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The Dignity of the Human Person: Catholic Social Teaching and the Practice of Criminal Punishment

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ARTICLES

THE DIGNITY OF THE HUMAN PERSON: CATHOLIC SOCIAL TEACHING AND THE PRACTICE OF CRIMINAL PUNISHMENT

*Dora W. Klein**

INTRODUCTION	1
I. THE FOUNDATION: CATHOLIC OPPOSITION TO THE DEATH PENALTY	2
II. BEYOND THE DEATH PENALTY	9
A. FROM DESERT TO VENGEANCE.....	10
B. RELIANCE ON IMPRISONMENT.....	13
C. ACCEPTANCE OF BRUTALITY	17
III. REFORMATION AND REDEMPTION	23
CONCLUSION.....	31

INTRODUCTION

Over the past several decades, the Catholic Church has become an influential voice in the public debate about the death penalty. Pope John Paul II began in earnest to try to change what he called the “culture of death,” which he identified as including the death penalty.¹ In the United States, the National Conference of Catholic Bishops has faithfully campaigned against the death penalty, with press releases, special reports, and amicus briefs.² Sister Helen Prejean, who wrote *Dead Man*

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1. See POPE JOHN PAUL II, ENCYCLICAL LETTER, THE GOSPEL OF LIFE (EVANGELIUM VITAE) ¶¶ 12, 27-28 (1995) [hereinafter EVANGELIUM VITAE].

2. Many of these resources are collected at *Death Penalty/Capital Punishment*, U.S. CONF. OF CATH. BISHOPS, <http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/> (last visited Mar. 6, 2014).

Walking—the popular nonfiction book that became a popular movie—is in some sense the “face” of the anti-death penalty movement.³

The moral foundation that supports the Catholic Church’s opposition to the death penalty is wide and deep. This Article proposes that despite the oft-repeated maxim that “death is different,”⁴ the same foundation that supports efforts to abolish the death penalty can also support those who seek to achieve other reforms in the practice of criminal punishment.

I. THE FOUNDATION: CATHOLIC OPPOSITION TO THE DEATH PENALTY

In modern times, the Catholic Church’s opposition to the death penalty begins with the belief that all human life is sacred.⁵ As Pope John Paul II explained:

The new evangelization calls for followers of Christ who are unconditionally pro-life: who will proclaim, celebrate and serve the Gospel of life in every situation. A sign of hope is the increasing recognition that the dignity of human life must never be taken away, even in the case of someone who has done great evil.⁶

The Church’s position does not require an absolute prohibition against imposing the death penalty; rather, the Church recognizes an exception if the death penalty is the only means to protect the lives of innocent others. According to the Catechism: “Assuming that the guilty party’s identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death

3. See HELEN PREJEAN, *DEAD MAN WALKING* (1993).

4. See *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (noting that “the penalty of death is different in kind from any other punishment” and emphasizing its “uniqueness”); *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”).

5. This Article accepts that this modern view, expressed particularly in the teachings of Pope John Paul II, is consistent with the Tradition of the Church. This question, though, has provoked disagreement among scholars. See generally JAMES J. MEGIVERN, *THE DEATH PENALTY: AN HISTORICAL AND THEOLOGICAL SURVEY* (1997).

6. Pope John Paul II, Homily at the Papal Mass, St. Louis, Mo. (Jan. 27, 1999), available at http://www.vatican.va/holy_father/john_paul_ii/travels/documents/hf_jp-ii_hom_27011999_stlouis_en.html.

penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.”⁷

However, the exception is more theoretical than practical because “the cases in which the execution of the offender is an absolute necessity ‘are very rare, if not practically non-existent.’”⁸ Given the ability of our penal system to confine dangerous offenders, rarely if ever will execution be the only way that the state can prevent someone from killing others.

The reason for prohibiting the death penalty, except in cases of strict necessity, is concern for both “the common good” and “the dignity of the human person.” The Catechism explains: “If, however, non-lethal means are sufficient to defend and protect people’s safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and are more in conformity with the dignity of the human person.”⁹

Opposition to the death penalty thus begins with the fundamental truth that human life is sacred; it is created by God and is created in God’s image, and therefore, the existence of a human life—its beginning and its ending—is the sole dominion of God.¹⁰ The sacredness of every human life requires that all people be treated with respect for their inherent human dignity. Ending a human life, however, is not always inconsistent with respect for human dignity; the law of double effect, for example, allows the administration of life-threatening and even life-ending medications if the purpose of the medications is to alleviate pain.¹¹ While not all life-ending actions are violations of the

7. CATECHISM OF THE CATHOLIC CHURCH ¶ 2267 (2d ed. 1997).

8. *Id.* (quoting EVANGELIUM VITAE, *supra* note 1, ¶ 56).

9. *Id.*; accord EVANGELIUM VITAE, *supra* note 1, ¶ 56.

10. See U.S. CONFERENCE OF CATHOLIC BISHOPS, RESPONSIBILITY, REHABILITATION, AND RESTORATION: A CATHOLIC PERSPECTIVE ON CRIME AND CRIMINAL JUSTICE 21 (2000) [hereinafter RESPONSIBILITY, REHABILITATION, AND RESTORATION], available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm> (“The fundamental starting point for all of Catholic social teaching is the defense of human life and dignity: every human person is created in the image and likeness of God and has an inviolable dignity, value, and worth, regardless of race, gender, class or other human characteristics.”). “Human life is sacred because from its beginning it involves the creative action of God and it remains for ever in a special relationship with the Creator, who is its sole end.” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 7, ¶ 2258 (emphasis omitted).

11. See T.A. CAVANAUGH, DOUBLE EFFECT REASONING: DOING GOOD AND

sanctity of life, the death penalty does not conform to the dignity of the human person because it ends a human life for the purpose of criminal punishment.

Much has been written about whether criminal punishment, in general, is best justified in terms of deterrence or retribution.¹² Those on the side of deterrence argue that the imposition of pain (by any actor, including the state) is a harm or “disutility” that is justified when it avoids the experience of an even greater amount of pain; thus, punishment is justified when it prevents future crimes and thereby maximizes utility.¹³ Deterrence theory asserts that “punishment is justified if it generates more utility, happiness, pleasure, benefit, or good consequences than disutility, suffering, pain, expense, or bad consequences.”¹⁴

Those on the side of retribution argue that punishment is justified when it is deserved. People who commit crimes accrue a benefit to themselves at the expense of those they harm. Criminal punishment is the way that someone “pays” for his crime; it “is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer’s action through

AVOIDING EVIL 1-14 (2006).

12. For a basic overview, see SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 101 (7th ed. 2001) (“Broadly speaking, the justifications for punishment fall into two large groups, retributive and utilitarian.”). Framing the question as a choice between retribution and deterrence (or any other particular justifications for punishment) is, to some extent, misleading because few scholars claim that there is one single purpose for imposing criminal punishment. See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1941-42 (1988) (discussing theories of criminal punishment). Broadly speaking, retribution and deterrence are both appropriate goals of the criminal punishment system, as are many other goals, including rehabilitation, moral education, and public catharsis. See Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 441 (2002) (observing that “retribution, deterrence, public catharsis, education in social norms, incapacitation, [and] rehabilitation” are determinants of just sentences for individual offenders as well as the social ends served by criminal punishments generally). On the other hand, there are some punishments, such as the death penalty, that do require some theorists to choose a side. If the death penalty does deter, does that mean that it is therefore justified, even if it is a harsher punishment that the offender deserves? Or, if the offender deserves the punishment of death, does that mean that the punishment is therefore justified, even if it does not deter others? An additional issue is that retribution and deterrence are not only justifications for punishment—the reasons why punishment is warranted at all—they are also purposes of punishment—what punishment hopes to achieve. See *id.*

13. Russell L. Christopher, *The Prosecutor’s Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 114 (2003).

14. *Id.*

the construction of an event that not only repudiates the action's message of superiority over the victim, but does so in a way that confirms them as equal by virtue of their humanity."¹⁵ The Catholic Church has largely sided with the retributivists; for example, Pope John Paul II stated in his encyclical letter *Evangelium Vitae* that "[t]he primary purpose of the punishment which society inflicts is 'to redress the disorder caused by the offence.'"¹⁶

Regarding the particular question whether death as a punishment is justified, some who support the death penalty do so because they believe that the death penalty deters—that when one murderer is sentenced to death and executed, other would-be murderers are deterred from killing, and thus, the net effect is that lives are saved.¹⁷ The basis for this belief likely cannot be definitively proven or disproven.¹⁸ Even though there are many good reasons to believe that the death penalty does not deter,¹⁹ it is possible that it does deter.²⁰

15. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992).

16. EVANGELIUM VITAE, *supra* note 1, ¶ 56 (quoting CATECHISM OF THE CATHOLIC CHURCH, *supra* note 7, ¶ 2267); *see also* Pope Pius XII, *Crime and Punishment*, 6 CATH. LAW. 92, 94 (1960) ("The order violated by the criminal act demands the restoration and re-establishment of the equilibrium which has been disturbed. It is the proper task of law and justice to guard and preserve the harmony between duty, on the one hand, and the law, on the other, and to re-establish this harmony if it has been injured.").

17. *See* Chad Flanders, *The Case Against the Case Against the Death Penalty*, 16 NEW CRIM. L. REV. 595, 600 (2013).

18. *See id.* ("The first issue we must address when it comes to deterrence is the deceptively simple question of whether there is, in fact, any good evidence that the death penalty deters. The debate over this is controversial, fierce, and—it must be said—ultimately inconclusive. It is, all sides concede, very difficult to measure whether the death penalty deters.").

19. The question is really whether the punishment of death deters more than other punishments, such as life imprisonment. The difficulty is that in order for the death penalty to be a greater deterrent than another punishment, many unlikely conditions would have to exist: "[A] potential offender who is at least indirectly aware of the rule intended to influence his conduct; a perception that the immediate benefit of the crime is less than the delayed and doubtful possibility of a distant punishment; a sufficiently rational actor who is sufficiently free of decision-distorting influences to be able and willing to respond to the manipulation of rules by altering his conduct; and a resulting deterrent effect not so incrementally dissipated as to be trivial." Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 1001 (2003).

20. Compare Joanna M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICH. L. REV. 203, 233 (2005) (finding that "each execution deters, on average, 4.5 murders"), *with* Michael L.

Others who support the death penalty say that death is the proper payment for the crime of murder—that the deserved punishment for taking the life of an innocent person is the loss of the offender's life.²¹ This argument has a certain formalistic appeal. In the Old Testament of *The Bible*, the rule is presented as “an eye for an eye, and a tooth for a tooth.”²² Some death penalty proponents cite this Biblical endorsement of “*lex talionis*” justice as establishing a moral foundation for the argument that those who commit murder should themselves be killed.²³

Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 8 (1996) (reporting that approximately 80% of criminologists believe existing research does not support the deterrence justification).

21. See, e.g., Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1669 (1986) (“Execution [is] . . . the only fitting retribution for murder I can think of.”); see also Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley*, 11 HOFSTRA L. REV. 273, 301 (1982) (“The death penalty has always been considered a standard example of retributive justice; there is no other punishment that can be inflicted on a murderer that could possibly be proportionate to his crime.” (footnote omitted)). The Supreme Court of the United States has ruled that under the Eighth Amendment to the U.S. Constitution, the death penalty is cruel and unusual punishment for crimes that do not cause the death of another person. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977). Moreover, those who are sentenced to death must be “the worst of the worst.” the death penalty is an excessive punishment for “ordinary” murder. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976); see also *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (“Since *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes.”); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (noting that “within the category of capital crimes, the death penalty must be reserved for ‘the worst of the worst’”).

22. The “eye for eye, tooth for tooth” formula appears three times in the Old Testament: *Exodus* 21:23-25, *Deuteronomy* 19:19-21, and *Leviticus* 24:17-21. At the time, “an eye for an eye” was a step towards more just punishments. See Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57, 57 (2008) (stating that “the *lex talionis* of the Old Testament marked a turning point in the evolution of lawful punishment” because “[i]t introduced a policy of restraint and it sanctified proportionality as a moral principle of punishment”); Monica Kostielney, *Understanding Justice with Clarity, Civility, and Compassion: Reflections on Selected Biblical Passages and Catholic Church Teachings on the Death Penalty*, 13 T.M. COOLEY L. REV. 967, 969-70 (1996). It is also possible that the passage in *Exodus* was meant to apply to civil penalties rather than criminal punishment. See Clifford S. Fishman, “*Old Testament Justice*,” 51 CATH. U. L. REV. 405, 414 (2002). Other passages, however, imply support for “an eye for an eye” for those who commit crimes. See Richard H. Hiers, *The Death Penalty and Due Process in Biblical Law*, 81 U. DET. MERCY L. REV. 751, 797-98 (2004). For example, *Genesis* states: “Whoever sheds the blood of man, by man shall his blood be shed.” *Genesis* 9:5-6.

23. See Jacob Sullum, *The Death Penalty is Just*, in THE DEATH PENALTY: OPPOSING VIEWPOINTS 57 (Carol Wekesser ed., 2d ed. 1991).

The Catholic Church—along with most every other religion—rejects this formalistic approach to determining what punishment ought to be imposed when someone commits a crime.²⁴ Determining the appropriate punishment for the crime of murder is the topic of much discussion, in large part because of the issue of the death penalty, but determining the appropriate punishment for any crime is a far from simple matter. The magnitude of social harm that a crime causes certainly is relevant to determining what and how much punishment is appropriate. Generally, those who kill should be punished more harshly than those who assault. It does not necessarily follow, however, that those who kill ought to themselves be killed, just as, for example, those who assault ought not necessarily be assaulted themselves. A theory of retribution can say that both the murderer and the assaulter deserve to be punished and also that—all other things being equal²⁵—the murderer deserves to be punished more harshly than the assaulter, but a theory of retribution cannot say more precisely what or how much punishment either offender should receive.

Answering the questions what and how much punishment an offender should receive requires a theory that goes beyond the premise that someone who violates the criminal law deserves to be punished. Such a theory must offer an understanding of the human condition that can help explain why a particular kind or a particular amount of punishment is or is not warranted. Retributivist theories often incorporate the principle of proportionality to explain how to determine what and how much

24. See Michael L. Radelet, *The Role of Organized Religions in Changing Death Penalty Debates*, 9 WM. & MARY BILL OF RTS. J. 201, 207 (2000) (“Leaders of Catholic, most Protestant (with the notable exception of the most fundamentalist denominations), and Jewish denominations are strongly opposed to the death penalty, and most formal religious organizations in the U.S. have endorsed statements in favor of abolition.”). Of course, this principle is explicitly rejected in the New Testament: “You have heard that it was said, ‘An eye for an eye and a tooth for a tooth.’ But I say to you, Do not resist an evildoer. But if anyone strikes you on the right cheek, turn to him the other also.” *Matthew* 5:38-39.

25. It is possible that in a given case, factors other than the nature of the crime will influence whether and to what extent someone deserves to be punished. For example, a juvenile who commits murder is likely to be less culpable than an adult, and someone who is legally insane is not culpable at all. See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that the Eighth Amendment forbids the execution of juveniles, in part because juveniles are unlikely to be as culpable for their crimes as adults); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 596 (1997) (discussing why people who are legally insane are not culpable for their crimes).

punishment a particular offender deserves. This principle—which asserts that “the severity of a punishment should be a function of the seriousness of the offense”²⁶—can be helpful in explaining what is wrong with severe punishments for minor offenses (or with minor punishments for severe offenses), but it is not especially helpful in creating a finely-tuned system of sentencing. As two noted sentencing law scholars have stated: “A law of proportionality does not imply that there is a right sentence in each case but it does imply that there can be wrong sentences and inappropriate ranges.”²⁷

The principle of proportionality can help us achieve criminal sentences that are relatively just, but achieving criminal sentences that are just in an absolute sense depends upon how we view people who commit crimes.²⁸ The Catholic Church understands human beings as created by God, in God’s own image, and existing always in relation to God. Those who commit crimes should be punished, but their punishment should never deny their intrinsic humanity.

This is a principle that U.S. law purports to endorse. The opinions of the Supreme Court of the United States, for example, are replete with references to human dignity. In one recent death penalty case, for example, the Court stated: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . .”²⁹ In another death penalty case, the Court

26. Douglas N. Husak, “Already Punished Enough?,” 18 PHIL. TOPICS 79, 83 (1990) (“A corollary of the ‘just deserts’ theory is the principle of proportionality, according to which the severity of a punishment should be a function of the seriousness of the offense.”).

27. Marc Miller & Daniel J. Freed, *The Emerging Proportionality Law for Measuring Departures*, 2 FED. SENT’G REP. 255, 256 (1990).

28. In other words, the proportionality principle is concerned with informing ordinal rankings, not with establishing punishment continuum endpoints:

Every society must decide what punishment it will allow for its most egregious case, be it the death penalty, life imprisonment, or fifteen years. Once that endpoint is set, the challenge for the adjudication system is to determine who should be punished and how much punishment each should be given. That process of distributing punishment requires only an ordinal ranking of offenders according to their blameworthiness. . . . Ordinal ranking does not require a specific amount of punishment in an absolute sense. It requires imposition of only that specific amount of punishment that will put the offender at the appropriate ordinal rank given the punishment continuum endpoint in that society.

Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 33-34 (2007) (footnotes omitted).

29. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)).

similarly stated: “Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.”³⁰ And in a very recent case involving prison conditions, the Court stated that “[p]risoners retain the essence of human dignity inherent in all persons.”³¹

Despite the nominal acceptance of the principle that all humans, even those who have committed the most horrendous crimes, possess an inherent human dignity, the practice of criminal punishment in the U.S. has in many ways failed to translate the principle into practices that respect the humanity of criminal offenders.³² This Article seeks to draw upon the teachings of the Catholic Church to provide moral support for efforts to make the practice of criminal punishment more fully respect the human dignity of all persons. A recent law review article posed the question: “How does one convince the public to care about prison reform when the vast majority do not know anyone in prison and are probably reassured that most people who do spend time in prison are not like them?”³³ This Article suggests that one possible answer to that question is: By connecting the need to address the inhumanity of our present prison system with a moral code that is founded upon a belief in the inherent human dignity of every person.

II. BEYOND THE DEATH PENALTY

According to the calculations of the Bureau of Justice, 2,239,800 people were imprisoned in the United States in 2011.³⁴ Although it is hard to think that there might be good news in a

30. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008).

31. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

32. For example, despite its observation that the Eighth Amendment serves to protect human dignity, the Supreme Court of the United States made it difficult for those who claim that punishment practices are “cruel and unusual” when it adopted a policy of deferring to prison administrators’ assessments: “Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

33. David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 43 (2011).

34. LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 3 (2012), available at <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

prison population of more than 2 million people, the total for 2011 was lower than the count for 2010, and it was the third consecutive decrease from the peak count of 2,307,500 in 2008.³⁵

Despite the small decreases in the prison population over the past three years, the United States remains one of the most punitive countries in the world.³⁶ What accounts for our slightly improved yet still excessive levels of imprisonment? The U.S. prison population began to increase exponentially in the 1970s,³⁷ owing to the enactment of a flurry of “get tough on crime” sentencing legislation.³⁸ Our “war on crime,” however, has come to look a lot like a “war on people who commit crimes,” fueled by a retributivism that embraces vengeance rather than desert.³⁹

The effects of this acceptance of vengeance as a justification for criminal punishment are visible not just in the numbers—how many people are punished and for how long—but also in the particular system of punishment we have created—a system that relies almost exclusively on long periods of imprisonment and tolerates a degree of brutality that cannot be defended as justified by any theory of punishment. It is here that Catholic social teaching can offer support to those working to create a more humane system.

A. FROM DESERT TO VENGEANCE

Our reliance on imprisonment, and very long periods of imprisonment, as the default means of imposing punishment in this country is at least a reflection of, and perhaps also a result of, viewing offenders as less than human. Saint Augustine taught: “[H]ate the sin but not the sinner.”⁴⁰ In the U.S. penal system, the distinction between crime and criminal is lost; we punish the criminal. Moreover, we degrade the criminal until we

35. GLAZE & PARKS, *supra* note 34, at 3.

36. *See infra* note 56 and accompanying text.

37. In 1970, the prison population was less than 200,000; by 2005, it was more than 2 million. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 104 (2d ed. 1988) (reporting that the number of jail inmates reached 160,863 in 1970); GLAZE & PARKS, *supra* note 34, at 3 (reporting that the inmate population for 2005 was 2,195,500).

38. *See infra* notes 60-65 and accompanying text.

39. *See infra* Section II(A).

40. Jeffrie G. Murphy, *Forgiveness and Resentment*, in FORGIVENESS AND MERCY 14, 24 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (quoting Saint Augustine).

no longer think of him⁴¹ as a member of the human family;⁴² then, we treat him accordingly.⁴³

The degrading, dehumanizing rhetoric is most obvious and most extreme when the crime is murder. Those who are convicted of murder are called “monsters,” not only by victims’ families, members of the public, and the media, but also by prosecutors,⁴⁴ sentencing judges,⁴⁵ and legislators.⁴⁶ Offenders who have committed murder are most likely to be cast as sub-human, but other offenders are also subjected to this kind of dehumanization by language. For example, one study observed that during one series of Congressional debates:

[T]he majority in Congress defined anyone involved in the drug trade, from “kingpins” to low-level couriers, in abstract, non-human terms. They labelled these individuals as a

41. To avoid the cumbersome “him or her,” and also in recognition that the vast majority of those imprisoned are men, this Article uses masculine pronouns to refer collectively to both men and women.

42. One scholar has observed that because minorities are overrepresented among prison inmates, it is already easy for the majority to think of them as “the other.” Cole, *supra* note 33, at 28 (“[O]ne reason that the majority can tolerate such high rates of incarceration is that most of those incarcerated are seen as ‘the other’—African Americans, Latinos, and/or the poor.”).

43. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 692 (1989) (“The more we can designate a person as fundamentally different from ourselves, the fewer moral doubts we have about condemning and hurting that person. We assign the offender the mythic role of Monster, a move which justifies harsh treatment and insulates us from moral concerns about the suffering we inflict.”).

44. See, e.g., *Comer v. Schriro*, 463 F.3d 934, 960-61 (9th Cir. 2006) (reporting prosecutor’s use of “monster,” “filth,” and “reincarnation of the devil”); *Malicoat v. Mullin*, 426 F.3d 1241, 1256 (10th Cir. 2005) (“evil” and “a monster”); *Oken v. Corcoran*, 220 F.3d 259, 270 n.7 (4th Cir. 2000) (“monster”); *Kellogg v. Skon*, 176 F.3d 447, 451-52 (8th Cir. 1999) (“monster,” “sexual deviant,” and “liar”).

45. See, e.g., *Vetter v. Ayers*, No. CV 06-1728-R(RC), 2009 WL 3672829, at *13 (C.D. Cal. Nov. 3, 2009); *People v. Foulk*, B231469, 2012 WL 2336247, at *6 (Cal. Ct. App. June 20, 2012); *People v. Ball*, No. 295851, 2011 WL 1086557, at *3 (Mich. Ct. App. Mar. 24, 2011); *Neloms v. State*, 274 P.3d 161, 170 (Okla. Crim. App. 2012).

46. In California, state Representative Chuck Quackenbush, arguing in support of a bill that lowered the age at which juveniles could be tried as adults for murder, referred to the “[l]ittle monsters we have today who murder in cold blood’ who must be ‘punished and walled off from society for a very long period of time, if not forever.” Barry Krisberg, *The Politics of the War Against the Young, in AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION* 195 (Mary Louise Frampton et al. eds., 2008), *quoted in* Sara Sun Beale, *You’ve Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 HARV. C.R.-C.L. L. REV. 511, 535 (2009).

'scourge' and as a warring enemy attacking from the outside. They characterized even low-level couriers as "merchants of death," incapable of understanding all but the most violent threats (and perhaps not even those).⁴⁷

As an expression of the pain caused by an offender's actions, "monster" is understandable. And in part, our criminal justice system exists to impose pain on an offender to redress the wrongfulness of his crime.⁴⁸ Criminal punishment reestablishes the societal order that the offender's crime disrupted. Criminal punishment thus serves as a sort of penance. As one prominent philosopher has explained: "[Punishment] is a burden imposed on an offender for his crime, through which, it is hoped, he will come to repent his crime, to begin to reform himself, and thus reconcile himself with those he has wronged."⁴⁹ Or as Pope Pius XII wrote:

[I]t would be incorrect to reject completely, and as a matter of principle, the function of vindictive punishment. While man is on earth, such punishment both can and should help toward his eternal salvation. . . . The result of vindictive penalties is in no way opposed to the function of punishment, which is the re-establishment and restoration of the order of justice which has been disrupted⁵⁰

Punishment becomes mere vengeance, however, when it is

47. Michele H. Kalstein, Kirstie A. McCornock & Seth A. Rosenthal, *Calculating Injustice: The Fixation on Punishment as Crime Control*, 27 HARV. C.R.-C.L. L. REV. 575, 610-11 (1992) (footnotes omitted).

48. Some proponents of a "restorative justice" approach to criminal justice have argued that the imposition of pain is not a necessary part of a valid system. See, e.g., Stephen E. Henderson, *Hijacked from Both Sides—Why Religious Extremists and Religious Bigots Share an Interest in Preventing Academic Discourse on Criminal Jurisprudence Based on the First Principles of Christianity*, 37 IDAHO L. REV. 103, 129-30 (2000). However, other scholars have argued—more convincingly, I believe—that justice cannot be restored unless the offender suffers some form of deprivation. See, e.g., Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1819-27 (1999). Additionally, there is the moral instinct that justice requires that offenders suffer. See VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 276 (2011) (noting the popular belief that "something is amiss when a serious wrongdoer is not punished"). Or as philosopher Jean Hampton explains: "When a serious wrongdoer gets a mere slap on the wrist after performing an act that diminished her victim, the punisher ratifies the view that the victim is indeed the sort of being who is low relative to the wrongdoer." Hampton, *supra* note 15, at 1691.

49. R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 106 (2001).

50. Pope Pius XII, *International Penal Law*, in 1 MAJOR ADDRESSES OF POPE PIUS XII 244, 313 (Vincent A. Yzermans ed., St. Paul The N. Cent. Publ'g Co. 1961) (1939).

about nothing more than imposing pain.⁵¹ Indeed, one reason for having a public system of criminal punishment is to guard against the likelihood that those seeking vengeance will precipitate a “downward spiral of violence,” motivated by their own personal pain, unrestrained by reason or by considerations of the overall public good.⁵² Viewing offenders as “monsters” so that we can execute them or sentence them to “rot” in prison is consistent with a desire to inflict pain, but it is inconsistent with a more reasoned, tempered approach to criminal justice.

B. RELIANCE ON IMPRISONMENT

The attitude of much of the public in the United States towards imprisonment seems to be: If some is good, more must be better.⁵³ Although this trend seems to be abating slightly in

51. Or in the language of the Supreme Court’s Eighth Amendment jurisprudence, a punishment is “cruel and unusual” when it is an “unnecessary and wanton infliction of pain,” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion), that “serves no valid legislative purpose.” *Furman v. Georgia*, 408 U.S. 238, 331 (1972) (Marshall, J., concurring).

52. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 10 (1998). Minow explains:

Vengeance is the impulse to retaliate when wrongs are done. Through vengeance, we express our basic self-respect. . . . Vengeance is also the wellspring of a notion of equivalence that animates justice. . . . Yet vengeance could unleash more response than the punishment guided by the rule of law. . . . The danger is that precisely the same vengeful motive often leads people to exact more than necessary. . . . The core motive may be admirable but it carries with it potential insatiability. Vengeance thus can set in motion a downward spiral of violence. . . .

Id. Another scholar put the matter somewhat more directly: “We do indeed harbor a strong natural tendency to perceive offenders as ‘dangerous and vile,’ and therefore to strike them hard: Human beings are so constituted that they typically want, not to punish in a measured way, but to crush offenders like cockroaches.” James Q. Whitman, *A Plea Against Retributivism*, 7 *BUFF. CRIM. L. REV.* 85, 98 (2003). An additional reason why the state and not the individual is the preferred imposer of punishment is that the state bears the collective moral authority of all of its citizens:

[S]ome crimes are so serious that we cannot imagine any person or institution sufficing as an adequate agent other than the state. . . . [T]he modern state is the citizenry’s moral representative; in the face of pluralism and religious controversy, it is the only institutional voice of the community’s shared moral values. Serious crimes represent serious attacks on those moral views, and in particular, on the conception of worth animating those views, and thus the state is the only institution that can speak and act on behalf of the community against the diminishment accomplished by the crime.

Hampton, *supra* note 15, at 1694.

53. This attitude has been labeled “popular punitiveness.” See Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 *UCLA L. REV.* 1143, 1183 (2006) (“Standard accounts of the rise of incarceration and the resurgent interest in archaic forms of punishment often refer to the emergence of a ‘popular punitiveness’ in America. According to this theory,

recent years,⁵⁴ the period since the mid-1970s has been characterized by the adoption of “tough on crime” practices that have caused prison populations to rise dramatically. In 1970, the prison population (including those held in federal prisons, state prisons, and local jails) was approximately 330,000; by 2005, it was more than 2 million.⁵⁵ To put these numbers in context, the U.S. now has the highest rate of incarceration in the world, more than seven times higher, for example, than the rates in developed democratic states of western Europe.⁵⁶

Two of the practices that are most responsible for this exponential increase in the number of people imprisoned are mandatory minimum sentences, which now apply to a broad range of offenses and require long prison sentences,⁵⁷ and the adoption of legislatively enacted “real offense” sentencing

the public demands harsher and harsher penalties as an expression of its fear of crime and its disgust with criminality.” (footnotes omitted)); *see also* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1276 (2005) (“The politics of sentencing over the past three decades have consistently produced longer prison terms and an escalation in tough-on-crime rhetoric, regardless of whether crime rates have been going up or down.”).

54. *See, e.g.*, Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2, 124 Stat. 2372 (eliminating the mandatory minimum sentence for possession of crack); *see also* Scott Wilson, *Obama Signs Fair Sentencing Act*, WASH. POST, (Aug. 3, 2010, 3:43 PM), <http://voices.washingtonpost.com/44/2010/08/obama-signs-fair-sentencing-ac.html> (discussing how the Fair Sentencing Act of 2010 reduced the crack-cocaine sentencing disparity from 100:1 to 18:1).

55. *See* Vincent Schiraldi & Jason Ziedenberg, *The Punishing Decade: Prison and Jail Estimates at the Millennium*, JUST. POLY INST., May 1, 2000, at 1, available at www.justicepolicy.org/uploads/justicepolicy/documents/punishing_decade.pdf (reporting that the number of prison and jail inmates was 338,029 in 1970); GLAZE & PARKS, *supra* note 34, at 3 (reporting that the inmate population for 2005 was 2,195,500).

56. ROY WALMSLEY, WORLD PRISON POPULATION LIST 1-3 tbls.2 & 4 (8th ed. 2009), available at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/w ppl-8th_41.pdf; Bureau of Justice Statistics, *Facts About Prisons and Prisoners*, SENT’G PROJECT (July 2008), available at http://www.ala.org/ala/aboutala/offices/olos/prison_facts.pdf; *see also* ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA (2009), available at http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf.

57. *See* U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 23 (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm (“Congressional action in the 1980s resulted in the enactment of many additional mandatory minimum penalties and an increase in the length of existing penalties—particularly for drug offenses and violent crimes.”).

guidelines, which also require long sentences⁵⁸ and have left judges with diminished discretion to make case-by-case reductions in sentences.⁵⁹

During the 1980s, Congress enacted laws that mandated such sentences as a minimum of five years of imprisonment for possession of more than five grams of crack cocaine⁶⁰ or for using or carrying a firearm during a “crime of violence.”⁶¹ States also adopted mandatory sentences, including New York’s “Rockefeller Drug Laws,” which mandated a sentence of fifteen years to life for selling two ounces or possessing four ounces of heroin or cocaine,⁶² California’s “Three Strikes” law, which mandated a minimum twenty-five year sentence for offenders who committed a third “violent” or “serious” felony;⁶³ and Florida’s “10-20-Life” law, which mandated a minimum ten-year prison sentence for any offender who “carries, displays, uses, threatens to use, or attempts to use any weapon or firearm” during the commission of

58. David Yellen, *Reforming the Federal Sentencing Guidelines’ Misguided Approach To Real-Offense Sentencing*, 58 STAN. L. REV. 267, 268-69 (2005). Although the Guideline sentences were supposed to reflect the pre-Guidelines sentences, many offenders have ended up with longer sentences because the Guidelines provide for “real offense” sentencing, allowing judges to increase sentences based on factors other than the convicted offense. *See id.* As one scholar explains:

For example, suppose a defendant is convicted of a drug-possession charge and acquitted of a charge that he was part of a larger drug conspiracy. Under the federal system, if a judge finds that the defendant was part of the conspiracy, the Sentencing Guidelines provide that the defendant’s sentence should be set on the basis of the drugs involved in that conspiracy, regardless of the jury’s acquittal.

Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119, 133 (2005).

59. *See* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

60. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6371, 102 Stat. 4181, 4370; *see also* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (providing for a five year mandatory minimum sentence for trafficking offenses involving 5 grams of crack cocaine).

61. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138, 2138-39 (amending 18 U.S.C. § 924(c)).

62. *See* N.Y. PENAL LAW §§ 220.00-.65 (McKinney 1999). These laws were recently revised. *See* Jeremy W. Peters, *Albany Reaches Deal to Repeal ‘70s Drug Laws*, N.Y. TIMES, Mar. 26, 2009, available at 2009 WLNR 5644088; Brian Mann, *How the Rockefeller drug laws changed America*, N. COUNTRY PUB. RADIO (Jan. 24, 2013), <http://www.northcountrypublicradio.org/news/story/21316/20130124/how-the-rockefeller-drug-laws-changed-america>.

63. CAL. PENAL CODE § 667(e) (Deering 2013); *id.* § 1170.12(c)(2).

a felony.⁶⁴ Mandatory life without parole, even for first time offenders, is the sentence imposed for the sale of 650 grams of heroin or cocaine under Michigan's "Public Act 368 of 1978."⁶⁵

In addition to mandatory sentences for certain crimes, the federal government and many state governments require judges to determine an offender's sentence according to a set of structured guidelines.⁶⁶ The federal Sentencing Guidelines were enacted in 1987 for the specific purpose of limiting judges' discretion at sentencing.⁶⁷ This limited discretion, combined with "real offense" sentencing and longer sentences for many offenses, resulted in a dramatic increase in the number of people sentenced to federal prisons.⁶⁸

In 2005, the U.S. Supreme Court's decision in *United States v. Booker* made the federal Sentencing Guidelines "effectively advisory" rather than mandatory—a ruling that has increased judges' sentencing discretion.⁶⁹ It remains to be seen, however, whether this ruling will result in a reduction in imprisonment.⁷⁰ After *Booker*, judges are not bound to impose a sentence within the range recommended under the Sentencing Guidelines, but

64. FLA. STAT. § 775.087(1) (2012).

65. See generally Harmelin v. Michigan, 501 U.S. 957 (1991) (holding that the mandatory sentence of life in prison under Michigan's law was not cruel and unusual punishment).

66. For a discussion of state guidelines systems, see Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005). In 1987, the United States Sentencing Commission enacted the Federal Sentencing Guidelines. See U.S. SENTENCING COMM'N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL 406-08 (2011), available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_PDF/index.cfm.

67. See Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 521-23 (2009).

68. See *id.* at 523 ("Predictably, the combination of the Guidelines, mandatory minimum and consecutive penalties, the drug war, demographics, three strikes laws, and the federalization of crime brought about a population explosion in the federal prison system—an increase of over 600 percent since the 1980s—as more people were sent to prison for longer periods of time.").

69. See 543 U.S. 220, 245 (2005). A year earlier, the Court had similarly ruled that Washington's sentencing guidelines were invalid, to the extent that they allowed judges to impose sentences above the beyond "standard range" based on facts that were not found by the jury. *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

70. See Paul J. Hofer, *Has Booker Restored Balance? A Look at Data on Plea Bargaining and Sentencing*, 23 FED. SENT'G REP. 326, 328 (2011) (presenting data demonstrating that "sentences imposed continue to be driven by the now-advisory guidelines").

they still must calculate this sentence, which serves as the “starting point and initial benchmark.”⁷¹ Additionally, a sentence that is within the Sentencing Guidelines range must be given “respectful consideration,”⁷² and departures from this range must be “sufficient[ly] justifi[ed].”⁷³ On review, appellate courts may presume that a within-Guidelines sentence is reasonable.⁷⁴

C. ACCEPTANCE OF BRUTALITY

“Total institutions” such as prisons are to some extent inherently dehumanizing.⁷⁵ But the dehumanizing properties of U.S. prisons go far beyond this inherent quality. Commentators, including judges, have used words like “brutal” and “barbarous” to describe the conditions within many U.S. prisons.⁷⁶ These inhumane conditions consist of physical violence, from beatings by prison guards to gang rapes by other inmates,⁷⁷ as well as

71. *Gall v. United States*, 552 U.S. 38, 49 (2007).

72. *Kimbrough v. United States*, 552 U.S. 85, 101 (2007).

73. *Gall*, 552 U.S. at 46 (“[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications.”).

74. *Id.* at 51.

75. See JEFFRIE G. MURPHY, *RETRIBUTION, JUSTICE, AND THERAPY* 239-40 (1979) (“Studies on the effects of long-term incarceration in ‘total institutions’ indicate that long-term confinement develops in persons an ‘institutional personality’—i.e. a personality with diminished affect, neurotic dependencies, loss of autonomy and mental competence generally: in short, a kind of death (of personhood).”).

76. See, e.g., Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 95 (2010) (discussing the harshness of prison conditions as described by Professor James Q. Whitman). Even Justice Kennedy, in a case challenging procedures for placing inmates in high security prisons, observed: “Prison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the State’s interest. Clandestine, organized, fueled by race-based hostility, and committed to fear and violence as a means of disciplining their own members and their rivals, gangs seek nothing less than to control prison life and to extend their power outside prison walls.” *Wilkinson v. Austin*, 545 U.S. 209, 227 (2005).

77. See Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2(2), 117 Stat. 972 (codified as amended at 42 U.S.C. § 15601 (2006)) (finding that more than a million people had been raped in prison during the prior twenty-year period); ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007, at 2 (rev. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svsfpri07.pdf>; HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 70 (2001). In a classic study of the psychological dynamics between prison guards and inmates, psychologist Phillip Zimbardo found that university students, randomly assigned to role-play either guards or inmates in a simulated prison, quickly adopted attitudes and behaviors

psychological violence, caused by the generalized stress of the prison environment⁷⁸ or the torture of extended solitary confinement.⁷⁹

Scholars have debated whether prison conditions are rightfully considered part of an offender's punishment.⁸⁰ On one hand, our present system generally assigns people to particular prison conditions based not on the severity of their offenses, but on their propensity to act violently while confined.⁸¹ Thus, those

consistent with their roles. PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007). The guards became abusive, the inmates became submissive, and the experiment had to be terminated after only a few days because of safety concerns. *See id.*

78. *See* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 123 (2007) ("Whatever happens, fear will be a prisoner's constant companion from the beginning to end of his prison sentence.").

79. Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & LAW 104, 104 (2010), available at http://www.hrw.org/sites/default/files/related_material/Solitary%20Confinement%20and%20Mental%20Illness%20in%20US%20Prisons.pdf ("Isolation can be psychologically harmful to any prisoner, with the nature and severity of the impact depending on the individual, the duration, and particular conditions (e.g., access to natural light, books, or radio). Psychological effects can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, obsessive thoughts, paranoia, and psychosis.").

80. *See, e.g.*, Thomas K. Landry, "Punishment" and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1621-23 (1996). This discussion assumes that although conditions vary widely among different prisons, none of the conditions is so harsh as to be inhumane.

81. Inmate placement is a prison management matter, not a sentencing matter. Judges may make recommendations, but there is no guarantee that they will be followed. For example, in the federal system among the factors that are considered when determining an offender's placement are "the resources of the facility contemplated;" "the nature and circumstances of the offense;" "the history and characteristics of the prisoner;" and "any statement by the court that imposed the sentence—concerning the purposes for which the sentence to imprisonment was determined to be warranted; or recommending a type of penal or correctional facility as appropriate." 18 U.S.C. § 3621(b) (2006). In practice, the Bureau of Prisons relies primarily on information in the offender's presentence report to make a placement decision. Nancy Glass, *The Social Workers of Sentencing? Probation Officers, Discretion, and the Accuracy of Presentence Reports Under the Federal Sentencing Guidelines*, 46 CRIM. L. BULL. 21, 54 (2010). As explained in a recent report:

Inmates in federal prison can be housed in facilities ranging from minimum security level institutions (known as federal prison camps) that have ample opportunities for work and programs to far more restrictive facilities for the most dangerous, violent, or escape-prone prisoners. A prisoner's placement by the BOP depends on his classification on a scale from zero to twenty-four. Classification is determined by a variety of factors, including the severity of the offense, length of confinement, criminal history, and prior attempts to escape. Public safety factors are also used to determine placement. PSFs are assigned

who have committed murder or rape might well be housed with those who have committed low-level, non-violent drug offenses, for example.⁸² On this account, it is the severity of the sentence—twenty-five years of imprisonment for the rapist and five years for the drug possessor, for example—that is the measure of punishment severity, not the conditions of the imprisonment.⁸³ Others argue that those who commit less serious offenses should experience their punishment as less severe—not just in quantity of years in prison, but also in quality of life experience during those years.⁸⁴

for certain activities in the prisoner's record, such as designation as a sex offender, or belonging to a "disruptive group," i.e., a gang. PSFs have a great effect on placement—a single PSF rules out prison camp as a confinement option, and the "disruptive group" PSF means automatic placement in a high security facility.

Glass, *supra* note 81, at 55 (footnotes omitted).

82. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 885 n.13 (2009) ("The aim is to place prisoners in the least restrictive classification in which they can be housed safely and coexist peaceably with other inmates. If the profile of a convicted murderer indicates a nonviolent and cooperative disposition, he may well end up in minimum security, whereas a check kiter with a long institutional history of violence will wind up in maximum security." (citing DEAN CHAMPION, MEASURING OFFENDER RISK: A CRIMINAL JUSTICE SOURCEBOOK 53-54 (1994)).

83. Professor Robert Blecker described this attitude as existing among both the corrections officers and the inmates at Lorton Central, a federal prison in Virginia:

[B]y their actions and attitudes consistent with official D.C. Department of Corrections policy, officers and inmates reject retribution as a goal of punishment on the inside for past conduct on the outside. To them, the judge metes out punishment by setting the number of years during which all inmates will be equally deprived of liberty. The officers see no point in trying to make prison more painful for prisoners because they "deserve" it, unless they deserve it for their conduct inside prison. . . . As Captain Townshend said: "It's none of my business. What a man is like in here is what I'm concerned with, not what he did out there."

Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1171-72 (1990) (footnote omitted)). For a criticism of this view, see Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009) (objecting that "our sentencing provisions pay fetishistic attention to the duration of terms of incarceration while largely ignoring the many other ways that prison sentences vary" and putting forth an extended argument that prison systems should be calibrated to particular inmate characteristics).

84. Professor Robert Blecker, for example, has observed that "by severing the crime committed outside from the quality of time spent inside, the guards, the prisoners, and the prison's administration further undermine retribution: The short-term, first-time offenders suffer most, while the most hardened criminals—with the best contacts, the best hustles, and the best jobs—enjoy the softest lifestyle." Blecker, *supra* note 83, at 1216. Blecker further observes that "criminals who committed relatively minor crimes, who long to return to their families, live in a 'death trap,' while those who have murdered, raped, and robbed, in the midst of their

While there is much to be said in favor of the argument that those whose crimes are less serious should experience prison conditions that are less harsh, it is important that this argument does not become a way to justify prison conditions that are physically violent or psychologically traumatizing. Imprisonment punishes first and foremost because it is a deprivation of liberty,⁸⁵ it does not, justifiably, punish⁸⁶ because prisons are “a dangerous place to live.”⁸⁷

Prison conditions can be especially brutal for people who are mentally ill.⁸⁸ In 2003, Human Rights Watch reported that

long sentences, continue to prey on the weak.” Blecker, *supra* note 83, at 1228. Blecker proposes that prison administration should be reformed and that

convicts should be separated into groups according to the seriousness of the crime committed. For the entire duration of their sentences, they should live among others who committed crimes of equal seriousness. These classes of criminals are the layers, and the quality of life of each layer inside should always remain a function of the crime committed outside. Within each layer, however, inmates may progress in stages.

Id. at 1245 (footnote omitted).

85. This is not to say that “unintentional” consequences of imprisonment should not count as punishment. In fact, it makes sense to consider the “unintentional” consequences of imprisonment when assigning offenders to particular prisons—those who have committed the most serious offenses should be assigned to the prisons with the harshest conditions (so long as those conditions are not inhumane, either in the sense of being cruel or unusual or in the sense of not respecting prisoners’ inherent human dignity). From the inmates’ point of view at least, it is certainly true that “[i]n the most concrete sense, whatever conditions a prisoner is subjected to while incarcerated, whatever treatment he receives from the officials charged with administering his sentence, is the punishment the state has imposed.” Dolovich, *supra* note 82, at 899; cf. Adam J. Kolber, *Against Proportional Punishment*, 66 VAND. L. REV. 1141, 1158-60 (2013) (discussing the “different facilities challenge” to achieving proportionality in punishment).

86. See *Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994) (“Prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective, any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.” (citations omitted) (internal quotation marks and alterations omitted)).

87. Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 108 (2008) (“Prisons are also physically dangerous places in which to live.”). The Supreme Court accepted that “prisons are dangerous places” in considering whether California’s practice of racially segregating new prison inmates was constitutional. *Johnson v. California*, 543 U.S. 499, 515 (2005). An opinion of judges on the United States Court of Appeals for the Seventh Circuit noted “the general knowledge that prisons are dangerous places where rape and assault occur frequently.” *Riccardo v. Rausch*, 375 F.3d 521, 536 (7th Cir. 2004) (Ripple, Rovner, Wood & Williams, JJ., dissenting).

88. See sources cited *infra* note 89. Juveniles and young adults are also likely to find prison especially harsh because, like people with mental illnesses, they are

“[s]omewhere between two and three hundred thousand men and women in U.S. prisons suffer from mental disorders, including such serious illnesses as schizophrenia, bipolar disorder, and major depression. An estimated seventy thousand are psychotic on any given day.”⁸⁹ Since the mass closings of psychiatric hospitals that began in the 1950s,⁹⁰ prisons have become our de facto mental institutions. More people with mental illnesses are in prison than in facilities specifically devoted to the treatment of mental illness.⁹¹ The Los Angeles County Jail alone houses more people with mental illnesses than any psychiatric treatment facility in the country.⁹²

Even though prisons are referred to as the “new psychiatric institutions,”⁹³ people with mental illnesses are likely to find prison anything but therapeutic. Prison health care in general is often barely adequate, and sometimes, it is so far below adequate that it amounts to “cruel and unusual punishment”; prison mental health care is often even worse.⁹⁴ Additionally, people

likely to be ill-equipped to adapt to the demands of prison life.

89. HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1* (2003) [hereinafter HUMAN RIGHTS WATCH, *ILL-EQUIPPED*], available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf>; see also DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES* (2006), available at http://www.nami.org/Template.cfm?Section=Press_September_2006&Template=/ContentManagement/ContentDisplay.cfm&ContentID=38175.

90. See ROBERT M. JULIEN, *A PRIMER OF DRUG ACTION: A COMPREHENSIVE GUIDE TO THE ACTIONS, USES, AND SIDE EFFECTS OF PSYCHOACTIVE DRUGS* 346-47 (10th ed. 2005) (“Prior to 1950, effective drugs for treating psychotic patients were virtually nonexistent, and psychotic patients were usually permanently or semipermanently hospitalized; by 1955, more than half a million psychotic persons in the United States were residing in mental hospitals. In 1956, a dramatic and steady reversal in this trend began. By 1983, fewer than 220,000 were institutionalized.”).

91. HUMAN RIGHTS WATCH, *ILL-EQUIPPED*, *supra* note 89, at 1 (reporting that “[i]n the United States, there are three times more mentally ill people in prisons than in mental health hospitals”).

92. MARVIN I. HERZ & STEPHEN R. MARDER, *SCHIZOPHRENIA: COMPREHENSIVE TREATMENT AND MANAGEMENT* 275 (2002).

93. HEATHER BARR, *CORR. ASS'N OF N.Y. & THE URBAN JUSTICE CTR., PRISONS AND JAILS: HOSPITALS OF LAST RESORT: THE NEED FOR DIVERSION AND DISCHARGE PLANNING FOR INCARCERATED PEOPLE WITH MENTAL ILLNESS IN NEW YORK* 6-7 (1999), available at <http://www.prisonpolicy.org/scans/MIRreport.pdf>.

94. According to a 2003 Human Rights Watch report:

[A]cross the nation, many prison mental health services are woefully deficient, crippled by understaffing, insufficient facilities, and limited programs. All too often seriously ill prisoners receive little or no meaningful treatment. They are neglected, accused of malingering, treated as disciplinary problems.

with mental illnesses lack the psychological resources to cope with prison,⁹⁵ and the prison environment can exacerbate mental illnesses, resulting in a downward spiral of mental deterioration.⁹⁶

On numerous occasions, courts have recognized that prison conditions that cause or exacerbate serious mental illnesses are inhumane.⁹⁷ “Segregated housing units,” where mentally ill prisoners are often placed because their psychiatric symptoms make them unable to live safely in a general population, are especially harmful.⁹⁸ For example, one federal district court judge observed: “[A]dministrative segregation units are virtual incubators of psychoses-seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities.”⁹⁹

In sum, much of how prisons operate in the United States fails to respect the inherent human dignity of all people, including those people who have committed even very serious crimes. More specifically, from a Catholic perspective, these

Without the necessary care, mentally ill prisoners suffer painful symptoms and their conditions can deteriorate. They are afflicted with delusions and hallucinations, debilitating fears, extreme and uncontrollable mood swings. They huddle silently in their cells, mumble incoherently, or yell incessantly. They refuse to obey orders or lash out without apparent provocation. They beat their heads against cell walls, smear themselves with feces, self-mutilate, and commit suicide.

HUMAN RIGHTS WATCH, *ILL-EQUIPPED*, *supra* note 89, at 1. In 2011, the U.S. Supreme Court approved an unprecedented federal district court order mandating that the State of California reduce its prison population because the overcrowded conditions meant that inmates were deprived of basic physical and mental health care. *Brown v. Plata*, 131 S. Ct. 1910 (2011).

95. HUMAN RIGHTS WATCH, *ILL-EQUIPPED*, *supra* note 89, at 2 (“Mental illness impairs prisoners’ ability to cope with the extraordinary stresses of prison and to follow the rules of a regimented life predicated on obedience and punishment for infractions.”).

96. People with mental illnesses are disproportionately placed in “segregated housing units” (such as solitary confinement), an environment that can be even worse for their mental state. *See id.* at 4, 14.

97. The likelihood that prison conditions will exacerbate an offender’s mental illness has caused some judges to impose a shorter prison sentence. *See, e.g.*, *United States v. Boutot*, 480 F. Supp. 2d 413, 421 (D. Me. 2007) (granting downward departure); *United States v. Roach*, No. 00 CR 411, 2005 WL 2035653, at *6-8 (N.D. Ill. Aug. 22, 2005) (reducing sentence); *United States v. Ribot*, 97 F. Supp. 2d 74, 83-84 (D. Mass. 1999) (granting downward departure).

98. *See BARR*, *supra* note 93, at 15; HUMAN RIGHTS WATCH, *ILL-EQUIPPED*, *supra* note 89, at 4, 14.

99. *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999).

prison conditions are inconsistent with the belief that all people exist at all times in a relationship with God and with their fellow human beings. As Pope John Paul II described, human life is “a sacred reality entrusted to us, to be preserved with a sense of responsibility and brought to perfection in love and in the gift of ourselves to God and to our brothers and sisters.”¹⁰⁰ Viewing offenders, even those who have committed the most monstrous crimes, not as monsters themselves but as human beings created by and existing in a relationship with God reminds us that although we should punish them for their crimes, we should punish them in a manner that does not deny their inherent human dignity.

III. REFORMATION AND REDEMPTION

In opposing the death penalty, Catholic thought has stressed the inherent dignity of every human being. Respect for this dignity should inform not only the limits of punishment, but also the content. As Pope Benedict XVI counseled:

When conditions within jails and prisons are not conducive to the process of regaining a sense of a worth and accepting its related duties, these institutions fail to achieve one of their essential ends. Public authorities must be ever vigilant in this task, eschewing any means of punishment or correction that either undermine or debase the human dignity of prisoners.¹⁰¹

Respect for the dignity of all people means that death is

100. EVANGELIUM VITAE, *supra* note 1, ¶ 2.

101. Pope Benedict XVI, Address to the Twelfth World Congress of the International Commission of Catholic Prison Pastoral Care (Sept. 6, 2007), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2007/september/documents/hf_ben-xvi_spe_20070906_pastorale-carceraria_en.html. Pope John Paul II similarly said:

The Spirit of Christ, the Redeemer of the world, must breathe even where people are chained in prisons according to the logic of a still necessary human justice. Punishment cannot be reduced to mere retribution, much less take the form of social retaliation or a sort of institutional vengeance. Punishment and imprisonment have meaning if, while maintaining the demands of justice and discouraging crime, they serve the rehabilitation of the individual by offering those who have made a mistake an opportunity to reflect and to change their lives in order to be fully reintegrated into society.

Pope John Paul II, Homily at “Regina Coeli” Prison in Rome during the Celebration of the Great Jubilee (July 9, 2000), *available at* http://www.vatican.va/holy_father/john_paul_ii/homilies/2000/documents/hf_jp-ii_ho_m_20000709_jubil-prisoners_en.html.

beyond the limits of acceptable punishments in today's society. But saying that respect for the dignity of all people leaves incarceration within the limits of acceptable punishments is only the beginning of the inquiry about the relationship of human dignity to the practice of criminal punishment. In particular, the overarching question that we should be asking is: What does respect for the dignity of all human beings require of a modern system of punishment?

What would a system of punishment look like if it respected the dignity of criminal offenders?¹⁰² First, such a system would not rely on imprisonment when equally effective, less dehumanizing punishments are available, such as fines, community service, house arrest, and electronic monitoring.¹⁰³ A starting point might reserve imprisonment for offenders who have committed violent crimes or who, for other reasons, pose a danger if not confined.¹⁰⁴ Although a majority of people in state and federal prisons have committed violent offenses, that majority is a slim 53% which means that slightly less than half of all people in prison in 2011 are nonviolent offenders.¹⁰⁵ In 2012, voters in California approved a ballot measure that reserves the punishment of life imprisonment for serious and violent

102. The U.S. Bishops assert that "any system of penal justice must provide those necessities that enable inmates to live in dignity: food, clothing, shelter, personal safety, timely medical care, education, and meaningful work adequate to the conditions of human dignity." RESPONSIBILITY, REHABILITATION, AND RESTORATION, *supra* note 10, at 21.

103. On the effectiveness of alternative punishments, see U.S. SENTENCING COMM'N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2009), available at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Alternatives/20090206_Alternatives.pdf.

104. Reserving prison for the violent offenders has been proposed by many others. See, e.g., Haney, *supra* note 87, at 97 n.23 (quoting statement of James Vorenberg, executive director of the President's Commission on Law Enforcement and Administration of Justice, "that only the very dangerous should be held in prison"). Vorenberg explained that decreased reliance on imprisonment, especially for non-violent offenders, would benefit not only those in prison but society as a whole:

[T]he Commission urged a shift from the use of prisons to community treatment of offenders. Its reasoning can be simply summarized: if we take a person whose criminal conduct shows he cannot manage his life, lock him up with others like himself, increase his frustrations and anger, and take away from him any responsibility for planning his life, he is almost certain to be more dangerous when he gets out than when he went in.

Id. (alteration in original).

105. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 10 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.

offenders.¹⁰⁶ This vote is a ray of hope, suggesting that electorates might no longer be responsive to the “get tough on crime” political rhetoric that gave us “three strikes” laws and mandatory minimum sentences.

A greater reliance on alternative sanctions would have both direct and indirect benefits.¹⁰⁷ First, diminished reliance on imprisonment would mean that some people would avoid the dehumanizing conditions of prison altogether. Additionally, because overcrowding is responsible for some of the dehumanizing aspects of prisons, reducing prison populations could naturally make prisons less dehumanizing places.¹⁰⁸ And finally, the resources saved as a result of fewer prison inmates could be spent on rehabilitating those people who are imprisoned.¹⁰⁹

A more humane system of criminal punishments would also mean that prison sentences would be shorter. Commentators on present U.S. sentencing systems almost uniformly argue that U.S. prison sentences are too long.¹¹⁰ A recent comparison of

106. See “Three Strikes Made Fairer,” N.Y. TIMES, Nov. 10, 2012, available at 2012 WLNR 23958339.

107. Although the focus of this Article is offenders, it should be noted that decreasing the number of people sent to prison would have benefits for “the common good” as well. Perhaps most importantly, prisons have been widely observed to be “crimogenic”—that is, people who are sent to prison are more likely to commit a crime upon release because of their experiences in prison. According to an interview with one prison inmate: “You come here for stealing a car, you leave here knowing how to crack a safe . . . This is a crime factory.” Blecker, *supra* note 83, at 1194. For a recent, in-depth discussion of this issue, see Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049 (2008).

108. Nilsen, *supra* note 78, at 133 (“Prisons today may hold two to three times their designated capacity, and such overcrowding severely affects all other prison conditions. It drains resources and forces prisoners into closer contact than is tolerable or healthy. Greater numbers force institutions to double- and triple-cell inmates, thereby creating a host of health and security problems. It generates neglect of individual needs, which correspondingly leads to a need for greater control of the inmates, including long-term isolation.” (footnote omitted)).

109. See Matthew G. Rowland, *Too Many Going Back, Not Enough Getting Out?: Supervision Violators, Probation Supervision, and Overcrowding in the Federal Bureau of Prisons*, 77 FED. PROBATION, no. 2, Sept. 2013, available at <http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2013-09/too-many.html> (“There are examples where states have strategically shifted correctional resources from prison to community corrections, reducing overall corrections costs and crime.”).

110. See, e.g., Nilsen, *supra* note 78, at 140; Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Address at the American Bar Association Annual Meeting 4 (Aug. 9, 2003), available at <http://meetings.abanet.org/webupload/commupload/>

prison sentences found that sentences in the U.S. are many times longer than sentences imposed in other countries such as Britain and France.¹¹¹ For example, under federal law in the United States, “a judge must sentence a person convicted of possession of a kilogram of heroin to at least 10 years. The same offender in Britain would receive a maximum sentence of 6 months.”¹¹²

With less need to operate from a position of crowd control, prisons could re-embrace rehabilitation. Prisons in this country were once thought of as places for spiritual reformation: “The very names we give to American prisons illustrate their genesis in the rehabilitative ideal. The term ‘penitentiary’ was coined by Pennsylvania Quakers, who conceived of their prison regime of confinement, work and prayer as conducive to penance and thus to the reform of the offender.”¹¹³

If prisons are to be penitentiaries, they must be environments that provide the basic preconditions necessary for reformation. This means that prisons must *not* be certain things—for example, overcrowded and violent. But it also means that prisons must provide certain opportunities, such as opportunities for meaningful activity like work or study. The U.S. Bishops have objected to the death penalty on the grounds that it denies offenders an opportunity for “moral growth in a human life which has been seriously deformed.”¹¹⁴ Imprisonment rather than execution preserves that possibility, but only in theory unless the conditions of imprisonment change in a way that fosters such growth rather than contributes to further deformity. As Saint Augustine explained in recommending imprisonment rather than execution as punishment for those who had killed a Catholic priest:

We do not object to wicked men being deprived of their freedom to do wrong, but we wish it to go just that far, so that, without losing their life or being maimed in any part of

CR209800/newsletterpubs/Justice_Kennedy_ABA_Speech_Final.pdf.

111. CONNIE DE LA VEGA ET AL., CTR. FOR LAW & GLOBAL JUSTICE, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 17 (2012), available at http://www.usfca.edu/law/clgj/criminalsentencing_pr/.

112. *Id.* at 8.

113. Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 685 n.20 (1996).

114. U.S. Bishops, *Statement on Capital Punishment* (Nov. 1980), available at <http://www.ctwincities.org/document.doc?id=90>.

their body, they may be restrained by the law from their mad frenzy, guided into the way of peace and sanity, and assigned to some useful work to replace their criminal activities.¹¹⁵

Overcrowding has been blamed for the “drastically increased levels of idleness that plague prisons around the country” and for prisons’ failures “to address even the most basic educational needs of their prisoners.”¹¹⁶ Many commentators describe current prison conditions as amounting to the “warehousing” of inmates—the keeping of inventory rather than human beings.¹¹⁷ Of course, some critics of educational and other rehabilitative programs complain that such programs are inconsistent with the purpose of punishment, which is to make offenders suffer. For example, one student writer asked: “Why should society ‘reward’ convicted felons for attacking innocent victims by providing the felons with a free education?”¹¹⁸

There is, of course, a practical answer to this question: Rehabilitative programs can benefit society by decreasing recidivism. But this is a contingent answer, dependent upon how programs are administered and how their success is measured. Even if it cannot be demonstrated that rehabilitative programs succeed in decreasing recidivism, prison inmates ought to be provided with educational and vocational training because leaving them idle—warehousing them—is inhumane. As one scholar has explained:

[T]he zoo-like confinement of idle inmates symbolizes that they are undeserving of anything but daily survival, and in many prisons not even that is assured . . . [B]y institutionalizing inmates in a manner that provides for nothing more than their most elementary needs, warehousing authorities are presenting them as “living corpses”—as solely body and appetite and thus unworthy of work or other activities that impart social value and self-

115. JEFFRIE G. MURPHY, *GETTING EVEN: FORGIVENESS AND ITS LIMITS* 110 (2003) (quoting Saint Augustine).

116. Haney, *supra* note 87, at 113.

117. *See, e.g., id.* (“Even in prison systems where per inmate expenditures were high, overcrowding ensured that there was little to do. In essence, they warehoused large numbers of prisoners for long periods of unproductive time, and made little or no effort to address their pre-existing needs.”).

118. Michael K. Greene, Note, “*Show Me the Money!*” *Should Taxpayer Funds Be Used to Educate Prisoners Under the Guise of Reducing Recidivism?*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 173, 173-74 (1998).

esteem—their only useful role being universal objects of condemnation.¹¹⁹

Finally, a system of punishment that respected the dignity of the human person would aim for repentance, redemption, and reintegration. One of the most straightforward bases for opposing the death penalty is that by killing the offender, the state takes away the possibility of repentance. This was Saint Augustine's argument: "[D]o not go so far as to kill the criminal, for in wishing to punish the sin, you are destroying the man. Do not take away his life; leave him the possibility of repentance. Do not kill so that he can correct himself."¹²⁰ A system of punishment that took seriously the task of assisting the prison inmate in "correcting himself"—of living up to the self-proclaimed identity as a "Department of Correction"—would embrace as the ultimate goal the return of the inmate to his family, his community, and society at large. Penance, after all, is about restoring the sinner's relationship not only with God, but also with the community.

Rehabilitation has been out of favor with legislators and the public since at least the 1980s, when opinion started moving towards a "tough on crime" stance. Many still see rehabilitation as an unachievable ideal—criminals cannot be reformed. The Church has a quite different view, based on its belief that no person is beyond God's reach.

The Church's conception of redemption is of course distinctly theological. It should not, however, be dismissed as irrelevant to questions of secular punishment. As scholars of moral philosophy have observed, the imposition of criminal punishment necessarily says that the state regards the offender as a moral agent.¹²¹ People whose actions cause even the greatest of social harms are not punished as criminals if they are not morally responsible;

119. James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1031-33 (1997); see also Major Philip C. Mitchell, *Federal Prison Industries: Ending Their Mandatory Source Status*, 83 MICH. B. J., Sept. 2004, at 20 ("Many contemporary prisons do little more than warehouse their human residents by subjecting them to coerced and regimented idleness.").

120. MEGIVERN, *supra* note 5, at 38 (quoting sermon cited in GUSTAVE COMBES, *LA DOCTRINE POLITIQUE DE SAINT AUGUSTINE* 188-92 (1927)).

121. See, e.g., R.A. DUFF, *TRIALS AND PUNISHMENTS* 234-35 (1986); H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY* 28-53 (1968); Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1609 (1992).

young children and people with mental illnesses who do not understand the nature of their acts, for example, cannot be convicted of a crime.¹²² A precondition of imprisoning people is that the state determines that they are moral agents; therefore, the state ought to recognize an obligation to treat prisoners as such, including regarding them as capable of making moral decisions.¹²³ So long as prisoners possess the capacity to make moral decisions, they possess the capacity to choose to reform themselves. At its best, the state would enact a system of punishment that actively seeks to promote reformation. At the very least, the state should not create a system of punishment that works against reformation or denies the capacity for reformation.

In addition to addressing the problems already discussed—reducing both overcrowding and warehousing and their attendant dehumanizing consequences—a system of punishment that took redemption and re-integration seriously would devote resources to programs such as halfway houses that provide support for offenders as they transition from imprisonment back into their communities. The federal prison system explicitly provides for the use of “community correction centers,” yet only a very small fraction of inmates—estimates range from 4 to 6 percent—have been placed in such facilities.¹²⁴

Finally, changes must be made to what are called “collateral consequences” of criminal convictions—sanctions imposed by the operation of non-criminal laws. These sanctions set up hurdles that can keep the newly released inmate from becoming a full member of society. One recent article presented this chronicle of common collateral consequences of a felony conviction:

- (a) ineligibility for state and federal licenses for certain

122. See, e.g., OKLA. STAT. ANN. tit. 21, § 152 (West 2002) (including among those people who cannot be convicted of a crime children under the age of seven and those people who are mentally ill or mentally retarded and who at the time of committing the criminal act “were incapable of knowing its wrongfulness”).

123. Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 231 (1984) (“[T]he state’s assumption that the people it is entitled to punish are free means it must never regard any one it punishes as hopeless, insofar as it is assuming that each of these persons still has the ability to choose to be moral.”).

124. See LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 7 app. tbl.2 (2011), available at <http://www.bjs.gov/content/pub/pdf/cpus10.pdf>.

professions; (b) ineligibility for certain government jobs; (c) ineligibility to vote in state or federal elections; (d) ineligibility for public office; (e) ineligibility for jury service; (g) ineligibility for public housing and other public welfare benefits; (f) ineligibility for some educational loan or grant benefits; (h) ineligibility for a driver's license; (j) sex offender registration laws that limit where offender can live, in some cases subjecting him to jail because he can't find a place to live.¹²⁵

Rather than working to ensure that those released from prison transition successfully into their new lives, these burdens all but ensure the opposite.

Collateral consequences can impose on former offenders a kind of banishment or exile. Exile is inconsistent with regard for the offender's humanity and is disfavored by Catholic teachings. Punishment, as opposed to banishment,¹²⁶ accepts that the offender is still part of the community.¹²⁷ But when the offender has completed his sentence and is released, yet cannot vote, hold a job, or find a place to live, then he has been effectively exiled. He has been told: You are not part of our community; we do not want you here.

The Catholic social teachings on exile have roots in the Old Testament, which tells the story of the Jews' exile in Egypt. From their own experience as outcasts, the Jews developed a commitment to caring for the outcast,¹²⁸ a commitment that Catholics share. As one scholar has explained: "The Old Testament imperative to care for the stranger, central as it was to the ancient Jewish moral code, likewise became a foundational

125. Nilsen, *supra* note 78, at 137-38 (footnotes omitted).

126. Many former offenders have alleged that residency restrictions for sex offenders are a form of banishment. Courts, however, have found that residency restrictions are not banishment because they only prohibit offenders from living in certain areas, not from being in those areas. *See, e.g., Doe v. Miller*, 405 F.3d 700, 719-20 (8th Cir. 2005); *Bulles v. Hershman*, No. Civ.A. 07-2889, 2009 WL 435337, at *5 (E.D. Pa. Feb. 19, 2009).

127. Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 *IND. L.J.* 719, 752 (1992) ("We punish offenders not because they stand outside of society, not because they are alien enemies, but because they are fundamentally like the rest of us.").

128. *Exodus* 22:21 ("And a stranger shalt thou not wrong, neither shalt thou oppress him; for you were strangers in the land of Egypt.").

element of the Christian-Catholic faith tradition.”¹²⁹ New Testament teachings provide a further foundation for the commitment to care for the outcast, because now “in the face of the stranger, the Christian community encounters the face of Jesus.”¹³⁰

CONCLUSION

The Catholic Church has played an important role in the debate about the death penalty, providing a strong moral foundation for opposing a punishment that denies the inherent human dignity of all people. The death penalty, though, is only one of many ways that our practice of criminal punishment does not respect the dignity of the human person. Excessively long prison sentences, an over-reliance on imprisonment, prison overcrowding, and the violence and idleness of the prison experience all contribute to a prison system that is utterly dehumanizing. Respect for the humanity of every person means that these aspects of our criminal punishment system must be changed.

129. Terry Coonan, *There Are No Strangers Among Us: Catholic Social Teachings and U.S. Immigration Law*, 40 CATH. LAW. 105, 109 (2000).

130. *Id.* at 110-11.