportunity to thrive, in return for which individual inhabitants are

obligated to cede some of their sovereignty to the state, pay taxes to support the shared enterprise, and abide by the laws of the state. As one of its responsibilities under the social contract, the state is granted the authority by the inhabitants, within constitutional limits, to define certain conduct as criminal because that conduct is viewed as inimical to the safety and security of society. Taken one step further, the state is also authorized to hold its inhabitants accountable for committing those crimes, following a determination of legal culpability. In appropriate cases, the classic formulation of the social contract envisions that the state may impose a deprivation of liberty on the person who has breached the contract. The liberty deprivation can be mild—such as minor conditions of probation—to more severe, such as a prison sentence and, under some legal regimes, the death penalty. By forcing a determination that any deprivation of liberty, whether mild or severe, is necessary to achieve a legitimate social purpose, the principle of parsimony can operate as a check on the exercise of state power.

As we articulate the nexus between the principle of parsimony and social contract theory, we cannot ignore the distance between theory and reality. On the contrary, we recognize the massive gulf between social contract theory and the use of state power throughout American history to include some members of society while excluding others from society's benefits, rights, and privileges.² Our history illustrates the country's biggest quarrels have been, and continue to be, over what groups of people are included in the proverbial "We" in "We the People" of the Preamble of the Constitution. For centuries, beginning with the genocide of indigenous people and the enslavement of Africans, the forces of white supremacy have leveraged state power to crush the liberty interests and aspirations of Black, Brown, Latinx, immigrant, and other dispossessed communities (Purnell 2020). If social contract theory is articulated as a mutuality of obligations between the state and its inhabitants, the state has failed tragically to keep its end of the bargain in relation to these communities. Stated bluntly, there has never

been a binding social contract between the United States and these marginalized groups.

This assessment of U.S. history compels a second conclusion: since the country's founding, the criminal law has been wielded to deliberately undermine the social contract. These laws have been invoked to support oppressive racial hierarchies, advance the economic interests of those in power, stifle political dissent, and protect the status quo. When state power is used in ways that diminish the status of some inhabitants while privileging the status of others, the mutuality of the social contract is violated. Stated differently, the criminal law has been used to undermine the country's trust in, and aspirations for, an effective social contract. As a consequence, the legitimacy of the state's authority to enact and enforce the criminal law is called into question, particularly among those members of society experiencing the abuse of state power. This historical harmful exercise of governmental authority has another corrosive effect: it creates doubts that the state can be entrusted

to adopt the fundamental reforms necessary to create a social contract that is equitable and inclusive of marginalized people.

In our view, an honest and explicit reckoning with the use of criminal law to oppress and marginalize is a precondition to creating and defining legitimacy in the exercise of state power. Such a reckoning is needed for all inhabitants of this country to believe that the state will honor the social contract and grant rights, protections, and liberty to all. What we hope will emerge from this process of reckoning is a trustworthy and legitimate state that has the moral authority to uphold the social contract by consistently and justly applying state power across its inhabitants. Without a reckoning, the exercise of state power will always be suspect.

The principle of parsimony provides an analytical framework to understand the ways the criminal law has been weaponized to distort the social contract. By forcing a focus on the primacy of individual liberty, and asking whether all state intrusions

on liberty through the enforcement of the criminal law were reasonably necessary to accomplish a legitimate purpose, the parsimony perspective brings into sharp focus the ways state power has been mobilized to support racial hierarchies and exclude full participation in our society.

We have a more ambitious hope. We believe that a process of reckoning with the historical failures of the state to honor the social contract—and the role of the criminal law in that tragic history—can help facilitate the creation of a new vision of justice. The principle of parsimony can support this ambition by requiring that our society affirm the centrality of individual liberty, limit the application of state power, come to terms with our history, and reconstruct our social contract to include those communities that have been excluded. The vision of justice that emerges from rigorous application of these guiding principles would be grounded in human dignity, social justice, an honest understanding of our past, and vibrant community life.

We begin this paper by describing the history of the principle of parsimony, which has philosophical and jurisprudential roots. We then apply the principle of parsimony to three aspects of criminal justice—prison sentences, collateral consequences, and solitary confinement—to demonstrate the analytical power of this framework. We conclude the paper by suggesting that the principle of parsimony can be an integral part of the process of “reimagining justice”

that is now underway in our country and lies at the heart of the Square One Project. We believe that the principle of parsimony, as reinterpreted to require a reckoning, can make a uniquely powerful contribution to the current era as reformers, abolitionists, activists, legislators, and system stakeholders are bringing new energy and urgency to the challenge of creating a compelling vision for the future of justice in America. □



OUR HISTORY ILLUSTRATES THE COUNTRY'S BIGGEST QUARRELS HAVE BEEN, AND CONTINUE TO BE, OVER WHAT GROUPS OF PEOPLE ARE INCLUDED IN THE PROVERBIAL “WE” IN “WE THE PEOPLE” OF THE PREAMBLE OF THE CONSTITUTION

PARSIMONY: A BRIEF HISTORY OF AN IDEA

Parsimony is a double-edged sword: it simultaneously recognizes the legitimacy of state power and asserts the importance of limiting the exercise of state power.

State power can, of course, be exercised beneficially, as in providing social supports like health care, public education, housing, and security from harm. These exercises of state power represent what French philosopher Pierre Bourdieu called the left hand of the state (Bourdieu 1992). In this paper, we are concerned with the right hand of the state, which is the coercive exercise of state power in ways that limit individual liberty, especially in the context of society's response to criminal conduct.

Embedded in social contract theory is the recognition that in certain circumstances, people who cause harm to others, thereby violating the social contract, can suffer consequences imposed by the state. To be legitimate, however, this coercive exercise of state power must be limited. The assertion that the punitive powers of the state must be constrained has long been understood as a core underpinning of the notion of a Republic. Modern Western philosophical concepts of a state's

exercise of punitive power date back to the 18th century, when philosophers such as Cesare Beccaria and Immanuel Kant considered the extent to which the state could impose punishment on an individual. Beccaria wrote that the state's power to exercise retributive sanctions must be proportionate to the offense and moderated, as "punishments are unjust when their severity exceeds what is necessary to achieve deterrence" (Beccaria 1764). Kant similarly described punishment as an evil to be used only when necessary, asserting "act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end" (Kant 1785).³ Philosopher Jeremy Bentham articulated the parsimony principle even more strongly—"all punishment is mischief: all punishment in itself is evil... If it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil" (Bentham 1970).



A PRINCIPLE OF PARSIMONY WOULD HAVE US AIM FOR THE LEAST RESTRICTIVE—LEAST PUNITIVE—SANCTION NECESSARY TO ACHIEVE SOCIAL PURPOSES

The principle of parsimony has been debated by various legal scholars and can be discerned in many of the foundational political documents establishing this country. The constitutional amendments ratified in the Bill of Rights were explicitly designed to limit the power of the federal government while guaranteeing personal rights and freedoms to members of society. The Eighth Amendment, for example, reflects parsimonious principles regarding punishment by barring excessive bail and fines and prohibiting cruel and unusual punishment. The Fourth Amendment also represents the parsimony principle by protecting people from “unreasonable” searches and seizures without probable cause.

Legal scholar Norval Morris defined the principle of parsimony elegantly in *The Future of Imprisonment*. According to Morris, a principle of parsimony would have us aim for “the least restrictive or least punitive sanction necessary to achieve defined social purposes” (Morris 1974). Morris, attentive to parsimony’s multiple dimensions, asserted that the principle of parsimony was rooted in moral precepts: “it is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal need is, in this context, what defines cruelty” (Morris 1974). Morris viewed the parsimony principle as the “Hippocratic criminal justice oath” which would require

that criminal sanctions do no more harm than required to achieve legitimate social purposes (Morris 1974). Another prominent legal scholar, Michael Tonry, takes a broad view of the role of parsimony in a just society. In his formulation, parsimony is not so much grounded in principles of punishment as in more general values of justice—that people be treated with equal respect and concern, in a way that affirms their fundamental human dignity (Tonry 2017).

The principle of parsimony undergirds some of the principles articulated by legal scholars to guide the enforcement of the criminal law. The Model Penal Code of 1962, for example, describes in detail the limits of the application of the criminal sanction (The American Law Institute 1962). According to the Model Penal Code, courts should impose the “least restrictive alternatives” as a condition of pretrial release and criminal sentences. In 1972, the admonition that sentences should reflect the “least restrictive alternative” was codified in the *Model Sentencing Act* of the Advisory Committee of Judges of the National Council on Crime and Delinquency. The centrality of parsimony as a guiding principle was recently reaffirmed by legal scholars at the American Law Institute (ALI). In 2017, after a 15-year reexamination of the Model Penal Code, the ALI approved an expansion of the application of the parsimony principle to include decisions to defer prosecution, impose collateral

consequences, and adopt sentencing guidelines (Model Penal Code 2017).

Notwithstanding this long-standing tradition and affirmation throughout history, the principle of parsimony does not have a high profile in today's debates over the reach of the criminal law, the footprint of the criminal justice system, or the extent of mass incarceration. As criminologist Mary Bosworth notes in an edited volume titled "Reinventing Penal Parsimony," "criminology has a rich tradition of valuing restraint, tolerance, and 'peacemaking,' and has many times extolled the virtues of a minimum necessary penal system. But such literature is today dimmed, if not altogether disappeared from sight" (Bosworth 2010). Yet the parsimony principle still has its advocates. Jamie Fellner, Senior Counsel in the U.S. program at Human Rights Watch, recommended that parsimony be placed at the center of sentencing debates. She notes that while "few may use the term parsimony, many have come to understand that unnecessarily harsh sentences make a mockery of justice" (Fellner 2014).

The most recent affirmation of the importance of parsimony can be found in a 2014 landmark report of the National Research Council (NRC) entitled *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. After reviewing

the history of the four-fold expansion of incarceration rates in the United States, this interdisciplinary consensus panel concluded that an "explicit and transparent expression of normative principles has been notably missing as U.S. incarceration rates dramatically rose over the past four decades" (Travis, Western, and Redburn 2014). The panel recommended that future justice policy should include application of four normative principles; proportionality, parsimony, citizenship, and social justice. Parsimony "expresses the normative belief that infliction of pain or hardship on another human being is something that should be done, when it must be done, as little as possible" (Travis, Western, and Redburn 2014). In linking this concept to the larger concern for social justice, the NRC report observed that "parsimonious use of punishment may not only minimize unnecessary use of penal sanctions, including imprisonment, but also limit the negative and socially concentrated effects of incarceration, thereby expanding the distribution of rights, resources, and opportunities more broadly throughout society" (Travis, Western, and Redburn 2014).

Having traced the history of the parsimony principle in our philosophical and legal traditions, we acknowledge again that practice has frequently strayed far from theory. The punishment meted out by U.S. courts has often been more severe than

required to achieve a legitimate social purpose. Throughout our history, the criminal law has been used to suppress free speech, protect the interests of corporations and other powerful sectors of society, suppress opposition to the status quo, and further marginalize those who are poor and with less power. In these instances, when the criminal law is used as a tool of oppression, the mutuality of obligations inherent in the social contract is strained and often torn, seemingly beyond repair.

Viewed against this history, the values that should limit state power—including the principle of parsimony—can appear inadequate to the task of restoring

a legitimate relationship between government and the governed. But this is the work that lies ahead. We hope that, by reinvigorating the legal and policy discourse to once again include the principle of parsimony, the modern criminal justice reform era will have another framework for understanding that our criminal legal system has strayed far from the Hippocratic oath to do no more harm than absolutely necessary to achieve a legitimate social purpose. The first step in reaching this goal is to engage in an honest reckoning with our country's history of abusing state power through the criminal law. This is necessary so we can begin to reimagine justice. □



THROUGHOUT OUR HISTORY, THE CRIMINAL LAW HAS BEEN USED TO SUPPRESS FREE SPEECH, PROTECT THE INTERESTS OF CORPORATIONS AND OTHER POWERFUL SECTORS OF SOCIETY, SUPPRESS OPPOSITION TO THE STATUS QUO, AND FURTHER MARGINALIZE THOSE WHO ARE POOR AND WITH LESS POWER

APPLICATION OF THE PRINCIPLE OF PARSIMONY IN THE MODERN ERA OF PUNITIVE EXCESS

The principle of parsimony can serve as a powerful tool for interrogating the current operations of the U.S. criminal justice system.

Given the realities of the modern era of punitive excess, the unequal application of the social contract, and the racist underpinnings of the application of the criminal law throughout U.S. history, there are few examples of successful application of the parsimony principle. Yet, at a time when advocates are calling for fundamental reforms and activists are urging for the abolition of police and prisons, we would hope that the principle of parsimony could provide more than a critique of current realities. Perhaps in the reconstruction of a more equitable and more effective approach to criminal conduct, parsimony's simultaneous affirmation of the primacy of human liberty, the legitimacy of state power, and the principled limits on state power, might provide new models for these core functions of the justice system.

In the following sections, we apply the principle of parsimony to challenge three specific practices—prison sentences, collateral consequences, and solitary confinement—all of which constitute, in differing degrees, deprivations of liberty.

We apply a two-prong analysis. First, we must determine whether the limitation on liberty serves a "legitimate social purpose." Second, we must ask whether that liberty deprivation is "reasonably necessary" to achieve that purpose. If either of these two tests is not met, then the practices are, in Beccaria's word, "unjust." Or, citing Morris, "any punitive suffering beyond societal need is, presumably, what defines cruelty" (Morris 1974).

This analytical framework could also be applied to challenge other aspects of the justice system: police use of force, brutal prison conditions that deprive incarcerated people of their human dignity, the practices of community supervision that send people back to prison for technical violations, the use of cash bail to secure pretrial detention, or the imposition of fines and fees that trap poor people under a regime of state control. Parsimony can also be deployed as a critical framework to examine the state's decision to criminalize certain behaviors—e.g. drug use, sex work, or vagrancy—that pose little or no social harm. This framework also supports

inquiry into the application of state power through the criminal law to categories of people—e.g., youth who have committed a crime, or people suffering from mental illness or experiencing homelessness—who may face challenges living up to the expectations of the social contract. Finally, as discussed above, the parsimony framework can be used to analyze the use

of the criminal law to sustain systems of oppression throughout American history. In all cases, the process of interrogation asks whether the imposition of state power is reasonably necessary to accomplish a legitimate social purpose. In many of these cases, the policy or practice will fail to meet the test of parsimony and is therefore illegitimate.⁴

PRISON SENTENCES

The aforementioned National Research Council report set out to answer two questions that are central to understanding the realities of mass incarceration: What were the drivers that led to the four-fold increase in incarceration rates over the past four decades? And what were the consequences of this unprecedented expansion of the use of prisons as a response to crime? After an exhaustive review of the research literature on the first question, the panel reached this consensus:

the explosion in the prison population can be traced to three simultaneous trends—the increased use of mandatory minimums, the launch of the War on Drugs, and policy decisions to make long sentences even longer (Travis, Western, and Redburn 2014). Importantly, the panel also concluded that the driver of this unprecedented expansion of imprisonment in the United States was not an increase in crime rates; and, secondly, that the expansion did not produce significant public safety benefits. As the NRC report carefully documents, the era of mass incarceration is the result of a series of choices in sentencing policy, fueled by the politics of the “tough on crime” era, grounded in implicit and explicit racism, and now supported by a firmly entrenched status quo. As the nation works to imagine a new future, we believe application of the parsimony



THE ERA OF MASS INCARCERATION IS THE RESULT OF A SERIES OF CHOICES IN SENTENCING POLICY, FUELED BY THE POLITICS OF THE “TOUGH ON CRIME” ERA, GROUNDED IN IMPLICIT AND EXPLICIT RACISM, AND NOW SUPPORTED BY A FIRMLY ENTRENCHED STATUS QUO



WE APPLY A TWO-PRONG ANALYSIS. FIRST, WE MUST DETERMINE WHETHER THE LIMITATION ON LIBERTY SERVES A “LEGITIMATE SOCIAL PURPOSE.” SECOND, WE MUST ASK WHETHER THAT LIBERTY DEPRIVATION IS “REASONABLY NECESSARY” TO ACHIEVE THAT PURPOSE

principle could facilitate a fundamental rethinking of sentencing policy that could in turn lay the groundwork for a sharp reduction in the prison population.

The first step in this inquiry is to ask whether the deprivation of liberty inherent in a prison sentence serves a legitimate social purpose. According to the traditional formulation, all criminal sanctions—from least onerous to most severe—can serve three purposes. They can deter future crime, rehabilitate the individual found guilty of a crime, and provide appropriate retribution for the harm caused. Deterrence and rehabilitation have a common goal: to prevent future crime. Deterrence can operate at the individual level (specific deterrence, either by increasing the likelihood that the individual will avoid criminal conduct, or by incapacitating the individual thereby reducing the opportunity for engaging in that conduct) or the societal level (general deterrence). The test of effectiveness is straightforward: does the imposition of a criminal sanction deter that person—and others—from engaging in criminal conduct in the future? Like specific deterrence, rehabilitation operates at the individual level. To assess the efficacy of criminal sanctions, we ask whether providing supportive services will result in behavior changes that reduce that person’s law violations in the future.⁵ (The retribution rationale is discussed separately below.)

Promoting safety and communal wellbeing is a core function of the state. Indeed, the expectation that government will provide security for the governed is an explicit part of the “bargain” that constitutes the social contract. Accordingly, the use of the coercive power of the state to impose a criminal sanction—in this discussion, a prison sentence—satisfies the first prong of the parsimony test. Too often, however, the public discourse ends there, without recognizing the limits on that specific power of the state. The Constitution provides many limits on the power of the state to simply put people in prison in the name of safety, ranging from the protection against unlawful searches and seizures to the requirements of due process. In our view, the principle of parsimony similarly provides important guardrails. The second prong of the principle requires a determination that the deprivation of liberty is reasonably necessary to achieve the legitimate social purpose of promoting public safety and communal wellbeing.

The tough-on-crime rhetoric that has dominated American political discourse for the past half century has created a narrative justifying the nation’s unprecedented expansion of imprisonment as “reasonably necessary” to reduce crime. Using reverse logic, proponents of this view point to the significant reductions in crime over recent decades and attribute those trends to the growth in the prison population. The NRC

convened a panel of scholars and experts to determine whether there was evidence to support this assertion. The panel's report on the causes and consequences of the massive expansion of imprisonment in the United States puts this reasoning to rest. Following an exhaustive review of the research, the NRC panel concluded that "the increase in incarceration may have caused a decrease in crime, but the magnitude of the reduction is highly uncertain and the results of most studies suggest it was unlikely to have been large" (Travis, Western, and Redburn 2014). The NRC report does not answer the question whether a prison sentence in an individual case is ever "reasonably necessary" to reduce the future criminal behavior of that individual, nor whether prison sentences for categories of crimes have deterrent effects, but the report makes it clear that current policies in the United States far exceed the limitations of the parsimony principle.

The parsimony framework, however, provides an opportunity to reframe the policy debate from the typical "more prisons,

less crime" formulation. Beyond merely recognizing the limited value of prison sentences in producing public safety gains, we must ask whether this penal policy was "reasonably necessary" to promote safety. The public discussion then shifts to an examination of other, more effective policies that can reduce crime and create public safety. Some may involve only minimal restrictions on liberty, e.g., effective community supervision instead of a prison term. But very importantly, there are many policies and programs that promote public safety with no application of the criminal law and no intrusion on individual freedom. An analysis of community-led crime reduction strategies shows the advantages of limited governmental intrusion while prioritizing the rehabilitation and reintegration of community members. The list of proven interventions that reduce crime with minimal—or no—use of the criminal sanction is long and the evidence of their effectiveness is growing.⁶ These policies and practices can be advanced in ways that reflect the analytical utility of the parsimony principle. They are more effective—i.e., more "reasonable"—at achieving a legitimate societal goal and, importantly, they are also less intrusive of individual liberty. As we reimagine justice, we should actively promote reforms that are shown to reduce crime with minimal reliance on the coercive powers of the state.



AN ANALYSIS OF COMMUNITY-LED CRIME REDUCTION STRATEGIES SHOWS THE ADVANTAGES OF LIMITED GOVERNMENTAL INTRUSION WHILE PRIORITIZING THE REHABILITATION AND REINTEGRATION OF COMMUNITY MEMBERS

Sentences of imprisonment are also justified as “reasonably necessary” to promote the rehabilitation of the person convicted of a crime. To the extent that rehabilitation reduces future violations of the law, the analysis is similar to the public safety rationale above. But the goal of rehabilitation is often viewed more expansively in terms of individual betterment. Certainly, it is a legitimate social purpose to advance the wellbeing of people under criminal justice supervision, especially those who have been removed from the normal cycles of family and community life. But it is not “reasonably necessary” to deprive someone of their liberty to achieve that goal. Likewise, it is sound public policy that prisons offer programs that promote positive human development, help incarcerated people realize their potential, and help prepare them for life in free society. But is it necessary to send people to prison to improve their lives? We recognize that some people find that time in prison provides them personal benefits that come from reflection and discovery. But forced removal from society is not how those admirable goals are best achieved. Finally, experience teaches that the goal of rehabilitation is often twisted into an instrument of control, as incarcerated people are coerced to participate in programs “for their own good” and further punished if they do not.

We would restate the legitimate social purpose of rehabilitation as follows: the state

may advance the goal of rehabilitation through deprivation of human liberty only in ways that affirm human dignity, are fully voluntary, and promote successful return to free society. As with the public safety rationale for a prison sentence, the rehabilitation rationale should always be a secondary outcome, never the primary purpose. The parsimony framework demands this outcome because a prison sentence is not “reasonably necessary” to achieve this particular legitimate social purpose.

Finally, retribution is also asserted as a legitimate social purpose that justifies the use of prison. Unfortunately, in common parlance, “retribution” is sometimes confused with “revenge” or “retaliation” and is dismissed as unworthy of affirmative recognition in our sentencing philosophy. Yet in traditional jurisprudential formulations, retribution (and the closely aligned formulation, “just deserts”) is viewed as a legitimate purpose of the criminal sanction. The core idea is that all criminal sanctions—whether a monetary fine or a prison sentence—are justified as necessary, in large part, to demonstrate society’s disapproval of the underlying criminal conduct. Stated differently, the imposition of a sanction underscores to society the expectations for good behavior. Most fundamentally, the imposition of a criminal sanction reaffirms the social contract under which people cede power to the state to define certain societal

harms as requiring formal disapproval. This disapproval can include limitations on individual liberty through imprisonment.

Yet the recognition of the right of the state to enforce its criminal laws through a prison sentence for the sole purpose of expressing public disapproval of the criminal act leaves many questions unanswered. Indeed, this is where the public debates are fierce. Is a prison sentence ever justified? Why do some believe that a prison sentence is necessary to hold an individual accountable for breaking the social contract? If it is, for what crimes, for which people, for how long, and with what opportunities for early release? Is a life sentence ever justified? Why should a prison sentence ever be mandatory? Should someone with mental illness ever be sent to prison? Should the terms of prison sentences be fixed or indeterminate? Under what conditions can sentences be shortened? If a prison sentence is imposed, how do we ensure that prisons respect human dignity, and that a returning citizen is restored to full citizenship? What sanctions and supports are appropriate for youth? What is the place for mitigation and individualization in the imposition of sentences? How are the harms experienced by victims and survivors recognized in the outcome of the criminal legal process? Some people in the current justice reform debates are raising a more fundamental structural question: should prisons be abolished?

As these debates continue—and the co-authors of this paper have engaged in lively and inconclusive discussions on these topics—we believe that the parsimony framework can structure a new dialogue on the role of prisons in our response to crime.⁷ This analysis must begin with a recognition of the profound damage that has resulted from mass incarceration. As the NRC report documented, the four-fold increase in incarceration rates has caused untold pain at an individual level, separated families, weakened communities, hampered economic vitality, and undermined our democracy. The growth in imprisonment has had the most profound impact on young men of color, particularly those who have not graduated from high school. Reversing this damage to our social contract, if at all possible, will take decades. Any calculation of what is “reasonably necessary” to achieve the goals of sentencing must take these harms into account and recognize that these harms have fallen disproportionately on communities of color.

The public discourse on the harms attributable to our sentencing policies often moves quickly to analysis of a wide variety of reform options. For example, should we repeal three strikes laws, eliminate mandatory minimums, adopt European-style limits on the length of prison terms, abolish life without parole? These are all worthy goals, but as we are



SO, WE COMPLICATE THE QUESTION BY ADDING: IS IT EVER APPROPRIATE TO SENTENCE SOMEONE TO PRISON, EVEN IF THE PRISON IS THE MOST HUMANE WE COULD ENVISION?

called upon to “reimagine justice from square one,” we are compelled to ask a more fundamental question: when, if ever, is it appropriate to send someone to prison? Asking this question forces honest confrontation with antiquated assumptions about the place of retribution or “just deserts” in our sentencing philosophy. Often this question is sidetracked by the reality that prisons are inhumane institutions. So, we complicate the question by adding: is it ever appropriate to sentence someone to prison, even if the prison is the most humane we could envision?

At a most fundamental level, by asking heretical questions about the legitimate social purpose served by this extreme deprivation of liberty we come face-to-face with the realization that our society has for too long worshiped at the altar of punitiveness as a societal necessity. This raises another question: have we put so many people in prison because we believe that cruelty to one of us is necessary to affirm the social contract that supports all of us? A brutally forthright discussion of the purpose of prison that centers human dignity, recognizes the racist underpinnings of the history of imprisonment in the United States, values liberty, and promotes a broad understanding of social justice will, at a minimum, severely limit the reach of this institution and, in time, may even result in its abolition.

As we seek to minimize reliance on prison, we should affirmatively recognize that imposing a prison sentence is certainly not the only way to show societal disapproval for criminal conduct. We would follow the lead of the Model Penal Code, which calls for the imposition of “the least restrictive alternative” sanction, and envisions a menu of non-custodial sanctions. This menu of alternatives to incarceration should also be subjected to the parsimony test—do they advance legitimate societal purposes while imposing the lightest intrusion on liberty? As with proven crime reduction strategies, the list of effective and innovative alternative sanctions is long and growing. Restorative justice practices stand out because they offer new ways to acknowledge the harm caused, promote individual responsibility for that harm, and articulate a way forward for all parties. But the growth and acceptance of these alternatives has been stunted by the oppressive weight of the tough-on-crime era and our overreliance on prison.

This discussion of the classic purposes of the criminal sanction raises the question of whether this formulation of social purposes is too limiting. In a thought-provoking departure from the traditional analysis of sentencing policies, the Urban Institute recently issued a report highlighting the justice goals that long prison sentences do *not* achieve. They do not help victims heal, meaningfully hold

people accountable, help people change for the better, nor effectively prevent violence (Leigh, Pelletier, Eppler-Epstein, King, and Sakala 2017; Sered 2019). The challenge of the moment—a fundamental challenge the Square One Project considers—is: can we imagine responses to harms caused in violation of the social contract that can accomplish these purposes—help people heal, hold people accountable, allow for change, promote community health and

prevent violence—that also minimize the limits on liberty?

We believe the parsimony principle holds great power to not only reveal that current sentencing practices have caused societal damage and perpetuated injustice, but also points the way to new forms of accountability that rely less on the deprivation of liberty and more on practices that promote healing, human dignity, and community wellbeing.

COLLATERAL CONSEQUENCES

Over the past four decades, legislatures at all levels of government have enacted restrictions on the lives of people with criminal convictions. The proliferation of these restrictions⁹—called collateral consequences or invisible punishments—took place at the same time as the four-fold increase in incarceration rates, the doubling of the reach of community supervision, the three-fold growth of pretrial detention

rates, and the criminalization of wide varieties of state-defined anti-social behavior (Bureau of Justice Statistics 2013). These laws and regulations, now deeply embedded among the realities of the modern era of punitive excess, serve as barriers to full participation in communal life for millions of Americans (Travis 2002).

These restrictions can affect every aspect of a person's life—creating limitations on, or entirely prohibiting, access to public housing, education, and employment opportunities.⁹ People with a criminal record may be deemed ineligible for public benefits, like food stamps or government approved student loans; or restricted from obtaining certain occupational licenses to pursue jobs, such as cosmetologists or barbers (The Collateral Consequences Resource



THE CHALLENGE OF THE MOMENT—A FUNDAMENTAL CHALLENGE THE SQUARE ONE PROJECT CONSIDERS— IS: CAN WE IMAGINE RESPONSES TO HARMS CAUSED IN VIOLATION OF THE SOCIAL CONTRACT

Center 2021). By prohibiting the exercise of one's right to vote, serve on a jury, or hold public office, these restrictions create a second-class of citizens who cannot fully participate in our democracy. Restrictions on the right to vote are particularly pernicious because they limit the power of individuals with criminal convictions to hold their government accountable for the punitive policies that diminish their standing. In the case of people convicted of sex offenses, these statutes can even restrict where one can sleep, travel, or associate with one's family.¹⁰ As a recent report concluded, these legal barriers significantly restrict individual autonomy and impinge on an individual's liberty interest (National Inventory of Collateral Consequences of Conviction 2020). The political philosopher Tommie Shelby's writing on economic justice further highlights the disconnect between citizenship and opportunity, "to emphasize this inequity, a kind of civic unfairness, would be to connect equality—as a domestic value—with liberty and opportunity" (Shelby 2018). When combined with intrusive conditions of probation and parole, the financial burdens of court-imposed fines and fees, and the

challenges of getting back on one's feet after time in prison or after completion of a court case, these collateral consequences are another reminder to justice-involved people that their debt to society can never be fully paid.

Before we determine whether this intrusion on liberty is necessary to achieve a legitimate social purpose, we also recognize that these restrictions suffer from another fundamental flaw. In many cases, the legislative, regulatory, or programmatic processes that created these restrictions were themselves illegitimate. Unlike sentencing policies that authorize prison sentences, collateral consequences are rarely debated in the legislature or subjected to oversight hearings after enactment. They are seldom codified in a state's criminal code, making them hard to find. To further complicate matters, some of these restrictions were enacted at the federal level by Congress, masked as riders to other bills; yet they apply to people with state convictions, thereby violating the general principle that punishment for state crimes should be left to the states. Some are embedded in complex statutes governing federal public benefit programs. Many lawyers are not even aware of them so cannot advise their clients at the time of sentencing that their felony conviction will hobble their autonomy in unexpected ways (American Bar



THE CONTORTIONS OF THE TRADITIONAL DEMOCRATIC PROCESSES INVOLVED IN THE CREATION OF THIS INVISIBLE NETWORK OF CRIMINAL SANCTIONS IS TRULY PERNICIOUS



THERE IS NO EVIDENCE THAT COLLATERAL CONSEQUENCES ARE EFFECTIVE BEYOND THOSE NARROWLY TAILORED TO PREVENT FUTURE CRIME

Association 2007). The contortions of the traditional democratic processes involved in the creation of this invisible network of criminal sanctions is truly pernicious. The violation of norms of democratic accountability and transparency is blatant. That these sanctions fall most heavily on communities of color further undermines any claim to legitimacy.

These exercises of state power—which have the effect of limiting liberty, autonomy, and full participation in civil society—are qualitatively different from the imposition of a criminal sentence, fine or fee, or even an arrest for commission of a crime. Where does one go to challenge these deprivations of liberty? Which government official is responsible for the decision? Which legislative committee will consider the wisdom of collateral consequences? The imposition of these invisible punishments is virtually automatic. There is rarely any adversarial process to challenge the impact; no individualization of the sanction before an impartial jurist; no notice of the consequences of these restrictions.

As with prison sentences, the framework of the parsimony principle can be used to critically examine the application of collateral consequences. In virtually every case, the legal barrier will fail the parsimony test. The first prong of the test requires a determination that these collateral consequences serve a “legitimate

social purpose.” Interestingly, the goal of promoting public safety, so often cited as justification for other criminal sanctions, is highly attenuated in the case of collateral consequences. This rationale might be plausible in a narrow set of circumstances. For example, one could argue that permission to work in a certain industry might be denied to someone who has a criminal conviction for causing damage to that industry. A decision by the state to deny a banking license to someone convicted of robbing a bank, or of embezzlement, might well be an appropriate exercise of state power. Similarly, the state might, in the name of public safety, prohibit an individual convicted of child sexual abuse from working in a child care capacity.

Yet, beyond these narrow examples, it is difficult to articulate a link between these sanctions and the goal of promoting public safety. Is the hypothesis that there is a deterrent impact of these unfocused limitations on liberty and the incidence of crime? Moreover, to survive the “legitimate social purpose” part of the parsimony test, would require a demonstration that these sanctions actually reduce crime. Unlike the prisons example discussed above, there is no significant body of research testing this proposition. In 2019, the U.S. Commission on Civil Rights examined this question and found there is no evidence that collateral consequences are effective beyond those narrowly tailored to prevent future crime,

and there is no evidence that they have a societal benefit (U.S. Commission on Civil Rights 2019).

The injustices that flow from these ongoing restrictions on liberty are typically described as barriers at the individual level. But the vast reach of the modern U.S. criminal justice system requires consideration of their collective impact. When, for example, a large percentage of the residents of a neighborhood have felony records, and legislation has foreclosed large sectors of the labor market to people with those records, then the economic impact of that “invisible punishment” is far-reaching, far beyond the impact on people who are behind bars. Beyond the impact of state action, we can add the effect of private employers who refuse to hire people with felony records. The net effect is the harsh reality of both diminished lifetime earnings at the individual level, and a depressed community-level “gross domestic product” in neighborhoods with high rates of justice involvement. The damage is further compounded by the restriction on political power as the percent of residents eligible to vote is depressed by

felon disenfranchisement laws. Finally, when we consider the history of racial segregation, redlining, voter suppression, the Black codes of the Jim Crow era, and other manifestations of white supremacy, a clear picture emerges: these legislative enactments are part and parcel of a long history of the criminal law serving as a tool of oppression.

Applying the second prong of the parsimony test—asking whether these collateral consequences are “reasonably necessary” to reduce future crime—further demonstrates the weak justification for these sanctions. Certainly, as discussed above, these sanctions are not “necessary” to promote public safety. That goal can be achieved through many other strategies that do not involve deprivations of liberty as extensive and immutable as these. Furthermore, creating a massive group of second-class citizens hardly seems like an effective crime reduction strategy. If anything, limits on opportunities for employment, education, stable housing, civic participation, and family stability would seem more likely to create conditions that would engender criminal behavior. In short, these unfocused sanctions are so diffuse and pervasive that the relationship between the sanction and the envisioned behavior change that is attenuated at best, but more likely nonexistent, and has not been supported through empirical research.



THE MERE FACT THAT THEY ARE CALLED “COLLATERAL CONSEQUENCES” PERPETUATES THE MYTHS THAT THEY ARE NOT REAL PUNISHMENTS AND THAT THEY ARE ONLY MINIMALLY INTRUSIVE



COLLATERAL SANCTIONS REPRESENT RETRIBUTION ON TOP OF RETRIBUTION—INVISIBLE PUNISHMENTS THAT ARE GRATUITOUSLY AND AUTOMATICALLY IMPOSED IN ADDITION TO OTHER CRIMINAL SANCTIONS

The parsimony framework reveals the truly pernicious nature of these legislative enactments. Setting aside the concerns about their creation, the mere fact that they are called “collateral consequences” perpetuates the myths that they are not real punishments and that they are only minimally intrusive. Granted, these sanctions are less intrusive than other punishments such as prison, probation, parole, and financial penalties. Yet they undeniably constrain individual autonomy. By their very nature, it is more difficult to document their impact at the individual or societal level. In recent years, however, through a combination of scholarly research and effective storytelling, we have a better understanding of the far reaching impact of collateral sanctions. What is beyond dispute, however, is the intrusion on liberty interests of people with criminal convictions: by virtue of these laws, they are constrained, sometimes for the remaining years of their lives, from full participation in society, access to jobs, or the full realization of their roles as a parent or caregiver. Also beyond dispute is that these state-imposed limitations on freedom fall disproportionately on communities of color, thereby further undermining the legitimacy of the social contract in those communities.

We are left, then, with the assertion that, as with prison sentences, retribution—punishment of people for their anti-social behavior and the signaling of social

disapproval of criminal conduct—is positioned as the primary legitimate social purpose behind these sanctions. Yet, it is important to note the differences between invisible punishments and visible punishments, such as prison sentences. Invisible punishments are rarely imposed in public settings such as a courtroom, where societal disapprobation could be clearly articulated by a judge as the agent of the state. The sanction is typically long-lasting, with rare opportunities for relief. The sanctions are often disproportionate to the offense and not tailored to meet the circumstances of a person. And, very importantly, collateral sanctions represent retribution on top of retribution—invisible punishments that are gratuitously and automatically imposed in addition to other criminal sanctions. To limit the reach of this aspect of the penal regime in the United States we must also call on other core values of our democracy—the right to due process in the application of the law, the fundamental principle requiring proportionality between offense and sanction, and the right to challenge the actions of the state. It is difficult to reconcile these values with the laws that have created a web of collateral consequences.

If retribution has a place in our nation’s methods for ensuring accountability for wrong-doing, the universe of collateral consequences underscores the need for guardrails on the punitive powers



PERHAPS MORE THAN ANY OTHER PRACTICE, THE EXPANDED USE OF SOLITARY CONFINEMENT HAS ILLUSTRATED THE SHIFT TOWARD MORE PUNITIVE CONDITIONS OF CONFINEMENT IN THE UNITED STATES

of the state. The collateral consequences enacted by our legislatures are not “reasonably necessary” to express this disapproval. They do not meet the “least restrictive alternative” espoused by the Model Penal Code. They do not reflect the “do no harm” aspiration of Norval Morris’s criminal justice Hippocratic oath. Beyond this failure to meet the parsimony test, the fact that this blunt instrument of punitive excess falls most severely on marginalized communities only undermines

the legitimacy of the criminal law and further weakens the social contract. We are reminded of the observation in the NRC report: parsimonious use of a criminal sanction “may not only minimize unnecessary use of [that sanction], but also limit the negative and socially concentrated effects of [that sanction], thereby expanding the distribution of rights, resources, and opportunities more broadly throughout society (Travis, Western, and Redburn 2014).”

SOLITARY CONFINEMENT

As the United States significantly expanded the number of prisons and the number of people held in those prisons during the tough-on-crime era, the nation also failed to invest in more humane facilities that could accommodate larger populations. The well-established principle of correctional practice that prison cells should hold only one individual—“one man, one cell”—fell by the wayside. This stark shift in correctional policy resulted in not just double-celling, but at times triple-celling people who were incarcerated (Travis, Western, Redburn 2014). At the same time that prison populations increased and overcrowding became a norm, prison conditions deteriorated. Many recreational programs were discontinued; prison programming was significantly cut

back. In many states, family visits, including conjugal visits, were restricted. In 1994, federal funding for college education programs was stopped. State and federal governments curtailed programs designed to facilitate successful reentry into free society such as half-way houses, educational and work release programs and compassionate release (Travis 2000).

Perhaps more than any other practice, the expanded use of solitary confinement has illustrated the shift toward more punitive conditions of confinement in the United States. Although precise numbers are hard to come by, the practice has clearly become commonplace. According to the Vera Institute of Justice’s Commission on Safety and Abuse in America’s Prisons, between



ALTHOUGH SOME PERIODS OF CONFINEMENT ARE SHORT, MEASURED IN DAYS, WHAT IS NOTEWORTHY IN THE U.S. CONTEXT ARE THE LONG PERIODS OF CONFINEMENT

1995 and 2000, the number of people in solitary confinement grew by 40 percent, outpacing the 28 percent growth in the overall prison population (The Vera Institute 2006). A recent series of biennial reports by the Correctional Leaders Association (CLA)¹¹ and Liman Center for Public Interest at Yale Law School, based on surveys of U.S. correctional institutions, suggests that the upward trend has been reversed. In the first report, reflecting a 2014 survey, the CLA-Liman collaboration estimated that approximately 80,000–100,000 people were held in “restrictive housing.”¹² In the most recent report, CLA-Liman estimated the restrictive housing population at between 55,000–62,500 people.

The practice of placing people in solitary confinement provides us with a third opportunity to test the power of the parsimony framework. In this section, we first briefly describe the history of solitary confinement. We then interrogate solitary confinement using the principle of parsimony and answer two questions: does this practice advance a legitimate social purpose, and is the intrusion on individual liberty a reasonable means to achieve that purpose? We conclude that solitary confinement, as currently practiced, is grossly out-of-step with the principle of parsimony and its practice should be severely limited, if ever used at all.

The use of solitary confinement, sometimes called administrative segregation, is a longstanding practice in the corrections field. It originated during the 19th century in the Pennsylvania prison system as a form of rehabilitation that was thought to promote penitence through isolation, but the practice was used sparingly and only for short periods of time (Weir 2012). In the 1970s and 1980s, however, the practice rapidly expanded in the name of keeping prisons safe (Haney 2003). Typically, in the modern version of the practice, an individual in solitary is confined to an 8x10 foot cell, 23 hours a day, with an hour out of the cell each day for recreation or other activities.¹³ Although some periods of confinement are short, measured in days, what is noteworthy in the U.S. context are the long periods of confinement. According to the CLA-Liman survey, reflecting responses from 33 jurisdictions, 18.6 percent of people in restrictive housing were held 15–30 days, 27.5 percent were held 31–90 days, 16 percent between 181–365 days, 14.5 percent 1–3 years, 9.6 percent more than three years, of which 5.7 percent were in restrictive housing for six years or more (CLA-Liman 2021). Louisiana holds the record for the longest solitary confinement stay of a single person at 44 years (Solitary Watch 2019).

The detrimental effects of solitary confinement are well-documented. Studies by leading scholars have found that experiencing several days in segregation

is correlated with hypersensitivity to stimuli, distortions and hallucinations, increased anxiety and nervousness, diminished impulse control, severe and chronic depression, appetite loss and weight loss, heart palpitations, talking to oneself, problems sleeping, nightmares, self-mutilation, difficulties with thinking, concentration, and memory; and lower levels of brain function, including a decline in EEG activity, have been documented after only seven days in segregation (Haney 2003; Gendreau, Freedman, Wilde, and Scott 1972; Grassian 2006; and Grassian 1983). Furthermore, self-harm, including suicide, is significantly more prevalent in populations subjected to solitary confinement (Kaba, Lewis, Glowa-Kollisch, Hadler, Lee, Alper, and Selling 2013).

These individual-level effects are serious in and of themselves; and they do not account for the broader impact within the prison community, or the community beyond the prison walls. A more inclusive accounting would report on the stress upon families of incarcerated people who worry about the wellbeing of their loved ones. Returning citizens who have been confined in these inhumane conditions carry the damage and scars with them when they return home. The era of mass incarceration, marked by the reality that a high percentage of people have spent time in prison, combined with the widespread use of solitary confinement, is certainly also an era when first-hand

experience in an 8x10 foot isolation cell is no longer rare. Sociologist Bruce Western, examining the use of administrative segregation in the Pennsylvania prisons, calculated that eleven percent of the African-American male population in that state has spent time in solitary before the age of 32 (Pullen-Blasnik, Simes, and Western 2021).

Given these realities, it is entirely fitting that, according to the Vera Institute of Justice, “solitary confinement is increasingly being recognized in the United States as a human rights issue” (Shames et al 2015). International bodies such as the United Nations and Human Rights Watch have called for limitations on the practice following widespread documentation of harsh conditions and extended sanctions. In 2015, the United Nations’ Commission on Crime Prevention and Criminal Justice issued Standard Minimum Rules for the Treatment of Prisoners (SMR, or the “Mandela Rules”), which would prohibit both prolonged (over 15 consecutive days) and indefinite use of solitary confinement and ban solitary confinement for people with physical or mental disabilities as well as for women and children (United Nations 2015).¹⁴

The practice of solitary confinement has been the object of reform efforts, originating both within the corrections profession and outside.¹⁵ Lawsuits have challenged its constitutionality. Legislatures have tried, with minimal



SOLITARY CONFINEMENT IS AN OBVIOUS INTRUSION OF A PERSON'S LIBERTY INTEREST IMPOSED BY THE STATE

success, to limit its application. Reformers within the corrections profession have promulgated guidelines intended to restrain the practice. Researchers have documented the harmful effects of solitary confinement and have evaluated efforts to reform prison policies limiting its use. In the words of the Vera report, solitary confinement “remains a mainstay of prison management and control in the United State” (Shames, Wilcox, and Subramanian 2015).

Interrogating the practice of solitary confinement through the parsimony framework demonstrates that this practice, as currently administered, cannot withstand scrutiny. Solitary confinement is an obvious intrusion of a person's liberty interest imposed by the state. At a minimum, it is a significant and severe physical limitation on human autonomy and liberty, but additionally, as has been extensively documented, this form of extreme isolation inflicts psychological pain, negatively impacts physical health, and deprives people of basic human needs like sensory stimulation and human connection.

The first step in our analysis is to ask whether the practice of solitary confinement serves a legitimate social purpose. The governmental interest asserted to justify solitary confinement is safety within the prison.¹⁶ In this view, the institution's ability to isolate someone from the general

population, either as a response to a rules infraction or as a means to interrupt a cycle of violent behavior, is an essential tool in efforts to provide a safe and secure environment (American Civil Liberties Union 2012).¹⁷ Certainly, administering prisons that are safe and humane is a legitimate and necessary function of government. Achieving this goal is the professional responsibility of those who administer these institutions. To meet this obligation, correctional administrators create rules regarding appropriate conduct and, as with the criminal codes, also specify that, for violation of those rules, certain sanctions may be imposed. For the most serious breaches, removal from the general population is often prescribed as the appropriate response.

Yet even this generous formulation of a rationale does not begin to justify the excesses of the current practice.¹⁸ How can this safety rationale ever support years and decades in isolation, much less a lifetime in solitary? Perhaps one could justify a limited use of solitary confinement, with ample due process guarantees, as proportional to egregious misconduct, analogous to the argument for a short prison sentence for someone convicted of a serious crime; but even that argument does not justify the degrading conditions that characterize administrative segregation in American prisons.

Application of the parsimony framework requires questioning whether solitary confinement is reasonably necessary to promote safety within a prison. Borrowing language from the Model Penal Code, we can ask, “is solitary confinement the ‘least restrictive’ sanction that can be imposed for institutional infractions?” Answering this question would require enumeration of counter examples of ways that prisons can maintain order without resorting to this extreme form of isolation. Certainly one could look to practices in other countries to find principled limitations on the use of solitary confinement. In Germany, for example, there is a two-week limit on the duration of placement in solitary confinement, and the practice is rarely invoked. Examples closer to home also provide grounds for challenging the widespread use of solitary. According to a 2013 study by the ACLU, for example, the Maine Department of Corrections was able to reduce the population held in solitary confinement by more than half while experiencing no significant change in levels of violence in the institution (ACLU 2013).¹⁹

If the current practice of solitary confinement far exceeds what is “reasonably necessary” to achieve safe and secure prisons, we then ask whether there is another justification for the practice. Perhaps the state could justify removal from the general population of a prison as

necessary to reinforce the rules of conduct that govern the prison. This would be analogous to justifying a criminal sanction as reaffirming the societal disapproval of the underlying conduct. Setting aside the fatal flaw in this analogy—that incarcerated individuals are not represented in the formulation of these rules—it is still instructive to look at solitary confinement as punishment for rule-breaking. Following this analogy, imposition of this punishment is a form of retribution for violating the rules of the state. Yet this punishment within a punitive institution has very few guardrails. It represents a virtually unfettered expression of vengeance by a government agency—the prison—with enormous power to preserve its own rules and hierarchy. As with collateral consequences, this practice is nearly invisible to societal or governmental oversight. Unlike prisons in Germany where the use of solitary confinement is subject to judicial oversight, U.S. courts have rarely applied our Constitution’s prohibition against cruel and unusual punishment to limit this practice (Resnik 2020). If the exercise of state power to limit individual freedom must be constrained by the principle that only the lightest intrusion is justifiable, the current use of solitary confinement constitutes nothing less than state violence.

Solitary confinement is, in one sense, an easy target for the principle of parsimony. As practiced in the United States, it is

clearly excessive and damaging to individual autonomy and human dignity. But should the practice of solitary confinement be totally abolished? The co-authors of this paper have travelled to visit German prisons on trips organized by the Vera Institute of Justice. Those trips challenged U.S. assumptions about the use of solitary confinement. In the prisons we visited, solitary confinement was accepted practice, but the practice was severely limited to a maximum period of four weeks, and then only rarely employed. Very importantly, the practice was governed by rules established by the German constitutional law courts (Subramanian and Shames 2013). Those courts judged this practice against the provision of

the German Constitution which forbids the German government from violating human dignity. The U.S. observers noted the elements missing from the U.S. context—external review, constitutional standards, transparency, respect for human dignity, and concern for psychological consequences of this deprivation of liberty. We realized how far our country deviated from these standards and values. As with all criminal sanctions that constrain human liberty, the question is not whether the sanction can ever be justified, rather whether it is reasonably necessary to serve a legitimate social purpose. Whether even the most parsimonious use of solitary confinement can ever be justified is a question we leave to our readers. □



AS WITH ALL CRIMINAL SANCTIONS THAT CONSTRAIN HUMAN LIBERTY, THE QUESTION IS NOT WHETHER THE SANCTION CAN EVER BE JUSTIFIED, RATHER WHETHER IT IS REASONABLY NECESSARY TO SERVE A LEGITIMATE SOCIAL PURPOSE

PARSIMONY AS A BRIDGE TO A NEW VISION OF JUSTICE

We have argued that the principle of parsimony creates a framework for a critical examination of current criminal justice policies, using sentencing, collateral consequences, and solitary confinement as case studies.

We also recognize that these policies do not exist in a vacuum—and neither should application of the parsimony principle. On the contrary, parsimony draws much of its power from explicit recognition of historical and social context. It can also draw persuasive strength by reference to other closely aligned but distinct values, specifically proportionality, human dignity, and social justice. This concluding section discusses how these building blocks—history, social context, and a new normative framework—can provide a bridge to a new vision of justice.

At the outset of this paper, we posited that a historical reckoning with the legacy of white supremacy that has dominated the modern approach to criminal justice in the United States is a necessary precondition to the project of reimagining justice. We believe that nothing less than a new social contract based on a recognition of this history of

oppression and injustice is required. This will entail explicit acknowledgment of the harms carried out in the name of the “rule of law” and under the guise of “criminal justice” over centuries, and recent decades, up to and including yesterday’s news. This is an imagination project of the first order, requiring fortitude, honesty, and a deep commitment to anti-racist principles. This undertaking has been given new urgency and energy following the killings of Breonna Taylor and George Floyd in the spring of 2020 and the widespread protests calling for racial justice and police reform. We believe that a new vision of justice will not emerge without a process of truth-telling about the harms experienced by dispossessed groups, particularly those of African descent, and agreement on a path forward to repair of those harms.

We also recognize that a precondition to this new vision of justice is a radical restructuring

of the systems of social support in the United States—such basic necessities as universal access to health care, good public education, a strong economy providing employment opportunities, security in our homes and communities, and a functioning democracy. We earlier referred to this as the “left hand” of the state; and we believe that the public demand to use the “right hand”—the punitive powers of the state—will be lessened to the extent that the social infrastructure for community wellbeing is strong and trusted (Garland 2019). The COVID-19 crisis has exposed the weaknesses in these infrastructures, particularly made visible through the operations of our criminal legal system.²⁰ Creating this new social contract that values compassion and empathy will also facilitate the emergence of a new approach to justice.

We acknowledge that parsimony is not the only normative principle that should garner our support as we reimagine justice.



IN ADDITION TO PARSIMONY, THE PRINCIPLES OF PROPORTIONALITY, CITIZENSHIP, AND SOCIAL JUSTICE AS VALUES THAT SHOULD INFORM THE EMERGENCE OF A MORE JUST AND HUMANE RESPOND TO CRIME IN THE FUTURE

We are indebted to the report of the National Research Council on the causes and consequences of high rates of incarceration in the United States which named, in addition to parsimony, the principles of proportionality, citizenship, and social justice as values that should inform the emergence of a more just and humane respond to crime in the future. Each of these is powerful in its own right. Like parsimony, the principle of proportionality—the idea that penalties should be proportionate to the harm caused—serves as a limitation on the power of the state to impose criminal sanctions. The principle of citizenship—which we would characterize as an imperative to respect human dignity—is an elevating goal that centers the humanity of all involved in the criminal legal system. The principle of social justice compels us to ensure that state power, including the operations of the criminal justice system, is never exercised in ways that favors one group within society over another, or defies the principle of equal treatment before the law. Otherwise, the moral justification for the use of state power is undermined.

Taken together, these building blocks—historical reckoning, creating a new social contract, and respecting the normative principles that should govern a system of justice—provide a powerful platform for this national moment when reformers, abolitionists, activists, legislators and,

system stakeholders are trying to define a new future for justice in the United States. The principle of parsimony provides a powerful critique of the state of criminal justice in the United States. Why, we must ask, do we allow the government to limit human liberty beyond that reasonably necessary to achieve a legitimate social purpose? Why do we allow the state to inflict so much pain when there is no compelling justification for that exercise of state power? Why do we tolerate state violence

that weakens respect for the rule of law, undermines community wellbeing, and threatens the legitimacy of our democracy? Why do we allow our government, in our name, to pursue law enforcement policies that have perpetuated racial hierarchies and excluded marginalized populations from full participation in American life? By demanding answers to these questions, we will hasten the end of a shameful era in American history. Only then can we imagine and create a new vision of justice in our country. □



WHY DO WE TOLERATE STATE VIOLENCE THAT WEAKENS RESPECT FOR THE RULE OF LAW, UNDERMINES COMMUNITY WELLBEING, AND THREATENS THE LEGITIMACY OF OUR DEMOCRACY?

ENDNOTES

1 We recognize that the state can limit individual liberty in many ways, such as requiring school attendance for young people, conscripting adults into military service, or imposing restrictions on travel in the name of public health. Here we are analyzing those limits on liberty that are imposed through enforcement of the criminal law.

2 The aspirations for a new social contract was the topic of examination during the fourth convening of the Square One Project's Roundtable on the Future of Justice Policy. During the Roundtable discussion, it was determined that the principle of association (as opposed to the principle of alienation), through robust institutional support from both state and federal structures, is central to a contract that is grounded in human dignity, social justice, historical reckoning, and vibrant community life (Allen 2020).

3 Immanuel Kant's Second Categorical Imperative.

4 See also the series of essays on the many manifestations of the "era of punitive excess," published by the Brennan Center for Justice, with an introductory essay by Travis & Western. <https://www.brennancenter.org/our-work/analysis-opinion/era-punitive-excess>

5 It's important to note that there are many other measures of success under the rehabilitation rationale, e.g., employment, improved health, etc.

6 A recent review of the literature on community-based interventions published by the Research and Evaluation Center at John Jay College includes a typology of such programs that do not require police intervention (John Jay College 2020).

7 Similarly, the legal scholar Norval Morris's theory of "limited retributivism," grapples with the three rationales—deterrence, retribution, and rehabilitation—while emphasizing the need for a limit on the severity of sanctions.

8 Although the focus in this discussion is on legislative enactments, the laws restricting access for people with criminal convictions to benefits and rights often authorized enactment of regulations or local policies to carry out the legislative purpose. For example, in the mid-1990s, the Clinton Administration launched a campaign to encourage public housing authorities and Section 8 providers to use their statutory powers to exclude people with criminal convictions under the rallying cry, "One strike and you're out." The results were dramatic: in six months, rejections of applicants

to public housing based on criminal records doubled and the number of people evicted for this reason increased by 40 percent. See Travis, Jeremy, *But They All Come Back*, pp. 231-232.

9 The Arnold Ventures' Reintegration project is a four-part series that documents the full extent and impact of collateral consequences as a result of a criminal conviction (Arnold Ventures 2020).

10 The Collateral Consequences Resource Center's Restoration of Rights project includes a 50-state comparison on the restrictions on the lives of people convicted of sex offenses.

11 Previously known as the Association of State Correctional Administrators.

12 Restrictive housing" is defined as being held in a cell for 22 hours a day on average for fifteen or more continuous days.

13 The Mandela rules have highlighted the value of telecommunication as a way to maintain familial contact (United Nations 2015).

14 In April of 2021, New York State adopted the Mandela Rules statute into law to prohibit the use of solitary confinement for more than 15 consecutive days (The Crime Report 2021).

15 A 2019 ACLU report highlights reform efforts on a state-by-state basis with New Jersey and Nebraska leading with the most comprehensive reforms efforts. New Jersey has placed a 20-day consecutive limit on the practice for all people, including detainees, whereas Nebraska has banned the practice for people under 18, pregnant people, and those with serious mental illness, developmental disabilities, or traumatic brain injuries (ACLU 2019). Additionally, several states (Arkansas, Texas, Montana, Georgia, Maryland) banned the practice for those 18 years old and younger as well as for pregnant women (ACLU 2019).

16 American correction practitioners no longer assert, as did the designers of the early prisons, that time spent alone reflecting on one's sins as a penitent was a legitimate purpose of punishment.

17 Solitary confinement has also been justified as a safety precaution, primarily as a means to mitigate overcrowding, limited staff capacity, and a decrease in institutional programming as reported by the ACLU in 2012.

18 The Eighth Amendment to the United States Constitution prohibits the use of cruel and unusual punishment.

19 This report was conducted in conjunction with a multi-year campaign to reduce solitary confinement and to improve conditions in solitary units and facilities. In addition to reducing the number of people confined in solitary confinement and time spent, the Maine Department of Corrections prioritized access to care, including mental health, and transparent expectations to mitigate solitary stays.

20 The National Academies of Science, Engineering, and Medicine report "Decarcerating Correctional Facilities During COVID-19: Advancing Health, Equity, and Safety" outlines best practices for decarceration strategies as a result of the novel coronavirus (SARS-CoV-2).

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AUTHORS' NOTE

Daryl Atkinson is the co-director of Forward Justice.

Jeremy Travis is the executive vice president of criminal justice at Arnold Ventures, and is the co-founder of the Square One Project.

MEMBERS OF THE EXECUTIVE SESSION ON THE FUTURE OF JUSTICE POLICY

Abbey Stamp | Executive Director, Multnomah County Local Public Safety Coordinating Council

Amanda Alexander | Founding Executive Director, Detroit Justice Center & Senior Research Scholar, University of Michigan School of Law

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Danielle Sered | Executive Director, Common Justice

Daryl Atkinson | Founder and Co-Director, Forward Justice

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Emily Wang | Professor of Medicine, Yale School of Medicine; Director, SEICHE Center for Health and Justice; & Co-Founder, Transitions Clinic Network

Greisa Martinez Rosas | Executive Director, United We Dream

Jeremy Travis | Co-Founder, Square One Project; Executive Vice President of Criminal Justice, Arnold Ventures; President Emeritus, John Jay College of Criminal Justice

Katharine Huffman | Executive Director, Square One Project, Justice Lab, Columbia University & Founding Principal, The Raben Group

Kevin Thom | Sheriff, Pennington County, SD

Kris Steele | Executive Director, TEEM

Laurie Garduque | Director, Criminal Justice, John D. and Catherine T. MacArthur Foundation

Lynda Zeller | Senior Fellow Behavioral Health, Michigan Health Endowment Fund

Matthew Desmond | Professor of Sociology, Princeton University & Founder, The Eviction Lab

Melissa Nelson | State Attorney, Florida's 4th Judicial Circuit

Nancy Gertner | Professor, Harvard Law School & Retired Senior Judge, United States District Court for the District of Massachusetts

Nneka Jones Tapia | Managing Director of Justice Initiatives, Chicago Beyond

Patrick Sharkey | Professor of Sociology and Public Affairs, Princeton University & Founder, AmericanViolence.org

Robert Rooks | Chief Executive Officer, REFORM Alliance & Co-Founder of Alliance for Safety & Justice

Sylvia Moir | Interim Police Chief, Napa, CA & Former Chief of Police, Tempe, AZ

Thomas Harvey | Director, Justice Project, Advancement Project

Tracey Meares | Walton Hale Hamilton Professor, Yale Law School & Founding Director, The Justice Collaboratory

Vikrant Reddy | Senior Fellow, Charles Koch Institute

Vincent Schiraldi | Senior Research Scientist, Columbia University School of Social Work & Co-Director, Justice Lab, Columbia University

Vivian Nixon | Executive Director, College and Community Fellowship



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