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## PUNISHING PROPERTY OFFENDERS: DOES MORAL CORRECTION WORK?

Sharona Aharony-Goldenberg\* and Yael Wilchek-Aviad\*\*

*“We are forbidden to inflict punishment with any other design than for correction of the offender or direction of others.”*

THOMAS HOBBS, LEVIATHAN, Chapter 15.

### I. INTRODUCTION

The acknowledgment of the failure of attempts to rehabilitate criminals led to the conclusion beginning in the 1970s that “nothing works” to reduce recidivism and a shift toward a retributive approach.<sup>1</sup> Adopting the goal of retribution in the penal system has resulted in mass incarceration.<sup>2</sup> Indeed, imprisonment is the dominant punishment in the United States.<sup>3</sup> The punitive approach is also manifest in the penal attitude toward property offenses, which represent approximately 12.44% of total offenses in the United States.<sup>4</sup> Statistics have shown that incarceration, especially for property offenses, is *criminogenic*.<sup>5</sup> There is a high percentage of recidivism among prop-

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<sup>1</sup> Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U.L.J. 485, 493, 495 (1998). “Doubts about the effectiveness of deterrence have spurred interest in retribution or ‘just deserts’ as a basis for sentencing white-collar offenders.” *Id.*

<sup>2</sup> Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC’Y REV. 33, 33-34 (2011).

<sup>3</sup> Martin H. Pritikin, *Fine-Labor: The Symbiosis Between Monetary and Work Sanctions*, 81 U. COLO. L. REV. 343, 358 (2010).

<sup>4</sup> *Crime in the United States 2010*, F.B.I., <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl29.xls> (last visited Mar. 29, 2016). “Property crimes are offenses of burglary, larceny-theft, motor vehicle theft, and arson.” *Id.* In this essay we interpret property offenses more broadly to include white collar crime.

<sup>5</sup> Roy D. King, *Prisons and Jails*, in *PENOLOGY AND CRIM. JUST.* 17 (Shlomo Giora Shoham,

erty offenders in the United States where 82.1% of property offenders have been arrested for a new crime within five years of release,<sup>6</sup> and 73.8% within three years, the highest rates among all offenses.<sup>7</sup>

The incentive is strong to determine *what works* to reduce reoffending rates among property offenders. To find a solution to the high rates of recidivism among property offenders, it is necessary to examine the roots of property crimes, which in our opinion lie in the defective moral reasoning of property offenders, in other words, in their flawed moral judgment. Laurence Kohlberg, who formulated the theory of moral development, drew attention to the connection between delinquency and low moral standards.<sup>8</sup> In the wake of his theory on moral reasoning, dozens of empirical studies have confirmed the connection between low moral development and delinquency.<sup>9</sup> Similar results point to the low level of moral reasoning of property offenders.<sup>10</sup>

Although in the psychological and criminological academic arenas the link between low moral level and delinquency has been acknowledged, the legal academic field has paid little attention to moral development and the moral correction of offenders. Criminal law still adheres to its classic goals, namely retribution, rehabilitation, incapacitation, and deterrence.<sup>11</sup> Also, this lacuna is true regarding the possible correction of the low moral judgment of property offenders.

This paper examines ways in which the sentencing process

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Ori Beck & Martin Kett eds., 2008); Lynne M. Veritas, Tomislav V. Kovandzic & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data*, 6 CRIMINOLOGY & PUBLIC POLICY 589, 607, 614 (2007).

<sup>6</sup> Matthew H. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU JUST. STAT. (Apr. 22, 2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

<sup>7</sup> Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 CRIME JUST. 115, 129 (2009).

<sup>8</sup> LAWRENCE KOHLBERG, *Moral Stages and the Idea of Justice*, in THE PHILOSOPHY OF MORAL DEV. (1981); ANNE COLBY ET AL., *Theoretical Introduction to the Measurement of Moral Judgment*, in I THE MEASUREMENT OF MORAL JUDGMENT, 1, 15-16 (1987) [hereafter COLBY & KOHLBERG].

<sup>9</sup> Beth Judy & Eileen S. Nelson, *Relationship Between Parents, Peers, Morality and Theft in an Adolescent Sample*, 83 HIGH SCH. J. 31 (2000); Jerry L. Tatum & John D. Foubert, *Rape Myth Acceptance, Hypermasculinity, and SAT Scores as Correlates of Moral Development: Understanding Sexually Aggressive Attitudes in First-Year College Men*, 50 J.C. STUDENT DEV. 195, 201 (2009); Geert Jan Stams et al., *The Moral Judgment of Juvenile Delinquents: A Meta-Analysis*, 34 J.ABNORMAL CHILD PSYCHOL. 697, 708 (2006).

<sup>10</sup> See Judy & Nelson, *supra* note 9.

<sup>11</sup> Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1204 (2011).

can induce the moral correction of property offenders, and thus, lower recidivism. Part I explores the connection between morality and delinquency. Next, it refers to Kohlberg's theory of moral development. It introduces empirical evidence showing that moral reasoning can be acquired through various methods of intervention, especially through Moral Reconciliation Therapy (MRT), which has been shown to considerably lower recidivism rates. Part II describes the main penalties used in cases of property offenses in the U.S.

In view of the connection between moral judgment and property offenses, and of the fact that moral reasoning can be acquired so as to affect delinquent behavior and lower recidivism, Part III proposes to re-adopt the long-forgotten goal of criminal law, which is the moral correction of property offenders, and to espouse pro-moral correction sanctions. It analyzes the existing penalties from a moral point of view and suggests that financial sanctions, such as fines and restitution, support moral correction because property offenders may conceive them as fair and dignified. Part IV presents the suggested penal approach aimed at achieving the moral correction of the property offenders. It suggests that the sentence should incorporate mandatory MRT.

Note that Gilligan criticized Kohlberg's analysis for not taking into account women's moral orientation, claiming that longitudinal studies of women's moral judgments are necessary in order to validate his theory and that female notions of morality entail different reasoning.<sup>12</sup> Indeed, most of the following statistical data relate to male offenders. Consequently, the article refers only to male offenders and uses the suitable terminology.

## II. MORAL REASONING AND PROPERTY OFFENSES

### A. Defining Morality

Although morality is a common term, it is difficult to define. In order to be able to raise offenders' morality, it is important to understand what induces a moral behavior. When referring to a moral act, Kohlberg emphasizes cognition.<sup>13</sup> According to Kohlberg, jus-

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<sup>12</sup> Carol Gilligan, *In a Different Voice: Women's Conceptions of Self and of Morality*, 47 HARV. EDUC. REV. 481, 515 (1977).

<sup>13</sup> Lawrence Kohlberg, *Moral Development and Identification*, in CHILD PSYCHOLOGY 277, 278 (Harold William Stevenson ed., 1963).

tice, the primary regard for the value and equality of all human beings, is the central principle to the development of moral judgment.<sup>14</sup>

Conversely, when defining morality, Hoffman emphasizes feelings, rather than a cognitive process. He also considers empathy with the potential victim to be at the core of morality. In his view, empathy is defined as the vicarious affective response to another person.<sup>15</sup> The key requirement of an empathetic response is the involvement of psychological processes that induce a person to have feelings that are more congruent with another's situation than with his own.<sup>16</sup> He adds that moral reasoning or judgment may also be involved, although not necessarily.<sup>17</sup> Moreover, Hoffman holds that empathy can be aroused when observers imagine the victims, when they read about others' misfortunes, or even when they make Kohlbergian judgments about hypothetical moral dilemmas.<sup>18</sup> Similarly, Pizarro argues that emotions, specifically empathy, play an integral role in the process of moral judgment: "the capacity to experience empathy and the ability to regulate it efficiently are necessary in order to be a moral individual."<sup>19</sup>

According to Gibbs, these two notions, justice and empathy, complement one another and must be considered together for a comprehensive understanding of moral development.<sup>20</sup> In other words,

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<sup>14</sup> Lawrence Kohlberg, *A Cognitive-Developmental Approach to Moral Education*, in COLLECTED PAPERS ON MORAL DEVELOPMENT AND MORAL EDUCATION 95 (1973); Lawrence Kohlberg, *Moral Stages and Moralization – The Cognitive-Developmental Approach*, in MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES 40 (Thomas Lickona ed., 1976).

<sup>15</sup> MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE 29 (Cambridge University Press eds., 2000); M. L. Hoffman, *Empathy, Social Cognition & Moral Action*, in HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT, Vol. I. 275, 276 (W. M. Kurtines & J. L. Gewirtz eds., 1991).

<sup>16</sup> MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE 30 (Cambridge University Press eds., 2000).

<sup>17</sup> M. L. Hoffman, *Empathy, Social Cognition & Moral Action*, in HANDBOOK OF MORAL BEHAVIOR AND DEVELOPMENT, Vol. I 275, 276 (W. M. Kurtines & J. L. Gewirtz eds., 1991). *But cf.* WILLIAM ICKES, EMPATHIC ACCURACY 29 (DUKE UNIVERSITY PRESS 1997), who defines empathy as the cognitive awareness of another person's internal states, that is, his thoughts, feelings, perceptions, and intentions.

<sup>18</sup> MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT: IMPLICATION FOR CARING AND JUSTICE 91 (Cambridge University Press eds., 2000).

<sup>19</sup> D. Pizarro, *Nothing more than Feelings? The Role of Emotions in Moral Judgment*, 30 JOURNAL FOR THE THEORY OF SOCIAL BEHAVIOUR 355, 371-72 (Alex Gillespie & Doug Porpora eds., 2000).

<sup>20</sup> JOHN C. GIBBS, MORAL DEVELOPMENT AND REALITY: BEYOND THE THEORIES OF KOHLBERG AND HOFFMAN 238 (Oxford University Press eds., 3d ed. 2003); *see also* MARTIN L. HOFFMAN, EMPATHY AND MORAL DEVELOPMENT: IMPLICATIONS FOR CARING AND JUSTICE

the desire to act morally, “moral motivation,” can arise both from the cognitive construction of a situation as unjust and from the empathic response to the victim’s pain and suffering.<sup>21</sup> This integrative line of thought has been adopted throughout the present paper.

### B. Delinquency and Morality

Kohlberg described three universal levels of moral development: pre-conventional, conventional, and post-conventional. These stages identify the level at which a person regards other people, interprets their thoughts and feelings, and sees their role or place in society.<sup>22</sup> Theorists of the cognitive-developmental tradition have argued that a person’s level of moral development affects his ability to resist the temptation to behave immorally.<sup>23</sup> For example, Palmer and Hollin suggests that male delinquents have significantly poorer moral reasoning than non-delinquents, and that delinquents have value deficits in their moral reasoning.<sup>24</sup> Similarly, according to Raaijmakers et al., moral reasoning predicts rule-violating behavior in both adolescence and adulthood.<sup>25</sup> Similar conclusions have been reached with regard to juvenile offenders. A comprehensive meta-analysis conducted by Stams et al. reveals a significantly lower stage of moral judgment in juvenile delinquents than in their non-delinquent peers,

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6 (2000) (stating that empathy and reasoning about justice are linked from early stages in the moral development of children).

<sup>21</sup> JOHN C. GIBBS, *MORAL DEVELOPMENT AND REALITY: BEYOND THE THEORIES OF KOHLBERG AND HOFFMAN* 7 (2003) (claiming that moral perception can be profound in understanding and empathic in feeling).

<sup>22</sup> Lawrence Kohlberg, *Moral Stages and Moralization – The Cognitive-Developmental Approach*, in *MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH AND SOCIAL ISSUES* 172 (Thomas Lickona ed., 1976).

<sup>23</sup> S. L. Ward, *Moral Development in Adolescence*, in *THE ENCYCLOPEDIA OF ADOLESCENCE* 663 (Vol. I) (1991), as reported in Judy & Nelson, *supra* note 9.

<sup>24</sup> Emma J. Palmer & Clive R. Hollin, *A Comparison of Patterns of Moral Development in Young Offenders and Non-offenders*, 3(2) *LEGAL AND CRIMINOLOGICAL PSYCHOLOGY* 232 (1998).

<sup>25</sup> Quinten A. W. Raaijmakers et al., *Delinquency and Moral Reasoning in Adolescence and Young Adulthood*, 29 *INT’L J. OF BEHAV. DEV.* 247, 255 (2005); see Jerry L. Tatum & John D. Foubert, *Rape Myth Acceptance, Hypermasculinity, and SAT Scores as Correlates of Moral Development: Understanding Sexually Aggressive Attitudes in First-Year College Men*, 50 *J. OF C. STUDENT DEV.* 195 (2009) (finding that as respondents’ level of rape myth endorsement increases, assessed levels of moral development decrease); see also Wilson C. Goodwin & K. Beck, *Rape Attitude and Behavior and Their Relationship to Moral Development*, 9 *PSYCHIATRY, PSYCHOL. & L.* 85 No. 1 (2002) (finding levels of moral development and rape myth endorsement were likewise significantly and negatively correlated in a sample of Australian men convicted of rape).

even after controlling for socioeconomic status, culture, gender, age, and intelligence.<sup>26</sup> Likewise, Brugman and Aleva matched delinquent youths in a detention center with students from a local high school and found that the high school sample had significantly more advanced moral reasoning.<sup>27</sup> Moreover, Nisan claims that a conception of moral identity creates moral commitment, that is, if an individual identifies himself as moral he will behave morally.<sup>28</sup>

### C. Moral Reasoning and Property Offenses

Delinquents are divided into subgroups based on the nature, seriousness, and motivation of their anti-social acts. They also differ in their moral judgment.<sup>29</sup> For example, Kohlberg and Freundlich found that delinquents whose offenses were related to using drugs showed a higher stage of moral judgment than “regular” delinquents<sup>30</sup> Therefore, it is important to pay special attention to the connections between property offenses and moral development.

Research has shown a connection between property offenses and low moral reasoning. For example, Beth et al. found an association between self-reported theft and a low level of morality.<sup>31</sup> Likewise, Greenberg found that the chances of workers at the conventional morality level to steal from their employer are relatively lower than

<sup>26</sup> Geert Jan Stams et al., *The Moral Judgment of Juvenile Delinquents: A Meta-Analysis*, 34 J. OF ABNORMAL CHILD. PSYCHOL. 697, 708-10 n.5 (2006).

<sup>27</sup> Daniel Brugman & Elisabeth A. Aleva, *Developmental Delay or Regression in Moral Reasoning by Juvenile Delinquents?*, 33 J. OF MORAL EDUC. 321, 334 n.3 (2004); *But see* Richard J. Petronio, *The Moral Maturity of Repeater Delinquents*, 12 YOUTH SOC'Y 51, 55 n.1 (1980) (finding that recidivist juvenile delinquents showed higher moral judgment scores than juvenile delinquents who were not returned to court within two years after being first placed on probation).

<sup>28</sup> Mordecai Nisan, *Personal Identity and Education for the Desirable*, 25 J. OF MORAL EDUC. 75 n.1 (1996).

<sup>29</sup> Geert Jan Stams et al., *supra* note 26, at 708.

<sup>30</sup> L. Kohlberg & D. Freundlich, *Moral Judgment in Youthful Offenders*, (Unpublished manuscript) (1973), *as reported in* Geert Jan Stams et al., *The Moral Judgment of Juvenile Delinquents: A Meta-Analysis*, 34 J. OF ABNORMAL CHILD PSYCHOL. 697, 700 n.5 (2006). *See* Jennifer G. McCarthy & Anna L. Stewart, *Neutralisation as a Process of Graduated Desensitisation: Moral Values of Offender*, 42 INT'L OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 285 (1998).

<sup>31</sup> *See* Judy & Nelson, *supra* note 9 (analyzing data of a sample of 83 male and 92 female high school students and the relationships between attachment to parents, morality, peer theft, and self-reported theft, and adolescents reporting involvement in burglary achieved significantly lower morality scores than those who reported no involvement in burglary in the preceding year).

those of workers at the pre-conventional moral level.<sup>32</sup> Similar findings were reported in connection with tax crimes: honesty prevents treating tax evasion as a simple portfolio decision.<sup>33</sup> Likewise, LaLumia & Sallee demonstrated that many taxpayers have a “substantial inclination toward honesty, and that an unwillingness to cheat is an important component in the prevention of tax evasion and perhaps of crime more generally.”<sup>34</sup>

Palmer and Hollin researched the moral reasoning of non-offenders and of offenders convicted mainly of property offenses. They found that delinquents show less mature moral judgment than their non-delinquent peers.<sup>35</sup> Thus, it may be concluded that offenders commit property crimes mainly because of a moral defect.

#### D. Raising the Level of Moral Reasoning

Empirical evidence suggests that moral reasoning can be acquired through various methods of interventions. Also, changes induced in moral judgment affect delinquent behavior and lower recidivism rates. For example, a meta-analysis conducted by Little showed that MRT<sup>36</sup> has lowered re-arrest and re-incarceration rates by about 20-35% relative to the rates observed in non-treated offenders, and it reduced short-term recidivism by at least 50%.<sup>37</sup> These findings match, to some extent, a meta-analysis by Wilson et al., at-testing to the positive effect of cognitive-behavioral programs (CBT)<sup>38</sup> for offenders, and showing that MRT studies indicate 42%

<sup>32</sup> Jerald Greenberg, *Who Stole The Money, and When? Individual and Situational Determinants of Employee Theft*, 89 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 985, 997 n.1 (2002).

<sup>33</sup> James P. F. Gordon, *Individual Morality and Reputation Deterrents to Tax Evasion*, 33 EUR. ECON. REV. 797, 804 (1989) (referring to morality as equivalent to honesty).

<sup>34</sup> Sara LaLumia & James M. Sallee, *The Value of Honesty: Empirical Estimates from the Case of the Missing Children*, 20 INT’L TAX AND PUB. FIN. 192, 193-94 n.2 (2013).

<sup>35</sup> Palmer & Hollin, *supra* note 24, at 225-32 n.2.

<sup>36</sup> MRT incorporates cognitive elements into a behavior-based program that stresses moral reasoning. The goals of MRT are to enhance the social and moral behavior of offenders, and its theory is based on the ideas of Kohlberg’s moral development theory. *Chris Hansen, Cognitive-Behavioral Interventions: Where They Come From and What They Do*, 72 FED. PROBATION 43 n.2 (2008).

<sup>37</sup> Gregory L. Little, *Meta – Analysis of Moral Recognition Therapy: Recidivism Results from Probation and Parole Implementations*, 14 COGNITIVE BEHAV. TREATMENT REV. 14, 17 (2005).

<sup>38</sup> “Cognitive-behavioral therapists seek to learn what their clients want out of life (their goals) and then help their clients achieve those goals. The therapist’s role is to listen, teach, and encourage, while the client’s role is to express concerns, learn, and implement that learn-

recidivism rates for treated populations, as opposed to 58% for the untreated.<sup>39</sup>

By contrast, Reasoning and Rehabilitation (R&R) is a CBT program for offenders. It does not focus on moral reasoning, but is based on the theory that offenders suffer from social and cognitive deficits.<sup>40</sup> This program was found to be less effective than MRT.<sup>41</sup>

Leeman et al. found a multi-component group treatment program for anti-social youths that includes social skills training, anger management, moral education (EQUIP), and stimulated substantial behavioral gains.<sup>42</sup> They also found that the effect of the program was evident twelve months after participants' release from jail: the 15% recidivism rate of the EQUIP group was approximately half that of the control groups six months after release, and slightly over one-third at twelve months. The authors noted that this pattern suggests that the result of the treatment is stable, and that without treatment the likelihood of recidivism increases.

Likewise, an extensive meta-analysis of intervention studies aimed at increasing moral judgment competence in delinquent and non-delinquent preadolescents and adults yielded consistently medium-to-large effect sizes.<sup>43</sup> Conversely, Rest found that it is difficult to raise the average moral judgment scores of any group by intervention. Although he pointed out that interventions lasting several months with explicit and heavy emphasis on moral reasoning are more likely to produce change.<sup>44</sup>

### III. EXISTING PENALTIES FOR PROPERTY CRIMES

Generally, the U.S. federal sentencing mechanism in property offenses is based on three groups of penalties: incarceration, mone-

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ing." *What is CBT?*, NACBT, <http://www.nacbt.org/whatiscbt.htm> (last visited Mar. 29, 2016).

<sup>39</sup> David D. Wilson et al., *A Quantitative Review of Structured, Group-Oriented, Cognitive-Behavioral Programs for Offenders*, 32(2) CRIM. JUST. BEHAV. 172, 198-99 (2005).

<sup>40</sup> Hansen, *supra* note 36, at 64. .

<sup>41</sup> WILSON, *supra* note 39, at 198.

<sup>42</sup> Leonard W. Leeman et al., *Evaluation of a Multi-Component Group Treatment Program for Juvenile Delinquents*, 19(4) AGGRESSIVE BEHAVIOR 281, 288-99 (1993).

<sup>43</sup> G. Lind, *Ist Moral lehrbar? Ergebnisse der modernen moralpsychologischen Forschung [Can Morality Be Taught? Research Findings from Modern Moral Psychology]* (2002) [In German], as quoted in Geert Jan Stams, Daniel Brugman, Maja Deković, Lenny van Rosmalen, Peter van der Laan, John C. Gibbs, *The Moral Judgment of Juvenile Delinquents: A Meta-Analysis*, J. ABNORMAL CHILD PSYCHOL. 697, 709 (2006).

<sup>44</sup> James R. Rest, *Morality*, in HANDBOOK OF CHILD PSYCHOLOGY 597 (1983).

tary sanctions, and intermediate sanctions (community service and community restitution centers).

The Federal Sentencing Guidelines set out a uniform sentencing policy relating to imprisonment for convicts of property offenses.<sup>45</sup> The average imprisonment sentence for property offenses is between 23 to 30 months.<sup>46</sup> However, as mentioned in the Introduction, incarcerating property offenses is “criminogenic.”<sup>47</sup> Below we describe in more depth the monetary and intermediate sanctions.

### A. Economic Sanctions

The economic sanctions discussed below consist of fines, disgorgement, and restitution.

#### 1. Fines

Under the federal system, fines are not recognized as a separate, noncustodial sentencing option, in contrast to many state guideline systems. According to the federal system, fines can be imposed only as part of probation, intermediate, or confinement sanction.<sup>48</sup> The Federal Sentencing Guidelines set fines within minimum and maximum bounds, according to the level of the offense; the court is to impose a fine in all cases, except when the defendant establishes that he or she is unable to pay and is not likely to become able to pay any fine.<sup>49</sup> In determining the amount of the fine, the court must also consider among others, the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant). The sentence must also promote respect for the law, provide just punishment, and afford adequate deterrence.<sup>50</sup> In some cases, the fine is greater than the gain caused by

<sup>45</sup> See *United States v. Booker*, 543 U.S. 220 (2005).

<sup>46</sup> Average sentence length for § 2b1.1 offenders (theft, property destruction, and fraud) (2009-2014); U.S. SENTENCING COMMISSION PRELIMINARY QUARTERLY DATA REPORT 33 (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC-2014-Quarter-Report-1st.pdf>.

<sup>47</sup> R. D. King, *Prisons and Jails*, in *PENOLOGY AND CRIMINAL JUSTICE 17* (S. G. Shoham et al. eds., 2008); L. M. Vieraitis, T. V. Kovandzic & T. B. Marvell, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974-2002*, 6(3) *Criminology & Public Policy* 589 (2007).

<sup>48</sup> Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 *STAN. L. REV.* 339, 343 (2005).

<sup>49</sup> U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (2013).

<sup>50</sup> § 5E1.2(d) (2013).

the misconduct.<sup>51</sup>

Generally, the revenue derived from fines is paid to the Treasury (the state) rather than to the victims. The Victims of Crime Act 1984 (“VOCA”) established the Crime Victims Fund, making possible the distribution of some funds collected from fines paid by defendants to deserving victims of crimes. Most states have a body that reviews and distributes compensation funds and grants to eligible victims.<sup>52</sup>

## 2. *Disgorgement*

Disgorgement is the mandatory transfer of the total profits or gain from some illegal or criminal conduct from the wrongdoer to the government.<sup>53</sup> The amount varies, at the discretion of the court, based on the facts of the case. Disgorgement can be imposed in addition to other penalties.<sup>54</sup> The Federal Sentencing Guidelines expressly address disgorgement as part of the sentencing and probation process of organizations.<sup>55</sup> Disgorgement typically applies when restitution or remedial efforts cannot be part of a sentence because there is no identifiable victim, such as in the case of money laundering. In *S.E.C. v. First Jersey Securities, Inc.*,<sup>56</sup> the court held that the purpose of disgorgement is to prevent a wrongdoer from profiting by his or her illegal conduct.<sup>57</sup>

## 3. *Restitution*

Restitution<sup>58</sup> owed to victims of crime is regarded as a critical part of American criminal sentencing. Restitution is defined in the Mandatory Victims’ Restitution Act of 1996 (MVRA), which re-

<sup>51</sup> JAMES T. O’REILLY ET AL., PUNISHING CORPORATE CRIME – LEGAL PENALTIES FOR CRIMINAL AND REGULATORY VIOLATIONS 182 (2009).

<sup>52</sup> 42 U.S.C.A. § 10601; 42 U.S.C.A. § 10602.

<sup>53</sup> O’REILLY ET AL., *supra* note 51, at 183.

<sup>54</sup> O’REILLY ET AL., *supra* note 51, at 183.

<sup>55</sup> U.S.S.G. § 8C2.9 (stating, “the court shall add to the fine determined under § 8C2.8 (Determining the Fine within the Range) any gain to the organization from the offense that has not and will not be paid as restitution or by way of other remedial measures”).

<sup>56</sup> 101 F.3d. 1450 (2d Cir. 1996).

<sup>57</sup> *Id.*

<sup>58</sup> Richard C. Boldt, *Criminal Law: Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969 n.2 (1986) (stating, “strictly speaking, the terms ‘restitution’, ‘reparation,’ and ‘compensation’ are neither interchangeable nor overlapping”).

quires courts to impose restitution to victims of offenses against property, including victims of fraud and deceit.<sup>59</sup> Most often, restitution is ordered in cases of property crime such as home burglary involving stolen or damaged property or the theft of goods from a retail store. It is also commonly ordered in cases of theft of services (*e.g.*, cab or restaurant bills), fraud, and forgery.<sup>60</sup>

The victim is defined as “a person directly and proximately harmed as a result of the commission of an offense.”<sup>61</sup> This definition applies to the United States itself, as well as government entities.<sup>62</sup> Restitution is a punishment to be included in a defendant’s sentence, together with incarceration, fines, and other penalties that the law allows.<sup>63</sup> Restitution payments take priority over fines.<sup>64</sup> Restitution may also be ordered as a discretionary condition of probation and supervised release for any offense.<sup>65</sup> If the defendant fails to make restitution, his or her supervised release is revoked, and the defendant is returned to prison to serve additional time.<sup>66</sup>

The court may order the return of property to the victim, and

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<sup>59</sup> 18 U.S.C.A. § 3663A(a)(1). Mandatory restitution to victims of certain crimes states that “notwithstanding any other provision of law, when sentencing a defendant . . . the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution.” *Id.* The mandatory provisions also apply in plea agreements. 18 U.S.C.A. § 3663A(c)(1); For other discretionary powers to impose restitution *see also* O’REILLY ET AL., *supra* note 51, at 185-86..

<sup>60</sup> David Beatty et al., *Rights and Services for the 21st Century* (1998), [https://www.ncjrs.gov/ovc\\_archives/directions/pdfxt/direct.pdf](https://www.ncjrs.gov/ovc_archives/directions/pdfxt/direct.pdf).

<sup>61</sup> 18 U.S.C.A. § 3663A(a)(2). The main exception to mandatory restitution is for offenses against property with respect to which the court makes a finding from facts on record that either (a) the number of identifiable victims is so large that restitution is impracticable or (b) determining complex issues of fact related to the cause or amount of the victims’ losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process. 18 U.S.C. § 3663A(c)(3).

<sup>62</sup> *United States v. Lincoln*, 277 F.3d 1112 (9th Cir. 2002); *United States v. Senty-Haugen*, 449 F.3d 862, 865 & n.3 (8th Cir. 2006); *U.S. v. Shana Schmidt*, No. 11–1911 (2012). Beatty recommended that when a victim cannot be identified to receive restitution, judges should consider ordering payment to a national, state, or local victim assistance or compensation program. Beatty, *supra* note 60.

<sup>63</sup> Melanie D. Wilson, *In Booker’s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 IND. L. REV. 379, 396-97 (2006).

<sup>64</sup> O’REILLY ET AL., *supra* note 51, at 192.

<sup>65</sup> 18 U.S.C.A. § 3563(b)(2) (West 2008). In this context, restitution expires with the term of parole or supervision.

<sup>66</sup> *See* 18 U.S.C.A. §§ 3583(e)(2) (West 2015), 3613A(a)(1) (West 1996), 3614(a) (West 1996) (noting that if a defendant knowingly fails to pay restitution, he or she may be resentenced to any sentence that might originally have been imposed); *see also* 18 U.S.C.A. § 3583 (West 2015) (explaining supervised release after imprisonment).

if such return is “impossible, impracticable, or inadequate,” payment of an amount equal to its value.<sup>67</sup> The court may order reimbursement to the victim for lost income, transportation, and other expenses related to the “participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.”<sup>68</sup> In *Hughey v. United States*,<sup>69</sup> the court held that a defendant may be ordered to make restitution only for losses proximately resulting from the offenses for which he is convicted and not for additional losses.<sup>70</sup> Therefore, pain and suffering may not be compensated for through MVRA.

MVRA makes restitution mandatory in the full amount of each victim’s losses, regardless of the defendant’s economic circumstances.<sup>71</sup> As a practical matter, however, a defendant who lacks resources or the potential to earn money may be “unlikely to ever make meaningful restitution to the victim” of a crime.<sup>72</sup> States have utilized “creative methods of monitoring and collecting restitution” because of the reluctance of offenders to pay their restitution.<sup>73</sup> Sources of restitution payments now include “inmates’ work wages, trust accounts, state and federal income tax returns, lottery winnings, and inheritances.”<sup>74</sup> Despite “the passage of federal and state legislation, restitution remains one of the most underenforced victim right[s] within the criminal and juvenile justice systems.”<sup>75</sup>

It has often been stated that the goal of mandatory restitution is rehabilitation: “While restitution serves the obvious function of compensating crime victims, its primary goal is the rehabilitation of the criminal.”<sup>76</sup> Similarly, in *United States v. Twitty*,<sup>77</sup> the court recognized that restitution is a “criminal penalty meant to have strong deterrent and rehabilitative effect.”<sup>78</sup> Furthermore, in *United States v.*

<sup>67</sup> 18 U.S.C.A. § 3663A(b)(1)(B) (West 2012).

<sup>68</sup> 18 U.S.C.A. § 3663A(b)(4).

<sup>69</sup> 495 U.S. 411 (1990).

<sup>70</sup> *Id.* at 413.

<sup>71</sup> 18 U.S.C.A. § 3664(f)(1)(A) (West 2002).

<sup>72</sup> *The Restitution Process for Victims of Federal Crimes*, U.S. DEP’T OF JUSTICE (Nov. 2014), <http://www.justice.gov/usao/ian/VW-pamphlet/Restitution.pdf>, at 1.

<sup>73</sup> Beatty, *supra* note 60, at 73.

<sup>74</sup> Beatty, *supra* note 60, at 73.

<sup>75</sup> Beatty, *supra* note 60, at 216.

<sup>76</sup> *People v. Goulart*, 224 Cal. App. 3d 71, 78 (1990).

<sup>77</sup> 107 F.3d 1482 (11th Cir. 1997).

<sup>78</sup> *Id.* at 1493 n.12 (11th Cir. 1997).

*Brown*,<sup>79</sup> the court held that restitution can be a useful step toward rehabilitation.<sup>80</sup> Thus, the courts regard the payment of restitution as a means to achieve moral rehabilitation of the offenders. This is a noteworthy position, given that the goal of rehabilitation is traditionally held to be occupational or psychological, rather than moral.

### B. Intermediate Sanctions

Intermediate sanctions fall between standard probation and incarceration. They include boot camps, work camp programs, and electronic monitoring. A common intermediary sanction is community service, which requires convicted offenders to perform unpaid work for the benefit of the community.<sup>81</sup> This sanction does not necessarily entail restitution.<sup>82</sup>

The various intermediate sanctions also include community residential facilities and restitution centers, which are community-based residential programs for recently released inmates and selected offenders under the supervision of state departments of correction.<sup>83</sup> The facilities provide around-the-clock supervision of non-violent offenders.<sup>84</sup> Offenders remain in restitution centers from three to 12 months, although courts have sentenced offenders for as long as 24 months.<sup>85</sup> The program offers job placement and budgeting skills development, vocational and educational training through linkages to community-based employers and providers, substance abuse treatment, and other services that promote personal responsibility, self-improvement, and public safety.<sup>86</sup> Some of the centers require man-

<sup>79</sup> 744 F.2d 905 (2d Cir. 1984).

<sup>80</sup> *Id.* at 909.

<sup>81</sup> GILL MCIVOR, SENTENCED TO SERVE: THE OPERATION AND IMPACT OF COMMUNITY SERVICE BY OFFENDERS 1 (1992).

<sup>82</sup> For a review of additional sanctions, such as probation or compelled community service, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 24 (6th ed. 2012).

<sup>83</sup> Also called "Probation and Restitution Centers (PRC)," James R. McDonough et al., *Substance Abuse Report Community Programs*, FLORIDA DEPARTMENT OF CORRECTIONS (2005), <http://www.dc.state.fl.us/pub/subabuse/probation/04-05/execsum3.html>.

<sup>84</sup> BELINDA RODGERS MCCARTHY & BERNARD O. MCCARTHY, COMMUNITY-BASED CORRECTIONS 130 (1984) (stating that Georgia operates several community restitution centers, known as diversion centers, where probationers live while they complete court-ordered restitution).

<sup>85</sup> Marcus Nieto, *Community Correction Punishments: An Alternative to Incarceration for Nonviolent Offenders*, CAL. ST. LIBR. (May 1996), <http://www.library.ca.gov/crb/96/08/#RTFToC17>.

<sup>86</sup> McDonough, *supra* note 83.

datory employment or payment to cover daily expenses.<sup>87</sup> A unique feature of the centers is that all earnings are surrendered directly to the center to pay restitution. The centers provide a resource for participants who have difficulty meeting their court-imposed financial obligations to victims.<sup>88</sup> Recidivism among participants in restitution centers is low: recommitment rates for those who complete the program are 14% at the two-year and 30% at the six-year follow up marks.<sup>89</sup> Similarly, data from the Michigan Law Enforcement Information Network concluded that within the 46-month study, only 41% of probationers were re-arrested, approximately half for property crimes.<sup>90</sup>

#### IV. DISCUSSION

##### A. Moral Correction as a Goal of Criminal Law

We noted above the connection between moral judgment and property offenses, whereby the offender's low level of moral judgment lies at the root of his disregard for the property of others.<sup>91</sup> If moral reasoning can be elevated to affect delinquent behavior,<sup>92</sup> sentencing should aim at elevating the moral judgment of property offenders. In other words, the goal of criminal law should be the moral correction of offenders in general, and of property offenders in particular. This idea, although *novel* in the modern legal analysis of the goals of criminal law, is *ancient* and has been supported throughout the ages by some of the greatest philosophers. Thomas Hobbes noted that "we are forbidden to inflict punishment with any other design than for correction of the offender or direction of others."<sup>93</sup> Similarly, Plato stated that punishment should aim to make the offender hate

<sup>87</sup> Nieto, *supra* note 85.

<sup>88</sup> McDonough, *supra* note 83; Nieto, *supra* note 85. *But compare* with a 1975 study of restitution centers where most of the residents had been convicted of property offenses and 85% of the participants were rearrested within 18 months of release. Steve Chesney et al., *Research on Restitution: A Review and Assessment*, in 61 JUDICATURE 348, 351 (1978).

<sup>89</sup> McDonough, *supra* note 83.

<sup>90</sup> Nieto, *supra* note 85.

<sup>91</sup> See Part I.C, *supra* (explaining the connection between property offenses and moral development).

<sup>92</sup> See Part I.D, *supra* (discussing various methods used to raise the level of moral reasoning).

<sup>93</sup> THOMAS HOBBS, LEVIATHAN ch.15 (1651).

injustice and embrace true justice.<sup>94</sup> To conclude, the sentence could play an important role in elevating the property offenders' moral judgment if it adopted a pro-moral correction approach. To explain the concrete meaning of the notion "pro-moral correction sanctioning approach" in property offenses, this article analyzes property offenses from a moral perspective and derives from this analysis the fundamental notions of moral sentencing.

### 1. *A Moral Analysis of Property Offenses*

A moral analysis of property offenses shows that they harm both the direct victim and society as a whole. The harm inflicted upon the direct victim consists of loss of property, the pain caused by the crime (fear, distress, shock, etc.) and the breach of the victim's right to property. The social harm caused by property crimes is more complex. First, they reduce the general social feeling of safety. Second, they cause enormous expenditure on policing, prosecution, and adjudication. Third, they interfere with the social order: if an offender can seize the rightful property of others, rightful ownership becomes insecure and not profitable. Fourth, adopting an Aristotelian line of thought, property crimes violate social equality: honest people work in order to earn money, whereas property offenders collect the fruits of others' labor.<sup>95</sup> Pro-moral sanctions are therefore intended to achieve moral correction through the imposition of just sanctions and the promotion of the delinquent's empathy with the victim (morality as justice and empathy).<sup>96</sup>

### 2. *Moral Correction in Property Offenses: Fundamental Principles*

Below are the fundamental principles that are necessary in order to attain justice and empathy at the sanctioning phase.

First, the sanction should aim to induce empathy toward the victim because of the endured harm and pain. This may be achieved by the offender having to experience pain similar to the one he caused: parting with the gains derived from the offense and with his

<sup>94</sup> PLATO, THE LAWS bk. XI, at 328 (Trevor J. Saunders trans., Penguin Books 1970) (c. 360 B.C.E.).

<sup>95</sup> ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 275 (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press rev. ed. 1926) (c. 384 B.C.E) ("[T]he unjust being . . . the unequal.").

<sup>96</sup> See Part I.A.1, *supra* (discussing the economic sanction of fines).

own property, confronting the harm caused by his offense, and working (in order to understand that the gains were the fruit of work undertaken by the victim).

Second, the punishment should aspire at achieving justice, as described below. The sanction should be conceived as just and dignified in the offender's eyes, to prevent the bitterness and rancor on the part of the offender against the penal system. It should promote personal responsibility and self-improvement. A fundamental principle of moral rehabilitation is the strengthening of the offender's ability to respect the law by assuming responsibility for his actions and for their repair. The sanctions should also be proportional to the just deserts of the offender that is, with the wrong committed, and should reflect the amount of harm done. There should be a conceptual connection between the harm caused by the offense and the criminal sanction. In other words, if the offender misappropriated someone's property, he should return it or an equivalent sum. This type of economic tit-for-tat ensures equivalent retaliation, in which the offender is punished in a way that is similar to his misconduct: in his pocket.

The sanction should also make sure that the wrongdoer does not derive any benefit from the criminal conduct, and that he should not be allowed to retain the fruits of his offense, that is, the victim's assets. Leaving the stolen property in the offender's hands signals the triumph of crime and strengthens the erroneous belief that crime pays. According to Gary Becker, "illegal activities would not pay."<sup>97</sup> The sanction should also correct financially the personal and social harm resulting from the property offense, thereby improving the offender's moral judgment. The basic principles of corrective justice are found in Aristotle's words:

For it makes no difference whether a good man has defrauded a bad man or a bad one a good one, . . . the law looks only at the nature of damage, treating the parties as equal, and merely asking whether one has done and the other suffered injustice, whether one inflicted and the other has sustained damage. Hence the unjust being here the unequal, the judge endeavors to equalize it: . . . the line representing the suffering and doing of the deed is divided into unequal parts, but the

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<sup>97</sup> Gary S. Becker, *Crime and Punishment: An Economic Approach*, in 76(2) JOURNAL OF POLITICAL ECONOMY 44 (1968).

judge endeavors to make them equal by the penalty or loss he imposes, taking away the gain.<sup>98</sup>

Thus, while the equal is a mean between more and less, gain and loss are at once both more and less in contrary ways, more good and less evil being gain and more evil and less good loss; and as the equal, which we pronounce to be just, is, as we said, a mean between them, it follows that Justice in Rectification will be the mean between loss and gain.<sup>99</sup>

Traditionally, “[t]he Aristotelian theory of corrective justice” is viewed as an aim of tort law; however, this doctrine is all the more relevant to criminal law: if correction of the harm done makes sense when the injury was committed recklessly, *a fortiori* it makes sense when the harm was done deliberately, in a criminal context.<sup>100</sup> This view is supported by other legal scholars who write about property offenses.<sup>101</sup> For example, Barnett supports criminal restitution based on the claim that it leads to the correction of the imbalance created by the offense and to corrective justice: “The idea of restitution is actually quite simple. It views crime as an offense by one individual against the rights of another. The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused.”<sup>102</sup>

Note that the sentencing process should perhaps inflict some additional pain on the offender to serve notice that he does not only return to the point of departure but must endure additional punishment for his wrongful acts. This line of thought is echoed in the words of Plato, who states that a thief ought to pay not only restitution but face additional punishment in order to deter him and others from committing injustice:

When a man does another any injury by theft . . . for

<sup>98</sup> ARISTOTLE, *supra* note 95, at 275

<sup>99</sup> ARISTOTLE, *supra* note 95, at 275.

<sup>100</sup> Sharon Aharony-Goldenberg & Yael Aviad-Wilchek, *Property Offences – An Economic Punitive Model*, 32 IUNEI MISHPAT 189, 213 (2010) (in Hebrew); *see also* Sharon Aharony-Goldenberg & Yael Aviad-Wilchek, *Restitution: A Multilateral Penal Approach*, TRENDS AND ISSUES IN VICTIMOLOGY 100 (Natti Ronel et al. eds., Cambridge Scholars 2008).

<sup>101</sup> PATRICIA HUGHES & MARY JANE MOSSMAN, RE-THINKING ACCESS TO CRIMINAL JUSTICE IN CANADA: A CRITICAL REVIEW OF NEEDS AND RESPONSES 75–76 (2001).

<sup>102</sup> Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 287 (Randy E. Barnett & John Hagel eds., 1977).

the greater injury let him pay greater damages to the injured man, and lesser for the smaller injury; but in all cases, whatever the injury may have been, as much as will compensate the loss. And besides the compensation of the wrong, let a man pay a further penalty for the chastisement of his offence: he who has done the wrong instigated by the folly of another, through the lightheartedness of youth or the like, shall pay a light penalty; but he who has injured another through his own folly, when overcome by pleasure or pain, in cowardly fear, or lust, or envy, or implacable anger, shall endure a heavier punishment. Not that he is punished because he did wrong, for that which is done can never be undone, but in order that in future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing.<sup>103</sup>

Bentham reaches a similar conclusion, based on different reasons: “To enable the value of the punishment to outweigh that of the profit of the offense, it must be increased, in point of magnitude, in proportion as it falls short in point of certainty.”<sup>104</sup>

## B. Moral Analysis of the Penalties of Property Offenders

Below we analyze penalties imposed on property offenders (imprisonment, intermediate sanctioning, and monetary sanctions) in moral terms, and inquire whether they represent pro-moral correction. The moral evaluation of the penalties is based on both theoretical arguments and on recidivism rates as a means to test whether they enhance moral judgment.

### 1. Imprisonment and Moral Correction

Analysis of incarceration from a moral point of view proves that it plays a limited role in achieving empathy and justice. Imprisonment appears not to achieve empathy because during his prison

<sup>103</sup> PLATO, *supra* note 94, at 328.

<sup>104</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 143-44 (Kitchener 2000) (1781), <http://socserv.mcmaster.ca/econ/ugcm/3ll3/bentham/morals.pdf>.

stay the offender is not confronted with the pain endured by the victim, but rather surrounded by other offenders who disregarded their victims' pain. Furthermore, incarceration also appears to play a limited role in achieving justice. First, it does not provide financial correction of the social harm resulting from the property offense; on the contrary, confinement entails heavy social economic costs that are shouldered by the taxpayers.<sup>105</sup> Holding each prisoner costs the taxpayers between \$20,000 and \$30,000 a year.<sup>106</sup> Bentham opposes inflicting punishment in several cases, including "where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented."<sup>107</sup>

Second, imprisonment seems to cultivate, rather than correct, the property offenders' tendency to exploit others, because during their confinement property offenders are freely provided with all their basic material needs at the expense of the taxpayer. Third, at times custody is conceived as unjust, non-proportional, and dehumanizing in the eyes of the offender,<sup>108</sup> which may lead to bitterness and vengefulness on his part.<sup>109</sup> Fourth, the imposition of incarceration without restitution, compensation, and fines may mistakenly lead the offender to the conclusion that he has paid his debt to society. Thus, it is highly improbable that incarceration would elevate the moral judgment of property offenders.<sup>110</sup> This conclusion is supported by the extremely high recidivism rates among property offenders: 82.1% within five years of release.<sup>111</sup>

<sup>105</sup> King, *supra* note 5, at 20.

<sup>106</sup> MARY K. STOHR & ANTHONY WALSH, CORRECTIONS: THE ESSENTIALS 112-13, 128-29 (2012) (discussing these rates are higher for women, juveniles, and the elderly).

<sup>107</sup> BENTHAM, *supra* note 104, at 134.

<sup>108</sup> Drew Leder, *Imprisoned Bodies: The Life-World of Incarcerated*, 31 SOC. JUST., Nos. 1-2, at 51, 64 (2004).

<sup>109</sup> Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 486-87 (1997); E. Rotman, *Beyond Punishment*, in A READER ON PUNISHMENT 285 (R. A. Duff & David Garland eds., 1994); *see also* Christopher Wildeman et al., *The Hedonic Consequences of Punishment Revisited*, 104(1) J. CRIM. L. & CRIMINOLOGY 133, 140-42 (2014) (discussing that incarceration decreases happiness).

<sup>110</sup> *See* Alvin J. Bronstein, *Incarceration as a Failed Policy*, 67 CORRECTIONS TODAY 6 (2005) ("Prisons . . . are still ineffective, corruptive and criminogenic. It is widely recognized by criminologists and corrections professionals that we have locked up too many social nuisances who are not real threats, and too many petty offenders and minor thieves, severing the few social ties that they have and pushing them toward more serious criminal behavior.")

<sup>111</sup> Alexia D. Cooper et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, BUREAU OF JUST. STAT.,

It may be argued that, besides the achievement of the goal of incapacitation, incarceration is intended primarily to achieve the goal of retribution: that it is an expression of vengeance and outrage against the criminal act. Bibas, for example, noted that “Our criminal procedures . . . allow the community to vent its outrage, satisfying the public’s sense of justice by bringing catharsis and closure.”<sup>112</sup> But this catharsis seems to be futile because it is temporary and lasts only until the next probable re-offense. It also appears to lead to public frustration, as taxpayers spend enormous amounts of money on prisons to which property offenders return soon after their release.

## 2. *Intermediate Sanctions and Moral Correction*

### a. **Moral Analysis of Community Service**

Moral analysis of community service reveals that it is moderately effective in producing moral correction of property offenders. On the one hand, it is possible to argue that community service provides some justice, as the offender works for the community he has harmed. Indeed, Pritikin enumerates the many benefits of community-based labor (typically unpaid) and generally relevant to restitution centers:

[C]ommunity-based labor] avoids the high costs of incarceration. Community service also has the potential to help reintegrate the offender into society and build his self-esteem, and thereby rehabilitate him. Paid labor lacks this rehabilitative panache, but it does provide a number of practical benefits: it avoids idleness which can lead to misconduct; it provides skills and experience which increase the offender’s employability and so reduce the risk of recidivism; and it gener-

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<http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986> (April, 22, 2014); see also Jeffrey Grogger, *Certainty vs. Severity of Punishment*, 29 ECON. INQUIRY 297, 304 (1991) (finding that prisoners given more severe punishment had a higher recidivism rate); see also David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 CRIMINOLOGY 587 (1995) (finding that white-collar criminals sentenced to prison were more likely to relapse than those who were not imprisoned).

<sup>112</sup> Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1392 (2003).

ates revenue which can be used to reimburse the state for criminal justice and corrections costs, compensate victims, and support the offender's dependents.<sup>113</sup>

On the other hand, community service does not correct the financial harm done to the direct victim. It does not offer any specific means of relating to the pain endured by the victim, but rather focuses on a vague retributive idea of paying off the offender's debt to society. Recidivism rates among offenders performing community service is quite high: 66.4% within four years<sup>114</sup> and 63.4% within three years after sentencing.<sup>115</sup> Similarly, 43% of participants in a New York three-borough sample have been arrested again within 180 days of being sentenced to community service,<sup>116</sup> and 75% of the re-arrests were for property offenses.<sup>117</sup>

#### **b. Moral Analysis of Restitution Working Centers**

Generally, restitution centers play an important role in effecting moral correction among property offenders. They serve justice because they focus on the financial correction of the harm done to the victim, and at the same time provide concrete means for the offender to work in order to earn a living and to make restitution. Because the program also provides services that promote personal responsibility, self-improvement, and public safety,<sup>118</sup> it can be argued that it operates as a type of moral intervention. Furthermore, it contributes to the achievement of empathy, because it signals to the offender that money is earned by work rather than by theft or fraud, and because it causes the offender to endure the pain of having to part from the fruits of his labor in order to pay restitution, giving him an opportunity to identify with his victim's ordeal. Pritikin noted that work ensures that "no offender is 'judgment-proof,' so that substantial fines can be imposed and restitution becomes more than an empty gesture."<sup>119</sup>

<sup>113</sup> Pritikin, *supra* note 3, at 346-47.

<sup>114</sup> McIVOR, *supra* note 81, at 154.

<sup>115</sup> McIVOR, *supra* note 81, at 154.

<sup>116</sup> DOUGLAS CORRY McDONALD, PUNISHMENT WITHOUT WALLS: COMMUNITY SERVICE SENTENCES IN NEW YORK CITY 166 (1986).

<sup>117</sup> *Id.* at 170.

<sup>118</sup> McDonough, *supra* note 83.

<sup>119</sup> Pritikin, *supra* note 3, at 348.

Recidivism among participants in restitution centers is low: recommitment rates for those who complete the program are 14% at the two-year, and 30% at the six-year follow up marks.<sup>120</sup> Similarly, data from the Michigan Law Enforcement Information Network show that only 41% of probationers were re-arrested within the 46-month time frame of the study, nearly half for property crimes.

### 3. *Monetary Sanctioning and Moral Correction*

The second sentencing notion is monetary sanctioning, which consists of restitution, disgorgement, and fines. Empirical data show that both fines<sup>121</sup> and restitution<sup>122</sup> are effective in reducing recidi-

<sup>120</sup> McDonough, *supra* note 83.

<sup>121</sup> It is difficult to find statistics concerning the imposition of fines, and almost impossible to find such data relating specifically to property offenses. Some relatively old or international data are available on the subject. According to the 2013 U.K. Compendium of Re-offending Statistics, relating to fines for offenses such as shoplifting, driving over the limit, etc., the one-year reoffending rate for offenders receiving a fine in 2010 is around 40%. *2013 Compendium of Re-offending Statistics and Analysis*, MINISTRY OF JUST., [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/278133/compendium-reoffending-stats-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278133/compendium-reoffending-stats-2013.pdf) (last visited Mar. 30, 2016). Reconviction rates in Scotland of offenders receiving fines fluctuate between 30-32% in the one-year follow-up studies and 43-45% in the two-year follow-up studies. Note that this rate is lower than the average reoffending rates for other sanctions. *Reducing Reoffending: Review of Selected Final Report for Audit Scotland Report*, THE SCOTTISH CENTRE FOR CRIME AND JUST. RES., <http://www.sccjr.ac.uk/wp-content/uploads/2012/12/Reducing-Reoffending-FINAL-Dec-2012.pdf> (last visited Mar. 30, 2016). A slightly less clear picture is drawn in a meta-analysis that “compared the effects of conditional sentences, fines, determinate imprisonment, training school imposed on young law-breakers aged 18 to 20 years” and imprisonment. The authors cited 11 comparisons that show significantly better outcomes for non-custodial sanctions; 14 studies, that showed no significant difference, although results were somewhat more favorable to non-custodial sanctions in four cases; and two studies that show significantly lower reoffending rates following custodial sanctions. Patrice Villettaz et al., *The Effects of Custodial vs. Non-Custodial Sentences on Re-Offending: A Systematic Review of the State of Knowledge*, CAMPBELL COLLABORATION, <http://www.campbellcollaboration.org/lib/download/108/> (last visited Mar. 30, 2016). Older research produced similar results. An examination of recidivism rates in the Netherlands found that they varied greatly. For example, “the proportion of recidivists among those sentenced to an unconditional fine was 32%; among those with conditional custodial sentences combined with an unconditional fine it was 35%; and among those sentenced to unconditional imprisonment it was 60%.” C. van der Werff, *Recidivism and Special Deterrence*, 21 BRIT. J. OF CRIMINOLOGY 136, 141 (1981).

<sup>122</sup> Furthermore, ordering the offender to restore stolen goods and to compensate the victim may advance his rehabilitation and thus prevent reoffending. ANDREW. R. KLEIN, ALTERNATIVE SENTENCING, INTERMEDIATE SANCTIONS AND PROBATION 156-57 (2d ed. 1997). Various studies have shown that restitution programs lower recidivism rates: Chesney et al., *supra* note 88, at 131-48; Anne L. Schneider, *Restitution and Recidivism Rates of Juvenile Offenders: Results from Four Experimental Studies*, 24 CRIMINOLOGY 533 (1986); Anne L. Schneider & Peter R. Schneider, *The Impact of Restitution on Recidivism of*

vism. These encouraging figures can be explained in moral terms, and economic sanctions appear to have great value in enhancing the moral judgment of property offenders because they help achieve empathy and justice for several reasons.

**a. Achieving Empathy through Monetary Sanctions**

Restitution is an important tool for enhancing the property offender's empathy with the pain endured by his victims, albeit less so than are fines and disgorgement. First, by having to part with the gains obtained through his offense the offender experiences pain similar to the one he caused. In the case of fines, he must also part with some of his own property. Second, the offender must confront the harm caused by his offense, which can be accomplished by exposing him to the Victim Impact Statement at the sentencing stage. These statements describe the manner in which the crime has affected the victim. This reasoning is echoed in the words of the Supreme Court in *Kelly v. Robinson*,<sup>123</sup> emphasizing the rehabilitative aspect of restitution:

Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.<sup>124</sup>

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*Juvenile Offenders: An Experiment in Clayton County, Georgia*, 10 CRIM. JUST. REV. 1 (1985); Roy Sudipto, *Juvenile Restitution and Recidivism in a Midwestern County*, 59 FED. PROB. 55-62 (1995). Petersilia and Turner suggested that the recidivism of offenders who paid restitution, received counseling, held jobs, and performed community service was 10-20% lower than that of offenders who did not. Joan Petersilia & Susan Turner, *Evaluating Intensive Supervision Probation/Parole: Results of a Nationwide Experiment*, NAT'L INST. OF JUST. RES. IN BRIEF, 7-8 (May 1993).

<sup>123</sup> 479 U.S. 36 (1986).

<sup>124</sup> *Id.* at n.10. Carolyn Robinson pleaded guilty to larceny in the second degree. The charge was based on her wrongful receipt of \$9,932.95 in welfare benefits. The court placed Robinson on probation for five years. As a condition of probation, the judge ordered her to make restitution to the State of Connecticut at the rate of \$100 per month. Robinson filed a volun-

Third, McCarthy and McCarthy noted that restitution provides offenders with a means of expressing guilt for their conduct: “such feeling may become more manageable because the offender is able to do something constructive following his offense, rather than repressing whatever remorse he may feel and attempting to rationalize his behavior . . . . Some therapists view the acknowledgement of responsibility that is required in restitution as a prerequisite for offender change.”<sup>125</sup> This line of thought also seems relevant to fines and disgorgement.

#### b. Attaining Justice through Monetary Sanctions

First, whereas imprisonment may be conceived by property offenders as harsh and unjust, economic sanctions can easily be conceived as fair and dignified, which could prevent the bitterness and rancor on the part of the offender against the penal system. At the same time, Wood and May found that a non-custodial sanction is deemed more onerous than a custodial sanction.<sup>126</sup>

Second, economic sanctions ensure that a wrongdoer does not derive any economic benefit from his criminal conduct.<sup>127</sup> Conversely, in the absence of restitution or disgorgement, the lawbreaker retains the spoils, leaving the injured party deprived.

Third, economic sanctions are proportional to the just deserts of the offender, that is, with the wrong that was perpetrated. Furthermore, according to McCarthy and McCarthy, the humanitarian benefits of restitution are closely linked to their rehabilitative objectives, because restitution is related to the offense committed. This type of personalized justice is not possible when only imprisonment is imposed. In the view of the authors, making punishment more meaningful should promote the goals of rehabilitation because the offender comes to view the criminal justice system as responding to his particular behavior.<sup>128</sup>

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tary petition in the United States Bankruptcy Court and made no further payments. She also sought a declaration in the Bankruptcy Court that the restitution obligation had been discharged. The court held that a bankruptcy debtor cannot discharge her criminal restitution obligations in bankruptcy proceedings.

<sup>125</sup> MCCARTHY & MCCARTHY, *supra* note 84, at 135.

<sup>126</sup> Peter B. Wood & David C. May, *Racial Differences in Perceptions of Severity of Sanctions: A Comparison of Prison with Alternatives*, 20 JUST. Q. 627 (2003).

<sup>127</sup> *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) (internal citation omitted).

<sup>128</sup> MCCARTHY & MCCARTHY, *supra* note 84, at 134.

Fourth, restitution and disgorgement play an important role in attaining justice because they assist to some extent in restoring victims to their situation before the wrongdoer's action (corrective justice). This line of thought is echoed, to some extent, in Bentham's words:

To furnish an indemnity to the injured party is another useful quality in a punishment. It is a means of accomplishing two objects at once - punishing an offense and repairing it; removing the evil of the first order, and putting a stop to alarm. This is a characteristic advantage of pecuniary punishments.<sup>129</sup>

Pritikin noted that unlike most other punishments, restitution provides tangible benefits to victims.<sup>130</sup> Some of these merits are summarized by O'Reilly et al.:

Legal remedies, such as fines, and equitable remedies, such as restitution, work together to address multiple policy objectives. Disgorgement and restitution are, in an important sense, a form of restorative justice, not penal justice. Victims are compensated, the balance of society is restored, law-abiding companies are not disadvantaged, and justice is served if we know that the wrongdoer didn't get to keep any of their ill-gotten gains and the victims were made whole.<sup>131</sup>

The payment of fines by the offender to the Treasury is a form of redress for the harm caused to society, for the general feeling of insecurity caused by the property offense, and for social costs, such as policing expenses, involved in bringing the offender to justice.<sup>132</sup> Barnett describes the breach of equality amended in this way:

A crime creates an imbalance between a criminal and his victim, or, according to some accounts, between a criminal and an aggregation referred to as 'society.' Justice consists of 'getting even' - that is, restoring the balance between the offender and either the victim,

<sup>129</sup> JEREMY BENTHAM, *THEORY OF LEGISLATION* 339 (Etienne Dumont trans., 4th ed. 1931) (1882).

<sup>130</sup> Pritikin, *supra* note 3, at 346.

<sup>131</sup> O'REILLY ET AL., *supra* note 51, at 183.

<sup>132</sup> NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 125-26 (1990).

society, or both. Where restitution and retribution differ is with respect to how this balance should be obtained . . . . [A] restitutive account focuses not on the desert and punishment of the criminal, but on the right of the victim to be made whole. It would compel a criminal to make reparations - often, but not necessarily, consisting of monetary compensation - to raise the victim up to some semblance of her ex ante position.<sup>133</sup>

### c. Problematic Aspects of Monetary Sanctions

Two criticisms may be raised against the analysis of financial sanctions, based on moral terms. First, restitution, disgorgement, and fines alone are somewhat limited in their ability to achieve justice and to raising the moral judgment of the offenders, because they do not compensate victims for the emotional distress, pain and suffering, and fear and anguish they endured.<sup>134</sup> Compensation of victims for the pain and suffering inflicted by the offender is rare among U.S. sanctioning measures,<sup>135</sup> but we believe that it is a necessary element in the redress of harm done.

Second, the offender may lack the economic resources necessary for the payment of fines and restitution orders, which may result in reoffending and thus obstruct moral rehabilitation.<sup>136</sup> MVRA has been criticized for not taking into account the offenders' inability to pay and, as a result, creating a large surge in criminal debt.<sup>137</sup> This situation is exacerbated when the restitution order is combined with

<sup>133</sup> Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime*, 76 B.U. L. REV. 157, 159 (1996).

<sup>134</sup> See *Restitution*, THE NAT'L CTR. FOR VICTIMS OF CRIME, <https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution> (last visited Mar. 30, 2016); see also Lucia DiCicco, *The Rights of Victims in United States Criminal Proceedings and at the ICC*, AM. NON-GOV'TAL ORGS. COAL. FOR THE INT'L CRIM. CT. (Aug. 20, 2009), <http://www.amicc.org/docs/VictimsUS.pdf> ("Most states have a body that reviews and distributes compensation funds and grants to eligible victims.").

<sup>135</sup> See *About Victims' Rights*, VICTIM LAW, <https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp> (last visited Mar. 30, 2016).

<sup>136</sup> MORRIS & TONRY, *supra* note 132, at 114.

<sup>137</sup> Matthew Dickman, *Should Crime Pay?: A Critical Assessment of the Mandatory Victims Restitution Act of 1996*, 97 CAL. L. REV. 1687, 1693-95 (2009).

imprisonment, distancing the convict from possible sources of employment and income that he needs for obeying the order.<sup>138</sup> Therefore, some occupational assistance is needed in conjunction with financial sanctions.

## V. MORAL CORRECTION: THE DESIRED PENAL APPROACH

Research indicates that often the property offender's low level of moral judgment lies at the root of the crime.<sup>139</sup> Therefore, the main goal of criminal law should be to elevate and correct his moral reasoning. Federal law, state law, and the courts should adopt a pro-moral correction approach by incorporating the following elements in the sentencing: mandatory participation in MRT, moral analysis of the offense, moral correction of the offender, and pro-moral correction sanctioning.

### A. Mandatory MRT

As noted, empirical research has shown that participation in moral education interventions, especially MRT, elevates moral reasoning and lowers recidivism.<sup>140</sup> Therefore, participation in moral interventions should be a mandatory part of the sanction. Palmer and Hollin, for example, suggest that "interventions aimed at changing moral reasoning should be directed at raising levels of moral reasoning in these areas."<sup>141</sup>

### B. Moral Analysis of the Offense

To achieve moral correction, the verdict should stress the nature of the wrong committed. It is important that the judge analyze the immorality of the offense by adopting a terminology that includes both justice and empathy.

For example, if the offender stole a ring, it is preferable that the judge emphasizes the pain endured by the victim who was strongly attached to it, the breach of the victim's right to property, the injustice committed by the crime that deprived the victim of the fruit of her labor, and so forth. Similarly, if the case is one of tax evasion,

<sup>138</sup> *Id.* at 1705-07.

<sup>139</sup> Palmer & Hollin, *supra* note 24, at 225.

<sup>140</sup> Little, *supra* note 37, at 14-17.

<sup>141</sup> Palmer & Hollin, *supra* note 24, at 225.

which is a form of property offense that harms society as a whole, the judge should point out its consequences, including, the numerous victims (taxpayers) who must therefore shoulder a heavier tax burden and the reduced state budget that can now pay for fewer social benefits.

### C. Pro-Moral Correction Sanctions

We suggest the mandatory imposition of the following financial sanctions: restitution, fines, and compensation as a means to elevate moral reasoning.<sup>142</sup> These sanctions help the offender empathize with the pain and loss endured by the victim by forcing him to confront the consequences of his action and experience similar pain when parting with his own property. They also help the offender recognize in a concrete way the damage he has caused when he experiences a similar shortage of money, and assist him in assuming responsibility for repairing the damage he caused.<sup>143</sup>

The combination of these sanctions also helps in achieving justice because it makes sure that crime does not pay. Moreover, they impose an additional payment on the offender in the form of fines intended to compensate society for its general loss and to serve as an additional deterrent to wrongdoers.<sup>144</sup> Furthermore, they correct the harm caused to the victim by the payment of restitution and compensation (for pain and suffering).<sup>145</sup> Pritikin argued, “Restitution is thought to help rehabilitate offenders by providing them a way to make amends.”<sup>146</sup> Therefore, compensation should be added to the existing sanctions in order to achieve full corrective justice. This notion was embraced by Beatty et al., who recommended that full restitution should include, “when appropriate, compensation for pain and suffering.”<sup>147</sup> Note further that the imposition of the combination of these sanctions is not as expensive

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<sup>142</sup> See Aharony-Goldenberg & Aviad-Wilchek, *supra* note 100, at 213; see also Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 356 (2005) (“Other offenders constitute no risk to public safety but deserve a substantial sentence. For them, a combination of fines, restitution, and community service may be most effective.”).

<sup>143</sup> Aharony-Goldenberg & Aviad-Wilchek, *Property Offences*, *supra* note 100, at 213.

<sup>144</sup> MORRIS & TONRY, *supra* note 132, at 116.

<sup>145</sup> Beatty et al., *supra* note 60, at 233.

<sup>146</sup> Pritikin, *supra* note 3, at 346.

<sup>147</sup> Beatty et al., *supra* note 60, at 243.

as incarceration,<sup>148</sup> but rather assists the Treasury, because the income from the fines is collected by the state, so that they are neither unprofitable nor too expensive.<sup>149</sup>

We argue that the combination of these financial penalties can elevate the offenders' moral judgment and thereby reduce reoffending. The fact that imposition of these financial sanctions results in relatively low recidivism rates of around 40% attests to the fact that they achieve the goal of moral correction.

In cases in which the offender cannot meet the demands imposed on him by the financial sanctions or lacks the necessary working skills, confinement in restitution centers should be imposed to facilitate the payment of the monetary sanctions. The offender should remain in the restitution centers until the full restitution of the stolen amount is made, up to a maximum of years determined by a judge. Notwithstanding the numerous merits of work sanctions outside of prison, they are rare,<sup>150</sup> and therefore we strongly recommend expanding their use.

Conversely, imprisonment, and to a lesser extent community service, do not help correct the wrong moral reasoning of the property offender. Moreover, incarceration may further degrade the offender's low moral level because it involves parasitic behavior, a criminal environment, and the mistaken perception that the offender's debt to society has been paid. Therefore, it is not surprising that in practice both incarceration and community service lead to high reoffending rates of up to 80%, especially among property offenders. We believe that incarceration should be a last-resort penalty, imposed only rarely, especially when there is strong public outrage against the offender or when the likelihood of moral rehabilitation is extremely low – for example, if the offense was committed for ideological reasons or when there is evidence that the convict might escape from an open work setting.

#### **D. The Proposed Sanctioning Approach and Possible Criticism**

The proposed sanctioning approach adds a new goal to the ex-

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<sup>148</sup> Pritikin, *supra* note 3, at 422 (establishing that fine-labor is cheaper to administer than prison but more expensive to administer than probation, even if we factor in full-wage subsidy).

<sup>149</sup> MORRIS & TONRY, *supra* note 132, at 130.

<sup>150</sup> Pritikin, *supra* note 3, at 347.

isting goals of criminal law: that of moral correction. It may be argued, however, that this goal clashes with the important aim of retribution, which is generally interpreted to mean just deserts and public catharsis.

According to the just deserts approach, “the retributivist justifies punishment by the desert of the offender. Such desert is constituted by the wrong that was done by the offender and the culpability with which he did that wrong.”<sup>151</sup> Based on this approach, “[c]riminal law exists to punish people because they deserve it, in proportion to their desert, and not because it causes some other good consequence.”<sup>152</sup> But it is possible to argue that the proposed sanctioning meets the criteria of the just deserts approach because criminal law takes away misappropriated goods, and some additional amount, from the offender. Under the proposed approach there is complete proportionality with the desert of the offender. Pritikin, who prefers restitution and fines over incarceration, argued that restitution is retributively satisfying because “it involves literal and symbolic payback.”<sup>153</sup>

Furthermore, it is possible to argue that incarceration has little to do with desert: why punish financial misconduct by the denial of liberty? There is no proportionality in doing so. Similarly, Ashworth propose[d] that “imprisonment should not be imposed as a sentence for property offences” and argued that “deprivation of liberty is a disproportionate response for an offence that deprives people of their property.”<sup>154</sup> His proposition is limited to “pure property offences” and excludes those “that are violent, threatening, or sexual.”<sup>155</sup> Because the connection between incarceration and property offenses is tenuous, financial sanctions are a more relevant and proportional response to property offenses, and more consistent with the retributive approach of just deserts. A similar view seems to be supported by Morris and Tonry, who maintained that while “[t]he prison is a pun-

<sup>151</sup> Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 69 (1999).

<sup>152</sup> *Id.* at 66.

<sup>153</sup> Pritikin, *supra* note 3, at 346.

<sup>154</sup> Andrew Ashworth, *Foreword to What if Imprisonment were Abolished for Property Offences?*, in WHAT IF . . . ? SERIES OF CHALLENGING PAMPHLETS 1 (The Howard League for Penal Reform & Mannheim Ctr. for Criminology, 2013) [http://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard\\_league/user/online\\_publications/What\\_if\\_imprisonment\\_were\\_abolished\\_web.pdf](http://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/online_publications/What_if_imprisonment_were_abolished_web.pdf).

<sup>155</sup> *Id.* at 3.

ishment exacted against freedom of movement and association; the fine is a punishment exacted against money and what money can buy.”<sup>156</sup>

According to the catharsis approach, punishment channels public outrage against the breach of law.<sup>157</sup> It is possible to argue, therefore, that the general public considers the suggested financial sanctions to be too soft on property offenders and prefers incarceration. A similar public attitude exists with regard to probation. Petersilia claimed the public is critical of probation because it “suffers from a ‘soft on crime’ image” and is viewed as “permissive, uncaring about crime victims, and blindly advocating a rehabilitative ideal while ignoring the reality of violent, predatory criminals.”<sup>158</sup> Pritikin noted further that as offenders are made “not only to pay money, but [also] to work to pay it,” the punishment should be sufficiently retributive to “satisfy the public demand for retribution.”<sup>159</sup>

In our view, however, imposing not only restitution on property offenders but also a fine, which leaves property offenders in a worse position than they were before committing the offense, may best achieve the goal of retribution. Similarly, Doob and Marinos argued that a fine may “fail[] symbolically to denounce harm against the person” in violent crimes, as “society may view it as inappropriate because it does not serve the functions that a punishment is supposed to serve for that particular offense.”<sup>160</sup> Conversely, fines may be more easily accepted for property offenses.<sup>161</sup>

Indeed, in many instances convicts prefer prison over monetary sanctions.<sup>162</sup> Wood and May cited numerous studies “showing that many offenders would prefer to serve out a prison term and be released with no strings attached rather than invest time in an

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<sup>156</sup> MORRIS & TONRY, *supra* note 132, at 150.

<sup>157</sup> Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L. J. 1195, 1245 (2000); *see also* Kyron Huigens, *On Commonplace Punishment Theory*, 2005 U. CHI. LEGAL F. 437, 440 (2005).

<sup>158</sup> Joan Petersilia, *Probation in the United States*, in 22 CRIME AND JUST.: A REV. OF RES. 149, 150 (Michael Tonry ed., Univ. of Chicago Press 1997), *reprinted in* 22 PERSP. 30 (1998).

<sup>159</sup> Pritikin, *supra* note 3, at 346

<sup>160</sup> Anthony N. Doob & Voula Marinos, *Reconceptualizing Punishment: Understanding the Limitations on the Use of Intermediate Punishments*, 2 U. CHI. L. SCH. ROUNDTABLE 413, 426 (1995).

<sup>161</sup> Pritikin, *supra* note 3, at 346.

<sup>162</sup> Pritikin, *supra* note 3, at 357.

alternative sanction” that is perceived as being easily revocable.<sup>163</sup>

Note, however, that high moral reasoning is not a guarantee for moral behavior. Kohlberg and Candee found that, notwithstanding the high correlation between moral judgment and moral action, there is a gap between moral action and moral reasoning.<sup>164</sup> A similar conclusion was recently reached by Brooks et al., stating, “people often do not act in accordance with their reasoning.”<sup>165</sup> Therefore, although the proposed sentencing approach toward property offenders can achieve a lower rate of recidivism, it is not a panacea for property offenses.

## VI. CONCLUSION

Everyday life provides ample opportunities to commit property offenses and presents individuals with the option to respect or not to respect other people’s property. To a large extent, the choice of whether to commit property offenses is the result of one’s moral reasoning, of understanding the negative moral, social, and personal implications of these offenses.

To lower reoffending rates among property offenders, it is essential that criminal law makes moral correction one of its goals. To attain this objective, verdicts must adopt a pro-moral correction stance. They ought to express the immorality of the individual offense, incorporate some kind of moral correction therapy (MRT), and (in most cases) impose financial sanctions rather than a custodial penalty. If the offender lacks the means to meet his financial penal liabilities, confinement in restitution centers should be imposed.

The significant gap between the low recidivism rates of pro-moral correction sanctions and the high reoffending rates of incarceration indicates that monetary sanctions and restitution centers work.

<sup>163</sup> David May et al., *The Lesser of Two Evils? A Qualitative Study of Offenders’ Preferences for Prison Compared to Alternatives*, 36 JOURNAL OF OFFENDER REHABILITATION 71, 86 (2008).

<sup>164</sup> Marinus G.C.J. Beerthuisen & Daniel Brugman, *Moral Value Evaluation: A Neglected Motivational Concept in Externalizing Behaviour Research*, in MORAL DEVELOPMENT AND CITIZENSHIP EDUCATION, 7 HANDBOOK OF MORAL MOTIVATION: THEORIES, MODELS, APPLICATIONS 365, 365-66 (Karin Heinrichs et al. eds., Sense Publishers 2013) (discussing Lawrence Kohlberg & Daniel Candee, *The Relationship of Moral Judgment to Moral Action*, in ESSAYS ON MORAL DEVELOPMENT, 2 THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES 498 (Lawrence Kohlberg ed., Harper & Row 1st ed. 1984).

<sup>165</sup> Jeff Brooks et al., Abstract, *Moral Motivation, Moral Judgment and Antisocial Behavior*, 9 J. OF RES. IN CHARACTER EDUC. 149 (2013).

Conversely, prison, and to a lesser extent community service, are criminogenic. The criminal process should therefore aim to elevate the moral level of property offenders through the sanctioning process, and in most cases forsake incarceration, which has failed to prevent reoffending because it does not change the offender's low moral judgment. The goal of retribution is also served in this way because the suggested sanctioning can lead to public catharsis, and it is proportional with the just deserts of the offender.