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Miscalibrated: A Search for Better Outcomes in Legal Punishment, Pretrial Systems, and Beyond

Matthew Peters

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Matthew Peters
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Introduction

The seeds of this project were sown in Harrisburg, Pennsylvania in 2017. Having recently graduated high school, I found myself in a studio apartment. I was enrolled at Harrisburg Area Community College and wanted to devote all my time to school so that I could transfer to a nice university. I had signed a lease and had to come up with rent each month. This resulted in an unfortunate reality: given that I was only a high school graduate, it was nearly impossible for me to command an hourly rate high enough to cover my expenses without working at least 30 hours a week. With 30 hours as the minimum workload and a heavy incentive to work as few hours as possible to maximize my academic performance, my life seemed to be defined by a very thin financial margin each month and all the stress associated with it.

This stress became the impetus for this project because it was exacerbated by a seemingly exorbitant parking fine and a speeding ticket I received while trying to make it to a homecare client on time. The city of Harrisburg oversells permits for its street parking, meaning that it can be nearly impossible to find a spot.[1] This is a mere inconvenience for those visiting the city but is an inescapable reality to those who live there. Before long, I started to notice people's expressions as they discovered their tickets. Those who seemed well off just threw them on their passenger seat and did not seem to care. On the other hand, people who seemed to have tighter budgets appeared frustrated at times and devastated at others. At first, I did not understand this devastation. However, I eventually came to realize the tickets got much more expensive if you

[1] William Alden, "Harrisburg's 'Bad Deal': City Forced to Pursue Parking Privatization," HuffPost (BuzzFeed, August 15, 2011), https://www.huffpost.com/entry/harrisburg-parking-privatization_n_877568.

either didn't have the money to pay them or simply chose not to. It seemed strange to me that something designed to ensure adherence to parking regulations affected some poor individuals very harshly and did not seem to hurt those well off enough to affect their behavior at all.

The system in Harrisburg felt miscalibrated in some way, as if the systems designed to deter certain parking and driving practices had been designed without the fallacy of division in mind. Rather than accounting for differences in wealth between persons, the city government seemed to be applying a generalized conception of the average person to disparate citizens. When I first moved to Harrisburg, I did not have the tools necessary to verbalize why Harrisburg's system appeared miscalibrated to me. Thankfully, I encountered relevant thinkers at community college within my first semester. I was first exposed to John Stuart Mill's brand of "utilitarianism." I found Mill's view broad and wondered if we could truly calculate what would make everyone better off.[2] By Contrast, Immanuel Kant's moral absolutism seemed so rigid as to be stifling, but his contention that we should consider our conduct as if we were making decisions about the permissibility of conduct for more than just ourselves intrigued me.[3] I began to think about how utilitarianism could be applied and what payoff it offered beyond being a well-known theory with difficult to execute calculations of the good. At first, I thought that it did not seem to be making the world globally better off for the poor to pay parking fines that absorbed so much of their money that it almost ensured they would remain poor while some of the suits on State Street were fined so little that they did not seem to care. I then had roughly the same thoughts about speeding tickets, a topic more tangibly related to safety. How does it make

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[2] Julia Driver, "The History of Utilitarianism," Stanford Encyclopedia of Philosophy (Stanford University, September 22, 2014), https://plato.stanford.edu/entries/utilitarianism-history/.

[3] Robert Johnson and Adam Cureton, "Kant's Moral Philosophy," Stanford Encyclopedia of Philosophy (Stanford University, January 21, 2022), https://plato.stanford.edu/entries/kant-moral/#DutResForMorLaw.

the state of things better to fine everyone the same amount? A $200 fine could make the poor irrationally paranoid about barely exceeding the speed limit while the rich inclined to speed wouldn't be concerned about a fine that small at all.

2017 me, or 2018 me, was insufficiently equipped to answer such a complex question with a minimal command of utilitarianism and no significant understanding of utilitarianism's main competitor. Having not attended law school, nor a graduate program in philosophy, it is still unclear to me if I am sufficiently equipped, but I am willing to settle for a competent first crack at things. The reason Harrisburg seemed miscalibrated to me was because I have quite utilitarian intuitions—I just did not know it yet. It was not clear to me that the city had thought about which parking and traffic practices were the best for everyone involved or that It had considered how to effectively coerce its citizens without doing unnecessary damage to them. Seeking to solve this puzzle, I turned my attention to the American legal system more broadly. As we will see, what I found is that the miscalibration of systems of deterrence in the American legal system occurs so often as to be characteristic of the system.

The American legal system produces several bad outcomes. Here I will focus on criminal punishment and pretrial systems. I elected to study these topics either because I found real world cases troubling or because contentions in the literature struck me as strange. Insofar as sprawling state and federal criminal statutes can be synthesized, an analysis reveals poorly calibrated levels of punishment that fail to make American society better off. An analysis of American pretrial systems produces much the same result, with individuals prevented from returning home and to their communities due to onerous release conditions. Scholars have written much about punishment and a fair amount about pretrial systems. Nonetheless, much of the preexisting literature is insufficient because it relies on moral assumptions devoid of arguments or takes an

amoral legalistic approach.[4] As will be demonstrated, utilitarian intuitions offer an apt method for evaluating the failing of important aspects of the current American legal system and considering what modifications ought to be made.

My central argument is that the systems of deterrence used in the discussed portions of the American legal system are seriously flawed because they harm the people living under them. I begin developing this argument with an analysis of punishment that is spilt into two chapters. In Chapter 1, I provide a brief description of utilitarianism and retributivist theories. I then apply each theory to general questions in punishment as means of explaining why I chose to rely on utilitarian intuitions for the purpose of this project. In Chapter 2, I begin my analysis of issues in the context of the American legal context. I consider what quantity of punishment, an instrument in deterring future crime, is utility-maximizing in the context of the death penalty and long-term incarceration for non-violent crimes. In Chapter 3, I apply the theoretical framework developed in Chapter 2 to pretrial systems. I describe the typical American "cash bail" system before arguing that a properly calibrated "risk assessment"-based pretrial system represents a superior alternative. Examining pretrial systems is a worthy endeavor for a work in applied ethics, because such systems have a substantial base of empirical research but almost no scholarly philosophical consideration. Yet punishment and such systems are naturally related, not only because the same juridical institutions play a role in both systems, but also because pre-trial policies face similar trade-offs between the well-being of the accused, their alleged victims, and the rest of society.

[4] Fienberg and Heart are at least partially guilty of this error. For evidence of this, see chapter 7 of *Why Punish? How Much?*

Chapter One:
Bentham, Kant, and General Questions in Criminal Punishment

A state's criminal punishment apparatus is one of the most extreme ways it interacts with its citizens. In fact, the state's criminal punishment apparatus is a mechanism that allows it to intentionally target citizens for psychological and physical pain. It may seem that justifying a small fine is not of utmost importance because the fine may not be very impactful, but such fines are part of a larger coercive apparatus imposed by the state. A state's criminal punishment apparatus is so coercive that the state has the power to strap an individual to a table for lethal injection. A system capable of being so coercive and impactful requires justification.

Many philosophers and legal scholars have offered justifications for punishment over the years, but Jeremy Bentham and Immanuel Kant are the two most prominent theorists in the punishment literature.[5] As we will see Bentham was integral to the development of "utilitarianism" and Kant is among the most prominent "retributivist" theorists that have ever lived. I will explicate these two prominent justifications of punishment before investigating which justification produces better outcomes through the application of consequentialist reasoning to both abstract questions comparing theoretical approaches and to real world cases. I will argue that a "utilitarian" approach to punishment produces better outcomes than the application of elements of a retributivist approach. Further, I argue a consequentialist approach should be adopted because it produces better outcomes.

I begin this task by providing relevant background on the most widely adopted instantiation of an American system of criminal punishment. I then describe utilitarian and

[5] Mitchell N Berman, "Punishment and Justification," *Ethics* 118, no. 2 (2008): 261, 275, https://doi.org/10.1086/527424.

retributivist justifications of punishment. I evaluate which approach produces better outcomes by answering four questions. In brief, I ask why consequences are an appropriate measure, which justification reduces crime, which justification provides tangible prescriptions, and which justification avoids over-punishment. I then entertain two commonly held objections to using utilitarian reasoning to evaluate the efficacy of punishment systems. I conclude by explaining that I have found utilitarian arguments more convincing and plan to focus solely on calculations of utility for the remainder of the work.

The Utilitarian and Retributivist Justifications of Punishment

A utilitarian justification of punishment rests on the "Greatest Happiness Principle" and is influenced by assumptions about how aggregate utility should be calculated. Aggregate utility is the sum of all persons' pleasures minus their pains. The Greatest Happiness Principle, as articulated by Bentham, holds that we should produce "the greatest happiness for the greatest number."[6] Most utilitarians do not significantly deviate from the Greatest Happiness Principle; however, some believe there is in effect a two-currency system with higher and lower pleasure values.[7] For simplicity's sake, I will also embrace Bentham's position that all utility is equally weighted. To Bentham, no source of utility inherently counts more than another or is more heavily weighted. Bentham contends it is possible that eating more pleasant fruit could eventually equal the pleasure of sex or reading an engaging work of literature if an individual

[6] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Kitchener, Ont.: Batoche, 2000), 14.

[7] David Brink, "Mill's Moral and Political Philosophy," Stanford Encyclopedia of Philosophy (Stanford University, August 21, 2018), https://plato.stanford.edu/entries/mill-moral-political/#HapHigPle.

had enough time to eat pleasant fruit.[8] Maximizing happiness is also a matter of minimizing pain. The idea is that the outcome with the best net happiness result should be selected. For example, suppose we have access to a measuring device that can reduce outcomes to exact quantitative units of happiness and pain. Suppose outcome x involves 10 units of happiness and 4 units of pain whereas outcome y involves 25 units of happiness and 29 units of pain. Simply selecting the maximum absolute happiness value would not result in utility being maximized because the net result of outcome y (-4) is less than that of outcome x (6). Thus, the use of phrases like pain or negative utility reference factors that detract from happiness. Further, increases or augmentations of aggregate utility reference net increases.

Utilitarians such as Bentham hold that punishment is only justified when the Greatest Happiness Principle is satisfied because aggregate utility is augmented.[9] Utilitarians account for the pain imposed on the criminal during punishment in aggregate utility calculations.[10] The pain imposed on a victim of a crime in a previous moment cannot be undone by imposing pain on a criminal in the present moment. Consequently, it is very difficult to justify punishment in a utilitarian framework without involving potential utility calculations. Utility calculations are properly calibrated when the calculations suggest outcomes that maximize aggregate utility. The pain of a victim in a previous moment cannot be erased, but by punishing a criminal in the present moment, the pain of future victims can be avoided by deterring future crimes. A

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[8] I am indebted to Jacob Rowley for both providing a helpful summary of Mill's views and providing a compelling argument that all pleasure comparisons reduce to matters of quantity.

[9] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, 134.

[10] Anthony J. Draper, "An Introduction to Jeremy Bentham's Theory of Punishment," *Journal of Bentham Studies*, (January 2002): 13, https://doi.org/10.14324/111.2045-757x.018.

utilitarian justification of punishment partially relies on the empirical consideration that prospective future criminals will be less likely to commit crimes because they are aware that criminals are punished for their actions if they are found out.[11] Further, a utilitarian justification is also supported by the empirical consideration that crime might be deterred because criminals are more likely to commit crimes but some of them lack the means of doing so because they have been previously caught and are in prison. Utilitarian systems of punishment are forward-looking in this way. In sum, if utilitarianism is correct, then punishment ought only to occur in the present moment if we can reasonably believe that present punishment will lead to future expected utility.

Kant is best described as a retributivist within the context of punishment.[12] Retributivism is a justification of punishment rooted in the need to resolve an inequality created by a criminal when a victim is wronged.[13] A retributivist justification of punishment involves imposing just desserts on a criminal. Just dessert, in the context of a retributivist account of punishment, refers to a criminal getting what they deserve considering the inequality they have created by committing a crime. As such, a principal task of a retributivist justification of punishment is to explain how an inequality is created and its extent. Kant employs a maxim of punishment, the "principle of equality," to explain what a criminal has willed upon themselves and how the state ought to hold the criminal accountable. The principle of equality follows from the second

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[11] Daniel S. Nagin, "Deterrence in the Twenty-First Century," *Crime and Justice* 42, no. 1 (August 2013): pp. 199-263, https://doi.org/10.1086/670398.

[12] I am indebted to Ingrid Albrecht for this point.

[13] Ernest van den Haag, "The Ultimate Punishment: A Defense," *Harvard Law Review* 99, no. 7 (May 1986): 1663, https://doi.org/10.2307/1341082.

Sharon B Byrd, "Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution," *Law and Philosophy* 8, no. 2 (1989): 184. https://doi.org/10.2307/3504694.

formulation of the "categorical imperative" and is best explained by the duties it entails.[14] The second formulation of the categorical imperative holds that we ought "act upon a maxim that can also hold as universal law".[15] As I will explain in greater depth, Kant uses this to construct the principle of equality, which holds that you will your own mischief back onto yourself by engaging in it. In effect, let's just say that Kant is prohibiting individuals from making an exception of themselves. If an individual engages in action x, then according to Kant, they must hold it as permissible under universal law to engage in action x. Universal law clearly includes the criminal and, as such, the criminal has willed himself vulnerable to action x. A murderer cannot, within a Kantian moral framework, will murder to be universally permissible by engaging in it and then contend that he himself cannot be murdered. This is what Kant means when he states that we murder ourselves when we murder others.[16] Largely intuitive up to this point, Kant makes a further jump by contending that members of the criminals' political communities have a duty to inflict a criminal's just dessert upon them for the crimes they committed. He is so fervent in this belief that he contends the last murderer scheduled for execution needs to be murdered before society can appropriately dissolve without members of the dissolving society being involved in an injustice.[17]

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[14] Robert Johnson and Adam Cureton, "Kant's Moral Philosophy," Stanford Encyclopedia of Philosophy (Stanford University, January 21, 2022), https://plato.stanford.edu/entries/kant-moral/#DutResForMorLaw; Duties, to Kant, are constraints or incentives on our choices created either by external coercion or our own reason.

[15] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals* (Cambridge, United Kingdom: Cambridge University Press, 2017), 6:225.

[16] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:332.

[17] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:332.

Kant sends nebulous signals on what exactly a criminal's just dessert ought to be. His examples, of insulting, stealing, striking, or killing, all involve the criminal's exact action being willed back onto the criminal.[18] However, Kant also contends that a court is responsible for applying the law of retribution and determining an appropriate intensity and quantity of punishment in cases not involving death.[19] The reasons for this are twofold. First, Kant's abstract maxim of punishment and the implementation of it he stipulates for the courts should be thought of as separate but related. Kant's abstract maxim of punishment, the principle of equality, involves the criminal becoming subject to whatever they have universalized through their own action. One of Kant's examples is a thief, who in taking from another, has universalized the insecurity of property.[20] The reason his thief example is unclear is because it is not clear why the insecurity of property is being universalized and what would be universalized in other cases. For example, stealing an inexpensive pencil could signal the universalization of the insecurity of pencils, of writing instruments, of small dollar items, or of all property as Kant claims. Second, Kant does not seem to believe that the state is required to impose whatever is being universalized unless murder has occurred. This creates a quandary in which it is unclear what is being universalized and what equivalent punishment to the universalization would be.[21] I will say more about this later in my discussion of punishment tangibility. Lastly, Kant believes that murder is

[18] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:332.

[19] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:332.

[20] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:332.

[21]Derek Parfit, "Chapter 14 Impartiality," In *On What Matters* (Oxford: Oxford University Press, 2009), 303.

The rarity objection Parfit describes is an example of difficulty specifying a maxim.

the only case in which the very crime must be imposed on the criminal because he believes there is no similarity between death and life, no matter how tedious living becomes,[22]

Forward-looking Utilitarianism versus Backward-looking Retributivism

In this section, I'll argue that a utilitarian approach to punishment produces better outcomes and that we should adopt a forward-looking account for that reason. I intend to provide support for this point by asking a series of questions. First, how does a forward-looking utilitarian account differ from a backward-looking retributivist account? Second, which approach will result in the lowest level of crime? Third, which method provides the most tangible punishment prescriptions? Four, which approach is well calibrated and best avoids over-punishment? After answering these questions, I respond to two objections. That a Utilitarian account offers no protection for innocent persons and that comparing a Retributivist account based on consequences is begging the question.

The main difference between a forward and backward-looking approach is that a forward-looking utilitarian approach bases punishment decisions on what may happen in the future and a backward-looking retributivist approach solely focuses on events that have already taken place. As a brief example, Bentham's account looks forward toward the prevention of future crime and Kant's account looks back at what a criminal did in the past to determine their punishment. It is not inaccurate to treat Kant's initial assessment of a criminal as entirely backward looking, as Kant only allows forward-looking deterrence outcomes to be considered once it has been determined a criminal is guilty of crime committed in the past. A theory being

[22] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals*, 6:332-3; Leon Pearl, "A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley," *Hofstra Law Review* 11, no. 1 (1982): 273. doi:10.2466/pr0.1963.12.1.155.

backward or forward-looking has substantial implications. For example, suppose a murder had already taken place. A backward-looking approach, such as the approach articulated by Kant, would require that that the criminal be killed because of a previous event. Meanwhile, a forward-looking account, such as the one articulated by Bentham, does not require that an individual be punished simply on account of them doing something most people would consider bad in the past. To the forward-looking punishment theorist, murder is water under the bridge unless punishing the murderer can be expected to lead to the deterrence of prospective criminals or some other future benefit. The distinction between forward-looking and backward-looking accounts of punishment has been identified in the literature, but I believe its implications are underexplored given that most people would find letting a murder walk deeply counterintuitive.[23]

In reference to the second question, which approach will result in the lowest level of crime, I'll argue that a forward-looking punishment approach would lead to a lower level of crime because a forward-looking account is more adaptable than a backward looking one. A retributivist account is not very adaptable because it assumes a criminal wills her punishment. Punishing above that level, according to Kant, would represent using the criminal as a mere means.[24] Punishing below that level would violate the principle of equality, which is also impermissible to backwards-looking punishment theorists. Consider the following example designed to demonstrate why this is problematic. Suppose that individuals were randomly slapping one another three times as hard as possible as part of a TikTok trend. According to a backwards-looking account, their punishment must be three slaps mirroring the level of firmness

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[23] Michael H. Tonry and J.L. Mackie, "Chapter 18: Morality and the Retributive Emotions." In *Why Punish? How Much?: A Reader on Punishment* (Oxford: Oxford University Press, 2011), 273.

[24] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:331.

of their own or an equivalent punishment as determined by a court applying the law of retribution. Unfortunately, three slaps are not enough to deter future slapping. The slapper values the views too much and plans to continue. A backwards-looking account does not permit increasing the level of punishment a slapper receives, so the mischief continues. In the event the previous example was too mundane, what if the same logic was applied to a assaulter who himself enjoyed being punished or assaulted? The backwards-looking theorists would find themselves in much the same position, as it would be impermissible on their account to increase the level of punishment to deter further assaults. It seems that a backward-looking approach will always prove insufficiently flexible to deter crime efficiently.[25] Meanwhile, a forward-looking approach is not bound by what the slapper did in a previous moment. A forward-looking theorist's only concern would be that the slaps no longer occur in the future. As such, the forward-looking theorist would increase punishment until the views were no longer worth enduring the punishment. A Utilitarian approach allows punishment to be calibrated to whatever level is needed to prevent crime whereas a retributivist account lacks the requisite flexibility to do so. This case prevents an interesting result, as the same feature of a forward-looking account that could absolve a murderer also can serve as the justification for inflicting enough punishment to stop problematic behavior.

In reference to the third question, which approach provides the most tangible punishment prescriptions, I argue that a utilitarian justification provides functionally more tangible punishment prescriptions than retributivist one. As aforementioned, a literal interpretation of Kant's abstract maxim of punishment appears to offer tangible punishment prescriptions. We

[25] For additional information on Kant's view of deterrence, see the work of both Byrd and Hill. Both identify deterrence as an aspect in Kant's account while acknowledging Kant's account is primarily retributive

should murder the murderer, rape the rapist, and so forth. Granted, in each of these instances, it seems like Kant might be offering impractical suggestions as he seems to acknowledge.[26] Kant contends that returning some crimes to the criminal would represent crimes against humanity. As such, Kant suggests alternatives such as castration for rapists. [27] I agree with Kant that state-sanctioned rape carries any number of practical issues and should simply be dismissed due to its heinous nature. Given that some crimes are impermissible to replicate, it is worth considering alternatives to the literal reading of backward-looking punishment prescriptions. Rather than imposing the crime itself as punishment, suppose some equivalents were to be devised that also fulfilled the principle of equality. Immediately, it becomes difficult to discern what such a punishment would be within Kant's two-step process of abstract universalization and practical implementation in keeping with the law of retribution. Consider public drunkenness. Would a criminal be universalizing the consumption of alcohol to excess in public? Or would the criminal be universalizing simply not being in control of yourself in a public setting, which could just as easily result from serious sleep deprivation, blood loss, or brain injury? Even if a specific maxim could be determined as universalized, how would a court translate the universalized outcome into a tangible punishment prescription? How many years in prison is equivalent to acting in such a way that universally makes the consumption of alcohol to excess at least acceptable behavior?[28]

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[26] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:332.

[27] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:332.

[28] Patricia Kitcher, "Kant's Argument for the Categorical Imperative," *Nous* 38, no. 4 (2004): pp. 555-584, https://doi.org/10.1111/j.0029-4624.2004.00484.x, 560.

There is some debate in the literature on whether a descriptive law or mere permissibility is being universalized. I shall not entertain the matter here but point you towards Kitcher.

In principle, an equivalence approach seems possible, but in practice, the retributivist theorist is faced with more questions than answers.

Having sufficiently entertained a retributivist account on this question, it is worth considering if the forward-looking approach provides any more tangible prescriptions. On the surface, it appears that the forward-looking theorist is left with less to go on than the retributivist because a utilitarian account does not offer any specific recommendation on which crimes should receive which punishments. The quantity and nature of punishment in a forward-looking framework is an entirely empirical matter. An empirical matter, while difficult to parse, is a lesser and more tractable restriction than the principle of equality. The only bar a utilitarian must clear is that they must expect whatever quantity and type of punishment imposed will be correctly calibrated to cause an observable reduction in crime rates without causing unnecessary pain. While seemingly a very amorphous formula for determining punishment prescriptions, a utilitarian calculus provides tangible prescriptions in combination with publicly available data and sufficient time to experiment. For example, a utilitarian state could adjust prison sentences relative to crime and recidivism rates in an effort to generate empirically validated sentencing guidelines.

In reference to the fourth question concerning over punishment, It might be difficult to believe that a forward-looking approach could be less likely to over punish than a backwards looking approach; however, all-things-considered assessments demonstrate that a forward-looking account can reliably minimize punishment. The reason backward-looking accounts are assumed to be better at limiting over-punishment is that the principle of equality explicitly limits the amount of punishment that can be dealt to the criminal. According to Kant, doing more to the criminal than they did unto their victim constitutes using the criminal as a mere means for the

greater societal goal of crime deterrence.[29] Furthermore, doing less unto criminals than they did unto their victims violates what Kant would describe as our duty to impose the criminal's just dessert upon them. Conversely, a utilitarian approach can reduce punishment wherever doing so does not reduce aggregate utility. In fact, utilitarians have an obligation to reduce punishment as much as possible because punishment itself is a pain that must be justified by a net increase in aggregate utility.[30] As such, if murderers don't have to be murdered to deter murder, a utilitarian can reduce the punishment murderers receive up until the point where less punishment would result in fewer murders.

Objection: No Protection for Innocents

The protection of innocent persons poses greater difficulty for a utilitarian account. Within a retributivist framework, it would be impermissible to kill an innocent person in an attempt to deter crime because killing the innocent person for the purpose of deterrence would use them as a mere means. In a utilitarian account, killing an innocent person for crime deterrence would be acceptable so long as it increased aggregate utility. Consider the following thought experiment in which 15 murders can be deterred by passing off one innocent person as a murderer to a crowd of onlookers and then blowing up the innocent person in a public square. To provide additional clarification, a crowd of individuals contains prospective murders who will in the future be responsible for 15 murders. As a result of seeing an innocent person they believe to be a murderer blow up, the prospective murderers elect not to murder because they do not wish

[29] Immanuel Kant, Lara Denis, and Mary J. Gregor, *The Metaphysics of Morals,* 6:331.

[30] Zachary Hoskins and Antony Duff, "Legal Punishment," Stanford Encyclopedia of Philosophy (Stanford University, December 10, 2021), https://plato.stanford.edu/entries/legal-punishment/#PurConPun.

to be subject to similarly harsh treatment. If it is stipulated that the public will never find out that an innocent person was killed and that other sources of negative utility will not materialize, a utilitarian must advocate for the death of an innocent person. The death of one innocent person is a substantially smaller drain on aggregate utility than the deaths of 15 individuals who would be murdered.

Many readers will be uncomfortable with a utilitarian account's inability to say definitively that innocent persons will not be murdered but may find all-things-considered utilitarian calculus more palatable. While a utilitarian account cannot provide protections for innocent persons within the bounds of thought experiments, such an account can provide real-world reasons it would be imprudent to kill innocent people. For example, consider the implications of the public finding out that innocent persons are being killed in an attempt to deter crime. Public paranoia, angst, and fear represent clear instances of negative utility. Given the scale of the public, the negative utility of the public being paranoid about being selected for deterrence demise would be substantial. In the real world, where the risk of the truth coming out always exists, a utilitarian can cite this vast potential for negative utility as such a substantial risk to aggregate utility that innocents should not be killed. Once more, the use of potential utility is vital to offering a compelling utilitarian account of punishment.

Objection: Reasons Beyond Consequences to Dismiss Retributivism

This paper is primarily concerned with identifying and adopting the justification of punishment that is more likely than not to improve the state of the world and avoid excessive unnecessary pains. Given the most tangible way to improve the state of the world is to produce better outcomes, outcomes have been the primary concern of my analysis. Nonetheless, those

with intuitions less utilitarian than mine may wonder why consequences are the appropriate method of comparison. Since my primary aim here is to evaluate American legal practices, rather than to resolve the dispute between consequentialists such as Bentham and deontological theorists such as Kant, per se, I won't dwell on this point. However, I will briefly review some reasons for proceeding on the basis of utility rather than Kantian reasoning. First, a retributivist account of punishment does not offer an effective way to differentiate between moral and legal wrongs.[31] Both lying to my friend Ian and clubbing my friend John involve an inequality being created, but it is widely believed that lying should not be criminalized and that clubbing should for prudential reasons. Without an adequate means of differentiating between these two concepts, it is unclear that a retributivist can give an account of legal punishment. Second, it is not clear that a retributivist account can successfully evade the commensurability problem.[32] It is clear than rape is more serious than not paying a speeding ticket, but even if we can understand the difference in relative seriousness, it is still unapparent how much we should punish the speeder. Knowing the difference in seriousness between rape and speeding does not supply an answer to how much lesser of a punishment than castration the speeder should receive.[33] Third, it is not clear that a group of citizens would allow a retributivist implementation instead of alternatives. A retributivist punishment system increases state control over citizens without providing any corresponding increase in the specific interests of any one citizen. As such, it can be said that a retributivist punishment system is unappealing to individuals with liberal sensibilities.[34]

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[31] Russ Shafer-Landau, "The Failure of Retributivism," *Philosophical Studies* 82, no. 3 (1996): 289, https://doi.org/10.1007/bf00355311.

[32] Russ Shafer-Landau, "The Failure of Retributivism," 303.

[33] Russ Shafer-Landau, "The Failure of Retributivism," 303.

[34] Russ Shafer-Landau, "The Failure of Retributivism," 298.

Conclusion

In this chapter I have described the two most prominent accounts of punishment and have examined how each account answers general questions in punishment. While a retributivist account does have limited attractive qualities in the form of proportionality constraints and protection for innocent persons, I have demonstrated in each case that concerns about the frequency and circumstances that a utilitarian account would be subject to these objections are overblown. I have argued in largely consequentialist terms that a utilitarian approach minimizes crime, provides more tangible punishment perceptions, and avoids excessive punishment more effectively than a retributivist approach. For those unsatisfied with a consequentialist analysis, I have provided several other non-consequentialist arguments to reject retributivism. My aim has not been to settle the debate between Utilitarian and Retributivist accounts permanently, but merely to provide a convincing case for my continued use of utilitarian intuitions throughout the remainder of this paper.

Chapter Two:
Criminal Punishment in an American Context

Having worked through general questions in punishment to examine the differences between Utilitarian and Retributivist accounts, I now turn to an application of utilitarian considerations to two specific punishment questions in an American context. I begin by providing a general account of a typical American system of punishment. I then work through the death penalty and habitual offender laws as a means of demonstrating how a utility maximizing punishment system would function.

Punishment: The Typical American Way

Punishment can be simply defined as harsh treatment, often for the purpose of bringing about a particular aim.[35] While there are variations across jurisdiction and level of government, it is reasonable to contend that there is a typical criminal punishment procedure in an American context. The purpose of this section is to explicate a typical American punishment procedure sufficiently well to serve as a basis for considering the procedure's theoretical implications. To this end, I will use New York's system and the Model Penal Code as examples. Conveniently, many jurisdictions have embraced the Model Penal Code and the practice of other jurisdictions to such an extent that any particular jurisdiction is more likely than not to serve as a tangible example of typical American criminal procedure.

[35] This definition is left intentionally vague because different theoretical justifications of punishment impose harsh treatment for different reasons. See Tonry's work for additional theories of punishment.

New York's system serves as a good example of a typical American system, as New York is one of the foremost adopters of the Model Penal Code.[36] The Model Penal Code and New York's system serve as the most useful examples of a typical American system of criminal punishment because considering all state statues would be impractical and unproductive in a work this size. This stems from each state's system of criminal punishment being rooted in the common law tradition, which is to say that each states criminal system began as non-systematized collection of ad-hoc judicial opinions.[37] In the 1960's that began to change, as the introduction of the Model Penal Code provided states a systemized code to use as inspiration for criminal system reform.[38] The resulting state by state landscape is such that each state's code resembles a greater or lesser percentage of the Model Penal Code. Additionally, no comprehensive federal penal code exists to serve as a convenient subject of study.

Generally, a criminal case involves determining whether a crime has occurred and whether the defendant is in fact culpable. Determining whether a crime has occurred is a matter of checking whether the verifiable conduct of a defendant matches a crime defined in the penal code. In America, state or municipal penal codes generally define crimes as "felonies," "misdemeanors," and "violations."[39] The distinction between categories is arbitrary as the nature

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[36] Paul H. Robinson and Markus D. Dubber, "The American Model Penal Code: A Brief Overview," *New Criminal Law Review* 10, no. 3 (July 27, 2007): 322, https://doi.org/10.1525/nclr.2007.10.3.319.

[37] Paul H. Robinson and Markus D. Dubber, "The American Model Penal Code: A Brief Overview," 322.

[38] The Model Penal Code was created by the American Legal Institute, an organization comprised of lawyers and judges who hoped to codify criminal law to make the legal system more efficient. For more information, see the work of Robinson and Dubber.

[39] Michael H. Martella, *Law 101: Fundamentals of the Law* (Minneapolis, MN: Open Textbook Library, 2018), 139.

of the crime committed is not considered. What differentiates the categories is merely the prison sentence typically ascribed for each crime.[40] After the state determines that a crime has been committed, it seeks to determine whether the defendant is culpable for what occurred. Culpability is simply if a defendant was responsible for a crime and serves as a primary indicator of whether a defendant should be held accountable for their actions. The state uses four main indicators of culpability. First, whether a defendant acted purposely. Second, if a defendant knowingly committed the crime. Third, the defendant could have reasonably supposed that their behavior was reckless and could result in a negative outcome. Four, the defendant was negligent because they neglected a reasonable standard of care given their situation.[41]

After a jury or judge has verified that a crime has been committed and that a defendant is culpable, sentencing can commence. Judges then allocate punishment for the criminal offense committed during the sentencing process. In the typical American system, Punishment mostly involves death, confinement in a correctional facility, some other lesser form of confinement, the imposition of financial penalty.[42] The death penalty is still in use by 27 U.S. states and the federal government.[43] Methods of execution vary state by state. The important takeaway is that the death penalty involves state sanctioned killing and that states often give the governor or an

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[40] Michael H. Martella, *Law 101: Fundamentals of the Law*, 139.

[41] "Culpability." Legal Information Institute. Legal Information Institute. Accessed May 1, 2022. https://www.law.cornell.edu/wex/culpability.

Model Penal Code, § 2.02. (2022).

[42] Michael H. Martella, *Law 101: Fundamentals of the Law*, 150.

[43] States and Capital Punishment. National Conference of State Legislatures, August 11, 2021. https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx#:~:text=Capital%20punishment%20is%20currently%20authorized,government%20and%20the%20U.S.%20military.

advisory board the power to commute the sentences of those on death row.[44] The most severe form of confinement imposed is incarceration in a correctional facility for a specified period, though many offenders can serve less time than their sentences for good behavior or because they have otherwise become eligible for parole.[45] Lesser forms of confinement are a broad category covering everything from house arrest to probation. This category offers a spectrum of punishment intensity while still allowing the convicted some amount of integration with their community. For example, an individual constrained to a city by electronic monitoring can still participate in society and an individual constrained to their home and workplace can at least maintain their livelihood. Financial penalties are either fines or restitution. The main distinction is that a fine is imposed without the intention of assisting the victim whereas restitution is paid by the criminal to the victim for the purpose of offsetting some of the harm done to them.[46]

For brevity's sake, I have passed over some more granular rules and punishment types discussed in the literature.[47] Such rules may have substantial effects on the outcomes of punishment systems. However, such rules vary so much among states that they resist generalization. For this reason, I will only address such rules when they affect particular cases, rather than including them in my thumbnail sketch of typical American punishment systems. Also, many of the categories of punishments listed in the literature are merely combinations of the categories I have outlined or are punishments called different things in different jurisdictions. For example, a conditional release sentence including a shorter stint in prison if a defendant

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[44] States and Capital Punishment. National Conference of State Legislatures, August 11, 2021.

[45] Model Penal Code, § 305.6. (2022).

[46] Michael H. Martella, *Law 101: Fundamentals of the Law*, 150-151.

[47] Michael H. Martella, *Law 101: Fundamentals of the Law*, 47-98

submits to electronic monitoring and pays a small fine is just an example of adjusting levels of confinement and a financial penalties.[48]

The possibility of blending punishment categories in this manner is still worth noting, however, because it makes a wide spectrum of punishment intensity available to the states. Punishment intensity has important implications for each of the two therapeutical justifications I describe in detail in the section below. As we will see, a traditional utilitarian account requires flexibility in intensity to reduce punishment where possible while a retributivist account requires flexibility to accurately mirror a criminal's violation.

Specific Issue 1: The Death Penalty

Having spent a considerable amount of time arguing against retributivist conceptions of punishment in the general questions in chapter one, I now hope to provide a more affirmative case for forward looking conceptions of punishment in my analysis of specific issues within the American legal system. I will begin by considering the death penalty. The death penalty is an appropriate first case because it is among the clearest examples of an aggregate-utility damaging practice within America's legal system and because it is broadly adopted.[49] Of note is the fact that the death penalty is not inherently bad within a utilitarian system. It is conceivable that the deterrence effect of the death penalty could be so strong that its use drastically reduced future crime. The death of some criminals could save a sufficient number of lives to lead to an increase in overall utility. However, the idealized world in which the death penalty is consistently utility maximizing is not the world we live in because of the fact that most

[48] Michael H. Martella, *Law 101: Fundamentals of the Law*, 150.

[49] States and Capital Punishment. National Conference of State Legislatures, August 11, 2021.

defendants can be prevented from committing crimes with less extreme forms of punishment, the immense court costs associated with the death penalty, the difficulty of finding a cost effective method of execution, and the complexity of figuring out what an acceptable error rate is for the death penalty suggest that the death penalty maximizes liberty less effectively than alternatives would. As aforementioned, a utilitarian is not required to murder the murderer and should in fact attempt to minimize punishment in cases were doing so would augment aggregate utility.

Consider this example of two serial killers with different target types designed to demonstrate which circumstances the death penalty would not or would not be recommended on utilitarian grounds. Suppose there were to be a convicted serial killer who only killed elderly women. Were that defendant incarcerated in a correctional facility with enough security to make largely certain that he would not escape into the public where his target type exists, he would offer no threat to aggregate utility because he would not kill non-target types like male fellow prisoners and guards. Contrary to some countervailing public sentiment, a utilitarian like Bentham does not believe that a serial killer should be executed simply because his crimes were heinous or represent the worst of humanity. Utilitarians such as Henry Sidgwick advocate taking a position of radical impartiality and merely selects the least painful punishment that successfully prevents the convict from committing future crimes and deters prospective criminals.[50] Furthermore, within a Utilitarian ethical framework, the decision to pursue the death penalty must be made with the cost to aggregate utility that the death penalty entails in mind. As such, in cases such as the serial killer of elderly women, the death penalty should not be selected because

[50] Bart Schultz, *Henry Sidgwick, Eye of the Universe: An Intellectual Biography* (Cambridge: Cambridge University Press, 2012).

there is no gain in utility to be had from protecting guards, fellow inmates, and the public that would be sufficient to outweigh the disutility of pursuing the death penalty. Conversely, we can imagine a serial killer who killed anyone regardless of their characteristics who was also an escape artist who could not be effectively incarcerated. In such a case, killing this inmate might promote maximum utility, because the benefits of keeping his potential victims alive would exceed the utility lost employing the death penalty.

As was suggested earlier, the death penalty's disutility comprises costs to taxpayers, the possibility of error, and the death of the criminals themselves. I will first provide a general argument outlining the disutility of the death penalty before supporting my contentions with empirical evidence. Suppose that a typical death penalty case, from indictment to execution, costs the government five times the amount that it cost to imprison an individual for life. We can expect decent countries to spend exorbitant amounts on the death penalty to ensure it is not carried out in ways that produce unnecessary pains. This increased cost to the government is a potential source of disutility because of other ways the money could have been spent that would have produced more utility. The list of possible examples here is innumerable, but safer highways, better funded schools, and increased funding for cancer research are all suitable stand ins.

Consequently, the increased cost of the death penalty needs to be justified by some net increase in utility that occurs because of selecting the death penalty. In the case of the serial killer of elderly women who can be adequately contained with life in prison, there is no utilitarian reason to select the death penalty because the death of that inmate will never exceed the lost utility resulting from the government spending massive sums to execute a mostly harmless prisoner. Conversely, in the case of the escape artist who will kill anyone they can, it

makes sense for the government to employ the death penalty because doing so augments aggregate utility by preventing disutility in the form of additional murder. The important thing to keep in mind is that the resources spent on the death penalty will always represent a source of disutility. What determines whether the death penalty should be used is whether the resources spent on the death penalty prevent more disutility than they cost.

Most humans fear death and other irrevocable punishments; therefore, it should be of little surprise that death penalty cases are both typically more expensive to pursue and are subject to frequent appeals. According to a 2016 Susquehanna University report, one of the major drivers of the difference in cost between pursuing the death penalty is the Supreme Court's death is different doctrine.[51] The court effectively increases the due process requirements for prosecutors who seek the death penalty, which in turn increases the legal fees required to meet those heightened requirements. While the difference in cost in legal fees alone is not quite as extreme as I imagined in my hypothetical example involving serial killers, the difference in cost can reach up to 2.5 million dollars compared to seeking life in the same case.[52] A Duke University study supports these results, noting that the cost of pursing the death penalty adds an average of 2.16 million compared to seeking life.[53] Notice also that the increased costs I describe are primarily increased legal fees in specific cases and do not account for other costs, such as defending the death penalty from constitutional challenges, maintaining death chambers, or

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[51] Torin McFarland, "The Death Penalty vs. Life Incarceration: A Financial Analysis," *Susquehanna University Political Review* 7 (2016): 57, https://scholarlycommons.susqu.edu/supr/vol7/iss1/4.

[52] Torin McFarland, "The Death Penalty vs. Life Incarceration," 72-3.

[53] Philip J Cook and Donna B Slawson, "The Costs of Processing Murder Cases in North Carolina," 1993, https://www.ojp.gov/ncjrs/virtual-library/abstracts/costs-processing-murder-cases-north-carolina, 78.

procuring drugs for lethal injection. An all things considered calculation completed in the state of California concluded that the death penalty added $184 million to the budget at the local, state, and federal level compared to if death penalty cases were simply given life.[54] As such, while it certainly true that the death penalty can be utility maximizing in some cases, it appears to be deployed far more than it can be justified on the basis of augmenting aggregate utility.

Specific Issue 2: Habitual Offender Laws and Appropriately Calibrating Punishment

Most every state in the United States has some form of habitual offender law on the books.[55] Some of these laws, such as the most recent revisions of three strikes laws in California and Washington, are limited by statutory lists such that only three particularly egregious violent crimes listed in the law can result in an automatic sentence of life without parole.[56] Others, such as those deployed in New York and Louisiana, result in a significantly more severe punishment

[54] Carol J Williams , "Death Penalty Costs California $184 Million a Year," Los Angeles Times (Los Angeles Times, June 20, 2011), https://www.latimes.com/archives/la-xpm-2011-jun-20-la-me-adv-death-penalty-costs-20110620-story.html.

[55] Paul W. Tappan, "Habitual Offender Laws in the United States," Federal Probation 13, no. (March 1949): 28.

John Philips Jenkins, "Habitual Offender," Encyclopedia Britannica (Encyclopedia Britannica, inc., 2002), https://www.britannica.com/topic/habitual-offender.

[56] David Lacourse, "Three Strikes, You're Out: A Review," (Washington Policy Center, January 1, 1997), https://www.washingtonpolicy.org/publications/detail/three-strikes-youre-out-a-review.

Nina Shapiro, "Legislature Moves to Resentence up to 114," The Seattle Times (The Seattle Times Company, April 8, 2021), https://www.seattletimes.com/seattle-news/politics/up-to-114-people-serving-life-without-parole-to-get-resentenced-as-washington-legislature-eases-three-strikes-law/.

minimum after a certain number of felonies has been committed. These sentencing enhancements occur nearly irrespective of the nature of the crimes committed.[57]

One of the major criticisms levied against habitual offender laws like those deployed in New York or Louisiana is that a non-violent crime can trigger an extended prison sentence.[58] While I understand the sentiment behind not imposing long sentences for nonviolent crime, I argue that the only factor that should affect sentencing for particular crimes or as a result of repeated offenses is the prevention of future crime for the purpose of augmenting aggregate utility.

Consider this example designed to demonstrate that some nonviolent crimes are sufficiently damaging to aggregate utility to merit a substantial deterrence effort. It is certainly true that some nonviolent crimes will either have a minimal negative or plausibly positive impact on aggregate utility. It is conceivable that a homeless man living outdoors in Chicago over the winter might reap greater pleasure from a stolen winter coat than the retailer would have benefited from receiving payment for the coat. Nonetheless, it is not at all clear that all nonviolent crimes have such a minimal effect on aggregate utility. Vast financial scandals that raid the lifesaving of many people are technically nonviolent, but such scandals generate much

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[57] Jennifer Corbett, "Three Strike Law in Different States: 3 Strikes Law Facts," LegalMatch Law Library (LegalMatch, March 1, 2021), https://www.legalmatch.com/law-library/article/three-strikes-laws-in-different-states.html.

[58] Ed Pilkington, "Over 3,000 US Prisoners Serving Life Without Parole for Non-Violent Crimes," The Guardian (Guardian News and Media, November 13, 2013), https://www.theguardian.com/world/2013/nov/13/us-prisoners-sentences-life-non-violent-crimes.

Dan MacGuill, "Did a Man Receive a Life Sentence for Stealing a $159 Jacket?," Snopes.com (Snopes Media Group, July 2019), https://www.snopes.com/fact-check/life-sentence-stealing-159-jacket/.

more damage to aggregate utility than a violent crime like killing one man who does not substantially participate in society[59] As such, how strongly a government should attempt to prevent a crime should be dependent on how much an occurrence of such a crime negatively affects aggregate utility.

Now suppose we assume that crime prevention is not achieved based on the severity and effectiveness of the government's punishment apparatus overall. Instead, crime prevention is based on how likely a government is to catch a prospective criminal and how prospective criminals perceive punishments that have been allocated for the crime a prospective criminal is considering committing.[60] In this case, the distribution of state punishment resources should be skewed heavily toward preventing crimes that decrease aggregate utility, rather than focusing on preventing all crime equally. An efficient allocation of state resources involves ensuring that more resources are spent on ensuring prospective criminals considering the most utility damaging offenses are also the prospective criminals who most believe that they are going to be caught and subject to a punishment they perceive as unpleasant.

Returning to habitual offender laws with sufficient argumentative resources, it is not the case that habitual offender laws are incompatible with a largely utilitarian approach to punishment. My argument is simply that a fair proportion of habitual offender laws that are triggered by committing a certain number of felonies are inappropriately calibrated. Habitual offender laws focused on violent crime, such as those deployed by California and Washington, are less likely to be improperly targeted than habitual offender laws more simplistically targeted to the occurrences of felony convictions. Violent crimes are more likely to be damaging to

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[59] For more on why this style of utility calculation works, see arguments in Chapter 3.

[60] For more empirical research on how deterrence works see Nagin's work.

aggregate utility than nonviolent crimes because violent crimes tend to produce significant amounts of pain and nonviolent crimes are typically less damaging. However, the system as it currently stands over-relies on the assumption that violent crimes are of greater societal concern which I have demonstrated is not true in all cases. The way to combine these two prescriptions is simple, with the list style habitational offender laws that limit qualified offenses to violent crime broadened to include nonviolent offenses that have a substantial negative effect on aggregate utility.

Conclusion

In each of these cases we can observe a common theme. A punishment instrument, as a component of a system of deterrence of future crime, is either being used too much relative to a utility maximizing level of implementation or is being targeted in a non-utility maximizing way. In the case of the death penalty, the punishment is being employed against persons who would otherwise be sufficiently incapacitated by life in prison at a utility eroding cost to the public. In the case of habitual offender laws, it is certainly the case that some criminals will continually commit crimes that should land them in prison to shield the public from their utility-eroding behavior. Nonetheless, it should not be taken for granted that only habitual offenders of violent crimes should be placed in a correctional facility because of repeat offenses. Instead, the focus of punishment targeting generally and more severe punishments for habitual offenders should be based on best preventing the types of crimes that most damage utility. To calibrate a punishment apparatus differently than I have suggested would fail to maximize utility by avoiding as many negative outcomes as possible. Additionally, miscalibration of a state's punishment apparatus is

an inefficient use of state resources that itself erodes utility for the reasons described in the death penalty section.

Chapter Three:
Pretrial Systems

On Saturday, May 15, 2010, the Bronx slipped from Kalief Browder's view as he crossed over the water to Rikers Island.[61] Browder and friend had both found themselves in an NYPD squad car earlier that morning, but only Browder made the lonely ride to Rikers. Unlike his friend, Browder was on probation for taking a delivery truck on a joyride.[62] He was not offered the opportunity to be free as his case made its way through the courts. He was sent away on $3,000 bail, money he did not have, and his friends and family would not put forward for him either. A joyride, $3,000, and someone pointing at Kaleif from the back of a squad car entrapped Browder at Riker's for three years of his life. Browder and company were first accused of robbing the man in the back of the squad car that night. After Browder refuted the claim and allowed the officer to search him, Browder's accuser provided police with a new story in which Browder had robbed him two weeks ago. Because of shifting allegations from someone who had spotted Browder in a dark alleyway, Browder was no longer walking home and was about to be subject to abuse by New York City's "ready rule." The rule holds that cases must be ready for trial within six months of arraignment, but the passage of six months is insufficient to force a case to trial. Instead, six months that are counted by the rule must pass for it to take effect. Technicalities in the ready rule left seventy-four percent of felony cases in the Bronx older than

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[61] Jennifer Gonnerman, Jeffrey Toobin, and Atul Gawande, "Before the Law," The New Yorker (Condé Nast, September 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law.

[62] Jennifer Gonnerman, Jeffrey Toobin, and Atul Gawande, "Before the Law."

six months.[63] In Browder's case, three years at Riker's was not enough to cause six months in official time. Instead, he was finally released because the man who had accused him from the back of a squad car had left the country and was no longer cooperating with the prosecution.[64] Kalif Browder walked free from Riker's with many more emotional and physical scars than he entered with.

American pre-trial procedure is a mundane matter that can cause extraordinarily damage to the lives of those entangled in its web, as it did to Kalief. I will argue that the most common American pretrial release mechanism, cash bail, is undesirable because it fails to maximize aggregate utility. I will contend that Risk Assessment Tools (RATs) and Decision-making Frameworks (DMFs) offer an adequate replacement to cash bail, insofar as they maximize aggregate utility more effectively than either cash bail or alternative pretrial release reforms. Here again, we find ourselves asking a series of questions about current American procedure and prospective improvements. In this chapter I will seek to answer: What are the primary aims of a pretrial system? How does a common instantiation of an American pretrial system work? Do common American pretrial systems effectively account for the aims of a pretrial system? Have any US jurisdictions reformed their pretrial systems in ways that more effectively maximize aggerate utility? What would an ideal pre-trial system look like? Could an ideal utilitarian system be implemented realistically, or would practical limitations force a lesser system to be adopted? Many of my answers to these questions will come in the form of intuitionist arguments; however, I will provide detailed empirical evidence where possible. Intuition does not exist in a vacuum, nor do most people have well-formed intuitions about which policy

[63] Jennifer Gonnerman, Jeffrey Toobin, and Atul Gawande, "Before the Law."

[64] Jennifer Gonnerman, Jeffrey Toobin, and Atul Gawande, "Before the Law."

produces outcomes that maximize aggregate utility. Elizabeth Barnes makes a similar point, arguing that "[Intuitions] are formed in--and informed by--the culture in which we find ourselves."[65] As a result, a detailed empirical study can complement an intuitionist argument by supporting its underlying assumptions. In the case of this enterprise, an empirical study will support my intuition that Risk Assessment Tools and Decision-Making Frameworks are the most aggregate utility maximizing system of pretrial release that policymakers can currently deploy.

Section One: Pretrial system aims and aim fulfillment

Aims of a Pretrial System and the American Pretrial System

Rather than merely relying on the apparent aims of a common American pretrial system, I identify each aim and provide reasons each aim is sought to support my assessment. The aims of a pretrial system are to avoid crime by alleged criminals, ensure those accused show up for court dates, and to avoid the unintentional punishment of innocent people.[66] Avoiding crime by alleged criminals is a primary aim of a pretrial system because it is likely that criminals are more likely than the broader population to commit crimes. It is unclear what proportion of the accused are guilty, but it is a reasonable assumption that there are more criminals among the accused than in the broader population. As such, detaining the alleged pretrial can augment utility by reducing overall crime. Ensuring people show up for their court dates is a primary aim of a pretrial system because those accused have an incentive to flee and their attendance at court dates is integral to the function of the justice system. Some of those accused have an incentive to

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[65] Elizabeth Barnes, *The Minority Body a Theory of Disability* (Oxford: Oxford University Press, 2018), 72.

[66] "Pretrial," (National Institute of Corrections, March 9, 2022), https://nicic.gov/projects/pretrial#:~:text=Pretrial%20Services%20programs%20provide%20crucial,public%20safety%20and%20court%20appearance.

flee because they know they are guilty and expect to be imprisoned. Additionally, some alleged criminals might be falsely accused and have an incentive to flee because they do not trust the justice system to free them. Whatever the exact origin of the incentive, a pretrial system needs to serve as a counterbalance to the inclination to flee such that each case can take the appropriate course through the justice system. Court cases cannot reliably traverse the justice system without the presence of their defendants. Defendants might need to be questioned. Evidence may need to be collected, such as images of injuries or DNA. Lastly, and most obviously, defendants need to be present to serve their sentence in the event they are convicted. Avoiding the punishment of innocent people is a primary aim of a pretrial system because some alleged criminals did not commit a crime. Generally, the punishment of innocent people harms aggregate utility because individuals will become paranoid that they too will accidentally be mistaken for a criminal. As a result, they will be more careful than societally optimal and will be less involved in society than is optimal. For example, they might elect to participate in the labor market less to be out and about less, hampering the economy and the many affected by it.

Briefly responding to a seemingly plausible objection, a noticeable perceived issue in the three aims articulated is that avoiding crime by alleged criminals and ensuring people show up for trial directly conflicts with avoiding the punishment of innocent. It is not the case that one of the aims of a pretrial system is flawed in some fundamental way and ought to be thrown out in favor of the other. Rather, the aims must be balanced against each other. Just as the punishing of too many innocents can create an aggregate utility damaging level of societal risk, so too can too many risky alleged criminals be free to commit more crimes in the lead up to their trial. The societally optimal level of risk involves balancing the competing risks against each other such that net aggregate utility is decreased as little as possible. For example, in some cases, all that

would be required to prevent flight prior to trial would be to commandeer a defendant's passport. In such cases, it would be a wholly unnecessary decrease in utility to imprison a plausibly innocent person. In other cases, taking a passport might be insufficient. Consider someone like El Chapo who is especially tricky, is facing severe punishment, and has a substantial financial resource. It is easy to conceive of El Chapo fabricating new documents, especially since he has done more involved evasions like having himself tunneled out of jail. In El Chapo's case, imprisoning a plausibly innocent person would augment utility because his flight risk is so high, and the implications of his flight are so severe based on his reputation. For those unaware, El Chapo is a ruthless drug lord who led members of the Sinaloa cartel to commit several horrific crimes.[67] Having articulated the aims of a pretrial system and clarified a perceived issue before it took root, the US system's handling of these aims can be described.

The most common American pretrial system has long relied upon forms of cash bail to ensure defendants were present for their court dates; however, it has not always functioned as it does today. As Van Brunt and Bowman outline, "in the seventeenth and eighteenth centuries, sureties were paid only upon default, so that wealth did not in fact directly into release decisions."[68] Bail no longer involves someone with a personal relationship to the defendant (a surety) being willing to pay *if* the defendant was to default on their obligations to the court.

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[67] "Joaquin 'El Chapo' Guzman, Sinaloa Cartel Leader, Sentenced to Life in Prison Plus 30 Years," The United States Department of Justice (U.S. Government , July 17, 2019), https://www.justice.gov/opa/pr/joaquin-el-chapo-guzman-sinaloa-cartel-leader-sentenced-life-prison-plus-30-years.

[68] Alexa Van Brunt and Locke E. Bowman, "Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next," *Journal of Criminal Law and Criminology* 108, no. 4 (2018): 711, https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/3/.

Modern bail is paid by the defendant before their release from prison.[69] Additionally, the bail protections in the eighth amendment do not protect against bail that is more than the defendant can pay. Instead, the protections apply to bail that is excessive relative to the crime the defendant was charged with.[70] This creates a scenario in which people can languish in jail because they neither have cash nor sufficient credit to secure a bond. This wealth-based system of pretrial release, outside of those released on their recognizance, does help ensure defendants show up for their court dates because most everybody released has a security deposit to lose.[71] However, requiring security deposits also ensures that some poor people, even those who are not at substantial risk to flee or commit a crime, will remain in jail because merely they are poor.

The United States has avoided crime by alleged criminals by using preventive detention and by increasing the bail of risky defendants to decrease the chance they would be released. Both preventative detention and inflated bail are designed to keep defendants in jail that judges believe will commit further crimes in the leadup to their trial. The main difference between the two is the mechanism and the level of certainty the judge has that the defendant will remain in prison. Preventative detention involves no chance of release whatsoever, regardless of size of security deposit the defendant or their lawyer purposes to the government. Defendants held on inflated bail can still be released if they secure the funding, but this is normally not possible because a judge has intentionally set a bail amount, they do not believe the defendant can pay.

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[69] Alexa Van Brunt and Locke E. Bowman, "Toward a Just Model of Pretrial Release," 714.

[70] "Excessive Bail," Legal Information Institute (Cornell Law School), accessed May 1, 2022, https://www.law.cornell.edu/wex/excessive_bail.

[71] John Logan Koepke and David G. Robinson, "Danger Ahead: Risk Assessment and the Future of Bail Reform," *Washington Law Review* 93 (2018): pp. 1744, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041622.

The United States' use of pretrial detention was challenged in the U.S. v. Salerno, but the court held that regulatory detention was acceptable so long as no other conditions would assure public safety.[72] Were there to be release conditions that precluded the use of preventative detention, Judges still have the flexibility to set extremely high bail so long the amount does not "place excessive restrictions on a defendant in relation to the perceived evil."[73] Thus, the structure of the US system is such that preventative detention becomes more acceptable as the perceived evil increases and as their capability to evade the law increases.

Cash bail is employed by the US system, in concert with other methods like releases on personal recognizance, to offer an opportunity to the accused to avoid punishment in the lead-up to their trials.[74] While scholars debate that some detention may be regulatory and some detention for punishment, I will regard all detention as a form of punishment.[75] As a matter of lived experience, those detained are still imprisoned and their imprisonment communicates to them that they are regarded as bad enough to be detained by the government.[76] I take this position because I am hesitant to assign greater importance to semantic or legalistic concerns than human experience. In a cash bail system, in which a defendant has not been offered a release on their recognizance, the default option is conditional release contingent upon bail being paid. In other

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[72] "Excessive Bail," Legal Information Institute (Cornell Law School)

[73] "Excessive Bail," Legal Information Institute (Cornell Law School)

[74] John Logan Koepke and David G. Robinson, "Danger Ahead: Risk Assessment and the Future of Bail Reform," 1731-1749.

[75] John Logan Koepke and David G. Robinson, "Danger Ahead: Risk Assessment and the Future of Bail Reform," 1782-1791.

[76] Michael H. Tonry, and Joel Feinberg, "Chapter 7: The Expressive Function of Punishment." In *Why Punish? How Much?: A Reader on Punishment*, (Oxford: Oxford University Press, 2011), 113.

words, the default for those offered conditional releases is to endure the punishment of detention until trial. Freedom is the alternative, rather than the default itself, which is strange when one considers that the accused contains both innocent and guilty parties. Thus, a plausibly innocent person could be forced to pay for their freedom before even being offered an opportunity to prove their innocence. As such, it appears all cash bail systems that do not account for the accused ability to pay are inherently socioeconomically discriminatory.

What practices fulfill the aims of a pretrial system?

Cash bail is an unfair mechanism that does not offer the same opportunity to people who present identical flight risks and risks to the community. The socioeconomically discriminatory nature of bail is one of the major reasons the common American pretrial model is believed to be unfair. To illustrate this, consider two individuals accused of illegally shoplifting beer from a Kwik Trip. Suppose both accused are equally likely to flee or commit crimes in the leadup to their trial, but one individual has a lower-middle-class job and $650 in savings while the other is unemployed without saving. Let's assume bail is set at $375, an amount the employed person can pay but the unemployed person cannot. Despite being equal in the relevant aspects, the current U.S. system would inflict punishment on the poor while letting the person of modest means go. The Kwik Trip-beer example involves a low-level crime that would likely be assigned a low bail amount; however, it is useful insofar as it demonstrates that socioeconomic discrimination does not require large gaps in wealth.

Unfortunately, larger gaps in wealth create even more counterintuitive results than the Kwik Trip Beer Shoplifting example just explicated. Maintaining an equal likelihood of flight and risk to the community, consider two individuals that are accused of robbing a bank and injuring multiple people in the process. Suppose one individual works as a janitor at the bank

and the other works as an associate at a large law firm. For the purposes of this hypothetical example, let's set the income of the janitor at $45,000 a year with $8,000 in savings and the income of the law firm associate at $275,000 per year with $675,000 in combined cash saving and investments. Given that bail amounts are set relative to perceived evil in the common American pretrial system, we can assume a robbery that injured multiple people would likely carry a large bail amount. Suppose the judge elects to set bail at $500,000. The janitor would be punished in the leadup to their trial because they didn't have near enough money to pay such a large bail amount. Meanwhile, the Lawyer could free himself simply by liquidating investments and utilizing savings. That wealth, not a low likelihood of flight or low risk of community, could secure release seems very counterintuitive when utility is ultimately maximized by ensuring the accused level of societal risk governs their release decisions.

Unfortunately, simply taking aim at explicit wealth discrimination does not ensure that indigent defendants will not be discriminated against, because the same population of indigents can simply be inappropriately imprisoned pretrial under a different pretext.[77] Judges, both in the context of cash bail and reform efforts, often ultimately decide what happens to the accused. Judges are incentivized to avoid harm to the public. Avoiding harm to the public is not a non-instrumental good. Rather, judicial attempts to prevent harm should track a utility maximizing level of societal risk. Consider the implications of judges operating with a more than utility maximizing level of risk aversion. Suppose a judge was legally prevented from imposing a bail amount that the accused could not afford. However, whether because of a desire not to have a tragedy on their conscience or because of a desire not to have a tragedy affect their ability to not be reelected, a judge might elect to imprison someone pretrial who is an otherwise acceptable

[77] Alexa Van Brunt and Locke E. Bowman, "Toward a Just Model of Pretrial Release," 771.

candidate for release. Rather than imprisoning them because they cannot pay bail, a judge could use another mechanism like pre-trial preventative detention to prevent the accused release. In this instance, wealth discrimination has merely been replaced with another pretext for detention. Each unnecessary instance of pretrial detention erodes norms ensuring the accused return to their community if they do not present an undue societal risk. As outlined below, the accused returning home is not merely a good insofar as the imagery of a father returning home is emotionally appealing.

Consider that the effectiveness of rules and norms ultimately affects whether individuals lose their jobs, homes, cars, and various other possessions. Being away could have other effects as well, such as creating resentment in your relationships because you are unable to attend to responsibilities or your absence being used as ammunition to argue you are an unreliable parent in family court. Also consider the earlier implication that community ties are self-reinforcing, as community ties incentivize you to be a well-adjusted individual that is worthy of association with the community. A lack of adherence to rules and norms designed to prevent socioeconomic discrimination results in different people being subjected to the very real consequences of pretrial incarceration based on wealth and not based on risk.

Assuming individuals are not engaging in improper utility-sabotaging behavior, most people augment aggregate utility in various ways. Beyond the sense of purpose and income, a job might provide, it also augments aggregate utility because economic activity helps the community. Consider this, why do Culver's employees have money to support themselves and cater to wants when they can? They have money because people went through the drive-through and gave money to the owner, who in turn paid their wages. And why do those people have money? Well, we can suppose they have any number of different jobs, but say one got paid for

doing some landscaping after school. The point is that individuals who work and contribute to the continual network of exchanges that compose the economy augment aggregate utility by helping along a very important implementation of our society. To avoid an unnecessary tirade, I will only provide one more example. Consider the nature of large purchases, such as homes and cars. Beyond the benefit of transportation and shelter, these purchases also augment utility by contributing to the function of the banking system. Banks want to attract depositors so they can lend their money away. To do this, banks offer depositors interest payments as a reward for leaving their money under the bank's control. To fund payments to depositors, fund the operations of the bank, and generate profits, banks charge interest to people who borrow. This complex interplay augments aggregate utility by providing savers a place to productively leave unneeded funds and borrowers a source of funds for larger purchases or investments. That these large purchases are often transportation, shelter, or capital to fund business ventures to create even more economic activity, gives us even more reason to believe they increase aggregate utility.

Elaborating further, it is nonsensical to treat individuals of equal flight and societal risk differently on utilitarian grounds. Pretrial incarceration is only justifiable based on sufficient societal risk to counteract the utility of a given party being free to live their daily lives. To put it more plainly, most individuals create utility while living their lives in the ways described above and more. For simplicity's sake, I will refer to that as their positive contribution to utility. To imprison someone, their societal risk, or both actual and potential negative contributions to utility, must exceed their positive contributions. In the context of bail, the accused's negative contributions are often merely potential because it is not yet known whether they will commit additional crimes or not show up to court. When pretrial incarceration is decided on the basis of

risk, it only occurs when it is needed to prevent reductions in aggregate utility. When pretrial detention is decided based on wealth, the maximization of utility is no longer in the driver's seat. A rich man who is too much of a risk to flee and/or commit crimes might go free solely because of the accidental fact that he can afford the million-dollar bail amounts attached to more severe crimes. Meanwhile, a poor person who poses little societal risk might remain in prison because they are unable to pay a meager $250 bail amount attached to a lesser crime. To be explicit, in the first case utility is lost because the man is too much of a risk to be let out but is nonetheless freed because of the accidental fact that he has money. In the second case, utility is lost because the individual would generate more utility living their daily life, but they are being immorally inhibited from doing so because of the accidental fact that they lack sufficient funds to post bail. To the utilitarian, socioeconomic discrimination preventing the maximization of utility is inappropriate.

Section Two: A Utility-Maximizing Pretrial Mechanism

Introduction to Risk Assessment Tool and Decision-Making Frameworks[78]

Risk Assessment Tools and Decision-Making Frameworks are two intriguing pretrial system reforms being used in some U.S. jurisdictions.[79] In this section, I will explain what Risk Assessment Tools and Decision-Making Frameworks are, describe how they have performed in jurisdictions using them, consider if Risk Assessment Tools could be a crucial component of a

[78] I Spend much of this section correcting the inaccurate portrayal of Risk Assessment Tools and Decision-Making Frameworks created by Koepke and Robinson.

[79] John Logan Koepke and David G. Robinson, "Danger Ahead: Risk Assessment and the Future of Bail Reform," 1747.

ideal utilitarian pretrial system, and then determine how closely we can replicate the ideal of a perfectly calibrated system.

Risk Assessment Tools and Decision-Making Frameworks only produce tangible guidance together. Independent of each other, a Risk Assessment Tool only produces a meaningless number and Decision-Making Framework offers no guidance because it is an input-output based mechanism without an input. Together, the Risk Assessment Tool uses well-established methods of quantitative analysis to turn relevant data into a risk-assessment score and a decision-making framework assign meaning to that risk-assessment score by making a tangible recommendation to judges.[80]

Risk Assessment Tools are conceptually sound, but given they are data processing tools, are quickly compromised by flaws in their dataset. There are four main risks: 1) yesterday bias of predictions, 2) the effect of pretrial services, 3) reducing money bail could reduce risk, 4) "zombie predictions may dampen the positive effects of other reforms."[81] The first three of these concerns can be synthesized simply. Koepke and Robinson worry that using data from the previous system to make predictions in an evolving system will result in ineffective Risk Assessment Tools. Zombie Predictions, while seemingly self-explanatory, merits further explanation. Risk Assessment Tools and decision-making frameworks are not stand-alone reforms. They also involve a systemic shift from cash bail as the condition of release to the acceptance of various pre-trial monitoring levels as the condition of release. These measures vary wildly in their onerousness. Some accused might merely need to provide a phone number

[80] John Logan Koepke and David G. Robinson, "Danger Ahead: Risk Assessment and the Future of Bail Reform," 1774, 1781.

[81] John Logan Koepke and David G. Robinson, "Danger Ahead: Risk Assessment and the Future of Bail Reform," 1755-75.

for non-intrusive intervention by a pretrial services company. Such interventions are not all that different from the appointment reminders many of us get from our doctor's office. On the other end of the spectrum, some of the accused might have to submit to stringent electronic monitoring. It may be that they cannot leave a specific part of town and some others are confined to their homes alone. The point being, the dataset possessed from the cash bail era may not be relevant to what level of restriction ought to be employed in the era of significantly expanded pretrial flexibility. As a result, zombie predictions would occur that were more restrictive than necessary in the new system because they were based on data from the old system. Formulating an effective response to these flaws is a crucial task in my attempt to use Risk Assessment Tools as a component of an ideal utilitarian system because inaccurate and overly restrictive recommendations will lead to judges making decisions that are not utility maximizing.[82]

Decision-making frameworks have two main flaws that need to be addressed before they can be fruitfully included in an ideal utilitarian system. First, Koepke and Robinson note that it is "it is vitally important to understand that the specific contents of these grids are not supplied by statistical evidence."[83] Instead, only the risk assessment score or scores that form each axis of the graph is empirically supported. A lack of empirical support poses a problem from a utilitarian perspective because the content of these frameworks cannot be considered probability-driven statistical calculations designed to make society better off. If the contents of these frameworks are not empirically supported recommendations designed augment of aggregate utility, then it is

[82] See arguments in section one for information on why unnecessary restriction is not utility maximizing.

[83] John Logan Koepke and David G. Robinson, "Danger Ahead: Risk Assessment and the Future of Bail Reform," 1778.

not clear what moral backing the contents of these decision-making frameworks have.[84] Second, decision-making frameworks can be portrayed as prescriptive advice designed to reduce judges' workloads. The appeal of this approach is obvious, as working through the moral aspects each and every time would be significantly more taxing than simply referencing a chart. Additionally, there is an argument to be made those various forms of discrimination are less likely to permeate when decisions are made ahead of time irrespective of the race, wealth, et cetra of the defendant in front of you. However, providing judges of an ostensibly well thought out decision chart is problematic when the contents of decision-making frameworks lack moral justification. It is problematic because these frameworks affect impactful decisions that influence aggregate utility while also decreasing the extent that judges think about outcomes.[85] As such, decision-making frameworks currently contain prescriptive advice given levels of risk that are disconnected from any calculation of what a societally optimal level of risk would be. Reconnecting recommendations to augmenting aggregate utility will be an important task when assembling an ideal utilitarian system.

An Ideal Utilitarian System

Regardless of their possible disadvantages, such as being decried as a catch and release pretrial system, the effectiveness of Risk Assessment Tools and Decision-Making Frameworks signal that they could serve as the cornerstones of an ideal utilitarian system. Risk Assessment Tools and Decision-Making Frameworks have the potential to perfectly calibrate the level of restriction the system imposes to the level of risk the accused poses. Ultimately, pre-trial systems

[84] Note these frameworks are not backed by some other moral justification either and utility is simply being used because it is the chosen evaluation mechanism of this analysis.

[85] See earlier section on utility generation resulting from community participation.

are about deciding exactly how much risk society should tolerate when confronted with someone accused of a crime. Current Risk Assessment Tools suffer from imperfect data sets but suppose a Risk Assessment algorithm could be provided with fresh data from the jurisdiction in question. Many worries hinge on old data being utilized and the effects of using data from a system in flux. While I am hesitant to be dismissive of their concerns, it appears constantly updating data would solve many of the problems they posit. Additionally, once a given reform is agreed upon and put in place, the system will eventually stabilize. Once the system itself is stable, zombie predictions would no longer occur because the data inaccuracies that generate them would no longer exist. Removed from zombie predictions, the utility-generation of parallel reforms like pretrial services would not be hindered. Pretrial services generate utility because they minimize the amount of restriction required to fulfill the aims of a pretrial system on a per defendant level. A similar story could be told about decision-making frameworks. The primary criticism lodged against decision-making frameworks is that they do not possess either political or moral legitimacy. However, if one were to construct a decision-making framework that suggested the aggregate-utility optimal level of pre-trial monitoring, the contents of that framework would have legitimacy conferred upon them by utilitarian moral reasoning. Given that a utilitarian framework is an inherently empirical one, statistics could be used to determine which tangible recommendations provided to judges minimized restriction while fulfilling pretrial aims. Further, faulty recommendations could be detected and revised because they could be empirically demonstrated to be unnecessarily restrictive. Devoid of their respective downsides, these risk-assessment tools and decision-making frameworks have the potential to both generate very accurate assessments of risk and to advise aggregate utility-maximizing release conditions. A

utilitarian who contends undue societal risk is the only moral reason to prescribe burdensome release conditions, a system with such capabilities would be invaluable.

A Realistic Utilitarian System

Given that current technology cannot embody the perfectly accurate risk assessment tool I described in an ideal utilitarian system, it is worth describing the best Risk Assessment Tool that could be made with present technology. Despite some of the controversy around artificial intelligence (AI), it may offer the capability to validate an algorithm in real-time with a constantly updating data set. Implementing such an approach would also entail constant data collection and would create an amorphous algorithm that might make oversight more difficult than static datasets and formulas. The dangers of zombie predictions are greater than the risk of an amorphous algorithm and government officials need not fully understand complex advances in technology to decide whether they should be implemented. For example, it is likely that very few members of the legislature understand the exact details of stealth aircraft technology. Nonetheless, they understand its benefit to our nation's arsenal and support it insofar as they can despite other priorities. In the same way, government officials can oversee a complicated algorithm by comparing its performance to other alternatives. A Utilitarian approach offers an appealing method of performance-based oversight. So long as the outputs of the algorithm outperform alternatives, data collection does not occur in a way that decreases aggregate utility, and it can be funded at a cost that does not woefully exceed its societal benefit, then such a Risk Assessment Tools algorithm would augment aggregate utility. It seems a fair assumption that a constantly updating algorithm would avoid zombie predictions far more effectively than static algorithms. As such, a well-developed AI algorithm would almost certainly outperform alternatives so long as it wasn't riddled with other bugs. Empirical considerations about an AI-

based risk assessment algorithm are difficult without an advanced understanding of computer science, but it would appear that an AI-based algorithm could use the same records employed by lesser methods like regression analysis. Arrest records, conviction records, and court appearance rates can all be collected unobtrusively and are already collected for practical purposes. While aggregating the records from the various computer systems they inhabit could be a chore, it is certainly within the bounds of present computer science. Calculating the exact cost of the system is an even more complex affair that I am not equipped to do well. I will merely posit that even if the up-front cost of the system was relatively high, it is not unreasonable to assume that it would not be exorbitant when divided over the number of years it would benefit society. The argument that such a program would absorb too much money needed for more pressing projects seems unlikely. Advanced Risk Assessment Tools are possible and would augment aggregate utility more than the presently used alternatives.

Given the lack of availability of a million John Stuart Mills with millions of minutes on their hands, it is worth contemplating how decision-making frameworks from the ideal utilitarian system could be translated into translated into reality. Democratically formulating a decision-making framework at a town hall would certainly appeal to some theorists, but it is unclear that the populace could be relied upon to constantly produce a framework that maximized utility. In support of such an argument, consider the whims of voters over the years. It is unlikely that what maximizes utility sways back and forth like a pendulum, and yet voters sway back and forth between tough-on-crime and reformist inclinations. Given the limitations of a direct-democratic approach, might a legislature produce any better results? The results of Alaska's reforms suggest otherwise. Despite statistics showing the SB 91 pretrial system was functioning effectively,

Alaska has substantially rolled back the reform.[86] With representative democracy a seemingly futile option, what about an algorithm that generated decision-making frameworks that corresponded to various predictive characteristics of persons? For example, a person with children and a good job might be more likely to be recommended for a lesser level of pretrial monitoring because their presence in the community produces more utility than a childless unemployed person. I'll admit I'm simultaneously intrigued and concerned by this solution. I'm intrigued insofar as a workable version of this algorithm would closely resemble the earlier articulated ideal. I'm concerned insofar as utility is hard to measure. Risk Assessment Tools work because they can take readily available data and convert it into failure to appear and new criminal activity variables that the algorithm either provides separately or as a combined risk score. In the parental presence example I mentioned, an obscure study on the importance of parental presence would have to translate into a form the algorithm could process, and it is not clear an algorithm could determine whether that benefit to the children justified the risk of allowing a lesser level of monitoring. It appears both a fully individualized algorithm and a characteristic based algorithm are both beyond the capability of current technology. Given the lack of an obvious computational solution and the unlikelihood of democracy producing the appropriate result, a team of ethicists and various experts should construct decision-making frameworks customized to particular accused parties to the extent that is practical. For example, it might be practical to create different frameworks for people who do and do not have kids, but impractical to create an additional framework per kid. A similar story could be told about age

[86] "Alaska Criminal Justice Commission 2019 Annual Report" (Alaska State Government, 2019), http://www.ajc.state.ak.us/acjc/docs/ar/2019.pdf.

and any other number of factors. It ought to be remembered that the point of customized decision-making frameworks is to augment utility by tailoring pretrial monitoring levels appropriately to the outputs of Risk Assessment Tools to maximize aggregate utility. Attempting to create a new framework for every variable and every accessed person would be nearly impossible and immensely expensive given current technology. Rather than sapping larger and larger portions of the government's budget in service of a presently unattainable goal, practical and cost-effective frameworks should be employed to reduce utility damaging restrictions on community members as much as possible while continuing to fulfill the utility maximizing aims of a pretrial system.

Conclusion

No jurisdiction is employing a Risk Assessment Tool as advanced as I've suggested, nor Decision-making frameworks with solid statistical and moral justification. Nonetheless, implementations of lesser reforms suggest that my empirical assumptions about what would augment aggregate utility are on the right track. Alaska, Maryland, and New Jersey have all implemented Risk Assessment Tool based reforms and have observed a decrease in pretrial incarceration without experiencing a corresponding rise in pretrial crime or failure to appear at court rates.[87] In these instances, aggregate utility is being augmented because restrictions are

[87] "Alaska Criminal Justice Commission 2019 Annual Report," (Alaska State Government, 2019), http://www.ajc.state.ak.us/acjc/docs/ar/2019.pdf;
Gleen A. Grant, "Criminal Justice Reform: 2018 Report to the Governor and the Legislature," (New Jersey Judiciary, 2018), https://www.njcourts.gov/sites/default/files/2018cjrannual.pdf;
Mira Singhal, "An Analysis of Pre-Trial Services and Risk Assessment Instruments Used in Montgomery County," (Montgomery County Council, 2020),

being reduced in a way that allows utility maximizing participation without the utility damaging tradeoffs of failing to fulfill the aims of a pretrial system. Using these results as a jumping off point, it is not unrealistic to contend that more accurate reforms like those I've suggested would produce even better results. A more accurate pretrial system may reduce incarceration further while holding pretrial crime and failure to appear rates steady. It is also conceivable that pretrial crime and failure to appear rates improve as pretrial incarceration rates decrease. Such an outcome would be ideal, as it would represent all three utility damaging factors being reduced with no additional tradeoffs.

Now that we have gained a substantive understanding of pre-trial systems and have conceived of a realistic utilitarian system, let's return to Kalief Browder. Jennifer Gonnerman notes that "Browder had already had a few run-ins with the police, including an incident eight months earlier, when an officer reported seeing him take a delivery truck for a joyride and crash into a parked car."[88] From this it can be surmised that Browder likely would not have been considered completely risk free by a Risk Assessment Tool. However, in a world without cash bail, Browder still may have avoided a lengthy prison term while awaiting trial. Risk Assessment Tools have largely been accompanied with other reforms, like a shift in focus from varying the amount of cash bail amounts to tailoring pretrial monitoring levels to the risk the accused poses to society. As such, once Kalief's risk score had been calculated, it wouldn't have been translated into a total he likely couldn't pay based on some sort of risk-based bail schedule. Instead, it would have been translated into non-financial release conditions that did not prey upon him

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https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/Summer_Fellows/2020/MiraSinghal_PreTrialRiskAssessmentInstruments.pdf;

[88] Jennifer Gonnerman, Jeffrey Toobin, and Atul Gawande, "Before the Law."

simply because of his economic status. Maybe that would have changed the outcome of a fateful day when "his relatives recounted stories he'd told them about being starved and beaten by guards on Rikers."[89] Earlier that day Rikers Island drove Kalief to suicide, even though he had been released months ago. That this tragedy occurred is made all the more painful by the fact that it didn't have to happen. Kalief would have lived had he been released with no greater requirement than to provide a phone number so he could be reminded of court dates. Kalief would have lived if he were allowed to return to his daily life within the community with an electronic monitoring anklet. Kalief would have lived had he been subjected to house arrest. Instead, Kalief was subjected to a higher level of pretrial monitoring than his risk likely merited solely because of his socioeconomic status. It killed him.

[89] Jennifer Gonnerman, "Kalief Browder, 1993–2015," The New Yorker (Condé Nast, June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

Conclusion:

Although my aim in this essay has been to criticize aspects of America's criminal justice system that I happened to find infuriating, there is obviously a substantial relationship between the two subjects explored here. A criminal punishment system deters future crime. A pretrial system seeks to deter future crime, too, partly by deterring individuals from skipping court dates. In both cases, I have argued that there is a societally optimal amount of deterrence that maximizes aggregate utility. To exceed the societally optimal amount of deterrence reduces aggregate utility by causing unnecessary pain or restriction not offset by reductions in crime or failure to appear. To impose a level of deterrence below the societally optimal level reduces aggregate utility by allowing damaging crime and juridical errors to occur.

Before we ponder the broader implications of the considerations I've outlined here, let's return to Harrisburg far better equipped than I was in community college. It now seems clear to me that subjecting individuals with disparate incomes to the same fine is not utility maximizing. I will not pretend to conduct an objective analysis as has occurred in the preceding chapters, especially because I am relying purely on my own experience. Nonetheless, I know that the city subjecting a poor individual to steep fines relative to income did nothing to keep me from having to violate the city's parking regulations and everything to prevent me from ever dreaming about affording a private parking spot or paying tickets at their cheapest. I know that I was so paranoid after getting a speeding ticket that I occasionally felt like I was paying too much attention to my speedometer and not enough attention to the road. When I look back on Harrisburg, I see government action improperly calibrated to maximize utility and I am more confident that my views of Harrisburg are not just based on emotion after completing this project.

Thinking more broadly, the considerations I outline here have implications for many public policies and institutions besides those most directly relating to the well-being of criminals, suspects, and potential victims. Those implications concern everything from food prices to the distribution of damages in civil liability cases. Consider this: presently, Congress does not deter, but rather incentives, the consumption of very calorie-dense, unhealthy foods by subsidizing commodity corn.[90] These food subsidies contribute to obesity, which contributes to increased healthcare costs by both private individuals and the federal government.[91] As I argued in the death penalty section, an inefficient use of government funds represents a deduction to aggregate utility because the more utility maximizing use for the funds was not pursued. It seems miscalibration goes beyond the systems designed to deter certain parking practices, deter crimes, and prevent individuals from failing to show up in court.[92] There are innumerable ways that the government could seek to deter utility damaging behavior, but as the corn subsides case I've just described demonstrates, it is not even clear that the government acts in an aggregate utility neutral manner in these instances.

It is conceivable that it would not always be utility maximizing for the government to be the arbiter of utility. Nonetheless, the government can and already does take a central role in making decisions that affect aggregate utility as I have demonstrated in my discussion of punishment, pretrial systems, and my brief parking and farm examples here. Given that

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[90] Michael Pollan, *The Omnivore's Dilemma: a Natural History of Four Meals* (Penguin Books, 2006), 117.

[91] Kathryn Doyle, "Foods From Subsidized Commodities Tied to Obesity," Reuters (Thomson Reuters, July 5, 2016), https://www.reuters.com/article/us-health-diet-farm-subsidies/foods-from-subsidized-commodities-tied-to-obesity-idUSKCN0ZL2ER.

government interference already seems to be the norm, it seems rational to wonder why government interference is not more directly focused on augmenting utility. The following is too big a question to answer here, but it is worth pondering why anything other than a small government that maintains the function of the state is justified when increases in the size of government do not result in the maximization of aggregate utility. I cannot prove it here, but I have come away from this project believing that the government ought to influence outcomes for the better or limit its influence to avoid damaging aggregate utility unnecessarily.

Bibliography

"Alaska Criminal Justice Commission 2019 Annual Report." Alaska State Government, 2019. http://www.ajc.state.ak.us/acjc/docs/ar/2019.pdf.

Alden, William. "Harrisburg's 'Bad Deal': City Forced to Pursue Parking Privatization." HuffPost. BuzzFeed, August 15, 2011. https://www.huffpost.com/entry/harrisburg-parking-privatization_n_877568.

Barnes, Elizabeth. *The Minority Body a Theory of Disability*. Oxford: Oxford University Press, 2018.

Bentham, Jeremy. *An Introduction to the Principles of Morals and Legislation*. Kitchener, Ont.: Batoche, 2000.

Berman, Mitchell N. "Punishment and Justification." *Ethics* 118, no. 2 (2008): 258–90. https://doi.org/10.1086/527424.

Brink, David. "Mill's Moral and Political Philosophy." Stanford Encyclopedia of Philosophy. Stanford University, August 21, 2018. https://plato.stanford.edu/entries/mill-moral-political/#HapHigPle.

Byrd, B. Sharon. "Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution." *Law and Philosophy* 8, no. 2 (1989): 151. https://doi.org/10.2307/3504694.

Cook, Philip J, and Donna B Slawson. "The Costs of Processing Murder Cases in North Carolina." *Terry Sanford Institute of Public Policy*, 1993. https://www.ojp.gov/ncjrs/virtual-library/abstracts/costs-processing-murder-cases-north-carolina.

Corbett, Jennifer. "Three Strike Law in Different States: 3 Strikes Law Facts." LegalMatch Law Library. LegalMatch, March 1, 2021. https://www.legalmatch.com/law-library/article/three-strikes-laws-in-different-states.html.

"Culpability." Legal Information Institute. Legal Information Institute. Accessed May 1, 2022. https://www.law.cornell.edu/wex/culpability.

Doyle, Kathryn. "Foods From Subsidized Commodities Tied to Obesity." Reuters. Thomson Reuters, July 5, 2016. https://www.reuters.com/article/us-health-diet-farm-subsidies/foods-from-subsidized-commodities-tied-to-obesity-idUSKCN0ZL2ER.

Draper, Anthony J. "An Introduction to Jeremy Bentham's Theory of Punishment." *Journal of Bentham Studies*, 2002. https://doi.org/10.14324/111.2045-757x.018.

Driver, Julia. "The History of Utilitarianism." Stanford Encyclopedia of Philosophy. Stanford University, September 22, 2014. https://plato.stanford.edu/entries/utilitarianism-history/.

"Excessive Bail." Legal Information Institute. Cornell Law School. Accessed May 1, 2022. https://www.law.cornell.edu/wex/excessive_bail.

Gonnerman, Jennifer, Jeffrey Toobin, and Atul Gawande. "Before the Law." The New Yorker. Condé Nast, September 29, 2014. https://www.newyorker.com/magazine/2014/10/06/before-the-law.

Gonnerman, Jennifer. "Kalief Browder, 1993–2015." The New Yorker. Condé Nast, June 7, 2015. https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

Grant, Gleen A. "Criminal Justice Reform: 2018 Report to the Governor and the Legislature." New Jersey Judiciary, 2018. https://www.njcourts.gov/sites/default/files/2018cjrannual.pdf.

Hill, Thomas E. "Kant on Punishment: A Coherent Mix of Deterrence and Retribution?" *Respect, Pluralism, and Justice*, 2000, 173–99. https://doi.org/10.1093/0198238347.003.0008.

Hoskins, Zachary, and Antony Duff. "Legal Punishment." Stanford Encyclopedia of Philosophy. Stanford University, December 10, 2021. https://plato.stanford.edu/entries/legal-punishment/#PurConPun.

Jenkins, John Philips. "Habitual Offender." Encyclopedia Britannica. Encyclopedia Britannica, inc., 2002. https://www.britannica.com/topic/habitual-offender.

"Joaquin 'El Chapo' Guzman, Sinaloa Cartel Leader, Sentenced to Life in Prison Plus 30 Years." The United States Department of Justice. U.S. Government, July 17, 2019. https://www.justice.gov/opa/pr/joaquin-el-chapo-guzman-sinaloa-cartel-leader-sentenced-life-prison-plus-30-years.

Johnson, Robert, and Adam Cureton. "Kant's Moral Philosophy." Stanford Encyclopedia of Philosophy. Stanford University, January 21, 2022. https://plato.stanford.edu/entries/kant-moral/#DutResForMorLaw.

Kant, Immanuel, Lara Denis, and Mary J. Gregor. *The Metaphysics of Morals*. Cambridge, United Kingdom: Cambridge University Press, 2017.

Kitcher, Patricia. "Kant's Argument for the Categorical Imperative." *Nous* 38, no. 4 (2004): 555–84. https://doi.org/10.1111/j.0029-4624.2004.00484.x.

Koepke, John Logan, and David G. Robinson. "Danger Ahead: Risk Assessment and the Future of Bail Reform." *Washington Law Review* 93 (2018): 1725–1807. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3041622.

Lacourse, David. "Three Strikes, You're Out: A Review." Washington Policy Center, January 1, 1997. https://www.washingtonpolicy.org/publications/detail/three-strikes-youre-out-a-review.

MacGuill, Dan. “Did a Man Receive a Life Sentence for Stealing a $159 Jacket?” Snopes.com. Snopes Media Group, 2019. https://www.snopes.com/fact-check/life-sentence-stealing-159-jacket/.

Martella, Michael H. *Law 101: Fundamentals of the Law*. Minneapolis, MN: Open Textbook Library, 2018.

McFarland, Torin. “The Death Penalty vs. Life Incarceration: A Financial Analysis.” *Susquehanna University Political Review* 7 (2016): 46–87. https://scholarlycommons.susqu.edu/supr/vol7/iss1/4.

“Model Penal Code.” American Law Institute. Accessed May 2, 2022. https://www.ali.org/publications/show/model-penal-code/.

Nagin, Daniel S. “Deterrence in the Twenty-First Century.” *Crime and Justice* 42, no. 1 (August 2013): 199–263. https://doi.org/10.1086/670398.

“Negligence.” Legal Information Institute. Cornell Law School. Accessed May 1, 2022. https://www.law.cornell.edu/wex/negligence.

Parfit, Derek. “Chapter 14 Impartiality.” In *On What Matters*, 295–312. Oxford: Oxford University Press, 2009.

Pearl, Leon. "A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley." *Hofstra Law Review* 11, no. 1 (1982): 273-306. doi:10.2466/pr0.1963.12.1.155. https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1463&context=hlr

Pilkington, Ed. “Over 3,000 US Prisoners Serving Life Without Parole for Non-Violent Crimes.” The Guardian. Guardian News and Media, November 13, 2013. https://www.theguardian.com/world/2013/nov/13/us-prisoners-sentences-life-non-violent-crimes.

Pollan, Michael. *The Omnivore’s Dilemma: a Natural History of Four Meals*. Penguin Books, 2006.

“Pretrial.” National Institute of Corrections, March 9, 2022. https://nicic.gov/projects/pretrial#:~:text=Pretrial%20Services%20programs%20provide%20crucial,public%20safety%20and%20court%20appearance.

Robinson, Paul H., and Markus D. Dubber. “The American Model Penal Code: A Brief Overview.” *New Criminal Law Review* 10, no. 3 (July 27, 2007): 319–41. https://doi.org/10.1525/nclr.2007.10.3.319.

Schultz, Bart. *Henry Sidgwick, Eye of the Universe: An Intellectual Biography*. Cambridge: Cambridge University Press, 2012.

Shafer-Landau, Russ. “The Failure of Retributivism.” *Philosophical Studies* 82, no. 3 (1996): 289–316. https://doi.org/10.1007/bf00355311.

Shapiro, Nina. “Legislature Moves to Resentence up to 114.” The Seattle Times. The Seattle Times Company, April 8, 2021. https://www.seattletimes.com/seattle-news/politics/up-to-114-people-serving-life-without-parole-to-get-resentenced-as-washington-legislature-eases-three-strikes-law/.

Singhal, Mira. “An Analysis of Pre-Trial Services and Risk Assessment Instruments Used in Montgomery County.” Montgomery County Council, 2020. https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/Summer_Fellows/2020/MiraSinghal_PreTrialRiskAssessmentInstruments.pdf.

States and Capital Punishment. National Conference of State Legislatures, August 11, 2021. https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx#:~:text=Capital%20punishment%20is%20currently%20authorized,government%20and%20the%20U.S.%20military.

Tappan, Paul W. "Habitual Offender Laws in the United States." Federal Probation 13. no. 1 (March 1949): 28-31.

Tonry, Michael H., and J.L. Mackie. “Chapter 18: Morality and the Retributive Emotions.” In *Why Punish? How Much?: A Reader on Punishment*, 271–81. Oxford: Oxford University Press, 2011.

Tonry, Michael H., and Joel Feinberg. “Chapter 7: The Expressive Function of Punishment.” In *Why Punish? How Much?: A Reader on Punishment*, 111–126. Oxford: Oxford University Press, 2011.

Van Brunt, Alexa, and Locke E. Bowman. “Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next.” *Journal of Criminal Law and Criminology* 108, no. 4 (2018): 701–74. https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/3/.

Van den Haag, Ernest. “The Ultimate Punishment: A Defense.” *Harvard Law Review* 99, no. 7 (May 1986): 1662–69. https://doi.org/10.2307/1341082.

Williams, Carol J. “Death Penalty Costs California $184 Million a Year.” Los Angeles Times. Los Angeles Times, June 20, 2011. https://www.latimes.com/archives/la-xpm-2011-jun-20-la-me-adv-death-penalty-costs-20110620-story.html.