

# FROM BECCARIA TO NEGATION OF INCARCERATION FOR NON-VIOLENT PROPERTY OFFENSES

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## I. INTRODUCTION

The experience of the criminal justice system in the United States in recent decades shows that mass incarceration has not achieved its goals, especially the reduction of crime. At the same time, imprisonment of many people across the country has caused suffering to many prisoners and their families and resulted in the destruction of small minority communities. In the past, it was thought that people could be educated in prisons and turned into better citizens. Reports and studies have shown that the opposite is true: not only are prisoners not rehabilitated, but they undergo a process of “prisonization” that makes them more dangerous to society than they were before imprisonment.

The main argument of this Article is that we use imprisonment excessively and that we must restrict its use to offenses involving attacks on the victim’s body (whether violence, the threat of violence, or sexual assault) accompanied by mens rea, and to use other penalties for pure property offenses that do not involve

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violence. To substantiate this argument, the Article returns to Beccaria's monumental book "On Crimes and Punishments," where it finds significant support.

Part I develops Beccaria's reasoning into the main argument of the Article: there should be no incarceration for non-violent property offenses. Part II formulates a proposal for a drastic change in approach to imprisonment, touching on four milestones: the Martinson Report, the development of the Prison Abolition Movement, the National Academy of Sciences report (2014), and the British Academy report (2014). Part III discusses the instructive recent decision of the Israeli Supreme Court regarding the minimal living space for inmates, which forced the government to release thousands of prisoners and detainees and, quite likely, to change future policy and imprison fewer people for shorter periods. Part III also goes back to Beccaria's book for inspiration on how to achieve the above-mentioned goal. Part IV concludes by qualifying the sweeping proposal that entirely rules out incarceration for non-violent property offenses and proposes instead a rejection of imprisonment for pure property offenses that protect only the social value of property, without any other significant social value.

## II. LEARNING FROM BECCARIA

The title of Chapter 22 of Cesare Beccaria's seminal book, *On Crimes and Punishments*,<sup>2</sup> is "Theft." Beccaria made an accurate distinction between "theft" and "robbery": "Theft without violence should be punished with fines. Whoever seeks to enrich himself at the expense of others ought to be deprived of his own wealth."<sup>3</sup> In the next paragraph, he elaborated: "But when violence is added to theft, then the punishment ought to be likewise a mixture of corporal punishment and penal servitude."<sup>4</sup>

Not everything that Beccaria wrote in the 18th century should be adopted today. I do not subscribe to the harsh punishment he proposed for robbery. Rather, I expand on the proper punishment he proposed for theft, and the necessary distinction he made between theft and robbery. We must distinguish between taking an asset and using violence or threats to forcibly take it; between theft and theft combined with assault or threats; between harming only the social value of property and harming other social values also, such as the integrity of the body, freedom, and free will.

In Chapter 30, Beccaria made a correct and important distinction: "I distinguish two classes of crime: the first consists of serious crimes beginning with murder and including all the worst villainies; the second consists of minor crimes.

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2. CESARE BECCARIA, *ON CRIMES AND OTHER WRITINGS* 53 (Richard Bellamy ed., Richard Davies trans., 1995) (1764).

3. *Id.*

4. *Id.*

This distinction has its foundation in human nature. The safety of one’s own life is a natural right, the protection of property is a social right.”<sup>5</sup>

The most significant paragraph in Beccaria’s book is the conclusion, in which he proposes a comprehensive recipe for sound criminal legislation: “In order that punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law.”<sup>6</sup>

This statement acknowledges the danger of unjustified punishment, the principle of legality (the requirement that the offense and the punishment be enshrined in the law), the requirement for the publicity of the law, the principle that criminal law is a last resort, the principle of parsimony in punishment, the requirement of immediacy of punishment to ensure effective deterrence, and especially the principle of proportionality of the severity of the punishment and of the offense; all in one concise sentence.

To compute the severity of the offense, I propose multiplying the harmfulness<sup>7</sup> (or dangerousness)<sup>8</sup> of the act with the culpability of the actor.<sup>9</sup> Multiplication is preferable to addition for three reasons. First, because of the significance of the culpability of the actor, the differences in severity between, say, causing death by negligence, consciously causing death, and intentionally causing death are enormous, even if the factual element of the offense (act, circumstances, and consequence) is the same.<sup>10</sup> Second, because of the significance of each social value (property v. physical integrity), deliberately causing property damage is much less severe than deliberately harming the human body, even if the mental element of the perpetrator is the same. And third, the formula must guarantee that if one of the components of the product is null, the severity of the offense is also null and does not result in punishment. In this case, the social phenomenon in question must be regulated by means other than criminal law.

Culpability of the actor	X	Harmfulness (or Dangerousness) of the act	=	Severity of the offense
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5. *Id.* at 77.

6. *Id.* at 113.

7. See JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW VOLUME 1*, 329 (1986); Andrew Von Hirsch & Niles Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1 (1991).

8. See Antony Duff, *Risks, Culpability and Criminal Liability*, in *SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS*, 121, 121-142 (G.R. Sullivan & Ian Dennis eds., 2012).

9. See ANDREAS VON HIRSCH, *DESERVED CRIMINAL SENTENCES* 8, 12, 23, 64, 123 (2017) (based on “The Desert Rationale” and the principle of Proportionality).

10. GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 33 (2007).

To ensure that the result is never excessive, both culpability and harmfulness (or dangerousness) should be defined between 0 and 1, or between 0 and 100%.

Almost on the same theoretical basis, I suggest a similar calculation of the moral justification for the criminal punishment:

Retribution	X	Utility (Deterrence + Incapacitation)	=	Justification of the Punishment
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Again, presenting the justification of criminal punishment as a multiplication illustrates the idea that if one of the components is missing, there is no justification for criminal punishment.<sup>11</sup> Given that punishment based on retribution means punishment according to the severity of the offense, which is culpability multiplied by harmfulness (or dangerousness), it follows that:

Culpability of the Actor	X	Harmfulness (or Dangerousness) of the act	X	Utility (Deterrence + Incapacitation)	=	Justification of the Punishment
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The last equation shows that there is no justification for punishment even if only one of the three components is null: harmfulness (or dangerousness), culpability, or utility.<sup>12</sup>

In Chapter 6, “The proportion between crimes and punishments,” Beccaria wrote:

It is in the common interest not only that crimes not be committed, but that they be rarer in proportion to the harm they do to society. Hence the obstacles which repel men from committing crimes ought to be made stronger the more those crimes are against the public good and the more inducements there are for committing them. Hence, there must be a proportion between crimes and punishments . . . . If pleasure and pain are the motive forces of all sentient beings, and if the invisible legislator has decreed rewards and punishments as one of the motives that spur men even to the most sublime deeds, then the inappropriate distribution of punishments will give rise to that paradox, as little recognised as it is common, that punishments punish the crimes they have caused. If an equal punishment is laid down for two crimes which damage society unequally, men

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11. Compare H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1-28 (1968), with VON HIRSCH, *supra* note 9, at 9, 12, 41 (based on “The Desert Model”).

12. Here again, the components of culpability, harmfulness (or dangerousness), and utility should be defined between 0 and 1, or between 0 and 100%.

will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so.<sup>13</sup>

Today this insight is known as the principle of marginal deterrence. The customary use of imprisonment for property offenses without violence reduces the deterrence against violent offenses that could have been achieved by the severe sentence of imprisonment.

Based on the fundamental distinctions made by Beccaria, I argue that we currently use imprisonment excessively. Imprisonment must be restricted mainly to punish offenses involving attacks on the victim's body accompanied by *mens rea*. For property offenses not characterized by violence we must use other penalties.

Von Hirsch wrote: "Imprisonment—and especially, imprisonment for significant durations—is a severe penalty. Under a proportionality-oriented sentencing scheme, the sanction should thus be reserved for crimes of a serious nature."<sup>14</sup> Section 152(2) of the English Criminal Justice Act, 2003, states that a custodial sentence should not be imposed unless the offense is "so serious that neither a fine alone nor a community sentence can be justified."<sup>15</sup> In Germany, imprisonment is perceived as a punishment of last resort reserved for serious offenses or for recidivist offenders.<sup>16</sup> Property offenses must be punished without using our most severe form of punishment, which is deprivation of liberty.<sup>17</sup> This argument does not purport to identify all the offenses that should or should not be punishable by imprisonment; it merely rejects incarceration for a particular type of offenses: non-violent property offenses.

There are, of course, non-violent offenses, like rape (which does not necessarily involve violence), that must be punished severely using incarceration. But rape is not a property offense. There are, on the other hand, non-property offenses, for which imprisonment would be excessive punishment, like traffic offenses. This suggestion concentrates only on a specific group of offenses, and this focus is justified by the fact that there are many non-violent property offenses and many prisoners who were sentenced for such offenses. Incarceration is too severe and disproportional for these offenses.

Depriving a person of liberty for a pure property offense that involves no attack on the victim's body (whether violence, the threat of violence, or sexual assault) is an abuse of state power and in strong contradiction with the social

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13. BECCARIA, *supra* note 2, at 19, 21.

14. VON HIRSCH, *supra* note 9, at 87.

15. Criminal Justice Act of 2003 (c. 44), s. 152(2).

16. Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMPAR. L. 679, 706 (2005).

17. Deprivation of liberty is the most severe form of punishment except for the death penalty, which is not discussed here because it is not relevant for property offenses and because it appears to be in the process of being eliminated in the Western world. See Boaz Sangero, *On Capital Punishment in General and on the Death Penalty for Murder Committed During a Terrorist Act in Particular*, 2 C. L. B. L. STUD. 97 (2002).

contract between the state and its citizens. The wrong done by the offender, which is an invasion of the victim's right to property, is not serious enough to justify the deprivation of the offender's liberty. The social value of liberty ranks much higher than the social value of property. Therefore, using imprisonment to punish pure property offenses is disproportionate, unfair, and violates the constitutional right to freedom.

### III. IMPRISONMENT

It is difficult to imagine the current criminal justice system without incarceration, which is the main punishment today and the accepted standard measure for comparing offenses. Note, however, that the large-scale use of this punishment, in contrast to detention before and during trial, is relatively recent, only about 250 years old.<sup>18</sup> A proposal for a drastic change of approach to imprisonment must take into account four landmarks regarding incarceration: the Martinson Report,<sup>19</sup> the Prison Abolition Movement, the National Academy of Sciences Report (2014),<sup>20</sup> and the British Academy Report (2014).<sup>21</sup>

#### A. Martinson Report

The report of the Martinson Commission was published in the U.S. in 1974, sending shockwaves throughout the legal system and the public.<sup>22</sup> Until then, it was mistakenly believed that we can rehabilitate offenders in prisons in the same way we cure patients in hospitals. Enthusiasm for rehabilitation has led the American system to impose ranges of years of imprisonment rather than exact terms. The actual date of release is determined by a parole committee based on its assessment of the degree to which the inmate was rehabilitated.

The Martinson Report revealed many problems. First, it argued that it was inhumane to hold a person in such uncertainty.<sup>23</sup> Second, the parole committees

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18. SHLOMO G. SHOHAM ET AL., *CRIMES AND PUNISHMENTS – AN INTRODUCTION TO PENOLOGY AND CRIMINAL JUSTICE* 209 (2009); MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 168-69 (1999).

19. Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 *THE PUBLIC INTEREST* 22 (1974) [hereinafter Martinson Report].

20. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* PAGE NUMBER (Jeremy Travis et al. eds. 2014), [http://johnjay.jjay.cuny.edu/nrc/NAS\\_report\\_on\\_incarceration.pdf](http://johnjay.jjay.cuny.edu/nrc/NAS_report_on_incarceration.pdf) [hereinafter NAS 2014 Report].

21. BRIT. ACAD., *A PRESUMPTION AGAINST IMPRISONMENT: SOCIAL ORDER AND SOCIAL VALUES* (2014), <https://www.thebritishacademy.ac.uk/publications/presumption-against-imprisonment-social-order-social-values/>.

22. Martinson Report, *supra* note 19.

23. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 *HOFSTRA L. REV.* 243, 254 (1979).

held too much power, often more than the courts.<sup>24</sup> Third, the decisions of the parole committees turned out to be racially biased: where white prisoners were readily declared to have been sufficiently rehabilitated, the terms of prisoners of color were generally extended.<sup>25</sup> Fourth, judges often imposed longer prison sentences based on the mistaken assumption that imprisonment can rehabilitate offenders.<sup>26</sup> The fifth and most difficult problem was that according to the Martinson Report, “nothing works,” in other words, no method of rehabilitation followed in prison was successful.<sup>27</sup>

Studies have shown not only that the prison cannot rehabilitate, but that the opposite was true: imprisonment causes inmates to connect with criminals and adopt their negative behavior. Prisoners learn to hate society, which has rejected and imposed a harsh punishment on them, and as a result they develop an antisocial attitude.<sup>28</sup> When they are eventually released, prisoners become more dangerous to society than before their incarceration.

The chances of criminals being rehabilitated and becoming normative citizens declines drastically during their imprisonment.<sup>29</sup> Studies conducted in prisons show that inmates undergo a process of “prisonization,” where they are assimilated into the criminal population in prison, adopting and internalizing the patterns of criminal behavior.

Incarceration causes prisoners a great deal of suffering. The so-called “pains of imprisonment” include the loss of liberty, social rejection, separation from family, friends, and workplace, material and sexual deprivations, loss of autonomy, loss of personal security from assault by others, and constraint of living with people whom they did not choose.<sup>30</sup> To defend themselves, prisoners reject the members of society who rejected them. Researchers have also pointed out the psychological harm and social stigma that greatly reduce the prisoners’ chances of successfully integrating into society after their release.<sup>31</sup> The conclusions of these studies are supported by the high rates of recidivism of released prisoners.<sup>32</sup> According to Foucault, “[d]etention causes recidivism; those leaving prison have more chance than before of going back to it; convicts are, in a very high proportion, former

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; but see Von Hirsch, *supra* note 9, at 9.

28. See MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT - THE BIRTH OF PRISON 266 (Alan Sheridan trans., Vintage Books 1995) (“The feeling of injustice that a prisoner has is one of the causes that may make his character untamable. When he sees himself exposed in this way to suffering, which the law has neither ordered nor envisaged, he becomes habitually angry against everything around him; he sees every agent of authority as an executioner; he no longer thinks that he is guilty: he accuses justice itself.” (quoting Bigot Preameneu)).

29. See also Anders Kaye, *The Secret Politics of the Compatibilist Criminal Law*, 55 KAN. L. REV. 365, 415-16 (2007).

30. GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES* 63, 63-64 (Princeton Univ. Press 1958).

31. *Id.*

32. *Id.*

inmates.”<sup>33</sup> Foucault provides a compelling description of “an ensemble whose three terms (police-prison-delinquency) support one another and form a circuit that is never interrupted. Police surveillance provides the prison with offenders, which the prison transforms into delinquents, the targets and auxiliaries of police supervisions, which regularly send back a certain number of them to prison.”<sup>34</sup>

Punishment has other goals as well: retribution, deterrence, and incapacitation. In a nutshell, retribution should be seen primarily as a limit that must not be exceeded;<sup>35</sup> prevention of crime by imprisonment (incapacitation) is necessary mainly for a small minority of violent offenders; deterring the general public does not require excessive punishment. Studies have shown that for deterring individuals, a short prison term is more effective than a long one because of its shock effect.<sup>36</sup>

## **B. The Prison Abolition Movement**

The second landmark is the approach of the Prison Abolition Movement,<sup>37</sup> according to which imprisonment is an unnecessary and even harmful sentence. Imprisonment does not achieve its goals, and it exacts heavy economic and human prices. Who, then, should be subject to imprisonment? Only “the dangerous few,” especially those who have committed violent crimes. Their rate is only about five percent of all prisoners.<sup>38</sup> As for the rest, society must develop other, smarter methods for coping with crime. The target is less criminal law, fewer offenses, fewer punishments, and fewer prisoners.<sup>39</sup> Criminal law cannot solve all the problems of society, certainly not by imprisonment.

Alternatives to imprisonment should be developed to prevent crime. An example of such an alternative is the restorative justice process.<sup>40</sup> The abolitionist approach does not necessarily advocate the complete elimination of imprisonment, but a drastic reduction of it. The importance of this approach lies in challenging the

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33. FOUCAULT, *supra* note 28, at 265.

34. *Id.* at 282.

35. *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991).

36. ARNOLD ENKER, *CONDITIONAL IMPRISONMENT* 29 (1981).

37. Sebastian Scheerer, *Towards Abolitionism*, 10 *CONTEMP. CRISIS* 5 (1986); R. S. De Folter, *On the Methodological Foundation of the Abolitionist Approach to Criminal Justice System*, 10 *CONTEMP. CRISIS* 39 (1986); *THE CASE FOR PENAL ABOLITION* (W. Gordon West & Ruth Moris, eds., 2000); Avraham Tennenbaum, *The Abolitionist Approach: Has Time Come to Abolish Criminal Punishment?* 2 *SHA'AREY MISHPAT* 261 (2001 Hebrew).

38. Tennenbaum, *supra* note 37, at 270.

39. *See also* Mirko Bagaric, Gabrielle Wolf & William Rininger, *Mitigating America's Mass Incarceration Crisis without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 *LEWIS & CLARK L. REV.* 1 (2018).

40. *See, e.g.,* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 *CRIME & JUST.* 1, 4 (1999); Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 *CARDOZO L. REV.* 2313, 2331 (2013).



conventional perceptions and rules of the criminal justice system,<sup>41</sup> and in aiming at reducing the conflict and the harm to the victim, rather than punishing the offender.<sup>42</sup>

One of the main arguments of the abolitionists is that because the law was enacted by the strong and rich, the sentences are disproportionate to the crimes. Excessively severe punishments are imposed for offenses typically perpetrated by poor people, such as theft and burglary, often referred to as “street offenses.” Because the law is biased against the poor,<sup>43</sup> it is not surprising that we find many of them imprisoned. To bring about a drastic change, we must refrain from the incarceration of non-violent property offenders.

### **C. National Academy of Sciences Report (2014) (NAS)**

Among the countless papers written about imprisonment, one of the most significant is the report from 2014 by the American National Academy of Sciences, titled “The Growth of Incarceration in the United States: Exploring Causes and Consequences.”<sup>44</sup> The United States is the modern democratic society that has gone the farthest in its attempt to solve social problems through mass incarceration, and its lessons are instructive for other countries as well. The reports of the NAS are always thorough. In this case, a committee of twenty experts coordinated the studies and wrote the report. The committee included criminologists, sociologists, economists, political scientists, psychologists, jurists, and historians, and was assisted by other experts as well.<sup>45</sup>

The report addresses the huge increase in incarceration rates in the United States, from about 200,000 prisoners in the 1970s to more than two million at the time of the preparation of the report, and explores its causes and severe consequences.<sup>46</sup> Much of the increase in prison sentences is attributed to the so-called “war on drugs.”<sup>47</sup> No victories were won in such wars, and its only results were increased imprisonment and greater suffering. Rather than waging war on drugs and on crime, the state treats its citizens as captives.<sup>48</sup>

A second important factor in the increase in the incarceration rate is the

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41. Susan M. Olson & Albert W. Dzur, *Reconstructing Professional Roles in Restorative Justice Programs*, UTAH L. REV. 57, 57 (2003).

42. See Antony Bottoms & Julian V. Roberts, *Preface to HEARING THE VICTIM: ADVERSARIAL JUSTICE, CRIME VICTIMS AND THE STATE* (2010).

43. See also *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J. concurring).

44. NAS 2014 Report, *supra* note 20.

45. *Id.* at 17.

46. *Id.* at 2, 13, 334-35.

47. *Id.* at 3, 336, 347.

48. See also Eliav Liebllich & Adam Shinar, *The Case against Police Militarization*, 23 MICH. J. RACE & L 105, 108 (2018) (“[T]his Article identifies the key problem of police militarization in its normalization . . . [of] a presumption that the policed community is threatening . . . while the liberal order . . . must be based on precisely the opposite.”).

policy makers' misguided belief that criminal law and imprisonment can eliminate crime. This erroneous belief has led to the enactment of cruel laws, such as life imprisonment with no possibility of parole after three convictions, the so-called "three-strikes law," applied even in the case of property offenses.<sup>49</sup> The report demonstrates the inaccuracy of this belief and presents data showing that the contribution of the enormous increase in imprisonment to the reduction of crime was insignificant.<sup>50</sup> The report also shows that the contribution of imprisonment to deterrence is limited: studies have found that deterrence is achieved by increasing the certainty that perpetrators will be caught, rather than increasing punishment.<sup>51</sup>

Beccaria realized this already in 1767: "The certainty of even a mild punishment will make a bigger impression than the fear of a more awful one which is united to a hope of not being punished at all."<sup>52</sup> The report also shows that the contribution of long imprisonment to preventing convicted offenders from committing further offenses is small because recidivism generally declines with age.<sup>53</sup>

A third notable cause of the growth of incarceration is the mechanistic U.S. Federal Sentencing Guidelines.<sup>54</sup> To the extent that these guidelines were perceived as binding, not merely as advisory, as determined by federal law,<sup>55</sup> they caused a significant extension in the length of sentences imposed by the judges.

Incarceration in the United States affects mainly weak minorities, blacks and Hispanics, especially the poor, and the uneducated among them.<sup>56</sup> These communities already suffer from considerable health, social, and economic

49. See, e.g., *Rummel v. Estelle*, 445 U.S. 263 (1980); Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three-Strikes You're Out" Law*, 11 STAN. L. & POL'Y REV. 65 (1999).

50. NAS 2014 Report, *supra* note 20, at 4, 337; see also FOUCAULT, *supra* note 28, at 265 ("Prisons do not diminish the crime rate: they can be extended, multiplied or transformed, the quantity of crimes and criminals remains stable or, worse, increases.").

51. NAS 2014 Report, *supra* note 20, at 4, 337; see also George Fisher, *The Birth of the Prison Retold*, 104 YALE L. J. 1235, 1278 (1995).

52. BECCARIA, *supra* note 2, at 63.

53. NAS 2014 Report, *supra* note 20, at 4-5, 337.

54. The punishment is determined by weighing the seriousness of the offense and its circumstances, as well as the circumstances related to the offender (mainly the offender's criminal record). The guidelines set a range for the punishment, specified in months of imprisonment (for example, 24 to 36). The guidelines are usually presented in the form of a table. The severity of the offense is based on the ranking of offenses along the severity axis, at times with the addition of circumstances (e.g., carrying a weapon). The offender axis is based mainly on the offender's criminal record and status at the time of the offense (e.g., released on bail, on probation, etc.). Judges are instructed to select the punishment that appears in the table at the point of intersection of the two axes. The judges may deviate from this punishment, but they must explain the deviation, and at times must do so based on considerations present in the guidelines: aggravating vs. mitigating circumstances. See 105(4) COLUM. L. REV. (2005) (a volume devoted entirely to criminal punishment).

55. *United States v. Booker*, 543 U.S. 220, 266 (2005) (holding that the guidelines have only an advisory effect).

56. NAS 2014 Report, *supra* note 20, at 2-5, 13, 31, 339.

difficulties.<sup>57</sup> The report shows that imprisonment has had severe social consequences, including the destruction of small communities.<sup>58</sup> The many long prison sentences exact a heavy social and economic toll, both during the period of imprisonment and after the release of the prisoner, whose family members, especially spouses and children, suffer greatly.<sup>59</sup>

The report recommends a change in policy, legislation, law enforcement, and court rulings aimed at significantly reducing imprisonment rates. It also recommends improving prison conditions and reducing unnecessary harm to the prisoners' family members and their communities. Given that most of the prisoners are expected to be released and to return to society at some point, the conditions of imprisonment must be adjusted in such a way that the transition from imprisonment to liberty would be successful both for the released prisoner and for society.

Plans should be devised for community-based alternatives to imprisonment and for support of released prisoners through employment, health, and education programs, which would significantly reduce recidivism. It is vital to reduce incarceration, and at the same time to develop alternatives to imprisonment, which in many cases are expected to be more practical and effective in achieving the goals of punishment than incarceration is.<sup>60</sup> The report suggests that it is not enough to change the policy from now on, so that fewer people are imprisoned and for shorter periods, but a significant change is required with respect to the many offenders already imprisoned, both in improving prison conditions and in greater use of early release mechanisms.<sup>61</sup>

The report offers four important principles for guiding penal reform:<sup>62</sup> proportionality, parsimony, citizenship, and social justice. Proportionality is required between the actions of the offenders (taking into account their personal circumstances) and the severity of the punishment imposed on them. Any term of imprisonment for minor offenses, even a short one, is harsh and constitutes a severe punishment. Here is the main link that I want to make between Beccaria's words, the NAS Report, and my proposal to refrain from imprisonment for non-violent property offenses: imprisonment is disproportionate to non-violent property offenses. Society must find better and more humane ways to deal with offenses of this type.

The second principle is that of parsimony in punishment in general, and in imprisonment in particular. Even if imprisonment cannot be avoided, it must be imposed for the minimum length necessary to achieve its goals. According to the present proposal, except for the most serious crimes of murder, rape, and severe violence, any prolonged imprisonment is suspected of violating the principle of parsimony, and it certainly does so in the case of non-violent property offenses.

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57. *Id.* at 7.

58. *See id.* at 6-7.

59. *Id.* at 338.

60. *Id.* at 343-53.

61. *See* NAS 2014 Report, *supra* note 20, at 344.

62. *Id.* at 8, 23, 341-53.

The principle of citizenship requires that we ensure that the conditions of imprisonment and its consequences are not so severe or lasting as to violate the prisoner's fundamental status as a member of society. Prisons must function in a way that respects the prisoners' autonomy and dignity. What is happening inside prisons should be transparent to the public at large. Inhumane prison conditions undermine the principle of citizenship.

The fourth and last principle is that of social justice. The position of the NAS Report is that prisons must become instruments of justice; the overall result of which should be the promotion of aspirations of society for a fair distribution of rights, resources, and opportunities. The principle of social justice is severely violated when imprisonment is imposed mainly on the poor and on minorities. At a minimum, it is necessary for prisons not to undermine the desire for social justice.

The report suggests that in their enthusiastic support for the war on crime, law enforcement officials have severely undermined these four principles, which are vitally important in a democratic state.<sup>63</sup> The position of the report is that a new balance is required between the goals of society, and that overly severe punishment does not serve these goals. The report ends with a recommendation to significantly reduce the number of prison sentences and their length, and to use the large amount of money saved to support weaker populations by implementing programs that are expected to reduce crime more than incarceration does, and certainly in a more humane way.<sup>64</sup> Another American report from 2015, titled "What Caused the Crime Decline?"<sup>65</sup> also found that more incarceration does not lead to less crime.

#### **D. British Academy Report (2014)**

In 2014, when the NAS report was published, a significant change occurred in the perception of imprisonment and of its place in society, as reflected also in the British Academy report, titled "A Presumption Against Imprisonment."<sup>66</sup>

The report reviews the significant increase in incarceration rates in England, Wales, and Scotland, from about 45,000 prisoners in 1992 to about 84,000 in 2013; an almost 100% increase.<sup>67</sup> The report found that sentencing in the courts is disproportionate to the gravity of the offenses, and is the result of misguided pressure by the media and public opinion on legislators and judges. The mistake

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63. *See id.* at 341.

64. *Id.* at 343.

65. OLIVER ROEDER, LAUREN-BROOKE EISEN & JULIA BOWLING, BRENNAN CTR. FOR JUST., WHAT CAUSED THE CRIME DECLINE? 10 (2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2566965](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566965) ("This report aims to spur discussion of what constitutes effective policies to deter crime. It aims to use science, law, and logic to break the myth that has fueled mass incarceration and resulted in harm to our communities, our economy, and our country. More incarceration does not lead to less crime. The United States can simultaneously reduce crime and reduce mass incarceration.").

66. *See* BRIT. ACAD., *supra* note 21, at 15.

67. *Id.* at 26.

lies in the perception that crime is on the rise and that it can be reduced by increased use of imprisonment. The report shows both the huge financial cost of incarceration<sup>68</sup> and its heavy personal and social cost. The report points to the deterioration of prison conditions and the lack of response to the special needs of disadvantaged groups of prisoners.

The report recommends a significant change in incarceration policy, based on a thorough discussion of theoretical, moral, and political arguments pertaining to the pros and cons of imprisonment.<sup>69</sup> The report advocates a massive reduction in the use of incarceration to promote the social values of liberty, autonomy, solidarity, dignity, inclusion, and security.<sup>70</sup> These values must guide our attitude toward all members of society, including those convicted of committing criminal offenses. The central recommendation of the report is a strong presumption against the use of imprisonment, which will not be easy to refute.

The report offers several strategies for reducing the prison population.<sup>71</sup> First, transferring the drafting of sentencing policy from the political field, which produces frequent, short-term changes, to a professional body of experts who would outline a long-term policy. Second, exclusion of certain types of lighter offenses from the field of criminal law. Third, promoting alternatives to imprisonment. Fourth, abolishing, or at least reducing, the use of short sentences of several months; or in other words, eliminating imprisonment in cases when short sentences are currently imposed. Fifth, canceling or restricting prison sentences for certain types of offenses. Sixth, reevaluation of prison sentences with the view of shortening them. Seventh, releasing mentally disordered and addicted persons from prisons for treatment in more appropriate settings. Eighth, accelerating early release.

The fifth recommendation, to stop imposing prison terms for certain types of offenses, corresponds to my proposal. Imprisonment is disproportionate in cases of offenses such as theft, pickpocketing, burglary of a business or a vehicle (unlike burglary of a dwelling), fraud, embezzlement, possession of stolen property, property damage, and more. Prison sentences should be restricted mainly to cases involving bodily harm, threat of bodily harm (as opposed to threat of property damage), and sexual assault. Today, prisons are populated with thousands of inmates who were convicted of property offenses that do not involve violence. The release of this population would significantly reduce the number of prisoners (assuming that in the future such offenses will incur no incarceration, but rather more appropriate and effective sentences).

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68. *Id.* at 16 (in England and Wales the financial cost doubled during this period, to about £ 3 billion).

69. *Id.* at 52.

70. *Id.* at 17-18.

71. BRIT. ACAD., *supra* note 21, at 86.

### III. THE ISRAELI EXPERIENCE AND A RETURN TO BECCARIA

#### A. The Israeli Experience

The important insight that the use of incarceration should be reduced—imprisoning fewer people, for shorter periods of time—has recently reached Israel too, as manifested in the report of Justice Dorner’s committee<sup>72</sup> from 2015, which is similar in its conclusions to the NAS and the British Academy reports. The report states that extending the prison terms does not advance the fight against crime and is therefore not justified as a means to achieve this goal.<sup>73</sup> The report contains six conclusions and recommendations. First, it concludes that expanding the use of incarceration or imposing longer prison terms does not promote deterrence.<sup>74</sup> Second, rehabilitation in the community—based on punishment ranging from working for the public in the status of a prisoner to probation and community service—is expected to produce better results.<sup>75</sup> Third, the report found that the effective use of imprisonment as a crime prevention tool must distinguish between offenders who are likely to repeat offenses and those who are not.<sup>76</sup> To explain further, the criminogenic effect of imprisonment must be taken into account, namely that imprisonment in general, and prolonged imprisonment in particular, encourage a tendency for delinquency and increase the likelihood that the prisoner will commit offenses upon release.<sup>77</sup> We should also consider the high incarceration costs that could have been directed to other means of reducing crime, the diminishing marginal benefit of incarceration, and the turnover effect, whereby the removal of criminals from the public sphere often allows others to take their place.<sup>78</sup>

Fourth, the report concluded that while in prison, inmates lose a great deal of their skills and abilities to earn a living legally, and often the prison reinforces delinquent thinking and behavioral patterns, so that the likelihood of a former inmate committing more offenses is greater than that of an offender not sentenced to prison.<sup>79</sup> Fifth, the direct cost of incarceration in Israel is about Israeli New Shekel (NIS) 10,000 a month for an average prisoner (just under 3,000 USD). To this should be added other costs, including state aid to the families of prisoners and the costs associated with the weakening of disadvantaged populations, a factor that increases the tendency for delinquency.<sup>80</sup> By comparison, punishment in the community, which includes various rehabilitation programs, is cheaper and more

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72. PUBLIC COMMITTEE TO EXAMINE THE PUNISHMENT AND TREATMENT OF OFFENDERS POLICY, REPORT (2015) (Hebrew).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. PUBLIC COMMITTEE TO EXAMINE THE PUNISHMENT AND TREATMENT OF OFFENDERS POLICY, *supra* note 72.

78. *Id.*

79. *Id.*

80. *Id.*

effective.<sup>81</sup> Finally, the use of imprisonment should be reduced if it is not necessary for limiting the ability of high-risk offenders to commit crimes.<sup>82</sup> Cheaper and more effective penalties should be imposed, to bring about more efficient and correct allocation of resources aimed at reducing crime. As an example, in Israel, the current monthly cost of incarceration stands at about 2,900 USD per prisoner, the same as the cost of a probation officer who handles about thirty perpetrators, and the chances of success in rehabilitation outside the prison are greater.<sup>83</sup>

The report offers a chance for changing the perception of imprisonment, not only based on its content, but also because of the authority of the committee members who produced it. The committee included, in addition to a retired justice and various academics, senior representatives of the State Attorney's Office, the prison service, and the police.

The committee recommended that when Knesset (Israeli parliament) members propose legislating a new offense or propose extending an existing prison sentence, they should include the estimate by the Treasury of the expected increase in the cost of incarceration. This may be the most important recommendation of the report, as not every legislator know of the heavy costs of a prison sentence.

To the estimated monthly cost of maintaining a prisoner, one must also add the enormous cost of building the prison facility itself. Therefore, my estimation is that if someone steals small amounts of money from time to time, it is less costly to society if they continue stealing occasionally than to allocate significant amounts of money for their imprisonment. Furthermore, if the thieves are poor people, out of combined financial and social considerations, they could be granted monthly support at a lower cost than that of incarceration; for example, in the form of vouchers for education, housing, food, medical treatment, etc., at least for a limited time, until they find employment.

In a significant recent development in Israel, the Supreme Court granted a petition by human rights organizations, and ordered state authorities to expand the average living space for prisoners from three to four square meters within eighteen months.<sup>84</sup> There are two main ways of accomplishing this: either to foolishly build more prisons, at a cost of billions, or to release prisoners. In December 2018, the first 1000 prisoners were released.

How can we achieve the goal of reducing the number of incarcerated people? We should return to Cesare Beccaria's timeless book, accept his proposition that fines are appropriate punishment for theft, and extend the offense of theft to include all non-violent property offenses, or at least all offenses that protect only the social value of property, without other social values such as privacy or freedom of will.

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81. *Id.*

82. PUBLIC COMMITTEE TO EXAMINE THE PUNISHMENT AND TREATMENT OF OFFENDERS POLICY, *supra* note 72.

83. *Id.*

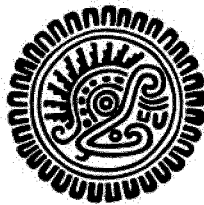
84. HCJ 1892/14 Ass'n for C.R. in Isr., Coll. of Law & Bus. in Ramat Gan, & Physicians for Human Rights v. Minister of Pub. Sec., Prison Comm'n & Minister of Just. (Israel).

## **B. A Partial Qualification**

In principle, according to the present proposal, the criminal justice system should resolutely bar the use of imprisonment for any non-violent property offense. But because this proposal is unlikely to find the necessary political support, as a starting point for the desired change, a partial bar could be imposed on sentences for offenses that protect the social value of property alone, excluding other significant social value such as freedom of will or privacy. With this qualification, incarceration would be eliminated for pure property offenses such as theft, pickpocketing, handling stolen goods, and criminal damage. In the case of other property offenses, such as domestic burglary (property + privacy) and fraud (property + freedom of will), which protect not only the social value of property but also other social values, imprisonment would be considered in the most severe cases. In the case of offenses involving property and violence or threats against human body, such as robbery, incarceration is still needed as a punitive option.<sup>85</sup>

## **IV. CONCLUSION**

Two and a half centuries after Cesare Beccaria wrote his ingenious book, “On Crimes and Punishments,” it can still serve as a source of wisdom for a critique of our criminal justice system, in our perpetual attempts to improve it. This Article draws on Beccaria’s book as the foundation for its argument to eliminate imprisonment for non-violent property offenses.




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85. See also ANDREW ASHWORTH, HOWARD LEAGUE FOR PENAL REFORM, WHAT IF IMPRISONMENT WERE ABOLISHED FOR PROPERTY OFFENCES? (2013); BRIT. ACAD., *supra* note 21, at 97-99.