**Should we shorten prison sentences?**

*Summary*: This chapter explores whether we ought to shorten the length of prison sentences by considering three major theories of punishment. First, we examine the retributivist justification – the claim that we should punish individuals who commit crimes because they deserve to suffer. We argue that this justification fails because its central premise is morally problematic, and because it is unable to justify the high costs of the prison system. Second, we consider the communicative justification – the claim that we should punish individuals who commit crimes in order to communicate our condemnation of their actions. We argue that this theory fails because prison sentences are an ineffective means of communicating our condemnation. Third, we consider the deterrence justification – the claim that we should punish individuals who commit crimes punished because doing so reduces crime. We provide support for this justification and use it to provide two arguments for reducing current prison sentence length. We offer the Proportionality Argument, which holds that current prison sentence length asks individuals to bear burdens that are too great. Next, we offer the Ineffectiveness Argument, which holds that the effect of lengthy prison sentences on crime rates are too low to justify the burdens they impose.

**1. Introduction**

It was amongst 2015’s most extraordinary events when the USA’s Democratic and Republican parties made a bipartisan push to introduce the Sentencing Reform and Corrections Act, which, amongst other things, advocated reducing the length of prison sentences for various crimes.[[1]](#footnote-2) For the two parties to find any common ground, let alone work together, is so rare that any such occurrence is momentous. But the development was also striking because it is set against a long-term trend towards *increasing* the length of prison sentences.

In recent decades, many western democracies have increased both the number of crimes that carry a prison sentence and the length of this sentence. In the UK, a recent Ministry of Justice report notes that between 1993 and 2012, the prison population rose by 98%. It attributes a large amount of this rise to two factors: courts have sentenced more people to prison and the average length of these sentences has increased. In the period between 1999 and 2011, the average custodial sentence length given for indictable offences rose from 14.3 to 17.4 months and the average time served increased by 1.4 months. The rise is particularly clearly within a subset of offences. Between 1993 and 2011 the average custodial sentence length for crimes relating to violence, drug offences, and sexual offences rose by 2.3 months, 3 months, and 17.3 months, respectively. The trend also includes a particularly sharp rise in the number of people serving determinate sentences of more than four years and those serving indeterminate sentences.[[2]](#footnote-3)

To some extent, this rise in prison sentence lengths sits in tension with an overarching trend in the direction of more humane punishment. Longer prison sentences have replaced (some) use of chain gangs, torture, and the death penalty. However, the fact that prison sentences are preferable to other forms of punishment is not sufficient to justify their use. Rather, we must also assess whether they constitute a morally acceptable form of punishment. It is precisely this matter the Democratic-Republican coalition meant to place under the spotlight. They pose the question: for how long should we detain in custody individuals who have committed crimes?

In the public debate surrounding the Sentencing Reform and Corrections Act, one of the most frequently mentioned issues is the cost of the current system. We shall discuss the relevance of this issue at various points in this chapter. But it is helpful to begin by highlighting another argument that figures prominently in discussion of the Act: the potential effects of prison sentences on crime rates. It is notable that assertions have been made in both directions here. Amongst the strongest opposition to the advocacy of shorter sentences is Senator Ted Cruz, who claimed that it “could result in more violent criminals being let out on the streets, and potentially more lives being lost”,[[3]](#footnote-4) and Senator Tom Cotton, who said that it will “see more needless crimes committed by those who are released early from prison”.[[4]](#footnote-5) In contest, Bernard Kerik, former police commissioner of New York, wrote that the assertion that current prison sentences “are necessary to keep…streets safe is simply false” and, indeed, that “the longer anyone sits in prison, their chances for a successful transition back into society diminishes with each passing day.”[[5]](#footnote-6)

What these claims contest is straightforwardly an empirical matter, namely whether longer prison sentences reduce crime to a greater extent than shorter sentences. As we shall discuss later in this chapter, this empirical question is important. But it is important also because it links the debate with a moral claim about punishment. It connects to the view that we should assess punishment, and prison sentences in particular, in terms of how they affect crime rates. This claim tracks the main thesis of what is often called the *deterrence justification* for punishment. This view holds that we ought to impose punishment on those who commit crimes in order, and in so far as they serve, to reduce the likelihood of crimes being committed.

The *deterrence justification* for punishment is a prominent and widely endorsed view. However, it is not the only moral justification that is offered in defence of punishment. Thus, to evaluate arguments about sentencing reform that rely on it – and, indeed, the permissibility of sentencing reform in general – we need to reflect more broadly about the range of moral claims that we can make about the proper purpose and dimensions of state punishment. Although this may sound like a grand enterprise, the main theories are familiar from public debate. Consider statements that have been made in defence of another form of punishment used in the US: the death penalty. In perhaps its most significant ruling on the matter in the case of Gregg v. Georgia, the Supreme Court’s decision to uphold use of the death penalty stated that it serves three ends.[[6]](#footnote-7) The first is the *deterrence justification* cited above: it reduces the likelihood of people committing crimes. The second is retribution: we can impose this penalty on an individual on grounds that her wrongdoing means it is intrinsically good for her to suffer. The third is communicative: in the words of the Supreme Court, “capital punishment is an expression of society’s moral outrage at particularly offensive conduct”. On this basis, we can distinguish three moral claims about the purposes of punishment. Let us state them as follows:

*Deterrence Justification*: the state may punish an individual who commits a criminal offence so as to deter wrongdoing.

*Retributivist Justification*:the state may punish an individual who commits a criminal offence on the grounds that it is intrinsically good for her to suffer.

*Communicative Justification*: the state may punish an individual who commits a criminal offence in order publicly to condemn her for what she has done.

We can easily translate these accounts into arguments about the appropriate length of prison sentences. We might claim that we should set the length of sentences so as to act as an effective deterrent, so as to reflect the amount an individual ought to suffer, or so as to ensure the appropriate level of public condemnation.

In this chapter, we explore the question of appropriate prison sentence length by evaluating these positions. In Sections 2-3, we cast doubt on the force of the *Retributivist Justification* and the *Communicative Justification*, also arguing that they provide weak support for the lengthy prison sentences we currently employ. In Section 4, we offer reasons to embrace some version of the *Deterrence Justification*, but in Sections 5-6 we explain how this justification supplies us with two objections to lengthy prison sentences. On this basis we support prison sentences that are shorter than various current practices.

We should highlight in advance that we do not aim to reach a complete account of sentencing. What is an appropriate custodial term – and whether current sentences are too long – is case specific. We proceed by discussing prison sentence length in general, believing that our arguments have widespread application in the context of many western countries. We also identify examples where we are confident our arguments have definite application. But we do not mean to propose that there are no currently applied prison sentences of appropriate length or, indeed, that some are not too short. Perhaps, for example, we should lengthen prison sentences for domestic abuse, as the Sentencing Reform and Corrections Act suggests.

Similarly, the overall practice of sentencing has various tools at its disposal. In addition to custodial terms, we can raise questions about prison conditions, parole, non-prison sentences (such as community service), and the existence and duration of criminal records. It is plausible that what constitutes an appropriate prison sentence depends heavily upon how these other aspects of the criminal justice system are constructed. Nevertheless, our arguments should be sufficient to push against lengthy prison sentences forming part of this package.

**2. The Retributivist Justification**

The core of the *Retributivist Justification* is most commonly expressed in the phrase “an eye for an eye”. In essence, it holds that it is intrinsically good for an individual who has committed a criminal offence to suffer. We might say that, because she has done something wrong, she *deserves* to suffer. On this view, whereas an individual’s suffering is normally a bad that we have reason to regret and to avoid, in the case of individuals who have committed criminal offences, it is a good that we have reason to welcome and to bring about.[[7]](#footnote-8)

We can qualify this core idea in various ways. For example, retributivists emphasise the importance of punishment being proportionate to the offence an individual has committed. It is common to hold that an individual’s wrongdoing involves a certain amount of badness and that it is intrinsically good for this individual to suffer a mirroring amount. It is this idea that the “eye for an eye” phrase captures. Nonetheless, retributivists need not hold that punishment must be an exact mirror of the crime. They need not propose that we should torture those who have tortured others. The aim is more along the lines of a close fit or “proximity” punishment. A more apt (but admittedly less catchy) phrase might, then, be “a loss similar to the loss of an eye for an eye”.

Thus, we can construct the following retributivist argument on prison sentence length:

*Retributivist moral claim*: individuals should suffer a proximate, proportionate amount for committing a criminal offence.

*Further premise*: a proximate, proportionate amount of suffering for assaulting another person in a way that causes actual bodily harm is, say, a five-year prison sentence.

*Conclusion*: we should imprison individuals who have assaulted others in a way that causes actual bodily harm for five years.

Although this line of argument appears valid, the *Retributivist Justification* also relies on another premise that is not currently stated. In order for the conclusion to follow, we must also claim that the state is permitted to bring about the appropriate suffering in order to realise its intrinsic goodness. This premise is not straightforward. Bringing about this suffering may be very costly and, in the case of imprisonment, it is likely to require coercively taxing the general public in order to secure the funds necessary to administer the punishment.

In sum, then, the retributivist justification must involve two moral claims:

*Retributivist moral claim 1*: individuals should suffer a proximate, proportionate amount for committing a criminal offence.

*Retributivist moral claim 2*: the state ought to bring about this suffering.

Let us address each premise in turn.

*Retributivist moral claim 1* – the idea that it is intrinsically good for an individual who has committed a criminal offence to suffer – is certainly a widely-shared conviction. Moreover, proponents of this view allege that it helps us to make sense of some of our most deep-rooted intuitions, including, for example, why we cheer when the villain needlessly suffers at the end of the film.

Despite this, there is something odd about such celebration of suffering, presuming, as it does, that there is something morally laudable in an individual’s suffering when it serves no instrumental purpose. Here, it is important to put aside the fact that such suffering can generate various benefits to the victim, the wrongdoer, and to other citizens. The *Retributivist Justification* does not rely on an instrumental claim of this kind. It holds that the suffering of an individual who has committed a criminal offence is good even when it does not produce such other benefits. This idea seems harder to accept. As H. L. A. Hart famously notes, it seems to involve “a mysterious piece of moral alchemy in which the combination of the two evils of moral wickedness [the crime] and suffering [the imprisonment] are transmuted into good”.[[8]](#footnote-9) To be sure, we need not deny that the idea of deserved suffering is intuitively appealing. Rather, what we are sceptical of is according this intuition any serious weight within our theorising about justifications of state punishment.

There are also reasons to doubt *Retributivist moral claim 2* – the claim that the state ought to bring about suffering that an individual deserves. For the sake of argument, let us assume what we have already challenged – that it is intrinsically good for an individual who has committed a crime to suffer. Even under this assumption, it is unlikely that it would be sufficiently valuable to justify the extensive costs that imprisonment imposes on the general public.

It is important to remember that there is a vast range of costs that are typically connected with prison sentences, including the immense emotional and psychological costs that can fall on the friends and families of those imprisoned. However, it is difficult to believe that the prison system is sufficiently valuable even if we consider only the financial costs. In the UK, the Ministry of Justice conservatively estimates the overall cost per prisoner in 2014-2015 to be £33,291 per year.[[9]](#footnote-10) This figure excludes costs relating to the trial, such as the costs of legal aid, which can easily amount to tens of thousands. Prison Watch UK estimates the average annual cost per prisoner to be closer to £36,000 and the recent rise in prison population alone to represent an additional cost of £1.22 billion.[[10]](#footnote-11) In the light of these costs, two points stand against the idea that they are defensible.

First, even if it is intrinsically good for an individual who has committed a crime to suffer, it seems clear that this value could not be sufficiently high as to justify the extensive coercive taxation of the general public necessary to provide these funds. That is, given that prisons (not to mention the related infrastructure) involve such costs, the *Retributivist Justification* relies upon the idea that the state may heavily tax innocent individuals to punish the guilty. But this result should strike us as troubling, especially if the innocent individuals who pay taxes do not consent to this use of their money.

Second, and relatedly, there are many better ways to spend this tax revenue. Rather than use its resources to increase the amount of suffering in the world, the state could invest more heavily in our healthcare or education systems. We could even use the resources simply to ensure that morally praiseworthy people prosper (rather than to ensure that those who commit criminal offences suffer).

Based upon this analysis, we should reject the *Retributivist Justification*. Whilst this view is widely-shared, we should resist the idea that the intrinsic goodness of an individual’s suffering can justify the use of state punishment with its extensive associated costs. For this reason, we must replace, or at least supplement, this account with a further justification.

**3. The Communicative Justification**

The *Communicative Justification* holds that the state may punish an individual who commits a criminal offence in order publicly to condemn the wrongdoing and, in doing so, publicly to affirm the rights of the offence’s victim. On this view, state punishment is justifiable because of what it *communicates* about both the conduct of the individual who committed the offence, as well as the moral importance of her victim.[[11]](#footnote-12)

As a defence of prison sentences, the *Communicative Justification* supports the following argument:

*Communicative moral claim*: we should treat individuals who have committed criminal offences in a manner that communicates suitable public condemnation of this act.

*Further premise*: a five year prison sentence, say, communicates appropriate public condemnation for assaulting another person in a way that causes actual bodily harm.

*Conclusion*: we should imprison individuals who assault others in a way that causes actual bodily harm for five years.

An important task in offering this argument involves defending what we have labelled the *further premise*. In particular, proponents of the *Communicative Justification* must find a way to link condemnation to state punishment in particular.[[12]](#footnote-13) That is, they must explain why we must *punish* an individual in order to condemn her and, furthermore, why any particular form of punishment should be thought suitable. Thomas Scanlon memorably summarises the challenge as follows, “insofar as expression is our aim, we could just as well ‘say it with flowers’ or, perhaps more appropriately, with weeds”.[[13]](#footnote-14)

Anthony Duff offers one influential attempt to meet this challenge. He claims that punishment is the form of communication that is apt or fitting in these cases.[[14]](#footnote-15) His defence of this conviction appeals to the idea that, when we condemn an individual, we want for her to recognise that she has acted wrongly and to apologise accordingly. Punishment can serve this morally educative function. Just as we may tell a naughty child to go to her room and spend some time thinking about what she has done, we may imprison someone so that she has time to reflect upon the seriousness of crime. Appreciating the seriousness of one’s crime can be hard work and imprisonment can facilitate this task.[[15]](#footnote-16)

It is worth acknowledging that Duff expresses some reservations about the use of imprisonment. Given his concern to encourage an individual who commits a criminal offence to recognise the wrongfulness of her actions and to reform her views and behaviour, Duff expresses support for greater use of victim-offender mediation programmes, probation, education programmes, and community service.[[16]](#footnote-17) Nevertheless, Duff maintains that the use of imprisonment is permissible when it is the means by which we can shock certain individuals into recognising and reforming their wrongful behaviour.

There are two problems with this view. First, we might question whether in fact imprisonment is conducive to reform, such that it increases the likelihood of an individual recognising that she has acted wrongly.[[17]](#footnote-18) One reason to doubt that it will have this effect is that prison is often such a torrid experience that the pains drown out the space for imprisoned individuals to engage in much careful reflection. Instead, the experience often simply generates hostility. This scepticism is further supported by the fact that evidence suggests that a prison sentence, and especially longer prison sentences, increase (rather than decrease) the chances of an individual committing further crimes after her release. We can explain this result by appeal to (1) the *learning effect,* whereby increased exposure to other criminals makes it easier for an individual to learn new criminal skills;[[18]](#footnote-19) and (2) the *outside option effect* whereby longer prison sentences both decrease an individual’s chance of employment once released and contribute to the loss or distancing from friends and family members.[[19]](#footnote-20) These explanations are important because they imply that we should be sceptical of the morally educative role of both existing prisons and even certain idealised versions of them. Accordingly, the link proponents of the *Communicative Justification* must make between public condemnation and prison sentences remains unestablished.

The second problem relates to the costliness of state punishment. Even if we have good reasons to punish an individual in order publicly to condemn her for what she has done, we need to ask whether these reasons are sufficient to justify the connected costs. As we noted above, the current practice of criminal justice comes at considerable cost. For many people, even the value of publicly condemning those who commit crimes will not seem worth this level of spending. Making this point, Victor Tadros rhetorically asks, “Do we really think that the machinery of criminal justice, with all of the costs that we incur to set it up and maintain it, can be justified on the basis of the desire to vindicate the victim’s right that the offender recognizes what he has done is wrong and apologizes for it?”[[20]](#footnote-21)

To be sure, for all that we have said here, we have not proven that punishment, and prison sentences in particular, are not the appropriate way publicly to condemn criminal offences or that such a system is necessarily unjustified in virtue of being so expensive. Our points are mainly designed to highlight places in which advocates of the *Communicative Justification* must do more work to prove their case. But they also suggest something further: when we theorise about the criminal justice system, there seems to be more going on than a concern for condemning an individual for having committed a criminal offence. It is to this point that we now turn.

**4. The Deterrence Justification**

The third position on punishment that we shall consider is the *Deterrence Justification*, according to which the purpose of state punishment is to deter wrongdoing. The appeal of this view resides in the fact that, when we think about what would be bad about abolishing the criminal justice system, one central concern is that doing so would increase our likelihood of becoming victims of crime.

The *Deterrence Justification* is also appealing for a second reason: it is more humane than the *Retributivist Justification*. Proponents of this view need not regard the suffering that results from punishment as something that is intrinsically good. Instead, we may view this suffering as something that is bad, but that may be justified in the instrumental fashion we mentioned above – in virtue of its good consequences.

When examining these good consequences, it is helpful to distinguish three distinct deterrence-effects that imprisonment may produce: (i) incapacitation effects; (ii) recidivism effects; and (iii) general deterrence effects. Incapacitation effects are those generated by detaining individuals who would otherwise commit crimes – taking criminals off the street, so to speak. Recidivism effects (sometimes known as reformation effects) refer to the role that punishment plays in reducing further criminal behaviour by an individual *after the full punishment has been administered*. And, finally, general deterrence effects refer to the disincentives to commit crimes that result from the threatof punishment. This occurs when an individual chooses not to commit a crime for fear of being sent to prison.

The third of these points is important because it shows how our concern for deterrence effects may support imprisoning an individual even if she poses no further threat. This is because we need not restrict our efforts to deterring that individual from re-offending. Rather, we may also punish her for general deterrence reasons – that is, to deter *others* from acting wrongly.

However, this thought leads us to one of the most common objections to the *Deterrence Justification*: the *Unjust Punishment Objection*. This objection asserts that the *Deterrence Justification* might also justify framing an innocent person for a crime she did not commit. This is because doing so might reinforce the widespread belief that criminal conduct will be punished, and so serve as an effective general deterrent. Obviously, this would be gravely unjust, and so it would be a fatal implication of the *Deterrence Justification*.[[21]](#footnote-22)

One way in which to reply to this objection is to maintain that, in practice, it is always unwise to frame the innocent in this way. This is because there is always a risk that it will come to light and, if this were to happen, it would have disastrous consequences for the effective functioning of the criminal justice system. Whilst there may be some truth to this reply, it severely mischaracterises the nature of the problem. Surely, we would still regard it as gravely unjust to frame an innocent individual even if we were (unrealistically) to suppose that this would never come to light.

The problem to which the *Unjust Punishment Objection* really alludes is that the *Deterrence Justification* fails to accord sufficient weight to our concern that we ought not to punish innocent individuals. The problem is not simply that it fails in practice to protect this right. The worry is that it fails to provide a principled explanation of the injustice involved in punishing the innocent. Stated in a more general way, the *Unjust Punishment Objection* challenges the alleged consequentialist nature of the *Deterrence Justification* by pointing to an especially important right that seems to be neglected if we focus exclusively on the outcomes of punishment. We might say that the emphasis on the ends overlooks the problems with the means.

To respond to this objection, it is necessary to show how the *Deterrence Justification* can avoid providing support for punishing the innocent. To focus our attention, and develop an argument along these lines, it may help for us to consider the following simple case:

*Crime*:Angela breaks Bethan’s arm.

In this case, it is clear that, through her wrongdoing, Angela incurs several duties, including a duty to compensate Bethan. This duty could take different forms, but one possibility is to protect her against the future threat of similar wrongs.[[22]](#footnote-23) If Angela were to prevent Bethan from having her arm broken a second time, by someone else, then there is an important sense in which Angela has offset her own wrong. Needless to say, this does not justify Angela’s initial wrongdoing, nor is it to say that Angela owes nothing else to Bethan. Rather, what we are drawing attention to is the fact that this is one way in which Angela can discharge the duty of compensation that she owes to her victim. Even if she has not negated her wrong, we might say that Angela has *counterbalanced* it.[[23]](#footnote-24)

Of course, in reality, it is likely to be impossible for Angela physically to protect Bethan against the threat of a similar wrong. But, there is a less direct way in which she can play this role: she could act in a manner that deters other people from wronging Bethan. In at least some cases, serving time in prison is the best way for an individual to do this.

To be sure, we do not deny that there may be a general duty that falls on everyone to protect others from wrongdoing. What is significant is that Angela owes an especially stringent duty to her victim. This duty explains why we can demand much more of her than we can of other individuals. This result is salient, as it supplies us with a principled reply to the *Unjust Punishment Objection*. Specifically, whilst Angela can have no good complaint against being forced to bear significant burdens in the service of effective deterrence, since she renders herself *liable* to these burdens through her wrongdoing, the same is not true for those who are innocent. This gives proponents of the *Deterrence Justification* principled grounds upon which to distinguish between punishing the guilty and punishing the innocent. This is the *Liability Reply*.[[24]](#footnote-25)

Stated more generally, the present argument holds that we should recognise the existence of various *moral constraints* when punishing others. It is these constraints that explain why we ought not to punish the innocent. However, by acting wrongfully, an individual can forfeit the protection that these constraints would otherwise grant. By refining the *Deterrence Justification* in this way, we can give deterrence a central role with our account of punishment whilst maintaining a principled objection to the punishing the innocent.

Clearly, our defence of the *Deterrence Justification* is incomplete in numerous respects. There are further premises that we have not made explicit, as well as objections that we have not considered. Despite this, we hope that the general structure and appeal of the *Deterrence Justification* is sufficiently clear for our purposes. With this in mind, we can consider its implications for the length of prison sentences.

**5. Prison Sentences and Proportionality**

Strictly speaking, the structure of the *Deterrence Justification* could be used to provide an argument for long (or longer) or for short (or shorter) prison sentences. With limited space here, we consider two arguments that support reducing current prison sentence length. In this section, we consider the claim that many lengthy prison sentences may be disproportionate. This is the *Proportionality Argument*.

To make progress with this argument, it will help to introduce some terminology. First, “proportionality” refers to the idea that the costs of imprisonment are a reasonable price for the good consequences that they produce. Second, we can distinguish two kinds of proportionality.[[25]](#footnote-26) *Wide proportionality* refers to the costs that we can expect third parties to bear in the pursuit of our aims. Lengthy prisons sentences would therefore be widely disproportionate if they were to impose too large a burden on the general public, perhaps because the amount we would need to collect in tax revenue to achieve the desired level of deterrence would be too high. We can contrast this idea with *narrow proportionality,* which concerns the costs that we may impose on those potentially liable to be punished, such as the wrongdoer. Lengthy prisons sentences would therefore be narrowly disproportionate if they were to impose too large a burden on those sentenced to spend time in prison.

We shall focus exclusively on *narrow proportionality*. On this view, the *Proportionality Argument* holds that currently lengthy prison sentences are disproportionate because they force those in prison to bear costs to which they are not liable. Put in simpler terms, this argument condemns lengthy prison sentences on the grounds that they are too harsh.

To see this, we can return to the *Liability Reply*, according to which Angela cannot complain about being forced to bear significant burdens in the service of effective deterrence, since she renders herself liable to these burdens through wronging Bethan. Fairly obviously, this reply does not license imposing unrestricted burdens on Angela. This is because the duty of compensation that Angela owes to Bethan has limits. Whilst we may force her to bear some costs in order to protect Bethan from having her arm broken a second time, it clearly remains impermissible, say, to torture Angela even if this is the only way in which she can discharge her duty of compensation. Doing so would impose costs on Angela that are disproportionate to her crime.

These remarks highlight another important moral constraint on the use of punishment. Just as it is gravely unjust to punish an innocent person, since it imposes burdens on her that she is not liable to bear, so too it is gravely unjust to punish her disproportionately, since this also imposes burdens on an individual that she is not liable to bear. An implication of this is that we should resist upholding prison sentences that impose costs that are disproportionate to their crime.

Of course, it remains an open question which costs qualify as disproportionate. A complete theory of punishment must answer this question. Since our aims are more modest, this is not necessary. Even without a complete theory, we are able to make reasonable judgments about proportionality in a range of cases.[[26]](#footnote-27)

For example, we can defend the shortening of at least some prison sentences, particularly for many minor crimes. In these cases, lengthy prisons sentences are likely to impose costs that are disproportionate. For example, consider the “three strikes laws” that operate in parts of the USA. These laws mandate courts to impose harsher, and, in some cases, life prison sentences, on “persistent offenders”, typically defined as individuals who have committed at least three criminal offences. This practice has produced a number of extraordinary cases, including that of Leandro Andrade, who was sentenced to two life sentences for multiple counts of shop lifting with the equivalent value of “around $150”.[[27]](#footnote-28) Laws relating to drug possession provide another compelling example. Even assuming that these laws are justified (which we contest in chapter 4), a potential sentence of seven years in prison and an unlimited fine for the possession of certain class A drugs is surely disproportionate, given the character of the wrongdoing in question. Being disproportionate, lengthy prison sentences such as these are thus rejected by the *Proportionality Argument*.

**6. Prison Sentences and Deterrence**

Let us now turn to the second argument, according to which we should reduce many lengthy prison sentences on the grounds that they are an inefficient way to deter crime relative to shorter sentences. This gives us reason to prefer shorter prison sentences, since these achieve similar effects, but at a lower cost to both those individuals subject to the sentences and the taxpayers who finance the criminal justice system. In this case, longer prison sentences are both narrowly disproportionate and widely disproportionate. This is the *Ineffectiveness Argument*.

This argument relies upon two empirical claims:

*Empirical claim 1*: lengthy prison sentences are not significantly more effective at deterring crime than short prison sentences.

*Empirical claim 2*: short prison sentences are effective at deterring crime.

To isolate the effect of prison sentences, and prison sentence length, on the level of crime is a difficult task. Many factors – poverty, inequality, unemployment, law enforcement practices, and cultural norms, to name a few – affect crime levels. Accordingly, there is uncertainty about the impact of various prison sentences on crime levels. Despite these concerns, there is sufficient evidence to vindicate the two empirical claims on which the *Ineffectiveness Argument* depends.

Regarding *Empirical claim 1* – that lengthy prison sentences are not significantly more effective at deterring crime than short prison sentences – the evidence suggests that, though longer prison sentences do have some additional deterrence effect, the estimated size of this effect is small. For example, Eric Helland and Alexander Tabarrok explore the differential behaviour under the three strikes regime in California.[[28]](#footnote-29) They compare individuals who have committed two crimes with those who have committed one crime and been tried for a second “strikeable offence”. They find that amongst those with two strikes, arrest rates were 20% lower. Although this result suggests some effect of utilising lengthy prison sentences, the effect is small considering the increased prison sentence length these individuals face. The authors estimate that a doubling of sentence length results in only a 6% decline in crime rates. This result is consistent with other research in this area.[[29]](#footnote-30) It is difficult to believe that this reduction in crime justifies the additional burdens that longer prison sentences impose on inmates and taxpayers.

This result is consistent with the claim that short prison sentences are effective at deterring crime. This is *Empirical claim 2.* That is, whilst the evidence suggests that lengthy prison sentences are not significantly more effective at deterring crime than short prison sentences, it does not show that short prison sentences have no deterrent effect.

Two considerations further support *Empirical claim 2*. First, short prison sentences are effective are reducing levels of recidivism. For example, Randi Hjalmarsson studies the effect of serving prison time on subsequent arrest rates amongst juveniles who have committed offences in Washington State, and finds that those who have been imprisoned have a lower chance of being convicted of a future crime.[[30]](#footnote-31) Moreover, recent experiments in “swift and certain” sanction regimes provide evidence that short and quickly applied prison sentences can sharply levels of recidivism. Hawaii’s Opportunity Probation with Enforcement programme punished those who violated parole conditions with almost certain, but light sanctions (from warnings to a week in prison). Studying this programme, Angela Hawken and Mark Kleiman found that those subject to the regime were 55% less likely to commit a new crime than comparable individuals on probation.[[31]](#footnote-32)

Second, it is plausible that short prison sentences provide general deterrence, since the threat of imprisonment effectively disincentivises others from committing crimes. The existence of short prison sentences contributes to a culture in which individuals are aware that imprisonment is a possible consequence of wrongdoing and this shapes individuals’ general outlook. The existence of short prison sentences may also be important for more indirect reasons, perhaps even facilitating good parenting, for example. This is because their existence enables a parent credibly to warn her children about the serious costs of acting criminally.

In summary, the evidence supports the *Ineffectiveness Argument*: if we are concerned with deterrence, the existence of short prison sentences remains important, but certain current sentences could be shortened without losing this deterrence effect.

**7. Conclusion**

Essentially, our argument in this chapter consists of two claims. The first is that we should accord a concern for deterrence a central role in justifying state punishment. This is the *Deterrence Justification*. The second is that, if we accept the first claim, then we should shorten prison sentences. This is a consequence of the *Proportionality Argument* and the *Ineffectiveness Argument*.

Needless to say, public policy in this area is more complex than these claims may suggest. In some cases, prison may involve too great a risk to an individual’s safety. In other cases, an individual may be better off in prison than in the outside world. These possibilities cast doubt on the idea that we ought always to prefer shorter prison sentences. Nonetheless, the overall thrust stands: in general, we should support shortening prison sentences.

1. See United States Congress, *S.2123 – Sentencing Reform and Corrections Act of 2015*, available at https://www.congress.gov/bill/114th-congress/senate-bill/2123. [↑](#footnote-ref-2)
2. Ministry of Justice (2013). These trends are also noted in House of Commons (2016). [↑](#footnote-ref-3)
3. http://www.latimes.com/opinion/editorials/la-ed-criminal-justice-20160215-story.html [↑](#footnote-ref-4)
4. https://medium.com/@SenTomCotton/the-current-sentencing-reform-and-corrections-act-is-dangerous-for-america-56b78a43da31#.m9o69srar [↑](#footnote-ref-5)
5. http://big.assets.huffingtonpost.com/Cotton.Letter.Final.pdf [↑](#footnote-ref-6)
6. [Reference to Supreme Court judgment.] [↑](#footnote-ref-7)
7. For various defences of this conviction, see Michael S. Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Oxford University Press, 1997), ch. 2; and Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988). [↑](#footnote-ref-8)
8. H. L. A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), 234-5. See also Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 63. [↑](#footnote-ref-9)
9. Ministry of Justice, ‘Costs per place and costs per prisoner’ (2015), available at https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/471625/costs-per-place.pdf. [↑](#footnote-ref-10)
10. Prison Watch UK, ‘Britain’s Prison Population: The Stats Unlocked’ (2015), available at https://prisonwatchuk.com/2015/06/11/uk-prison-population-stats/. [↑](#footnote-ref-11)
11. For the most sophisticated version of this view, see Anthony Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001). [↑](#footnote-ref-12)
12. Nils Christie, *Limits to Pain* (London: Martin Robertson, 1981), 98-105. [↑](#footnote-ref-13)
13. Thomas Scanlon, ‘The Significance of Choice’ in Sterling McMurrin (ed.), *The Tanner Lectures on Human Values* (Salt Lake City: University of Utah Press, 1986), 214. [↑](#footnote-ref-14)
14. Duff, *Punishment, Communication, and Community*, ch. 3*.* [↑](#footnote-ref-15)
15. For illuminating discussion of this point, see Jeff Howard, ‘Punishment as Moral Fortification’, *Law and Philosophy* (forthcoming). [↑](#footnote-ref-16)
16. Duff, *Punishment, Communication, and Community*, pp. 53-58. [↑](#footnote-ref-17)
17. This objection to Duff’s account is developed in Alasdair Cochrane, ‘Prison on Appeal: The Idea of Communicative Incarceration’, *Criminal Law and Philosophy*. [↑](#footnote-ref-18)
18. For recent discussion of the learning effect, especially within juvenile correctional facilities, see Patrick Bayer, Randi Hjalmarsson, and David Pozen, ‘Building Capital behind Bars: Peer Effects in Juvenile Corrections’, *The Quarterly Journal of Economics*, 124 (2009), 105-47. [↑](#footnote-ref-19)
19. For recent discussion of the outside option effect, see Michael Mueller-Smith, ‘The Criminal and Labor Market Impacts of Incarceration’, available at:

http://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf. [↑](#footnote-ref-20)
20. Tadros, *The Ends of Harm*, 103. [↑](#footnote-ref-21)
21. See Hart, *Punishment and Responsibility*, chs 1 and 2. [↑](#footnote-ref-22)
22. Tadros, *The Ends of Harm*, 275-9. [↑](#footnote-ref-23)
23. See Adam Slavny, ‘Negating and Counterbalancing: A Fundamental Distinction in the Concept of a Corrective Duty’, *Law and Philosophy,* 33 (2014), 143-73. [↑](#footnote-ref-24)
24. For the most sophisticated version of this reply, see Tadros, *The Ends of Harm*. [↑](#footnote-ref-25)
25. On this distinction, albeit within a somewhat different context, see Jeff McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), 20-24. [↑](#footnote-ref-26)
26. For more detailed discussion, see Jeff McMahan, ‘Proportionality and Necessity in *Jus in Bello*’ in Helen Frowe and Seth Lazar (eds), *The Oxford Handbook of the Ethics of War* (Oxford: Oxford University Press, 2016). [↑](#footnote-ref-27)
27. This case is discussed at length and in many places in Joe Domanick, *Cruel Justice: Three Strikes and the Politics of Crime in America’s Golden State* (London: University of California Press, 2004). [↑](#footnote-ref-28)
28. [Reference] [↑](#footnote-ref-29)
29. Lee and McCrary, Hansen and Waddell, and Hjalmarsson all find little or no effect of longer sentence length on crime. There are exceptions to these results. For example, Drago, Galbiati and Vertova [↑](#footnote-ref-30)
30. [Reference] [↑](#footnote-ref-31)
31. [Reference] [↑](#footnote-ref-32)