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Christian N. Futch
Georgia Southern University

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Bad Acts, Worse Responses:

Reconsidering the Moral Foundations of the US Criminal Justice System

An Honors Thesis submitted in partial fulfillment of the requirements for Honors in The Department of Philosophy and Religious Studies.

By
Christian Futch

Under the mentorship of *Dr. Paul Tubig*

ABSTRACT

The purpose of this paper is to evaluate the contemporary criminal justice system in the United States, offering moral and pragmatic critiques to its current construction, and proposing an alternative construction that is both more successful pragmatically and morally. In this paper, I first establish the connection between morality and the law through the consideration of jurisprudential theories of law. After arguing for this connection, I then offer critiques of the current criminal justice system in the United States. After this, I evaluate the four general theories of punishment using the scholarship of Thom Brooks, finding that retributive and deterrent forms of justice fail pragmatically and morally while rehabilitative and restorative forms of justice succeed. I then introduce my ethical theory, describing the moral framework it offers through concepts of moral essence and context in relation to moral character and moral action. Finally, I apply this ethical framework by connecting the ideas of moral essence and context to rehabilitative and restorative forms of justice, arguing for the abolition of prisons in favor of rehabilitation centers and community contracts as a way to reconstruct the moral foundations of the contemporary criminal justice system in the United States.

Thesis Mentor: _____

Dr. Paul Tubig

Honors Director: _____

Dr. Steven Engel

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Georgia Southern University

I. Introduction

In the contemporary United States, certain acts are labeled as ‘crimes’ in an effort to stop such actions. The function of the criminal justice system is to handle people who commit these acts. Questions arise as to what should be the purpose of the criminal justice system. Should the purpose be to deter crime? Protect society? Help the perpetrator to be reintegrated back into society as a civically responsible citizen? Regardless of the perspective one takes on the purpose of the criminal justice system, the United States seems to be failing on all accounts. Rape, murder, and assault have all risen over the past four years, showing a lack of deterrence in the most serious criminal acts.¹ The recidivism rate in the United States is dramatically high, with almost half of released prisoners being arrested within a year, 68 percent within three years, and up to 83 percent within 9 years.² These facts show the need to change the criminal justice system to better serve its purpose, whether that be deterrence, protection of society, or helping the criminal.

How should the criminal justice system be changed to treat criminals and their offenses in ways that are more responsive to broader considerations of morality and justice in the United States? In this paper, I will start by establishing the need for the involvement of morality in the law to answer this question. Without establishing a connection between morality and the law, any ethical answer to how we should change the criminal justice system is of no use. After establishing the connection between morality and the law, I will expand on the critique of the

¹ “United States Crime Rates 1960 - 2019,” United States crime rates 1960 to 2019, accessed October 10, 2021, <https://disastercenter.com/crime/uscrime.htm>.

² Matthew Clarke, “ Long-Term Recidivism Studies Show High Arrest Rates,” Long-Term Recidivism Studies Show High Arrest Rates | Prison Legal News, May 3, 2019, <https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/>.

current criminal justice system. After critiquing the current system, I will consider different general theories of punishment and discuss how well each one addresses the question of how we should change the criminal justice system to better address criminal acts. I will then offer my own ethical theory as a solution to the question and argue for the use of this ethical framework in restructuring the criminal justice system. Finally, I will show how my theory can be applied in practice, giving a hopeful view of how the criminal justice system could, and should, be.

II. Morality and the Law

Considering how the criminal justice system should be constructed presupposes that the system needs a moral basis when asking how *it should* be constructed. This raises the question whether there truly is a connection between morality and law. Scholars have pondered this question, specifically in the field of jurisprudence. Arising out of this field are two major ways of thinking about the law and its structures. One way is what has been called legal positivism. Legal positivists are those who believe that the law is based on social structures only. Second is natural law theory. Natural law theorists are those who believe that the law is based on morality and social structures. While this is an ongoing debate within the field of law, what I hope to show is that whichever theory proves correct, both show a need for the connection between morality and the law.

Rather than arguing that one is necessarily right and the other wrong, it may be more fruitful to show how viewing the law from a moral perspective would be beneficial to the goal of achieving a more just system of criminal justice. This section will use the scholarship of Ronald Dworkin and Scott Shapiro. I will explore the theories of both legal positivism and natural law

from the perspective of both scholars, using their work to argue for why a perspective of law that involves morality is better suited for the project at hand.

Dworkin and the Critique of Hart and Legal Positivism

When considering the position of legal positivism, it is important to make note of H.L.A. Hart. The form of positivism that Hart espouses is referred to as analytic positivism. Dworkin explains this position in the following way, “Analytic doctrinal positivism claims that the independence of the law from morals does not depend on any political or moral interpretation or justification of legal practice or any political doctrine at the adjudicative stage of legal theory but follows directly from the correct analysis of the very concept or idea or nature of law.”³ In other words, Hart argues that the idea of the law is itself independent of morality. This separation of morality and the law is the defining characteristic of legal positivism. Dworkin gives a general definition for legal positivism in that the theory claims “a community’s law consists only of what its lawmaking officials have declared to be the law, so that it is a mistake to suppose that some nonpositive force or agency—objective moral truth or God or the spirit of an age or the diffuse will of the people or the tramp of history through time, for example—can be a source of law unless lawmaking officials have declared it to be.”⁴

Dworkin views this theory of law as misguided and incorrect in assessing what the law is. He critiques this view, arguing that it fails to take into account the fact that people draw upon moral considerations when considering the law. Dworkin starts by making note of the difference between rules and principles within law. He says that rules “are applicable in an all-or-nothing fashion” while principles “states a reason that argues in one direction, but does not necessitate a

³ Ronald Dworkin. *Justice in Robes*, pg. 30. The Belknap Press of Harvard University Press.

⁴ Dworkin. *Justice in Robes*, pg. 187

particular decision.”⁵ For example, in football if you fail to pick up a first down on fourth down, then your opponent gets the ball wherever it was stopped at. If the condition of the rule is met— not making a first down on fourth down—then the consequence is always applied, which is that your opponent gets the ball wherever it was stopped. Principles are different. They don’t establish any necessary consequence from an act committed. For example, the principle that “no man may profit from his own wrong” doesn’t have any necessary consequence attached to it, is open to interpretation, and is a reason to apply things in a certain way rather than an all-or-nothing established consequence.⁶

The importance of the distinction between rules and principles is considering whether these principles are a part of the law or not. Dworkin argues that there are two ways to answer this question. The first answer is that principles are a part of that law, and therefore bind judges in applying these principles to cases in which they are related. This view gives legal obligations to those who are found guilty due to the reasoning of one of these principles. The second answer is that principles lie outside of the law, and therefore can be used at the discretion of the judges when applying principles to law. Under this view, those who were found guilty from the use of these principles have no legal obligation to follow the very principles used as reasons to rule in their cases the way in which they were ruled.

One example that exemplifies Dworkin’s point is the Supreme Court ruling on “Riggs v. Palmer” in 1889, which considered whether a grandson (Elmer Palmer), who murdered his grandfather (Francis Palmer) in order to attain his benefits from the will, was entitled to the profits from the grandfather’s will. The court ruled that the grandson does not have the right to

⁵ Ronald Dworkin. “The Model of Rules.” *The University of Chicago Law Review* 35, no. 1 (1967), pg. 25-26.

⁶ Dworkin. “The Model of Rules.” Pg. 26

what he was to receive in his grandfather's will, as the principle "no man may profit from his own wrong" was used as reasoning for this ruling. If the principle is a part of the law, then the judge was bound by the law to apply this principle here in this case, and thus there always was the legal obligation on the grandson. However, if the principle is not a part of the law, then the judge used the principle at his discretion and therefore there was no legal obligation on the part of the grandson.

This connects back to the theory of legal positivism. If there is no external source from which laws are considered, then the law is a set of rules and not principles. Whenever there is no way to apply the law through rules, positivists then argue that judges may use discretion in deciding a ruling. The problem with this is that if the decision is based on the judge's discretion, then there is no legal obligation on the part of the party ruled against, and the decision is implemented post-facto against the party in question. This creates two issues. First, there is the issue of applying laws post-facto. How can a person follow a rule that has not yet been made? How can a person be held responsible for breaking a rule that is yet to be made? These questions reveal the problem with assuming that the law is only rules without principles that judges are bound to follow. A second issue with this view is that discretion allows for any ruling in any case in which there is no established rule to apply. This would allow for an absolute power in the hands of the judges to interpret rules in any way they wish without necessary regard to any reasoning or considerations. These two problems show the difficulty in holding the legal positivist position in regards to application of the law due to the idea of legal principles.

Dworkin's Jurisprudential Theory of Law

Rather than legal positivism, Dworkin offers a view in which “we might treat law not as separate from but as a department of morality.”⁷ In this way, judges have the obligation to interpret legal principles in how they *should* apply to cases in which there is no clear ruling. This gives the law a normative component, tying morality to the law in the cases in which there is no rule to automatically apply. The way in which Dworkin argues we should treat the law in its normative capacities for “hard cases” is through constructive interpretation. Dworkin defines constructive interpretation as the process of “imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.”⁸ This is accomplished through interpreting the material at hand in a way that such an interpretation best justifies the material while still fitting within the confines of it. In this way, the interpretation goes as far as it can in justifying the material through portraying it in its best-light, while keeping within the confines of the material itself to satisfy the “fit” requirement. Dworkin argues that constructing the law as integrity is to place it in its best-light.

Dworkin then develops his theory of jurisprudence by arguing that there are: (1) normative components of law, and (2) ambiguity on how to apply law in hard cases. Constructing the law in its best-light is how to answer such ambiguities, which he argues is law as integrity. Scott Shapiro explains Dworkin’s account by stating that “law as integrity requires communities to act in every area according to one coherent set of principles. Integrity is violated when the rules in one legal domain can be justified only by principles that would not justify, or would be inconsistent with, the rules in another [legal] domain. The grounds of law demanded by integrity, therefore, are the set of principles and policies that place all past political decisions in

⁷ Dworkin. *Justice in Robes*, pg. 34

⁸ Dworkin. *Law’s Empire*, pg. 52

their best light.”⁹ Therefore, Dworkin presents a theory of jurisprudence which connects morality with the law and argues that one must use moral constructive efforts to answer hard cases of law by finding an interpretation of rules and principles that follows integrity, putting the law in its best-light while fitting within the content of the law.

Shapiro and the Critique of Legal Positivism and Natural Law Theory

Scott Shapiro, in his book *Legality*, offers a critique of both legal positivism and natural law theory, examines and critiques Dworkin’s jurisprudential theory, and offers his own jurisprudential theory called the ‘Planning Theory’. In this section, his critiques will be examined and his theory will be considered as an alternative view to the relationship between morality and the law.

Shapiro early on introduces the major problems faced by the legal positivist position and the natural law theorist position. The major problem faced by the legal positivists is how their stance appears to break David Hume’s is-ought law. Hume’s law is that an “ought” cannot be derived from an “is”, meaning that normative statements cannot be derived from descriptive statements. For legal positivism, which claims that the law is descriptive only and not normative, the question posed by Shapiro is “How can normative knowledge be derived exclusively from descriptive knowledge? That would be to derive judgments about what one legally *ought* to do from judgements about what socially *is* the case.”¹⁰ Thus, the problem for the legal positivist position is how the law can come from descriptive social facts while producing normative facts.

The major problem faced by natural law theorists, according to Shapiro, is that “by insisting on grounding legal authority in moral authority or moral norms, natural law theory rules

⁹Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2013), pg. 299.

¹⁰ Shapiro, *Legality*, pg. 47.

out the possibility of evil legal systems.”¹¹ This is because if the law comes from moral facts, then any legal system which isn’t derived from moral facts is not a legal system at all. This means that obviously immoral legal systems, like Nazi Germany’s legal system, is in fact not a legal system at all, according to the natural law theorist view. Shapiro calls this the problem of evil. Having shown the major dilemmas faced by both schools of thought, Shapiro proceeds by diving into the theories of legal philosophers and how they attempt to solve this problem before offering his own theory of law. For the purposes of this paper, we will shift to his critique of Dworkin and follow that by a summation of his theory.

First, Shapiro critiques Dworkin’s theory of constructive interpretation by arguing that his theory places an unqualified amount of trust in those involved in the legal process. The interpretation required by Dworkin’s theory is a meta-interpretation requiring a high level of philosophical contemplation. However, Shapiro argues “If, as is reasonable to suppose, most individuals are not particularly adept at, or likely to engage in, philosophical analysis, it seems imprudent to demand that they interpret the practice as a moral or political theorist would.”¹² Thus, the first critique of Dworkin’s theory is that it places too much trust on those in the legal process to understand the philosophy necessary to fulfill the interpretation that Dworkin’s theory requires.

The other critique Shapiro offers against Dworkin’s theory is that it defeats the purpose of the law. He states, “[O]n his account the only way to discover the content of the law is to engage in moral and political philosophy, which is the very sort of inquiry that the law aims to obviate.”¹³ He argues that the law’s aim is to resolve moral matters, and that if the law requires

¹¹ Shapiro, *Legality*, pg. 49

¹² Shapiro, *Legality*, pg. 33.

¹³ Shapiro, *Legality*, pg. 307

that one engage in moral philosophy to settle legal disputes, then it is contradicting its purpose of making this engagement unnecessary.

Response to Shapiro's Critiques

The two critiques offered by Shapiro can be seen as one which only is a dilemma for Dworkinian theory rather than natural law theory, while the other seems to be a dilemma for both. The critique on the basis of trust and the limited capacities of those involved in the law is a critique directed against Dworkin and not every theory of natural law. While this critique does show weaknesses in the account Dworkin draws up, other natural law theories need not place such trust within those handling the legal system. One could argue for a natural law theory which takes into account the limitations of legal professionals.

The second critique, however, does provide for a critique of natural law theory as a whole. For if the purpose of law is to settle moral questions, then it appears circular to require moral truths to settle moral truths. However, Shapiro here conflates the creation and the continuance of the law. When there are theoretical disagreements within hard cases of the law, it is because the issue has not yet been settled within the law. So to argue that considering questions of morality to answer questions of the law is unsettling the law is to conflate unanswered legal questions with answered ones. It would indeed be reductive to use reflective moral questioning to answer legal questions that already have a place in the legal system, for the legal system has already settled the need for moral deliberation, as Shapiro points out. However, when the case in question has no legal answer within the confines of the law prior to the case being brought up, then there is no law that has settled the issue. Rather, there must be an extension of the law to include an answer to this new legal question. Thus, it must be settled, and

moral questions are settled through moral truths. Therefore, Shapiro's critique only works when the legal question already has an answer. When there is no available legal answer, there is no unsettling but rather a first bit of settling needed to be done through moral analysis.

So, while the critiques brought up against Dworkin by Shapiro are compelling, there is no compelling reason to reject the connection between morality and the law altogether at this point. Furthermore, while Shapiro argues that his 'Planning Theory' is within the legal positivist vein, I will show that even in Shapiro's jurisprudential theory there is a necessary connection between the law and morality, and this provides us a way out of the dilemma faced by all natural law theories.

Shapiro's Planning Theory

Shapiro argues that the law is comparable to a social plan. He says "According to the Planning Theory, legal authority is possible because certain kinds of agents are capable of (1) creating and sharing a plan for planning and (2) motivating others to heed their plans."¹⁴ In other words, the Planning Theory sees legal systems as social plans which are used to attain certain goals and motivate citizens into following certain parameters to achieve the goals of the plan. Having argued that legal systems should be viewed as social plans which are regularly followed by the society, Shapiro considers the critique from Hume's law of how it could produce moral requirements from social facts. To alleviate this paradox, he introduces what he calls "the legal point of view". The legal point of view is "the perspective of a certain normative theory... that moral questions are to be answered on the basis of these norms... the legal point of view always purports to represent the moral point of view, even when it fails to do so."¹⁵ Essentially, Shapiro

¹⁴ Shapiro, *Legality*, pg. 181.

¹⁵ Shapiro, *Legality*, pg. 186-187.

is arguing that a legal system is a moral framework which establishes morality from the system's viewpoint. Furthermore, he says, "The Planning Theory... maintains that the main concepts that they [legal statements] employ are moral and hence normative... they describe the moral perspective of the law."¹⁶ In this way, the law is a normative framework that describes legal obligations and authority. Thus, legal statements describe this normative legal point of view and the conclusions reached are descriptions of that legal point of view. Therefore, Hume's law is not violated under the Planning Theory since it derives an 'is' from an 'is', rather than an 'ought' from an 'is'. Legal judgements describe the normative legal point of view, rather than purporting a moral judgment.

Reaffirming Morality in Law

While there is much more to the construction of the Planning Theory by Shapiro, the summation of the theory above is sufficient for the purposes of this paper. While Shapiro's Planning Theory takes the legal positivist position on morality and the law, his argument which defends his theory against Hume's law shows the necessary connection between morality and the law. His idea that the legal point of view is a normative theory shows the necessary ties between the two. For if the legal point of view is what the law uses in making legal judgements, and this point of view is a normative theory, then it follows that legal systems are built off of moral frameworks. Furthermore, if the law is a description of this moral framework, then the legal positivist position of the law deriving from social facts alone is only true if those social facts derive from moral facts.

¹⁶ Shapiro, *Legality*, pg. 191.

Having established this, it can be seen how Shapiro's Planning Theory of the law provides for a defense against the 'problem of evil' faced by natural law theories. Taking Shapiro's point of view that the law is social plans which take a legal point of view derived from a moral framework, it can be seen how legal systems can be derived from morality while still allowing for evil legal systems. The apparent 'problem of evil' only exists when it is believed that to derive law from morality is to use moral facts to do so. However, the Planning Theory shows that moral perspectives make the framework for legal systems, not moral facts. Thus, for the law to derive from morality, as natural law theorists argue, it is not necessary that it comes from moral facts, which would indeed make evil legal systems impossible, but rather that it comes from moral perspectives. These moral perspectives develop the framework from which it is assumed that the morality the law is derived from is fact. In this way, Shapiro's explanation of the legal point of view provides a defense against the 'problem of evil' faced by natural law theorists.

To conclude, the question of whether the law is derived from social facts alone, or from moral and social facts, is a question which requires great nuance. Dworkin and Shapiro provide arguments against jurisprudential theories that seek to sever the relationship between morality and law. While there are legitimate critiques against Dworkin's theory of law, he provides reasons for the importance of morality in law while describing one way this might be understood. Shapiro shows the shortcomings of Dworkin's theory and provides his own theory of law which he tries to develop within the legal positivist framework. However, Shapiro's Planning Theory of law shows that social facts themselves derive from morality. This view then shows the connection between morality and the law may remain even if Shapiro's account is right. Furthermore, Shapiro shows a way out of the supposed paradox of connecting the law to

morality, showing that it doesn't have to be tied to moral facts to be tied to moral perspectives, which allow for evil legal systems.

Therefore, no matter the position you take on the debate within analytic jurisprudence, morality plays a role in how we should construct the legal system. The debate is more of an issue of whether morality is within or outside the legal system rather than being whether there is any connection at all. It appears the positivist side must concede that the legal system is influenced by morality, though it may be argued that it is from the outside rather than being a component of the law itself. The discussion of legal positivism and natural law theory by Dworkin and Shapiro provide a framework for understanding this intimate relationship between morality and the law, and thus legitimizes the use of moral philosophy in critiquing and redeveloping the American criminal justice system.

III. Problems with the current criminal justice system

The Negative Impact of Prison

The problems with the current criminal justice system highlight the need to examine the moral foundations of the criminal justice system and propose an alternative moral framework for how criminal acts should be judged and how criminals should be treated by the state in light of such judgments. First, the current criminal justice system perpetuates crime rather than ends it. In *Until We Reckon*, Danielle Sered states, "prison does not merely fail to rehabilitate the people it confines: it contributes to the likelihood that they will commit greater harm in the future. Recent research has established prison's criminogenic impact—meaning that it is a measurable,

statistically significant *driver* of crime and violence.”¹⁷ One reason for this is that those sent to prison are surrounded by others who can encourage a life of crime.

A life of crime can be encouraged in multiple ways. First, one is surrounded by those who have more experience and expertise in committing crime. This makes it easier to learn how to be “better” at crime, thus making a life of crime as a way to succeed more enticing. Furthermore, people as social creatures are greatly influenced by those they are surrounded by daily. Therefore, whenever a person is surrounded by others who hold habits and beliefs that lead to crime, that person is more likely to “pick up” those habits and beliefs. Finally, the human desire for belonging causes a development of community and connections between those in prison. Once out of prison, that community and those connections remain. Having connections and community with individuals who are likely to continue in a life of crime (due to the high rate of recidivism) increases the chances of involvement in crime by all individuals within this community.

Furthermore, Sered discusses findings that show the leading causes of violence at an individual level is “shame, isolation, exposure to violence, and a diminished ability to meet one’s economic needs.”¹⁸ The current criminal justice system sustains and increases the likelihood of these causes. The lives of prisoners are exposed at every level while they have a complete lack of power and control over their lives and situations. This increases shame, and the problem is exacerbated by a lack of resources available to prisoners to deal with this shame in a productive manner. Prisons also increase isolation. This is a basic feature of prisons since its aim is to

¹⁷ Danielle Sered. *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair*, 66. New York, NY: The New Press, 2019.

¹⁸ Sered, *Until We Reckon*. Pg. 67

isolate prisoners from loved ones and society. This leads to prisoners seeking to find community in those who are more likely to encourage violence as an answer.

A third cause is exposure to violence. This is another emblematic characteristic of life in prison. A life of violence is the norm in prison systems which allow for great numbers of physical and sexual abuse within its walls. Furthermore, exposure to violence increases the likelihood of continued violence by prisoners through making it a norm of prison life. Sered states, “Violence is not an exception in prison—it is the daily, defining norm.”¹⁹ This norm is also further developed through the governmental response to crime. The harsh punishment used by the criminal justice system can be seen as a form of retaliatory violence against perpetrators of crime, and a response to violence with violence solidifies the norm of violence in the lives of the incarcerated.

The current criminal justice system also sustains the inability of one to meet their economic needs. Not only are there a lack of opportunities to gain skills or education while incarcerated, which hinders one’s future ability to be economically successful, but the label that the criminal justice system stamps on formerly incarcerated individuals when trying to find work greatly hinders their ability to meet their economic needs. Thus, the current criminal justice system helps perpetuate a life of crime and violence through the effects it has on those incarcerated both during and after their time in prison. This discussion leads into further societal problems which increase the likelihood of recidivism.

The Negative Impact Once out of Prison

¹⁹ Sered, *Until We Reckon*. Pg. 76

Scholars, such as Michelle Alexander, illuminate the broader societal problems of prisons in their work. One problem is the social stigma attached to the label, “felon,” which is imposed onto others by the criminal justice system. Alexander explains, “Once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits.”²⁰ They are barred from public housing, are treated as second class by private landlords, can’t receive food stamps, have to make it known to potential employers that they are former felons (which greatly impacts their ability to receive jobs), and are unable to get different forms of licenses. These are all the ways in which life changes for a person who is convicted of a felon after being released from prison. Being labeled a felon greatly increases the likelihood of recidivism. With these life changes, many who are labeled as felons see a lack of options and are inspired to lead a life that will likely bring them back to the prison system. For example, nearly 68 percent were rearrested within 3 years of their release.²¹ This evidence further shows the negative effects of the criminal justice system on people’s lives.

The Negative Impact of the Current Legal Structure

Furthermore, there is a great increase in the number of those convicted for felonies, largely due to drug offenses. The incarceration rate has grown 1,100 percent since 1980, as there were only 41,000 drug offenders in 1980 compared to a half-million now.²² This has resulted in highly populated prisons in which a culture of crime has emerged. The rise in the population of

²⁰ Michelle Alexander. *The New Jim Crow: Mass Incarceration in the Age of Colourblindness*, 92. UK: Penguin Books, 2019.

²¹ Matthew Clarke, “ Long-Term Recidivism Studies Show High Arrest Rates,” Long-Term Recidivism Studies Show High Arrest Rates | Prison Legal News, May 3, 2019, <https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/>.

²² Alexander, *Mass Incarceration in the Age of Colourblindness*, pg. 52.

prisons fosters an environment for the issues discussed by Sered to grow. Therefore, the recidivism rate has increased due to factors such as the discrimination faced by former convicted felons and the growth of incarceration and crime culture in the prisons. This directly reflects back to the current criminal justice system, its institutionalized laws and norms have created the causes that perpetuate crime.

Another problem with the current criminal justice system is the ways in which it judges the penalties for certain crimes. First, the manner in which certain sentences are determined seem unjust. This is in part due to the use of objective measurements of the law that don't take into account the circumstances of the crime. An example of this is mandatory minimum sentencing. Mandatory minimum sentences are the lowest amount of jail time a guilty person can be punished for the type of crime they committed. One reason is that judges were seen as "soft" on offenders and we needed to "toughen up" on crime, so laws were made to enforce a "tough" level of sentencing.²³ This has affected how offenders are prosecuted and punished by making those convicted for offenses serve for a harshly long time no matter the circumstances surrounding the case. The case of Weldon Angelos captures the unjust nature of these policies. Alexander describes the unfairness of Angelos' sentencing given the nature of his crime, "He will spend the rest of his life in prison for three marijuana sales. Angelos... possessed a weapon—which he did not use or threaten to use—at the time of the sales. Under the federal sentencing guidelines, however, the sentencing judge was obligated to impose a fifty-five-year mandatory minimum sentence."²⁴ This case illustrates the injustice of mandatory minimum sentencing

²³ Alexander, *Mass Incarceration in the Age of Colourblindness*, pg. 91.

²⁴ Alexander, *Mass Incarceration in the Age of Colourblindness*, pg. 91-92.

within the current criminal justice system. The judge in the case, upon making the ruling, said from the bench that the sentence was “unjust, cruel, and even irrational.”²⁵

There are institutional problems within the United States criminal justice system at multiple levels: within the prison system, once out of the prison system, and within the current legal structure. These must be dealt with if the goals of reducing crime, having a safe and peaceful society, and/or treating each other in a just manner are to be accomplished. Therefore, no matter the goal of criminal justice which you accept, these scholars show the need to restructure the contemporary criminal justice system in a way which better reflects and accomplishes the goals of the criminal justice system.

IV. Competing Theories of Criminal Justice

In considering the moral theory that should be used to envision a more successful and just criminal justice system, I would like to first consider four general theories of punishment to help guide the varying options available to solving the issue of crime. Thom Brooks offers insight into each of these four theories of punishment.

Retributivism

The first of these theories is retributivism. This theory of punishment argues that “criminals deserve punishment in *proportion* to their crime.”²⁶ This means that for retributivism, the criminal justice system should look at past actions in determining what is “deserved”, such as a person deserving to serve time in prison for stealing, and what the action is “proportional” to, for example stealing bread is different from stealing a car in its proportion. However, it is important to note that this form of punishment is not vengeance. Brooks describes how the two

²⁵ Alexander, *Mass Incarceration in the Age of Colourblindness*, pg. 91.

²⁶ Thom Brooks. *Punishment*. New York, NY: Routledge, 2016. Pg. 15

are distinct from one another in two ways. First, he says that retribution is “an act of public justice” while vengeance is “an act of private justice.”²⁷ Second, Brooks says “retributivist punishments have limits” while vengeance is “without limits.”²⁸ In this way, retributivism is different from vengeance in important ways.

There are issues of what counts as deserving and proportional within the framework of retribution, but a more important issue is whether this rationale for punishment is moral. The first concern is the morality of this theory of justice. Retributive justice assumes that one *should* be punished for committing a wrongdoing. Why is this? The act of punishing a person who committed a wrong does nothing in erasing the wrong that occurred, so this can't be the reason as to why. One might argue then that it is the consequence of the wrongdoing that the person deserves. However, the person already faces the consequences of the wrongdoing, and rather than the government imposing the natural consequences of the wrongdoing it is artificially creating a reaction to the wrongdoing. It could be said that this type of punishment has a correcting effect in ensuring the past won't be repeated. However, this is disregarding the past-looking nature of retribution and it doesn't necessarily mean that this form of punishment is necessary either. Finally, one might argue that the retributive theory of justice is a moral good as wrongdoing deserves punishment in this way. However, the act itself- restricting freedom, taking away pleasure, or killing- would certainly not be considered on its own right a moral good. Therefore, it is a means to an end which is viewed as a moral good. However, this runs back into the problem of it not erasing the wrongdoing, not being the natural consequence, and not being for the purpose of keeping it from happening again.

²⁷ Brooks, *Punishment*. Pg. 17

²⁸ Brooks, *Punishment*. Pg. 17

Therefore, retributive justice has moral concerns in whether this is how we should model the criminal justice system. Another concern for retributive justice is how well it works pragmatically speaking. There is a lack of evidence supporting the argument that retribution alleviates crime in a society, and the current criminal justice system in the United States could be viewed as a form of retributive justice, thus again showing the success of this form of justice to be questionable at best.

Deterrence

Another theory of justice to consider is deterrence. Contrary to retributive justice, deterrence is forward-looking in its concern with crime. Brooks says that deterrence is concerned with “its ability to make crime less frequent, if not end.”²⁹ The argument for deterrence is along the lines that the goal is to avoid and discourage future crime by decentivizing crime through threatening pain on the wrongdoer. This theory of justice uses deterrence as a means to an end, which is the reduction of crime. This is what justifies punishment according to this theory. Problems arise in relation to deterrence on the basis of moral and pragmatic grounds, as with retributive justice. First, there are moral concerns with deterrence. If reducing crime is what morally justifies this theory of punishment, then theoretically one could be punished in any way the criminal justice system would see fit to best deter future crime. For example, the threat of public torture and execution would be a punishment with strong deterrent effects, when working under the assumption of deterrence that potential criminals calculate the costs of the punishment with the rewards of the crime. Therefore, a government would be justified to torture and execute anyone publicly for any crime no matter how small, so long as it reduces the crime of the society.

²⁹ Brooks, *Punishment*. Pg. 35

Using this logic, the government would then be justified in making jaywalking punishable by torture and execution, so long as it helped reduce jaywalking. It is in this way that the logic of deterrence is both immoral and absurd.

Furthermore, the success of deterrence is unknown at best. Brooks points out, “[T]here is little evidence to suggest that criminals weigh costs and benefits in the way many deterrence models assume. Criminals appear to rely on little more than guesswork about their possible likelihood of arrest and conviction.”³⁰ Deterrence also rests on the incorrect assumption that people know the punishment for what they are considering doing beforehand. Sered affirms this point, stating, “Increasing the length of sentences does not work to motivate change if no one knows that those sentences have changed. As a culture, we simply do not possess that level of knowledge or awareness. Nor do people typically learn about their peers’ and neighbors’ sentences with enough context to anticipate the consequences of their own actions.”³¹ This goes counter to the assumption of deterrence that potential criminals calculate the costs and benefits of the crime and the punishment of said crime. Without this assumption, the strength of the deterrence argument is greatly hindered if the cost of punishment is not a strong consideration or even known to the prospective perpetrator when potentially committing a crime. Therefore, the presuppositions of deterrence fail to support the theory, and an analysis of the effectiveness of deterrence is non-verifiable as it is impossible to predict the future and to know what persons of a society would do under different circumstances. Therefore, the theory of deterrence has both moral and pragmatic concerns and may then not be the best in applying to the criminal justice system.

³⁰ Brooks, *Punishment*. Pg. 46

³¹ Sered, *Until We Reckon*. Pg. 61

Rehabilitation

The third theory of punishment discussed by Brooks is rehabilitation. This form of justice holds that “punishment should aim at the reformation of offenders and assist their transition from criminal to law abiding citizen. Rehabilitation is successful where criminals come to reject crime out of choice.”³² This theory of justice then would not focus on punishing the criminal out of retribution, nor due to deterrent effects, but to change the wrongdoer by treating them as if they have a criminal illness needed to be cured. This could come by therapeutic means, and would allow for a more moral treatment of the wrongdoer. A rehabilitative form of justice would be to treat the offender with human dignity, charity, and the opportunity for redemption in starting a new and better life. It is in this way that this form of justice provides a stronger moral basis in solving the problems of the current criminal justice system.

Furthermore, this form of criminal justice provides multiple pragmatic advantages. First, it helps former criminals acclimate back into society in a way that benefits everyone more compared to other forms of punishment. As Brooks says, “Studies have found that reconvictions may be reduced by 5-10 percent through a targeted rehabilitative treatment programme. Rehabilitation programmes have the potential to be roughly twice as effective as deterrence.”³³ From a strictly efficiency standpoint, rehabilitation appears to be more successful than other forms of punishment in stopping crime.

Restorative Justice

Finally, the fourth theory of justice Brooks discusses is restorative punishment. Restorative punishment is defined by Brooks as aiming at “the ‘restoration’ of offenders,

³² Brooks, *Punishment*. Pg. 51

³³ Brooks, *Punishment*. Pg. 59

victims, and the wider community.”³⁴ This essentially means that restorative punishment is a form of justice which focuses on building better relations amongst all parties affected by the crime. This occurs through restorative conferences in which the community comes together, with the victims and the offenders, in which all consent to having a greater dialogue of the issue at hand. Certain conditions are decided by the conference for the requirements of the offenders to be ‘restored’ in the community. It is mediated, the offenders have representation, and a contract is made from the conditions decided.

This theory of punishment has many advantages. One moral advantage is that restorative theory allows for greater involvement by those actually impacted by the criminal act. This allows for those with the greatest right in seeking justice to play a large role in the process of achieving justice. Another advantage is that the flexibility of the theory allows for a greater consideration of the moral context of the situation. Certainly, the person who steals for a starving family versus the one who steals from a starving family are both criminals, yet in different circumstances, and these different circumstances should be acknowledged, as restorative punishment allows for.

There are also many pragmatic advantages. Brooks says that “Restorative contracts are agreed on in about 98 per cent of restorative conferences.”³⁵ This shows the success of this informal version of community justice. Furthermore, this allows both parties to engage with each other in a productive manner, it allows for the community to set conditions for the offenses taken place within the community, and it allows for a level of flexibility not seen in a formal court of law. Brooks goes on to say “Restorative justice has been highly promising in the limited contexts in which it has been employed... The restorative justice approach leads to roughly 25 per cent less reoffending than alternatives. Restorative justice is more effective and at significantly less

³⁴ Brooks, *Punishment*. Pg. 64

³⁵ Brooks, Thom. *Punishment*. New York, NY: Routledge, 2016. Pg. 66

cost.”³⁶ Therefore, not only does restorative justice have the advantages mentioned above regarding flexibility and the participation of the community, victims, and offenders, but it also is more effective than traditional alternatives at a lower cost.

Therefore, building from Brooks provides a greater understanding of the four broad approaches to theories of punishment. It also provides a basis from which to critically examine each theory of punishment. The conclusion from this is that the retributive and deterrence theories of justice lack moral and pragmatic grounds on which to base the criminal justice system, while rehabilitative and restorative theories of justice provide promising approaches to criminal justice which may be applied in the formulation of how we should handle criminal acts and criminal actors.

V. New Ethical Theory

Having critiqued the current criminal justice system, showing the need for a new moral foundation from which we can rebuild a new system, and having evaluated the most prevalent theories of justice, how do we move forward? In light of the intimate connection between morality and the law, it appears necessary that the answer to how we should reconceptualize the American criminal justice system is through an ethical theory that can then be used to reconsider the theories of justice discussed above, and apply to the law in a compelling way. In light of this, I will argue that I have developed such a theory that succeeds in alleviating the problems of the current criminal justice system in a way that rethinks the system into a more just construction.

Good/Right and Bad/Wrong Distinction

³⁶ Brooks, Thom. *Punishment*. New York, NY: Routledge, 2016. Pg. 83

Before attempting to unpack my ethical theory, it may be useful to first present some of the semantics that are important for understanding the theory. It is often a tendency to deem people good when they do things that are right, and bad when they do things that are wrong. Good/right and bad/wrong are often used interchangeably in regular conversation. However, there is an important distinction between them. Simply put, good and bad are descriptive of the moral character of a person while right and wrong are descriptive of the moral action. Moral character is attributing moral soundness to the *person*, while moral action is attributing moral soundness to the *act*. This is important as the character of the person, and the individual choices one makes, are two separate entities deserving of separate moral considerations.

It may seem that this distinction is not needed as they affect one another. The moral character of a person tends to produce certain kinds of moral actions and the cumulative moral actions of a person may offer glimpses or reasonable assumptions of the moral character of the person. However, while they are tied to one another in these ways, they should remain analytically separate and distinct from one another. One reason is that if they were the same, then a single moral act would reveal the character of the person, and a change in moral acts would constitute a change in the character of the person. This seems implausible and unlikely at best. Furthermore, to have influence on each other in the way that they do, they must be distinct. If they were the same thing they would reflect each other in a one-to-one ratio rather than influence one another. In this way, one can see how they act as two distinct things tied together rather than one thing casting different shadows.

Moral Character and Moral Essence

Given this distinction, how are we to judge character and actions differently? For moral character, it resides in the *intentions/motivations and principles* of the person when they make choices. This is because choice is the vessel through which we espouse morality as moral agents. No other way can we actualize our morals into the world. So then what is our influence on choice as persons? Choice is influenced by context, which we don't control, and the motivation of the choice-maker, which we do control. Furthermore, the intentions or motivations of a person are driven by the moral principles we hold. This is what motivates us, for we hold certain principles that we deem good. Some hold liberty as the good, others equality. Whatever it may be, our intentions are driven by the principles we hold as good. Therefore, the way in which we can judge the moral character of a person is through their intentions or motivations from the principles they hold.

The principled motivation that a person holds, which serves to judge moral character, I refer to as *Moral Essence*. We all hold principles or moral rules that help us guide our conduct and actions in the world. These moral principles or rules are commonly seen as virtues like compassion, courage, equality, and liberty. However, these only go so far until they are restricted by some other deeper moral rule or principle. For example, liberty is good *up to a point*. For we would not let someone murder someone else in the name of liberty. Therefore, in the minds of most there is some moral principle that reigns supreme over that of liberty. If we take the same steps with other principles we hold, we will find the same result. This leads all the way until there is one core commonality between our core values that stands as the supreme principle from which we live by, our moral essence. This is what guides our intentions and motivations. When reaching our moral essence, context does not matter for this value. For context changes our actions because it pits principles we hold against each other, with our moral essence leading how

we should react to the context. We break compassion or courage, for example, in certain contexts because they in those contexts brush up against other moral principles which serves our moral essence better than the principle being broken. In other words, people break moral principles when they no longer serve the purpose of helping lead towards the moral essence we hold.

Moral Action and Context

How do people judge moral acts? An act is the actualization of a choice within a context resulting in a set of consequences. A moral act originates from certain principles held in one's intention, thus it is a principled action. It is also influenced by, and influences, contextual factors. So a moral act is a principled action chosen and performed within a set of circumstances. Why do we act on these principles, and why are they altered based on the circumstances? Here we see that the reason is to influence the future, or rather it is for a certain desired outcome. Therefore, a moral act ought to be judged by looking at the consequences that followed from the act itself.

How then do we judge the consequences of moral action? The answer to this is twofold. First, we must consider the specific consequence of the moral act that occurs in relation to its impact on individuals' abilities to follow their moral essences without conflicting with one another. This is because actions influence the context in which people find themselves in. Furthermore, the context surrounding a person either adds or alleviates tension and conflict between different moral essences held amongst individuals. Therefore, if the goal of morality is to hold a non-conflicting moral essence and to develop a society in which the moral essences of individuals don't conflict, then the consequences of an action should be judged by the alleviation or creation of tension or conflict between moral essences.

The second way in which we should judge moral acts is based on the context from which the act occurs. As discussed earlier, a moral act is dependent on both the intention of the person and the context the act is found in. Therefore, the context must be considered in how it may have limited the choices available, which principles it may have placed against one another, and the effect the context has had and still has on the psychological make-up of the person committing the moral act. The context allows us to view moral acts in a way that goes beyond the individual by allowing us to judge the moral act in a way that reflects the greater moral makeup of the society as a whole. Therefore, judging a moral act comes from evaluating the impact of its consequences on relations between different moral essences, and focusing on the context in which the act was made and how this influenced it.

Theory in Practice

What then do we do with this? First, we must ask ourselves what our moral essence is. Then we must ask ourselves what our moral essence ought to be.³⁷ If we can make it past that, then we must ask ourselves how we can change the context we find ourselves in to better fit our moral essence with that of others. If we cannot agree on what the moral essence ought to be, then we must change the world's contexts to alleviate conflict between differing moral essences as best we can. For example, liberty and compassion may be two opposing moral essences but they need not be in conflict if we could fix the contexts that create the conflict to start. We must also consider the goodness of our moral essence in regards to its applicability in the world. Our moral

³⁷ For the purposes of this paper, I won't discuss further the moral answers which this ethical theory gives. Rather, developing the ethical framework which the theory proposes is enough for the purposes of using it as a guide for a reconstruction of the current criminal justice system. In brief, the answer to the question posed in the text, offered by the ethical theory developed here, is the principle of *charity*. For further development of this idea, see C.S. Lewis's *Mere Christianity*, Book III (the chapter on Charity).

essence must be one that all could successfully hold without it leading to conflict with others. What I mean by this may be revealed easier by example. Take someone who has the moral essence of “hedonistic pleasure for me.” Now, if he were to consider this moral essence and its rightness, he would see that it fails the test of being possible to be good. For if all held this moral essence then there would assuredly be conflict amongst people in their following of this core principle.

After we have stripped ourselves of those contradictory moral essences, we must see what remains. Ask yourself then, how does context alleviate or create any potential conflict between different moral essences. In answering this, you are judging which acts are right to do and which are wrong. Understanding moral acts in this way allows for one to not only determine how to conduct oneself in their actions, but allows for one to determine the rightness or wrongness of the acts of others. Therefore, in practice, the moral character of a person should be judged by their moral essence, seen through the principle which drives their motivations, while the moral action of a person should be judged by the influence it has on context as well as the influence context has on it.

Internal and External Morality

Another way of looking at the right/wrong and good/bad distinction and the separate considerations of the moral essence and context is to distinguish between *internal morality* and *external morality*. The internal morality is the morality that is involved with self; with no concern of the facts of the external world, what should you do? This is the question for internal morality, and the answer one gives is their moral essence. However, we are social creatures and live in a society that goes beyond our internal selves. Thus, there is another level of morality that

is external to us by being between people in relations and, more generally, by being concerned with a societal view of morality. Considering morality in this way, external to us and found in societal relations, and asking the question of the influence of societal relations on individual acts and how these relations should best be constructed, or as it has been described here as context, are the considerations of external morality. Therefore, a simplified way of describing the two facets to this theory is the idea of considering both the internal morality and the external morality that impact the moral acts of individuals.³⁸

VI. Application of the Theory to the Law

Now that I have argued for this new theory of ethics, how does this fit within the question of the criminal justice system? I will attempt to show how my theory of ethics succeeds in its application to the system, developing a construction of the law which alleviates the critiques previously posed and opens opportunities to developing a more just society. If the criminal holds a moral essence deemed bad, then a deep change within the individual is required. Evaluating the different theories of justice by Brooks shows that the most promising way to change convicts away from a life of crime is through rehabilitation. Furthermore, rehabilitation can be seen as “curing an illness” within the disposition of the criminal, placing rehabilitation firmly within the realm of the moral essence or internal morality. If it is not a bad act but just a wrong one, then it requires a focus on changing the context. This requires restorative justice rather than current forms of punishment. For restorative justice is shown by Brooks to be more effective in restoring

³⁸ Another reason for making such a distinction within moral philosophy is the suggestion that this distinction between internal and external morality may be representative of separate ethical disciplines or concerns. For example, it could be said that internal morality is the subject matter of religion (in the broader sense of the word) while external morality is the subject matter of government. While these are distinct disciplines, there is much historical and theoretical overlap. Conceptualizing morality in this way might then be a theoretical framework which can be used in better understanding the relationship between these two distinct but overlapping disciplines.

the social relations within a community, and restoration focuses on the relations between perpetrator and community/victim, placing it within the idea of moral action or external morality. The focus on rehabilitative and restorative justice takes away the current aspects of punishment from law and puts the focus on helping the individual and their social relations.

Thus, when considering the moral system described above in relation to the criminal justice system, the vital question becomes whether the guilty party committed the crime due to external or internal factors. In other words, was the crime committed in response to external circumstances, such as stealing food due to one's impoverished circumstances, circumstances they have no control over, or was the crime committed due to a bad moral essence within the individual? This is no easy question to answer, but from taking a holistic approach to investigating crime, we may hope, and be justified in, distinguishing the two on the basis of circumstances, past actions, and evaluation of the individual. Applying the moral theory above entails an investigation that considers these three facets, from which one may be justified in making a ruling of whether the crime is due to internal or external moral factors. After this question is answered, the theory may be further applied in how we should respond to the cases of both crime due to internal moral factors and external moral factors.

If the crime is judged to be determined by internal moral factors, then a form of rehabilitative justice is required. This would be the goal of a rehabilitative form of justice, for if the criminal committed the crime out of internal moral factors, or due to one's moral essence, then even if you change the circumstances in which he is in, he will still be inclined to committing the same offenses as before. This type of criminal then requires a change of their moral essence, or as Brooks says a "reformation of offenders." The goal here is to develop a changed moral essence in the individual so that he will "reject crime out of choice."

The question then becomes how this is implemented. Rehabilitation will require some form of therapy. There may be therapy for substance abuse, mental health issues, or recreational therapy used to bring about the change needed in a criminal's moral essence. This is no easy task, and as such requires not prisons but rather rehabilitation centers. Thus, the abolition of prisons would arise from this view and in its place rehabilitation centers run by professionals who have expertise in therapeutic recovery. Following the approval of the professionals, former criminals will be released once confident that there has been a change in the moral essence, offering another chance in societal life as a show of charity and respect for the individual. Furthermore, allowing them the chance to change their lives will not only allow for them to live in a free society, but will allow for them to help promote that society as a productive citizen. Finally, rehabilitative justice confronts the problems of reconvictions, helping end the issue of repeat offenders by giving them the help they need while also helping end the criminal culture developed in many crime ridden areas in the ways described above.

The next question is how we should handle crimes and criminals which are not due to internal moral factors but rather external moral factors, or in other words the context. Rather than a rehabilitative form of justice this requires a variation of restorative justice. The reason why rehabilitation is not the solution is that if it is the context causing the criminal act, then attempting to change the individual is not justified as it is the context rather than the moral essence which is the root of the crime. Therefore, a restorative form of justice is needed to alleviate the problems of the context which helped create the crime. The reason for this form of justice in the case of crimes with external moral factors is that the context in which the crime is committed is the problem which we should strive to fix. For without the context there, the crime

doesn't happen, and therefore the crime in this case can be used as a tool of reflection on the part of society to see where there are issues needed to be fixed.

Restorative justice is how context is addressed, as it is the relationships between victims, offenders, families, and the overall community through which context arises. What is it that caused these people to be victims and offenders, and how can this be alleviated? What can be done to renew the relationship between victim and offender? What role do and/or can the families play in this? How does the community impact the greater situation and how should it impact it? All these are questions considered under restorative justice, and from this a community driven approach to justice is taken to ensure that the context from which this crime occurred is no longer an issue. This allows for both a rebuilding of the relationships affected from the crime at hand and for preventing future similar crimes from occurring.

One additional feature of this version of restorative justice would be adding a top-down layer to the mostly bottom-up approach of restorative justice. What this means is that not only is this handled through community conferences and contracts, but the context should be used as a reflection of the greater sociological factors at play. A large portion of the impact that context has on crimes comes from the educational and economic systems influencing the community. Therefore, crime can be used to illuminate parts of society in which there are problems at the sociological level, whether they be cultural, economic, educational, or any other form of institution. Adding this feature to the restorative justice system allows for both the illumination of societal problems and a greater impact on the community as a whole.

Therefore, applying my moral theory to criminal justice requires an investigation into whether the crime is due to internal moral factors or external moral factors. If it is internal moral factors, rehabilitative justice is required for a change in the offender's moral essence. If it is

external moral factors, restorative justice is required for a change in the context which helped cause the crime. Either way, the need for prisons is alleviated under this model, allowing for the abolitionment of prisons in favor of rehabilitation centers and community contracts in responding to crime on the basis of my ethical theory.

VII. Conclusion

In conclusion, the contemporary criminal justice system in the United States fails both morally and pragmatically. The law has a normative component that the legal positivist position fails to account for, which can be used in developing a better criminal justice system for the society. Understanding this normative component, and the connection to morality and the law, the current criminal justice system can be critiqued on moral grounds.

Morally, the criminal justice system should treat criminals with human dignity and charity in offering the chance to live a life without crime by helping change the moral character of the person and/or the context in which the criminals find themselves in. The current criminal justice system does not accomplish this. It fails in treating criminals with human dignity and with charity by institutionalizing a system in which criminals are faced with a lack of non-criminal options, are thrown into a crime culture, are not taught how to live otherwise, and are discriminated against when in public society. Thus, the criminal justice system can be critiqued on moral grounds.

Pragmatically, the current criminal justice system is not accomplishing the goals set out by such a system. Whether the primary goal is lessening/ending crime, protecting society, or helping victims, the current system does not serve as the best solution to these goals. These pragmatic critiques serve to further the moral critiques, as the criminal justice system should be

set up in a way to best end crime, protect society, and help victims. Therefore, alternative solutions to the way in which the criminal justice system is constructed must be sought.

In connecting morality to the law, finding an alternative construction to the current criminal justice system depends upon the ethical system from which it is based. I argue that this ethical system should be one in which morality is understood to have an internal and external component. The internal component is what I call the moral essence of an individual. The moral essence of an individual is what guides their motivations and should be consistent in application, meaning that all could hold such a moral essence without there being contradiction. The external component is the context in which a moral actor finds themselves in, which influences the action taken in a situation. Taking these two components of morality into account, the moral essence of a person and the context which acts upon the decision of the actions taken by an individual should be taken into account when considering how the criminal justice system should be constructed.

There are four broad theories of justice which were considered in the paper from which to consider how the criminal justice system should be constructed. The first two theories, retributive and deterrent justice, fail in applying a moral and pragmatically successful criminal justice system as they don't take into account the moral considerations of the moral essence and the context and lack data providing positive results in solving the problems faced with the criminal justice system. The other two theories, rehabilitative and restorative justice, show promise in the pragmatic concerns of the criminal justice system, with early studies showing a greater success in solving the issues of protecting society, ending crime, and helping victims. Furthermore, the two theories can be used in application of the moral concerns of the moral essence and the context of an action.

The moral essence would be the focus of a rehabilitative form of justice, attempting to change the moral character of the offender so that there is no motivation to repeat a life of crime. The context of a situation which influence criminal activity would be the focus of a restorative form of justice, by having the bottom-up approach of community driven justice, and thus focusing on the contexts between offender and victim and within the community, and by using the crime as a reflection of what the greater society needs to focus on fixing.

Therefore, a more just and successful construction of the criminal justice system is one which focuses on the moral essence of individuals and the context in which criminals are influenced. This can be achieved through rehabilitative justice for crimes caused by a moral essence, and through restorative justice for crimes caused by the context in which individuals find themselves in. If the criminal justice system is constructed in this way, crime will be lessened, the society will be safer, the victims and offenders will be helped, and the criminal justice system will be morally just.

Bibliography

Alexander, Michelle. "The Lockdown." Essay. In *The New Jim Crow: Mass Incarceration in the Age of Colourblindness*, 58–94. UK: Penguin Books, 2019.

Brooks, Thom. *Punishment*. New York, NY: Routledge, 2016.

Clarke, Matthew. "Long-Term Recidivism Studies Show High Arrest Rates." Long-Term Recidivism Studies Show High Arrest Rates | Prison Legal News, May 3, 2019. <https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/>.

Dworkin, Ronald M. "The Model of Rules." *The University of Chicago Law Review* 35, no. 1 (1967): 14–46. <https://doi.org/10.2307/1598947>.

Dworkin, Ronald. *Justice in Robes*. New Delhi, India: Universal Law Publishing, 2007.

Dworkin, Ronald. *Law's Empire*. Oxford: Hart Publishing, 1986.

Sered, Danielle. "Prison's Broken Promise; In Praise of Accountability; Displacing Incarceration; Our Reckoning." Essay. In *Until We Reckon: Violence, Mass Incarceration, and a Road to Repair*, 51-156, 235-254. New York: The New Press, 2021.

Shapiro, Scott. *Legality*. Cambridge, MA: Harvard University Press, 2013.

Shelby, Tommie. "Part III: Rejecting the Claims of Law." In *Dark Chettos: Injustice, Dissent, and Reform*, 201–273. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2013.

"United States Crime Rates 1960 - 2019." United States crime rates 1960 to 2019. Accessed October 10, 2021. <https://disastercenter.com/crime/uscrime.htm>.