BEYOND THE PRISON WALL: REFUNDABLE FINES AS AN ALTERNATIVE TO INCARCERATION

GIDEON PARCHOMOVSKY[*] & ALEX STEIN[**]

ABSTRACT

In this Commentary, we introduce the refundable fine, a novel mechanism designed to rehabilitate low- to mid-level first-time offenders and to improve the criminal justice system without reliance on incarceration. A refundable fine is a monetary penalty returned to the offender—in installments or, in exceptional cases, in one payment—over a certain period if he or she commits no further crimes. Unlike traditional fines, refundable fines can be structured to provide individually tailored rehabilitative incentives for offenders. First, the installment period of the repayment can vary in length depending on the characteristics of the offense and the offender. Second, the payment frequency intervals can be long, short, intermediate, or variable. The sentencing judge may order the repayments to be made annually, every six months, every single month, or, in exceptional cases, in one installment upon successful rehabilitation. As with traditional fines, the refundable fine's amount will correlate with the seriousness of the offender's misdeed. We argue that the introduction of refundable fines can reduce the rates and the costs of incarceration dramatically and create a more fair and humane criminal justice system that provides meaningful incentives for offenders to avoid committing further crimes.

* Robert G. Fuller, Jr. Professor of Law, University of Pennsylvania Law School. Wachtell, Lipton, Rosen & Katz Chair in Corporate Law, Hebrew University School of Law, Israel.

** Justice of the Israel Supreme Court. We thank David Abrams, Robert Aumann, Tom Baker, Mitch Berman, Stephanos Bibas, Shoham Choshen-Hillel, Malcolm Feeley, Kim Ferzan, Jill Fisch, Jean Galbraith, Nuno Garoupa, Yehonatan Givati, Miri Gur-Arye, Ehud Guttel, Sergiu Hart, Paul Heaton, Anjelica Hendricks, Dave Hoffman, Kierstan Kaushal-Carter, Jonathan Klick, Seth Kreimer, Adi Leibovitch, Sandy Mayson, Michael Morse, Alice Ristroph, Muhammad Sarahne, Peter Siegelman, Beth Simmons, David Skeel, and participants in the seminars held by the Hebrew University Center for the Study of Rationality, Hebrew University Law School, and University of Pennsylvania Carey Law School for their helpful comments on earlier drafts. We also thank Ariel Silverbreit and Dor Rotenstreic for outstanding research assistance.

TABLE OF CONTENTS

INTRODUCTION

In this Commentary, we introduce an innovative mechanism to reduce crime, lower recidivism, and improve rehabilitation: refundable fines. We propose that under appropriate circumstances, first-time offenders and those convicted of misdemeanors or mid-level felonies should not be sentenced to imprisonment or ordered to pay a traditional fine. Instead, we suggest that courts impose a refundable fine, a monetary penalty that will be returned to the offender—in installments or, in exceptional cases, in one payment—over a certain period, so long as she or he commits no further crimes. As we demonstrate, the use of refundable fines as a second-chance mechanism can dramatically reduce the rates and the costs of incarceration and render the criminal justice system fairer and more humane. At the same time, it would provide meaningful incentives for offenders to avoid committing further offenses. Consequently, refundable fines may save considerable societal resources that may instead serve to advance other worthy goals.

Our proposal stems from the colossal failure of conventional punishments employed by the American criminal justice system: incarceration and standard fines.[1]

Overincarceration, a disheartening fact of life, is a poor reflection of the society that embraces or even tolerates it.[2] Apart from causing unnecessary suffering and denying the convicted individual's basic freedom, overincarceration breaks families, overcrowds prisons, and wastes millions of taxpayer dollars.[3] Overincarceration is also inherently regressive: By and large, its ill-effects are absorbed by society's most disadvantaged segments.[4]

---

1. *See generally* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015) (examining why the carceral state is embedded in the United States' penal system and discussing reform strategies). *See also* Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 75 (2018) ("The United States inflicts more deliberate institutionalized punishment on its people than any other country on Earth, and by a large margin. More than two million Americans are currently incarcerated in prisons and local jails. This equates to an incarceration rate that is, remarkably, ten times higher than that of some other developed nations."). The problem of overincarceration is far from being peculiarly American. *See* Nick Wing, *Here Are All of the Nations That Incarcerate More of Their Population Than the U.S.*, HUFFPOST (Dec. 6, 2017), http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html [https://perma.cc/K23P-UCKJ] (attesting that among OECD countries "Israel comes in second, at 223 per 100,000," relative to the American 2013 ratio of "716 per 100,000 people").

2. *See* Bagaric, Hunter & Wolf, *supra* note 1, at 76–77; *see also* Samuel R. Wiseman, *Bail and Mass Incarceration*, 53 GA. L. REV. 235, 239 & n.6 (2018) (noting that "[t]he U.S. has the highest incarceration rate in the developed world, and the causes and ramifications of mass incarceration are the subject of intense study" and citing studies).

3. *See generally* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (evaluating the devastating effects of overincarceration upon individuals, families, ethnic and social groups, and upon society at large); Bagaric, Hunter & Wolf, *supra* note 1, at 76–77 ("The United States spends approximately $80 billion annually on corrections. Even for the world's largest economy, this is a terrifying amount—especially when one considers that the total expenditure on the criminal justice system is $270 billion, some $870 for every woman, man, and child in the United States."). Nowadays, the taxpayers' overall spending on prisons has reached $182 billion a year. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2025*, PRISON POLICY INITIATIVE (Mar. 11, 2025), https://www.prisonpolicy.org/reports/pie2025.html [https://perma.cc/NXM7-JDB4]; *see also* JOCELYN SIMONSON, RADICAL ACTS OF JUSTICE: HOW ORDINARY PEOPLE ARE DISMANTLING MASS INCARCERATION, at viii–xi (2023) (examining grassroot movement responses to overincarceration and claiming them to be more effective than expert-driven prison reforms).

4. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12–13 (2019) ("The United States stands out from all nations on Earth for its reliance on caging human beings. In the last forty years, the U.S. incarcerated population exploded from about 500,000 to more than two million. The U.S. federal and state governments lock up more people and at higher rates than do any other governments in the world, and they do so today more than they did at any other period in U.S. history. Most people sentenced to prison in the United States today are from politically marginalized groups—poor, black, and brown."); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22 (2012) ("In the five decades since African Americans won their civil rights, hundreds of thousands have lost their liberty. Blacks now make up a larger portion of the prison population than they did at the time of *Brown v. Board of Education*,

The problem of overincarceration arises, in large part, because courts lack a viable alternative to imprisonment. As per accepted wisdom, a prison sentence is intended to be the criminal law's last resort: a harsh punishment that courts should impose only when all else fails to fend off crime and rehabilitate the offender.[5] However, when "all else" is practically an empty category, incarceration becomes the norm, and as a corollary, many people are unnecessarily—and, indeed, unjustifiably—sent to jail.[6]

Fines have fared no better. They are inherently constrained by the offender's ability to pay, making them suitable for large corporations,[7] but not for individuals.[8] For a variety of practical and legal reasons, a fine's amount must be adjusted to the person's ability to pay.[9] Empirically, offenders are often incapable of paying their fines, which prompts courts to send them to jail.[10] This, in turn, aggravates the overincarceration crisis, creating a "Catch-22" dynamic.

Furthermore, fines are regressive. Affluent and white-collar offenders are better suited to pay them than most offenders, including petit ones, who lack the financial wherewithal to shoulder even moderate fines.[11] Against

---

and their lifetime risk of incarceration has doubled."); Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 707–08 (2010) (documenting and explaining why incarceration is racially skewed against people of color); *see also* Stephanie Holmes Didwania, *Regressive White-Collar Crime*, 97 S. CAL. L. REV. 299, 304, 330 (2024) (finding white collar criminal enforcement—while believed to disproportionately target "elite" offenders—targets predominantly black women for check fraud).

5. *See, e.g.*, Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 284 (2023) ("Instead of framing the goal as the end of prisons, would it be better to shift to an agenda that sees prisons as a necessary last resort and seeks to improve what is left of them as much as possible . . . ?").

6. For an equalizing prison-reform proposal, see Benjamin Levin & Kate Levine, Essay, *Redistributing Justice*, 124 COLUM. L. REV. 1531, 1534–35, 1581–92 (2024) (bringing to the fore the idea of group equality in the distribution of carceral punishment and analyzing its pros and cons).

7. For thoughtful discussion and criticism of criminal corporate fines, see generally W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601 (2017).

8. *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1882 n.15 (1991) ("[M]any defendants cannot pay the fines.").

9. *See* Sally T. Hillsman & Barry Mahoney, *Collecting and Enforcing Criminal Fines: A Review of Court Processes, Practices, and Problems*, 13 JUST. SYS. J. 17, 20–22 (1988) (reporting favorable collection rates for affordable criminal fines imposed by state courts). *See generally* Alec Schierenbeck, *The Constitutionality of Income-Based Fines*, 85 U. CHI. L. REV. 1869 (2018) (favoring and arguing for the constitutionality of fines adjusted to the offender's income and socioeconomic status).

10. *See* Dana A. Waterman, Note, *A Defendant's Ability to Pay: The Key to Unlocking the Door of Restitution Debt*, 106 IOWA L. REV. 455, 458 (2020) ("Failure to consider a defendant's ability to pay wastes judicial resources and impedes rehabilitation by placing defendants in a cycle of incarceration and burdening them with debt that can never be repaid.").

11. *See* State v. McCalley, 972 N.W.2d 672, 681 (Iowa 2022) (Appel, J., concurring in part and dissenting in part) ("To many of us, a restitution obligation of a relatively small amount may seem like

this dystopian reality, and to avoid the pitfalls of both incarceration and traditional fines, we introduce the refundable fine.

Refundable fines keep offenders out of jail, sparing them the horrendous experience of imprisonment from which it is hard, if not practically impossible, to rebound. The recidivism rate presently stands at 44 percent,[12] indicating that prison sentences often create a vicious cycle that traps the offender in an inescapable labyrinth. And the cost of prison is borne not only by individual offenders and their families but by the rest of society. American taxpayers spend around $80 billion per year on the maintenance of prisons alone[13]—money that, according to many studies, could be repurposed for socially productive uses such as education and healthcare.[14]

Furthermore, refundable fines are superior to traditional fines because offenders can realistically afford them. At first blush, one might incorrectly conclude that offenders who cannot afford to pay traditional fines cannot afford refundable fines either. Refundable fines, however, are called "fines" for no better word to tag this novel sanction. These fines are functionally

---

a minor inconvenience that does not require careful judicial attention. But unthinking minimization of the burdens of legal financial obligations on persons of low economic status is shortsighted and unjustified. A restitution obligation of a few hundred dollars may lead to cascading consequences when a criminal defendant serves more time in jail for failure to meet restitution obligations than for the underlying crimes. . . . Although the exact number is not known, it has been estimated that roughly a quarter of the incarcerated population in the United States is detained due to a failure to pay their legal financial obligations." (internal quotations omitted)); *see also* COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2–4 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf [https://perma.cc/8HFL-XJYL] (reporting substantial incarceration rates resulting from not paying criminal fines); R. Barry Ruback, Stacy N. Hoskins, Alison C. Cares & Ben Feldmeyer, *Perception and Payment of Economic Sanctions: A Survey of Offenders*, FED. PROBATION, Dec. 2006, at 26, 26–27 (reporting that 50 percent of criminal monetary sanctions are left unpaid); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1401 n.6 (2017) (finding that poor offenders cannot afford even $500 in bail).

12. *See* Hannah Friedrich, *Rolling Back Progress: The Unjustified End of COVID Home Confinement*, AM. U. J. GENDER SOC. POL'Y & L. (May 3, 2023), https://jgspl.org/rolling-back-progress-the-unjustified-end-of-covid-home-confinement/ [https://perma.cc/X6ZM-K3TB].

13. *See* Bagaric, Hunter & Wolf, *supra* note 1, at 76 ("The United States spends approximately $80 billion annually on corrections."); *see also* Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the United States* 3–6 (Inst. for Just. Rsch. & Dev., Working Paper No. IJRD-072016, 2016), https://nicic.gov/weblink/economic-burden-incarceration-us-2016 [https://perma.cc/U7V6-2D7B] (same). Arguably, this amount may have gone down to $50 billion a year, but it is still staggering. *See* John Pfaff, *Decarceration's Blindspots*, 16 OHIO ST. J. CRIM. L. 253, 273 (2018).

14. *See, e.g.*, Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 496 (2021) (recommending a "criminal legal system . . . in which we have chosen to divest from policing, jails, prisons, and punishment and to invest in education, employment, health, and social welfare"); W. David Ball, *Pay-for-Performance in Prison: Using Healthcare Economics to Improve Criminal Justice*, 94 DENV. L. REV. 451, 489 (2017) ("Starting with the dignity point, I would query whether it promotes human dignity to . . . spend money on prisons and not on schools or other generative endeavors.").

closer to a bail.[15] That is, if the offender does not break the law, her money will be returned. Moreover, courts can—and usually should—adjust the fine's amount to the first-time offender's financial situation, thereby avoiding the high cost of bail that the poor cannot afford.[16] Refundable fines, properly administered, thus ensure that offenders are able to raise the funds necessary to pay them from family members, friends, and, when all else fails, from bond agents. Therefore, utilizing social bonds by raising money from family and friends—or having family members and friends as guarantors under the bond agent's loan—would increase the probability that the offender will avoid future crime. This dynamic can create a virtuous cycle whereby the offender will not want to disappoint supporters in a time of need.

Of equal importance, our refundable fine regime offers incentives for lenders to help offenders reorient their lives with employment opportunities, emotional support, and improved social surroundings. And the financial risk for lenders is low, since a court may order the money repaid directly to the lender if necessary.[17]

Moreover, refundable fines are flexible. Courts will be able to structure them to provide individually tailored optimal rehabilitation for offenders. The repayment installment period, for example, can be short (several months) or long (several years), or variable, depending on the characteristics of the offense and the offender. The sentencing judge may order that the repayments be made annually, every six months, every single month, or, in exceptional cases, in one installment upon the successful completion of the rehabilitation. Furthermore, in appropriate cases, the sentencing judge may condition the fine's repayment not only on crime-free behavior but also on the offender's compliance with a rehabilitation program supervised by probation officers or social workers.[18]

It is also possible to combine the repayment periods to motivate the offender to remain crime-free or to adjust the repayment amounts over time. For example, courts may order a payment plan that starts with large

---

15. For a concise explanation of how bail works, see Simran Kaur, Note, *Eliminating Cash Bail in Washington State—Amending Criminal Rule 3.2*, 47 SEATTLE U. L. REV. 257, 261–62 (2023). Note that our proposal applies to defendants already proven guilty and thus avoids the inequities engendered by the current bail system. For discussion of these inequities, see *id.* at 268–71. For inequities and injustice engendered by the high cost of bail, see generally Thanithia Billings, Note, *Private Interest, Public Sphere: Eliminating the Use of Commercial Bail Bondsmen in the Criminal Justice System*, 57 B.C. L. REV. 1337 (2016); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017); John F. Duffy & Richard M. Hynes, *Asymmetric Subsidies and the Bail Crisis*, 88 U. CHI. L. REV. 1285 (2021).

16. *See infra* Part III.

17. Such orders will be of particular importance to bond agents and other lenders with whom the offender has no personal ties.

18. *See infra* Section II.B.

repayments so that offenders understand that it pays to obey the law. Conversely, courts may order a payment plan that starts with small repayments to motivate offenders not to break the law until the end of the installment period set for the repayment of the fine. Here too, the sentencing judge will be authorized to set different refund amounts along the timeline through a sliding scale or, when appropriate, an increasing scale.[19]

Furthermore, refundable fines have a different psychological effect on offenders than traditional fines. According to the vast literature written by psychologists on the perceptions of gains and losses and endowment effects,[20] refundable fines are superior to traditional fines. Traditional fines are a sure loss—a sunk cost that can never be recovered.[21] Refundable fines, in contrast, create the prospect of an avoidable loss that triggers the commonplace dynamic of loss aversion.[22] Like most people, the offender will try to avoid or minimize financial loss. Simply stated, the imposition of a refundable fine is not the end of the story because the offender has the opportunity to earn his money back, and every act of repayment proves to the offender that the errors of the past are not permanent. From this perspective, it may be advantageous to begin the repayment process with relatively considerable and frequent payments. This repayment pattern will convince offenders that they are neither toiling in vain nor facing a Sisyphean task in getting the full amount refunded.

Finally, and perhaps most importantly, refundable fines promote distributive justice. If properly structured, refundable fines can help poor offenders avoid prison and incentivize them to live normal lives.[23] Poor

---

19. *See infra* Section II.B.

20. For seminal work identifying and analyzing the endowment effect, see Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 44 (1980). For implications of this phenomenon on legal analysis, see generally Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227 (2003).

21. *See, e.g.*, Ganesh Sitaraman & David Zionts, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 529–30 (2015) ("Individuals are more averse to losing something rather than gaining something, even though the value of the good is the same. . . . A corollary of these insights is that people become more willing to take risks once there are 'sunk costs.' To the rational decisionmaker, Time 1 costs that cannot be recovered are not relevant to Time 2 choices. Since those costs are sunk, the optimal strategy is to act on the basis of *future* predicted costs and benefits. Yet when the decisionmaker's earlier moves resulted in losses at Time 1, she becomes more inclined to gamble on risky strategies at Time 2, even if that is not the utility-maximizing strategy.").

22. For a classical account of loss aversion, see Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 279 (1979) ("The aggravation that one experiences in losing a sum of money appears to be greater than the pleasure associated with gaining the same amount."). *See also* Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829, 885–94 (2012) (exploring the implications of loss aversion for law and legal theory).

23. *See* JOHN RAWLS, A THEORY OF JUSTICE 60, 78–79 (1971) (unfolding a comprehensive theory of justice under which political institutions and legal rules should be fashioned to benefit the least well-off members of society).

offenders, who live on the margins of our society, cannot afford to pay traditional fines and cover their daily expenses. For such offenders, traditional fines lead to prison.[24] Refundable fines, in contrast, provide a real ray of hope.[25]

This Commentary unfolds in four parts. Part I describes the failures of the American criminal justice system—and, indeed, of any system that routinely imprisons first-time low- to mid-level offenders. In Part II, we first present the refundable-fine mechanism as a means for improving this system. We then identify the offenses that this mechanism is designed to address and explain how it can be operationalized as an incarceration alternative. In Part III, we explore the advantages of refundable fines over traditional criminal sanctions and explain why such fines are uniquely suitable for the rehabilitation of offenders. In Part IV, we juxtapose refundable fines against the goals of criminal law—deterrence, retribution, incapacitation, and expressive justice—and demonstrate that refundable fines are compatible with these goals. A short Conclusion follows.

I. THE FAILURE OF CRIMINAL SANCTIONS

Michel Foucault's classic work, *Discipline and Punish: The Birth of the Prison*[26] offers an insightful account of the transition from the corporal to the carceral form of punishment. Corporal punishment—in particular, public torture and execution—had twin goals: to inflict excruciating pain on the offender and to instill fear and a consequent habit of obedience in observers who witnessed a graphic display of what might happen to those who dared break the law.[27] This form of punishment was largely effective, but it also fostered resentment toward the executioner and the sovereign,

24. *See* State v. McCalley, 972 N.W.2d 672, 681 (Iowa 2022) (Appel, J., concurring in part and dissenting in part).

25. Note that our idea differs from the radical proposals to do away with the prison system altogether. *Cf.* Roberts, *supra* note 4, at 114 (describing stances toward prison abolition); Barkow, *supra* note 5, at 272–81 (examining the pros and cons of prison abolition); Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2044–51 (2022) (discussing reasons supporting prison abolition); Introduction, *Developments in the Law — Prison Abolition*, 132 HARV. L. REV. 1567, 1569 (2019) (same).

26. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

27. *Id.* at 42–43 (explaining the ceremonial function of torture as a criminal punishment that produced "immediate, striking manifestation of the truth in the public implementation of penalties assumed").

thereby diluting the social discipline that the punishment ultimately aimed to entrench.[28]

Punishment reforms, introduced across Europe in the eighteenth century, gradually substituted corporal punishments with incarceration.[29] Yet, contrary to the humanistic appearance of those reforms, they merely shifted pain from body to soul.[30] Carceral punishment targeted the convict's soul in the same way that corporal punishment targeted his body.[31] The ultimate goals of incarceration were—and still are—to inflict severe mental and emotional anguish on a convict locked in a jail cell and to instill fear and the consequent habit of obedience in the witnessing observers.[32] Under Foucault's description, punishment in all its forms serves as a discipliner that reinforces society's power structure and norms, both good and bad.[33]

Arguably, along with the knowledge-power nexus constructed thereupon,[34] this description undervalues the protective effect of punishment. After all, incarceration removes offenders from the social

---

28. *Id.* at 59–60 ("Now it was on this point that the people, drawn to the spectacle intended to terrorize it, could express its rejection of the punitive power and sometimes revolt. Preventing an execution that was regarded as unjust, snatching a condemned man from the hands of the executioner, obtaining his pardon by force, possibly pursuing and assaulting the executioners, in any case abusing the judges and causing an uproar against the sentence—all this formed part of the popular practices that invested, traversed and often overturned the ritual of the public execution.").

29. *Id.* at 248 ("[T]he carceral apparatus has recourse to three great schemata: the politico-moral schema of individual isolation and hierarchy; the economic model of force applied to compulsory work; the technico-medical model of cure and normalization. The cell, the workshop, the hospital.").

30. *Id.* at 242 ("The prison is not a workshop; it is, it must be of itself, a machine whose convict-workers are both the cogs and the products; it 'occupies them continually, with the sole aim of filling their moments. When the body is agitated, when the mind applies itself to a particular object, importunate ideas depart, calm is born once again in the soul.'" (internal citation omitted)).

31. *Id.* at 254–55 ("At the point that marks the disappearance of the branded, dismembered, burnt, annihilated body of the tortured criminal, there appeared the body of the prisoner, duplicated by the individuality of the 'delinquent', by the little soul of the criminal, which the very apparatus of punishment fabricated as a point of application of the power to punish and as the object of what is still called today penitentiary science.").

32. *Id.* at 210–12; *see also* Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203, 212 (2021) ("[O]ne distinctive feature of *a* carceral state, as a type of government, is that crime structures the state's relationships even with those citizens classified as law-abiding. With law-abiding citizens, the state uses the fear of crime as a governance strategy . . . .").

33. *See* FOUCAULT, *supra* note 26, at 222 ("The real, corporal disciplines constituted the foundation of the formal, juridical liberties. The contract may have been regarded as the ideal foundation of law and political power; panopticism constituted the technique, universally widespread, of coercion. It continued to work in depth on the juridical structures of society, in order to make the effective mechanisms of power function in opposition to the formal framework that it had acquired. The 'Enlightenment', which discovered the liberties, also invented the disciplines.").

34. *Id.* at 172–77 (identifying social dynamics whereby power and hierarchies produce knowledge); *see also* LYNN FENDLER, MICHEL FOUCAULT 44 (Bloomsbury Acad. 2010) ("We try to be normal by disciplining ourselves even in the absence of threats of punishment.").

sphere and from law-abiding citizens for the duration of the punishment.[35] This consequence of the carceral punishment explains its prevalence in the United States and other parts of the world.[36] However, it still does not justify the imposition and scale of jail sentences.

To justify incarceration, one needs to separate it from torture—a task that is easy to formulate but difficult to carry out. An argument can be made that the difference between physical and emotional torture and incarceration is the use of prisons as a means to an end.[37] A prison sentence, so the argument goes, is not torture because it is not imposed on an offender for the sake of inflicting harm, but to accomplish a worthy societal goal, such as retribution,[38] deterrence,[39] incapacitation,[40] or expressive justice.[41] Under the framework of retribution, a prison sentence reinstates the moral equilibrium broken by the offender by removing freedoms in proportion to the harm suffered by the individual victim or society at large.[42] Under deterrence theory, incarceration instills fear in prospective offenders, steering them away from crime.[43] When the criminal justice system aims to

---

35. *See, e.g.*, Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1228 (2006) ("[I]ncarceration by design protects society by isolating and removing dangerous people from society . . . ."); *see also* D. Brian King, Note, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. REV. 1373, 1400 (1989) (explaining that sentence-enhancement statutes promote the goal of incapacitation because a longer period of incarceration better protects society from an offender who has shown a pattern of dangerousness).

36. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 591 (1996) (noting that "[i]mprisonment is the punishment of choice in American jurisdictions" and providing statistics); John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1040 (2009) (listing imprisonment and fines as "the two principal forms of punishment used in the United States"); Wing, *supra* note 1 (stating that imprisonment is a prevalent form of criminal punishment virtually everywhere in the world).

37. *See, e.g.*, Michael W. Lewis, *A Dark Descent into Reality: Making the Case for an Objective Definition of Torture*, 67 WASH. & LEE L. REV. 77, 95 (2010) (noting the widely accepted definition of torture as involving cruel, inhumane or degrading treatment of a person, as distinguished from "pain or suffering arising only from, inherent in or incidental to lawful sanctions").

38. *See generally* MICHAEL S. MOORE, *The Moral Worth of Retribution*, *in* PLACING BLAME: A THEORY OF THE CRIMINAL LAW 104 (2010) (describing desert as a both necessary and sufficient condition of just punishment); Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1324 (2004) ("Retributive justice obligates the state to punish an offender because and to the extent, but only to the extent, he deserves to be punished."); Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1203–09 (2007) (outlining different accounts of retributive punishment).

39. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170–71 & n.1 (Clarendon Press 1907) (1789) (proposing a seminal account of deterrence). *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (articulating a classic economic model of punishment as deterrence).

40. *See* W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 929–35 (2019) (analyzing the mechanics of incapacitating punishment).

41. *See* Kahan, *supra* note 36, at 594–601 (analyzing the expressive dimension of criminal punishment).

42. *See* sources cited *supra* note 38.

43. *See* sources cited *supra* note 39.

incapacitate an offender, it does so by locking him in prison for a period of time in proportion to the danger he presents for society.[44] And finally, under the framework of expressive justice, by making an offender's prison punishment fit his crime, society makes a public affirmation of the victim's moral worth denied by the offender's actions.[45]

Each justification is persuasive on its own terms. Yet, none suggest that incarceration is an appropriate punishment for any crime. On the contrary, in order to prevent carceral punishment from becoming torture, it should be reserved for cases in which lesser penalties fail to deliver retribution, deterrence, incapacitation, or expressive justice. Under accepted wisdom, this is exactly what the criminal justice system does in response to crimes that cannot be punished by fine, probation, suspended prison sentence, or community service without undercutting one of those goals. When a crime cannot be adequately punished by fine, probation, a suspended prison sentence, or community service—and when prison abolition is yet to become socially accepted and workable[46]—incarceration becomes the only viable option to accomplish retribution, deterrence, incapacitation, and expressive justice. This argument, however, is deficient: The system's failure to look for alternatives to prison other than fines, probation, suspended sentence, and community service is not alone sufficient to justify a prison sentence.

This point delineates the parameters within which the criminal justice system should look for proposals such as ours. As we explain in Part II, offenses ranging from misdemeanors to mid-level felonies can be

---

44. *See* Thomas, *supra* note 40, at 933–34 (describing imprisonment as a rudimentary form of the offender's incapacitation).

45. *See* Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 111, 125 (Jeffrie G. Murphy & Jean Hampton eds., 1988) ("[R]etributive punishment . . . symbolizes the correct relative value of wrongdoer and victim."); Kahan, *supra* note 36, at 597–98 ("Actions have *meanings* as well as consequences. . . . The distinctive meaning of criminal wrongdoing is its denial of some important value, such as the victim's moral worth. . . . The reason that theft but not competition is a crime, on this account, is that against the background of social norms theft expresses disrespect for the injured party's worth, whereas competition . . . does not. In effect, the thief's behavior says to the victim, 'you matter so little, relative to me, that I can take your property without your consent.' The theory of meaning here, moreover, is objective: so long as we understand his act to be theft, the wrongdoer's behavior conveys disrespect for the victim regardless of whether the thief meant to make any particular statement. . . . Under the expressive view, the signification of punishment is moral condemnation. By imposing the proper form and degree of affliction on the wrongdoer, society says, in effect, that the offender's assessment of whose interests count is wrong."); *see also* Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1749–52 (2005) (identifying expressive constraints on punishment); Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 449 (2020) ("The fact that makes criminal law a unique form of law is that it operates as a mechanism of collective condemnation. It is a body of law and legal practice that censures particular acts in the polity's name. This concept of criminal law makes sense of the bulk of existing criminal-law doctrine and institutions.").

46. For the idea of prison abolition, see *supra* note 25.

sanctioned by refundable fines without undermining retribution, deterrence, incapacitation, or expressive justice. The experience of a person who spends *any* time in jail fundamentally differs from that of an individual who has never been incarcerated. Life behind bars, even for a short period of time, causes distinct mental and emotional suffering to the inmate and carries social stigma as well.[47] For these reasons, defense attorneys in criminal cases work hard to fend off prison sentences for their clients whenever possible.[48]

From society's perspective, short prison sentences cost less than a prolonged incarceration. Yet, imposing short prison sentences upon first-time offenders for crimes far less serious than homicide, rape, robbery, infliction of grievous bodily harm, and large-scale drug-selling operations exponentially increases the number of incarcerated offenders. Mid-level felonies that include commonplace assault, carrying weapons in public places, small-time drug offenses, fraud, and theft are far more recurrent than ultra-dangerous felonies.[49] Correspondingly, the number of people who commit and are convicted of mid-level felonies is relatively high.[50] This factor explains why prisons are often overcrowded[51]—yet another problem

47. *See, e.g.*, Liane Jackson, *Prison Is Not for Punishment*, A.B.A. J., Feb./Mar. 2020, at 9, 10 ("[I]mprisonment in the U.S. usually involves barbaric living conditions, deprivation, pain and even death—whether it's state-sanctioned or the collateral damage of violent life behind bars and/or lack of adequate health care."). For scholarly accounts of these ill effects, see Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 459–63, 465–69 (2010); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1799–1803 (2012) (identifying suffering and social stigma originating from imprisonment as "civil death"); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887 (2009) (associating jail conditions with potentially unconstitutional cruelty).

48. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 35 & n.124 (1997) (citing studies showing that retained defense attorneys work hard to keep clients out of jail and are more successful at achieving this result than appointed counsel).

49. Typically, mid-level felonies are punishable by a two-year prison sentence. *See, e.g.*, Daniel N. Marx & Michael J. Licker, *Deepening a Split and Adding to a Consensus: The First Circuit Interprets Federal Sentencing Statutes in Two Recent Decisions*, CRIM. JUST., Fall 2016, at 20, 21 (2016) (noting that under federal law "the maximum sentence is five years for an underlying Class A felony, three years for a Class B felony, two years for a Class C or D felony, and one year for any other crime"); *see also* Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980–2000*, 29 CRIME & JUST. 39, 97 (2002) (reporting that conviction rates for some mid-level felonies (Classes F and G), punishable by imprisonment within the range of eighteen to twenty-four months, went up from 1980 to 2000).

50. *See, e.g.*, Wright, *supra* note 49; *see also* Kahan, *supra* note 36, at 605–06 ("Incarceration might be the only option for many violent offenses—including murder, forcible rape, and armed robbery. But offenders convicted of these crimes make up less than half the American prison population. The rest have engaged in nonviolent offenses—from larceny, to fraud, to drug distribution, to drunk driving.").

51. According to a leading empirical study, individuals incarcerated for short periods of time upon their conviction of low-level and mid-level felonies are one of the principal causes of mass incarceration. *See* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 74–75 (2017); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S.

that casts doubts on the utility and moral justifiability of carceral punishment. The criminal justice system would therefore do well to adopt our proposal: Add refundable fines to the list of criminal sanctions and apply this new mechanism in appropriate cases.[52]

Before explaining how this mechanism works and outlining its advantages, we need to complete our discussion of the system's failures by specifying the unjustified social costs of incarceration.

Apart from causing mental and emotional suffering to the jailed person, carceral punishment is a tremendous financial burden to society. Back in 2017, incarceration exacted from American taxpayers nearly $90 billion,[53] as specified in the table below:[54]

TABLE 1: INCARCERATION EXPENDITURES

Type of Expenditure	All Governments	Federal	State	Local
Total Expenditure	$89,225,916,000	$7,789,505,000	$51,476,590,000	$29,959,821,000
Direct Expenditure	$86,130,659,000	$6,977,000,000	$49,271,171,000	$29,882,488,000

CAL. L. REV. 1313, 1320–27 (2012) (demonstrating that imprisonment for misdemeanors is also responsible for overcrowded jails).

52. The only existing mechanism that bears some resemblance to refundable fines is a so-called "peace bond." As explained by Sidney Childress:

> [T]he peace bond machinery is set into motion by an individual's complaint to a magistrate . . . that some person has threatened him or her with bodily harm or property damage. The magistrate may then have the offending party arrested and brought before the bench for a hearing. If the magistrate determines that there is probable cause to believe the offending party intends to commit the threatened offense, the magistrate may require that person to enter into a recognizance or to post some monetary 'security' as a guarantee of keeping the peace. Failure or refusal to provide the security may lead to incarceration until the security is provided or until a statutory time limit has run.

Sidney Childress, *Peace Bonds—Ancient Anachronisms or Viable Crime Prevention Devices?*, 21 AM. J. CRIM. L. 407, 408–09 (1994).

53. *See* EMILY D. BUEHLER, U.S. DEP'T OF JUST., JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 2017, at 1 (2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf [https://perma.cc/9WN5-4T25].

54. *Id.* at 4.

The annual expenditure on a single inmate in 2023 averaged close to $61,000.[55] This expenditure has steeply increased year by year due to inflation and the growing number of prisoners.[56] In 2025, American taxpayers spent at least $182 billion annually on quartering nearly 2,000,000 inmates in state, federal, and local jails.[57] These expenditures give rise to difficult questions in and of themselves. Are taxpayers compensated with adequate protection relative to tax dollars spent? And, are the colossal prison expenditures justified by the enhancement of society's protection from crime?[58]

We answer both questions in the negative. Consider the following recidivism statistics. According to the Bureau of Justice Statistics, released prisoners are rearrested at a rate of 70 to 75 percent, five years after their initial release from prison.[59] About 82 percent of released prisoners are then rearrested ten years after release.[60] Not all of these prisoners committed crimes that led to their arrest, but many did.[61] Furthermore, 27 percent of released prisoners return to prison following new criminal convictions three years after their initial release,[62] and at a rate ranging from 45 percent to 55

55. *How Much Do States Spend on Housing Prisoners*?, USAFACTS (Oct. 31, 2025), https://usafacts.org/articles/how-much-do-states-spend-on-prisons/#footnote-1 [https://perma.cc/JWA9-653E].

56. *Total State Corrections Expenditures in the United States from 1982 to 2022,* STATISTA, https://www.statista.com/statistics/253003/total-state-corrections-expenditures-in-the-united-states/ [https://perma.cc/N74C-DCV6].

57. *See* Sawyer & Wagner, *supra* note 3. Note that this figure includes the financial impact on inmates' families.

58. *See generally* John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 1 (1998) (substantiating the claim that "cutting spending on prisons and using the savings to fund intensive preschool education would reduce crime").

59. *See* LEONARDO ANTENANGELI & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 24 STATES IN 2008: A 10-YEAR FOLLOW-UP PERIOD (2008–2018), at 4 (2021), https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs [https://perma.cc/UB9D-S3X7]. The federal rearrest rates are lower but still significant. *See* COURTNEY R. SEMISCH, CASSANDRA SYCKES & LANDYN ROOKARD, U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL VIOLENT OFFENDERS RELEASED IN 2010, at 5–6 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220210_Recidivism-Violence.pdf [https://perma.cc/MW5X-YF8W] (reporting that 63.8 percent of violent offenders released in 2010 were rearrested; same rate for 2005; 38.4 percent of nonviolent offenders released in 2010 were rearrested, a rate comparable to 2005 (39.8 percent)).

60. *See* ANTENANGELI & DUROSE, *supra* note 59.

61. *Id.* at 8–9.

62. *See* THE COUNCIL OF STATE GOV'TS JUST. CTR., 50 STATES, 1 GOAL: EXAMINING STATE-LEVEL RECIDIVISM TRENDS IN THE SECOND CHANCE ACT ERA 4 (2024), https://csgjusticecenter.org/publications/50-states-1-goal/ [https://perma.cc/K3Z4-XXBS]. According to the National Institute of Justice, nearly 44 percent of released offenders return to prison before the first year out of prison. *See* *Recidivism Rates by State 2024*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/recidivism-rates-by-state [https://perma.cc/XJ2R-JPK5].

percent five years after release from prison.[63] After ten years, the average rate of proven recidivism increases from 55 percent to 60 percent.[64]

State crime statistics for 2012–2017, categorized by gender, demonstrate similar rates of recidivism.[65] These rates appear in the table below.[66]

TABLE 2: POST-RELEASE RATES OF ARREST, CONVICTION, AND RETURN TO PRISON

Gender	**Arrested (34 states)**	**Convicted (31 states)**	**Returned to Prison (21 states)**
Male	71.7%	55.4%	47.2%
Female	63.1%	46.5%	34.0%

Data collected by the United States Sentencing Commission largely confirms these statistics.[67] According to these data, over the eight-year follow-up period starting in 2010, approximately half of federal offenders were rearrested after release from prison, as specified in the tables below.

TABLE 3: REARREST RATES OF FEDERAL PRISONERS[68]

1 Year	**2 Years**	**3 Years**	**4 Years**	**5 Years**	**6 Years**	**7 Years**	**8 Years**
18.2%	28.6%	35.4%	39.8%	43.1%	45.6%	47.5%	49.3%

63. *See* ANTENANGELI & DUROSE, *supra* note 59, at 8.
64. *Id.*
65. *See generally* MATTHEW R. DUROSE & LEONARDO ANTENANGELI, U.S. DEP'T OF JUST., RECIDIVISM OF FEMALES RELEASED FROM STATE PRISON, 2012–2017 (2023), https://bjs.ojp.gov/document/rfrsp1217.pdf [https://perma.cc/23L5-G9KX].
66. *Id.* at 5.
67. *See generally* RYAN COTTER, COURTNEY SEMISCH & DAVID RUTTER, U.S. SENT'G COMM'N, RECIDIVISM OF FEDERAL OFFENDERS RELEASED IN 2010 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf [https://perma.cc/S8HA-YAE6].
68. *Id.* at 21.

TABLE 4: REARREST RATES BY FEDERAL OFFENDER CHARACTERISTICS[69]

Offender Characteristics	**% Rearrested**
Gender	
Male	52.3%
Female	35.1%
Race/Ethnicity	
White	42.9%
Black	58.2%
Hispanic	46.5%
Other	50.2%
Education	
Less than High School	60.8%
High School Graduate	50.2%
Some College	37.2%
College Graduate	19.6%

These data demonstrate that the indiscriminate “lock ‘em up” strategy does not reduce crime. The prison system, both state and federal, wastes millions of taxpayer dollars that could be diverted toward the advancement of other important social goals.[70]

The existing menu of penal alternatives to incarceration presently includes fines, community service, probation, and suspended jail sentences. The fine penalty, however, is inherently problematic. When the fine is relatively low, it makes the crime and the harm suffered by the victim look

69. *Id.* at 31.
70. *See* Donohue & Siegelman, *supra* note 58, at 30–40. *See generally* Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71 (2019) (arguing that the social costs of crimes that occur within prisons and jails should be accounted for, which substantially increases the estimated cost of incarceration).

cheap, diluting the expressive effect of the punishment[71] and projecting the antisocial message that it is possible to commit certain crimes without repercussion.[72] If the fine is relatively high, however, the defendant often cannot pay, which serves no greater good either.[73]

Community service, probation, or supervision are punishments reserved for minor infractions and misdemeanors. These punishments do not fit mid-level felonies, and the same holds true for a suspended jail sentence. The reason is simple: Such punishments are too light. Community service may be a suitable punishment for juvenile offenders, but not for the majority of adult felons.[74] The same is true for probation, supervision, and suspended jail sentences.[75]

Evidently, the criminal justice system does not always work as intended. Punishments for both ends of the bell curve—the most heinous crimes and small-time offenses—are generally justified and proportional, but the system fails to deliver[76] proper punishments for mid-level felonies that constitute the most recurrent crimes.[77] The system has limited punishment

71. *See* Kahan, *supra* note 36, at 593 ("The message of condemnation is very clear when society deprives an offender of his liberty. But when it merely fines him for the same act, the message is likely to be different: you may do what you have done, but you must pay for the privilege.").

72. *Id.*; *see also* Mandy Pellegrin & Bryce Tuggle, SYCAMORE INST., HOW CRIMINAL FEES AND FINES FUND STATE AND COUNTY GOVERNMENT IN TENNESSEE 17 (2021), https://sycamoretn.org/wp-content/uploads/2024/08/2021.06.02v2-final-how-criminal-fees-and-fines-fund-state-and-county-government-in-tennessee.pdf [https://perma.cc/FD2S-RAHY] (identifying low fine-collection rate in Tennessee); VITTORIO NASTASI & CAROLINE GREER, REASON FOUND., FINES AND FEES: CONSEQUENCES AND OPPORTUNITIES FOR REFORM 15–17 (2023), https://reason.org/wp-content/uploads/fines-fees-consequences-opportunities-reform.pdf [https://perma.cc/D63S-YDKF] (same for Florida, Maryland, and Washington). Moreover, a recent study analyzing data from Wisconsin has revealed a positive correlation between the magnitude of the fine and the rate of recidivism. *See* Tyler Giles, The Government Revenue, Recidivism, and Financial Health Effects of Criminal Fines and Fees 3–8 (Feb. 19, 2025) (unpublished manuscript), https://ssrn.com/abstract=4568724 [https://perma.cc/KJ9B-EW7P].

73. *See* State v. McCalley, 972 N.W.2d 672, 681 (Iowa 2022) (Appel, J., concurring in part and dissenting in part) (citing studies confirming nonpayment of high fines); *see also* Waterman, *supra* note 10 (observing that unaffordable fines lead to nonpayment and incarceration); Duffy & Hynes, *supra* note 15 (observing that by subsidizing the costs of jail, but not the costs of bail, the government increases detention and incarceration, and proposing a novel bail-subsidization model).

74. *See* Kahan, *supra* note 36, at 593 ("Because community service penalties involve activities that conventionally entitle people to respect and admiration, they also fail to express condemnation in an unambiguous way.").

75. *See id.*; *see also* Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1024 (2013) ("Probation is often a sanction of first resort for offenders convicted of minor crimes and for youthful or first-time offenders. It is also, however, a common disposition for repeat offenders and for those convicted of many nonviolent felony offenses.").

76. *See* Bernd-Dieter Meier, *Alternatives to Imprisonment in the German Criminal Justice System*, 16 FED. SENT'G REP. 222, 226 (2004) (noting "the widespread belief that short term prison sentences have more disadvantages than advantages by taking the offender from his social setting and committing him to an institution where he has contacts with other offenders").

77. *See supra* notes 49–51.

options, such as carceral punishment and high fines; but, as noted, these sanctions do not make society safer, as they do not sufficiently intensify the deterrence of would-be criminals, nor are they necessary for attaining the goals of retribution and expressive justice. In the absence of offsetting benefits, the cost of unnecessary imprisonment and unpaid fines looms large.

II. REFUNDABLE FINES: A SECOND CHANCE FOR OFFENDERS

We propose the refundable fine mechanism to help solve the documented failures of the criminal justice system detailed in Part I. A refundable fine, as we define it, is a reversible penal measure. The payment of a refundable fine is not final; rather, it is conditional. The amount paid can be refunded in full if the offender abstains from breaking the law for a prespecified period of time. Although the term "refundable fine" brings to mind a traditional fine, there are critical differences between the two.

Funds captured by traditional fines are never returned to payers, by design. Refundable fines, however, are intended to be returned—in full—to the offender, providing first-time offenders a real second chance. Refundable fines are therefore operatively closer to a bail than to a traditional fine. For this reason, the economic and psychological effects of refundable fines differ dramatically from traditional fines. In what follows, we first explain how our proposal can be operationalized and structured. We then proceed to enumerate the advantages of refundable fines over customary criminal sanctions.

A. Refundable Fines – When?

The first step in implementing our proposal is to determine the appropriate use cases for refundable fines. A refundable fine, as we define it, is a fine that a convicted first-time, low-level or mid-level offender must pay at the end of a criminal trial. The offender will then be repaid the full amount in installments if she or he does not commit an additional offense during a period of time specified by the court. Under our proposal, low-level and mid-level offenses include all misdemeanors and low-level felonies,[78] as well as most mid-level felonies, such as unlawful possession of controlled substances, trespass, theft, and other crimes not involving serious or ongoing violence and seriously injured victims. This list follows the

---

78. *See* Natapoff, *supra* note 51, at 1314–20 (criticizing felony-centric accounts of overincarceration and noting the vast contribution of misdemeanor imprisonment to this problem); *see also, e.g.*, Wright, *supra* note 49 (noting that mid-level felonies include Classes F and G).

automatic record-sealing and clean-slate legislation adopted by a number of states.[79]

For illustration purposes, assume that a court imposes on an offender a refundable fine of $10,000 for a period of three years. Under our proposal, the offender will have to pay the fine, which is then returned to her with interest over the following three years if she does not commit another offense.

Obviously, refundable fines are not suitable for all criminal offenses. Individuals who commit severe crimes accompanied by long prison terms are not realistic candidates for our approach. Refundable fines should be reserved for first-time offenders who committed crimes punishable by short-to-moderate prison sentences as well as by traditional fines—either mandatory or discretionary. Stated simply, if the penal code provides for a moderate or short prison sentence or fine, then a refundable fine should be considered instead.

We caution, however, that refundable fines remain discretionary, rather than mandatory, to avoid crystallizing into a rule of conduct.[80] The judge who presides over a criminal case should have the ultimate authority to decide whether a refundable fine is appropriate and to determine how it should be applied to the individual circumstances of the offense. Maintaining judicial discretion prevents prospective offenders from assuming that criminal conduct will result merely in the payment of a fine rather than the risk of incarceration.

In addition to the severity of the offense, judges must also consider the offender's financial status when deciding whether to impose a refundable fine. In our view, the use of refundable fines should account for distributional or equitable principles. Refundable fines should be applied primarily to poor first-time offenders and to first-time offenders belonging to the working and middle socioeconomic classes who do not have the financial wherewithal to pay traditional fines. In contrast, when offenders are wealthy, as is often the case with white-collar offenses and prosecutions of large corporations, the default sanction should be a traditional fine and jail time, as appropriate. Affluent defendants who can afford paying criminal fines should not be given the opportunity to retrieve the amounts they pay.

---

79. *See* Abbey Moffitt Hruby, *Automatic Record Sealing in Colorado*, COLO. LAW., December 2025, at 26, 27 (noting that all crimes up to, and including, mid-level felonies are eligible for "clean slate" treatment in Colorado and several other states).

80. *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626–32 (1984) (explaining the mechanism of acoustic separation between "decision rules" addressed to courts and "conduct rules" that incentivize primary behavior).

Finally, courts should consider the monetary value of the refundable fine, as there is a difference between large and small fines. For large fines that range from thousands to billions of dollars, the public should not be deprived of significant amounts of money that can be used for socially beneficial purposes. Small fines, however, are very different because the potential loss to the public is relatively small, but the potential benefit to the offender is quite significant. As explained in Part I, fines are often imposed on poor offenders who cannot afford to pay them, so society not only is deprived of any positive benefits from the funds promised but must bear the cost of incarceration. Hence, the use of refundable fines as a substitute for small monetary sanctions presents an efficient win-win situation. Importantly, the rule requiring that a fine be returned to the rehabilitated offender with interest will reduce the cost of financing for poor offenders. Putting this rule in place will prevent the refundable-fine system from experiencing a crisis akin to bail.[81]

Before proceeding further, we would like to emphasize two points. First, the specific considerations we mentioned are not exhaustive. Under our proposal, judges would have the liberty to consider all other factors that affect sentencing decisions, such as the defendant's culpability and responsibility for the offense, the defendant's criminal history, and the unique circumstances of the offense and the victim. All factors should be carefully weighed prior to reaching a decision as to the appropriateness of a refundable fine. Second, as is true of every criminal sentence, the sentencing judge's decision not to order a refundable fine will always be appealable.

B. Fashioning Refundable Fines

We now proceed to discuss the design of refundable fines. The introduction of refundable fines opens up myriad new options for judges. The traditional menu of sanctions—incarceration and traditional fines—requires judges to choose or to balance a combination of penalties, including the possibility of a suspended term of incarceration, and to calibrate the severity of the chosen punishment (for example, six months in jail and/or a $12,000 fine).

The introduction of refundable fines adds several additional dimensions to sentencing decisions. First, the judge will have to set the period of

81. *Cf.* Duffy & Hynes, *supra* note 15, at 1287 ("[P]eople sit in jail every day because they both lack sufficient assets to post bonds themselves and are too poor to afford the fees of private bail sureties who could post bonds."); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 530–38 (2018) (documenting the same problem and its dire consequences for criminal justice).

repayment (for example, three years or six years). As we will explain, the repayment period will be affected, *inter alia,* by the size of the fine and the personal circumstances of the offender. Second, the judge will need to set the date of the first repayment. For example, the judge can order that the series of payments begin after thirty days, six months, or one year. Third, the judge will have to determine the intervals of repayment. She can select uniform intervals (for example, weekly, monthly, or annual intervals) or vary the intervals (for example, weekly intervals in the first three months and monthly intervals thereafter). Fourth, the judge must also set the amounts to be repaid. Here, too, the judge can select uniform amounts (for example, $1,000 every month) or variable amounts. If the judge chooses to fashion a variable schedule of repayments, she can choose an increasing schedule (for example, $500 a week in the first year, $750 in the second year, and $1,000 in the third) or a decreasing schedule (for example, $1,000 in the first year, $750 in the second year, and $500 in the third). Fifth, when the judge selects a variable repayment schedule, she will have to determine the rate at which the repayments will increase or decrease, as well as whether the change of increase/decrease will be uniform (say, $250 or $500) or differential (say, $100, then $200, and then $400). In addition, the judge will have to decide whether the change will occur on a regular basis (say, every month or every year) or on a changing basis (say, every year for the first two years, and then every six months for the next two years, and then every three months for the remainder of the installment period). Sixth, and finally, in exceptional cases, the judge will have to decide whether the offender will actually receive each repayment amount or whether the money should be deposited in an escrow account to be repaid in full at the end of the repayment period, if the offender abstained from breaking the law and successfully completed the rehabilitation program, if such a program was set up.

As we will now explain, each design choice has significant policy implications.

1. Repayment Period

Selecting the correct repayment period may have a profound effect on the success of refundable fines. At first blush, it may appear that a long repayment schedule is socially optimal because it provides offenders with a strong incentive to steer away from criminal activity. After all, the offender will recover the full amount of the fine (with interest) only when she or he refrains from committing additional offenses until the end of the repayment period. This outlook is oversimplistic, however. Choosing a very long repayment period (for example, ten years or longer) may prove to be counterproductive: It may actually break the offender's spirit and cause them to re-offend.[82] This is especially true when the fine is relatively small. For example, if the fine was set to $6,000 and the court orders a repayment schedule of ten years with *equal* monthly payments, the monthly returns would be $50 each. Such small returns over a long period of time may fail to incentivize normal behavior. Refundable fines should therefore be meaningful and perceived by offenders as adequate rewards for normative behavior.

At the same time, the repayment period should not be too short. Although refundable fines allow offenders to retrieve money they paid in fines, this is not their ultimate goal. The ultimate goal of refundable fines is to offer offenders a second chance and an opportunity to lead a stable life. For this to happen, it is critical that offenders leave their past behind them and adopt a lifestyle devoid of criminal activity. But changing one's life is a process, and processes take time—certainly more than several weeks, or even months.[83]

Ideally, the optimal repayment period should be set between one and three years, depending on the specific circumstances of the offense. Structuring the repayments over this period would give individual offenders a sufficient amount of time to adopt a normative life without breaking their spirit. But in practice, individual judges are permitted to determine the repayment period as they see fit, and we expect that they may choose longer or shorter periods than those we recommend. Over time, however, certain standards or common understandings will be created with respect to the length of the repayment period. Based on the court's experience, general guidelines similar to the sentencing guidelines will emerge with regard to refundable fines as well.

2. *Starting Date*

A second important determination judges would have to make concerns the date of the first repayment. The date of the first repayment is of vital importance to the success of the refundable-fine mechanism because it provides proof that the mechanism works and that the promise made to offenders is not empty. For offenders, the repayments are no different from

---

82. *See generally* George Ainslie, *Specious Reward: A Behavioral Theory of Impulsiveness and Impulse Control*, 82 PSYCH. BULL. 463, 469 (1975) (associating delayed rewards with frustration and impulsive behavior).

83. *See generally* SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (2001) (describing offender rehabilitation as a lengthy and difficult process).

rewards for good behavior, and rewards work well when they are awarded in close temporal proximity to the behavior they are designed to encourage. Long wait periods may undermine the effectiveness of rewards. This is especially true when young offenders are concerned. Young offenders typically lack the patience and self-discipline to steer clear of illicit behavior for a long period of time without rewards.[84]

We therefore generally recommend that the offender receive the first repayment no later than six months post-sentencing. Judges can order that the offender receive the first installment right away, after several weeks or months, or even after a year. And for young offenders, the waiting period may even be shortened to three months.

To be clear, the timing of the first repayment is important not only for psychological reasons but also for practical ones. Refundable fines constitute a potential source of revenue for offenders. The repayments might, in many cases, represent a significant contribution to the offender's livelihood. Most offenders qualifying for a refundable fine come from poor economic backgrounds and need money to support themselves and their families. If they borrowed money to pay the fine, it further accentuates their need to receive the first repayment expeditiously. Hence, we recommend that judges structure the repayment schedule such that the first repayment occurs relatively early on.

3. *Repayment Intervals*

The third determination the judge would have to make involves the repayment intervals. The intervals can be short (for example, daily or weekly) or long (for example, annual). We propose that the intervals remain relatively short. Specifically, we recommend that the default regime be monthly payments. In exceptional cases featuring complete rehabilitation, the judge may order the entire fine amount returned to the offender in a single transaction at the end of the specified crime-free period.

Monthly payments are optimal, in our opinion, for three principal reasons. First, a one-month waiting period between payments, akin to

---

84. *See* Elizabeth P. Shulman & Elizabeth Cauffman, *Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime*, 37 LAW & HUM. BEHAV. 412, 416 (2013) (reporting studies showing that reward bias is highest in later adolescence); *see also, e.g.*, Kevin Holman, Note, *Should Little Joey's Juvenile Adjudication Be Used Against Him When He Becomes Joe the Habitually Violent Felon?*, 25 J. JUV. L. 45, 54 (2005) ("California state law gives juveniles the option of either having their juvenile records sealed or their criminal convictions expunged in certain cases. Both of these options are designed to allow juveniles to get a fresh start if they refrain from committing any other criminal acts. The theory underlying these options is that they serve as a reward for a juvenile who does not commit additional offenses and as motivation for juvenile offenders to rehabilitate.").

monthly salaries, is not excessively long. A month-long period requires offenders to develop a certain level of willpower and perseverance and will ideally help develop a certain degree of mental toughness. Instant gratification rarely occurs in life. Second, monthly payments are consistent with labor market practices.[85] The purpose of refundable fines is to enhance the likelihood of rehabilitation, and our hope is that an offender sentenced to pay a refundable fine will be able to find employment to earn an income. Because employees are typically paid on a monthly basis, monthly repayments will therefore harmonize repayments and wages, preparing offenders for the habitual norm of labor markets. The third reason for selecting monthly intervals involves administrability. The repayment of fines imposes an administrative cost on the criminal justice system. Any payment is costly to process, and the repayment of fines is no exception. For this reason, daily repayments, for example, do not make economic sense: Depending on the amount, the processing cost of such repayments may be higher than the amount paid. The same problem may arise with respect to weekly repayments, albeit to a lesser degree. From a pure administrability standpoint, annual payments may be the ideal solution. However, for the reasons we explained, such a long waiting period may undermine the success of refundable fines.[86] Monthly repayments seem to strike the right balance between the societal interest in avoiding unnecessary costs and the desire to help offenders with rehabilitation.

To be clear, it is possible to design a repayment schedule with non-uniform repayments. For example, the judge can order repayments on a monthly basis in the first year; bi-monthly repayments in the second year; and on a weekly basis thereafter. Such a schedule will add a significant degree of complexity to our proposed scheme. It will raise processing costs and increase the risk of error. Worse yet, it is likely to confuse offenders, drive them and their families into severe economic instability, and break their spirit. For these reasons, we strongly advise against the adoption of uneven repayment schedules. However, when the judge encounters a case that she believes to be suitable for a non-uniform repayment schedule, she should have the authority to do so. In either case, a judge who chooses to take this path should be required to justify her choice in light of the increased administrative cost.

---

85. *See, e.g.*, Brett R. Turner, *Classification of Employee Bonuses*, 20 EQUITABLE DISTRIB. J. 49 (2003) ("[M]ost companies pay salary on a weekly, biweekly, or monthly basis.").

86. *See supra* Section II.B.2.

4. Repayment Amounts

The fourth decision judges would need to make in fashioning a refundable fine concerns the repayment amount. If the judge chooses uniform repayments, the amount of each installment would be effectively determined by the duration of the repayment period and the payment intervals. For instance, if the fine is set at $7,200 to be paid in monthly payments over a period of three years, the offender will be paid back $200 every month (with or without interest adjustments, as decided by the sentencing judge). Although it is tempting to use uniform payments for simplicity's sake and for administrability reasons, it may actually be advisable to use greater amounts at the beginning and end of the repayment period.

We suggest that courts assign a large initial repayment. Criminal trials impose considerable costs on defendants, who often cannot pay those debts.[87] Defendants must pay their attorneys, incur various other expenses, and cannot focus on their jobs, if they retain them. Awarding higher amounts upfront may therefore help defendants defray some of the high costs associated with the criminal prosecution and trial. Furthermore, it is possible that the higher repayments would show defendants that refundable fines work, thereby establishing a nexus between compliance with the law and positive rewards. That said, the subsequent drop in repayment amounts may demoralize defendants, weakening their resolve to be law-abiding citizens.

The final payment must also remain substantial. We recommend that the final payment constitute at least 10 percent of the total fine amount and may even be set at 30 percent. Reserving a disproportionately high amount for the very end of the rehabilitative program would provide offenders with an incentive to avoid missteps and to maintain a clean record until the very end of the repayment period. The final payment may be analogized to a bonus paid by employers, such as law firms, to employees at the end of the calendar year. To qualify for a bonus, employees are required not to quit their job prematurely.[88] The same dynamic should be employed with respect to refundable fines. Making the final payment disproportionately large can go a long way toward ensuring that fine recipients do not quit midway.

---

87. *See* Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024, 1027–31 (2016) (describing how criminal defendants run into unbearable debts due to the need to finance their defense).

88. *See, e.g.*, Greg Giangrande, *Should I Wait a Bit After Getting My Bonus Before I Quit?*, N.Y. POST (Dec. 18, 2022, at 06:59 ET), https://nypost.com/2022/12/18/should-i-wait-a-bit-after-getting-my-bonus-before-i-quit/ [https://perma.cc/5YSD-H3UP] (discussing pay structures blocking employees' "get the bonus and quit" strategy).

5. *Decreasing and Increasing Repayments*

If the sentencing judge decides not to use uniform repayments, she will have to decide whether to use a decreasing or an increasing schedule of repayments. A decreasing schedule commences with relatively high repayments that drop over time. For example, a decreasing schedule can incorporate monthly repayments of $500 in the first year, $400 in the second year, and $300 in the third. An increasing schedule of repayments is comprised of amounts that increase over time—the mirror image of the first option. An increasing repayment schedule, for example, could consist of repayments of $200 in the first year, $400 in the second year, and $600 in the third. It should be noted that the rate of decrease/increase need not be uniform. It is possible to use varying increments. Also, it is possible to combine the two prototypical options we discussed by designing a repayment schedule that decreases at first, and then increases over time.

A decreasing repayment schedule can be used when an offender is in dire need of money and cannot secure loans from financial institutions. Large upfront repayments can help alleviate the financial plight of such offenders and provide them with much-needed liquidity. The problem with decreasing payments is that once the repayment amounts start to drop, the motivation of offenders to comply with the program may also weaken. As the rewards diminish, offenders may conclude that continued compliance with program requirements—and even with the law itself—is no longer in their best interest.

Decreasing repayments can be further analogized to salary cuts. From a psychological perspective, the two have the same effect: They undermine the commitment of the affected individuals to their jobs and drive them to explore other opportunities.[89] In the context of employment, there are positive achievement incentives driven by the prospect of a future salary raise,[90] but no such prospect exists in the case of refundable fines. For this reason, it is critical to reserve a very large payment for the very end of the program, as we explained above in Section II.B.4.

An increasing repayment schedule creates a better incentive structure, in our opinion. It encourages individual offenders to behave normatively in the

89. For extreme scenarios, see generally Jerald Greenberg, *Employee Theft as a Reaction to Underpayment Inequity: The Hidden Cost of Pay Cuts*, 75 J. APPLIED PSYCH. 561 (1990) (reporting that employee pay cuts engender disloyal conduct and embezzlement).

90. *See* Tali Sharot, *What Motivates Employees More: Rewards or Punishments?*, HARV. BUS. REV. (Sept. 26, 2017), https://hbr.org/2017/09/what-motivates-employees-more-rewards-or-punishments [https://perma.cc/5VYZ-QQYL] ("Neuroscience suggests that when it comes to motivating action (for example, getting people to work longer hours or producing star reports), rewards may be more effective than punishments.").

long run by providing them with increasing rewards for normal behavior. The longer a former offender avoids illegal behavior, the more likely they are to adopt a normative lifestyle that would prevent them from repeating past mistakes. Maintaining a normative life for a long period of time fosters healthy habits and crime-free behavior and proves to the offender that they are capable of changing their ways. Hence, we believe that in most cases, judges should favor increasing repayment schedules over those that decrease.

6. Escrow

The discussion thus far has assumed that individual offenders receive repayments directly, allowing them to access funds immediately. Without a doubt, most offenders need the money. Direct payments, however, may tempt some offenders to pocket the payments they receive, spend the funds, and then stumble right back into the world of crime. To mitigate this risk, we suggest the use of a special escrow account where the money will be deposited and held in trust for the individual offender to access at a later point determined by the judge. If the judge decides that the funds can only be withdrawn at the end of a designated period, the escrow option will be functionally equivalent to a refundable fine with a single repayment date at the "finish line." It is possible, however, to create other withdrawal options. For example, it is possible to allow individuals to withdraw the money held for them in escrow every six or twelve months, rendering the escrow option very similar to a refundable fine with an annual or semi-annual repayment schedule. It should be noted, however, that the alternatives are not identical. The use of escrow accounts would allow individual offenders to withdraw only *part* of the money accumulated. Partial withdrawal may prove beneficial for individuals who fear that possessing too much disposable cash may lead to unwise spending.

Depositing repayments in an escrow account is not a perfect solution, however. Doing so may not have the same positive psychological effect as direct transfers, as the use of escrow accounts may raise suspicion that the government does not intend to transfer the money and will try to use pretexts to retain it. If this becomes the prevalent belief among offenders, it will undermine the success of refundable fines.

III. THE ADVANTAGES OF REFUNDABLE FINES

Our preceding discussion demonstrated the advantages of refundable fines over incarceration. In this Part, we enumerate and discuss two distinct advantages of refundable fines over traditional fines: the impact of refundable fines on individual offenders and the effect of refundable fines on third parties.

A. *The Effect of Refundable Fines on Individual Offenders*

1. *Income Effects*

From a purely economic standpoint, the use of refundable fines allows offenders to avoid a significant loss that most cannot afford to absorb. Reportedly, most Americans cannot readily pay an expenditure of several hundred dollars.[91] The socioeconomic status of the average offender falls way below that of the average American.[92] In fact, many offenders break the law precisely because they lack the financial wherewithal to support themselves and their families.[93] The imposition of a criminal fine on such individuals not only worsens their financial woes dramatically but effectively drives them into insolvency. Traditional fines therefore doom offenders to a life of struggle.

To begin with, offenders frequently cannot pay the fines imposed upon them.[94] Worse yet, they have to bear the mark of bankruptcy.[95] Even offenders who can, somehow, secure the money to pay fines, either from savings or by borrowing from third parties, face an uphill battle. Such offenders must forego other plans they have had that may include paying for education or medical care. Alternatively, if offenders must borrow money from others, they would have to designate a sizeable portion of their income to loan repayment.

---

91. *See, e.g.*, Anne Marie D. Lee, *Most Americans Can't Afford a $1,000 Emergency Expense, Report Finds*, CBS NEWS (Jan. 23, 2025, at 19:20 ET), https://www.cbsnews.com/news/saving-money-emergency-expenses-2025/ [https://perma.cc/6S3A-MDP3].

92. *See* Lisa M. Saccomano, *Defining the Proper Role of "Offender Characteristics" in Sentencing Decisions: A Critical Race Theory Perspective*, 56 AM. CRIM. L. REV. 1693, 1719–20 (2019) (discussing offenders' socioeconomic disadvantage as potentially relevant to blameworthiness).

93. *See generally* William C. Bailey, *Poverty, Inequality, and City Homicide Rates: Some Not So Unexpected Findings*, 22 CRIMINOLOGY 531 (1984) (linking crime to economic deprivation); Eric J. Boos, *Moral Imperative—Legal Requirement: Why Law Schools Should Require Poverty Law and International Human Rights*, 19 U. ST. THOMAS L.J. 63, 74 (2023) (observing the vicious cycle that poverty causes crime and crime causes more poverty).

94. *See supra* notes 10–11. For comprehensive discussions of that problem and solutions thereto, see generally Jean Galbraith et al., *Poverty Penalties as Human Rights Problems*, 117 AM. J. INT'L L. 397 (2023); Beth A. Colgan & Jean Galbraith, *The Failed Promise of Installment Fines*, 172 U. PA. L. REV. 989 (2024).

95. *See* Mona Lewandoski, *Barred from Bankruptcy: Recently Incarcerated Debtors in and Outside Bankruptcy*, 34 N.Y.U. REV. L. & SOC. CHANGE 191, 247 (2010) (noting the existence of "a large amount of debt burdening impoverished former criminals" and examining their bankruptcy options and obstacles).

The use of refundable fines can help alleviate the economic plight of convicted individuals. Imagine the following scenario: An offender is assigned a refundable fine of \$6,000, repayable in installments of \$500 per month over a period of one year. The fine is paid with personal savings, and the offender has a low-paying job that nets \$1,000 a month. In this example, the monthly repayments of \$500 will raise the disposable income of the recipient to \$1,500 per month, a 50 percent increase in her salary. In contrast, the use of a traditional, non-refundable fine nets the offender only \$1,000 per month, which may be the difference between successful rehabilitation and falling deeper into the abyss of despair.

Imagine next, given the same facts as above, that the offender had to borrow money from family members to pay the fine. As a result, the offender must pay back \$300 every month to her family. As before, the offender has a job that pays her \$1,000 per month. Under a refundable fine regime, the offender must transfer \$300 of the \$500 refund she receives every month to her family to repay the loan, leaving her with a disposable income of \$1,200 a month. Living off such a modest salary is not easy and certainly requires many painful sacrifices. However, the use of a traditional fine, under the same circumstances, leaves the offender with a disposable income of only \$700 per month, since she will have to use \$300 of her \$1,000 salary to repay her loan to her family—and *today we exclusively use traditional fines*.

To be clear, we do not argue that refundable fines will always work. Nor do we contend that refundable fines will effectively guarantee offenders sufficient resources to avoid crime. We are not naïve. We actually expect that a non-negligible percentage of offenders will resort to crime despite the use of refundable fines, but this is not the point. Instead, we assert that the use of refundable fines will provide offenders a *much better opportunity* to avoid past mistakes and to start a crime-free life, relative to traditional fines and functionally unnecessary jail sentences. This second chance is not trivial. Given the disproportionately high number of convicted offenders in the United States, coupled with the conservative estimate that refundable fines can help 20 percent of individuals included in this group, refundable fines would provide relief for tens of thousands of offenders while benefiting their families and society as a whole.

2. *Prospect Theory*

The celebrated work of psychologists Amos Tversky and Daniel Kahneman[96] points to another virtue of refundable fines. One of the most important findings of Tversky and Kahneman, known as the "prospect theory," suggests that individuals treat losses and gains differently.[97] Subjects uniformly reported that the negative impact of losses on happiness or well-being exceeded the positive impact of comparable gains.[98] For example, the pain one experiences from losing $500 is greater than the increase in happiness resulting from a $500 earning. Thus, Tversky and Kahneman argue that individual actors are more motivated to avoid losses than to pursue gains of equal size.[99]

Refundable fines capitalize on the psychological phenomenon illustrated by prospect theory. That is, refundable fines provide offenders an opportunity to avoid loss by presenting a real chance to earn back the funds paid to the state. Note, once again, that the earnings back here are full: Under our model, the state will repay the fine amount with interest.

As Tversky and Kahneman's prospect theory suggests, the offenders' ability to undo the negative financial implications of past behavior will drive them away from unlawful future behavior and secure compliance with all other requirements of the rehabilitative program.[100] Stated simply, the positive motivational effect of refundable fines is particularly powerful because they provide offenders a second opportunity to avoid a substantial loss—an opportunity they do not presently have.[101]

B. *The Effect of Refundable Fines on Third Parties*

1. *Family and Friends*

Refundable fines have the potential to alter the behavior of an offender's family and friends. Under the current criminal justice system, many offenders sentenced to pay a traditional fine ultimately find themselves in prison since they lack sufficient funds to pay and cannot borrow money.[102] It is unsurprising that banks and other financial institutions often refrain

---

96. *See* Kahneman & Tversky, *supra* note 22 (describing a classic account of the prospect theory and loss aversion).

97. *Id.*

98. *See* Zamir, *supra* note 22, at 835–38 (citing studies).

99. *Id.*

100. *Cf. id.* ("Plaintiffs are willing to pay a considerably higher expected fee to avoid even a small risk of loss.").

101. *Id.*

102. *See supra* notes 10–11 and accompanying text.

from lending money to offenders.[103] Sophisticated institutional players are guided solely by profit motives and will not extend a loan to a high-risk borrower who cannot provide a security. Family members and friends of the offender, too, are likely reluctant to loan funds; an offender's meager income is likely insufficient to support the offender's own financial needs, let alone enable them to repay the family loan.

Refundable fines would make family and friends more amenable to the idea of lending money to offenders. As we have demonstrated, refundable fines significantly improve an offender's ability to pay off loans. The monthly repayments increase their disposable income, ensuring lenders that the borrower will honor her obligations, within a reasonable amount. For example, in the case of monthly repayments of $500, $250 can be allocated to cover the loan payback, and $250 can be retained by the offender to cover living expenses.

Furthermore, the use of refundable fines may incentivize family members and friends who loan funds to the offender to provide employment or assist in locating alternative employment. Generating additional income for the offender in the form of a salary would considerably enhance the likelihood that the offender would repay the loan in full. Arranging employment for the offender would also promote the offender's rehabilitation—the ultimate goal of refundable fines. Holding a paying job reduces the risk that the offender reoffends and enhances the offender's sense of self-worth.

Realistically, lenders that loan to offenders require assurance that debts will be repaid with the funds distributed through the repayable fines program. We suggest that administrators responsible for distributing repayable loans earmark funds to repay debts, and either deposit the funds directly into a lender's bank account or write the lender a check. Similarly, when a family member or a friend employs the offender, they can incorporate a loan forgiveness mechanism into the remuneration scheme in a way that would benefit both parties. Specifically, it is possible to stipulate that, in addition to the salary paid to the employee, a certain percentage of the debt would be forgiven every month.

---

103. *See, e.g.*, A.B. & S. Auto Serv., Inc. v. S. Shore Bank of Chi., 962 F. Supp. 1056, 1064 (N.D. Ill. 1997) ("South Shore Bank's practice of inquiring into a credit applicant's criminal history is legitimately related to its extension of credit for two reasons. First, the regulations require the SBA, in evaluating a loan guarantee application, to consider 'the character, reputation, and credit history of the applicant, its associates, and guarantors.' . . . Secondly, the bank's inquiry into an applicant's criminal record provides relevant information about an applicant's creditworthiness, particularly his judgment and character.").

2. *Society at Large*

Finally, refundable fines are socially advantageous because the program carries a lesser social stigma. Scholarly literature suggests that a criminal conviction is akin to a modern Mark of Cain that accompanies the offender.[104] It negatively impacts the future of convicted individuals, making it much harder for them to succeed in life.[105] A refundable fine would not completely negate the social stigma associated with a criminal conviction. But it can ameliorate that stigma. The judge's choice to impose a refundable fine should, and would likely be, construed as a clear signal indicating that the offender has a real chance at rehabilitation and that he deserves an opportunity to achieve this important goal.

As we explained in Part I, although refundable fines offer a superior alternative to imprisonment, they should be reserved for crimes ranging from misdemeanors to mid-level felonies, and for first-time offenders.[106] Individuals who commit mild offenses for the first time should not bear the full brunt of criminal sanctions. Nor should they be viewed in the same light as hardened criminals. The introduction of refundable fines would enable the criminal justice system to better differentiate among offenders and send a message to society that offenders deserve a second chance and a shot at rehabilitation.

IV. REFUNDABLE FINES AND THE GOALS OF CRIMINAL JUSTICE

In this Part, we raise and respond to the following question: Do refundable fines run contrary to the fundamental goals of criminal law, such as retribution, deterrence, incapacitation, and expressive justice? As we mentioned earlier in this Commentary, incarceration is not a prerequisite to attain those goals. That is, it is clear that punishments other than jail time can achieve—as effectively as prison—the social goals of retribution, deterrence, incapacitation, and expressive justice.[107] Our focus here is whether those goals can be promoted by the imposition of refundable fines as well.

---

104. *See* Zoe R. Feingold, *The Stigma of Incarceration Experience: A Systematic Review*, 27 PSYCH. PUB. POL'Y & L. 550, 550 (2021) ("Individuals who have been incarcerated experience unparalleled health and economic disparities. Stigma, defined as a social phenomenon in which labeling, separation, and discrimination occur together in a power situation that allows them may be a central cause of the social inequalities that formerly incarcerated persons face." (citations omitted)).

105. *Id.* at 551–52, 558–60 (reporting prison's devastating effect on offenders' employment opportunities).

106. *See supra* Section II.A.

107. *See supra* text accompanying notes 38–48.

Consider retribution first. Arguably, our proposal allows offenders to evade punishment, which may undermine the principle of just deserts.[108] As we have argued, and hope is clear, the mechanism of refundable fines is rooted in, and fully consistent with, a rehabilitative approach to offenders.[109] The inherent tension between retribution and rehabilitation is familiar to criminal law scholars.[110] Pursuit of retribution often clashes with the societal interest in rehabilitating offenders.[111] We join other criminal law scholars in prioritizing rehabilitation over retribution[112] while restricting our claim to offenses ranging from misdemeanors through mid-level felonies, and for first-time offenders.

Two further observations are in order here. First, although retribution is a valid concern in the eyes of certain criminal law theorists, it is unclear as to how penalties should be calibrated to satisfy the wishes of retributivists. That is, it is uncertain whether the current system of criminal penalties fits the demands of a retributive worldview. Accordingly, it is not clear whether our proposal is, or is not, consistent with the demands of retribution. Second, assuming that our proposal undermines retributive concerns—and as we explained, this assumption is highly contestable—it is unwise, in our view, to adopt a dogmatic retributive approach that is completely disjointed from the social reality that engulfs us and the enormous costs it imposes on society at large.[113]

As far as incapacitation is concerned, it is critical to recognize that incapacitation is not a goal in its own right but a means of preventing further

108. For retributive justice demands, see *supra* note 38.

109. *See supra* Section II.A.

110. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315–18 (2000) (summarizing the retribution vs. rehabilitation debate and citing literature); Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1150–54 (1990) (same).

111. *See* Cotton, *supra* note 110 (discussing the clash between retribution and rehabilitation).

112. *See, e.g.*, Josephine R. Potuto, *The Modern Prison: Let's Make It a Factory for Change*, 18 U. TOL. L. REV. 51, 56 (1986) ("The case for rehabilitation may be stated simply. It is clear that at least some criminals resort to crime for want of any better way to earn a living. Since providing the means and attitudes to be a success at employment reduces the need and, hence, the incentive, to commit crime, then providing employment training and saleable skills could assist released prisoners to avoid recidivating. Surely a reduction in recidivism rates is the predominant goal of a correctional system. The system succeeds when few released prisoners recidivate, not when there is adequate punishment or when taxpayer costs are saved. As former Chief Justice of the United States Supreme Court, Warren Burger, believes, it is well past time to resolve clearly that prisoners should be rehabilitated through prisoner employment and then plan out how to do it effectively, efficiently, and consistently."). *See also* Vincent Schiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 14 FED. SENT'G REP. 332, 333 (2002) (reporting that "the public believes that laws should be changed to reduce the incarceration of nonviolent offenders [and] that rehabilitation should still be the number one purpose of the justice system" and citing studies).

113. *See supra* notes 53–70 and accompanying text.

crime.[114] It is therefore illogical and inefficient to imprison offenders without first offering a mechanism designed to prevent relapse without incarceration. Our proposal demonstrates that incapacitation is not the sole means of preventing re-offense, as refundable fines operate alongside existing sanctions. When a refundable fine succeeds, imprisonment—and thus incapacitation—becomes unnecessary. When it fails, incapacitation remains available as a backstop.

Furthermore, our proposal does not conflict with theories of incapacitation because our mechanism is offered for offenses that are not punishable exclusively by imprisonment. That is, society already determined that for certain offenses—mainly misdemeanors and mid-level offenses—prison is unnecessary. And, we grant judges broad discretion in implementing our mechanism. Judges may simply choose to ignore refundable fines entirely and commit a defendant to prison if, in their belief, incarceration is the fair punishment.

This brings us to deterrence. Admittedly, adopting our proposal might erode deterrence on the margins. Yet our proposal is designed primarily for first-time offenders and for low- to mid-level offenses.[115] Under this proposal, incarceration remains a viable option for socially dangerous criminals. Incarcerating small-time offenders may enhance deterrence, but, as we explained in Part I, it will do so at too high a price, given the exorbitant cost of prisons[116] and the rate of recidivism that the implementation of our proposal will reduce.[117]

More importantly, deterrence is not, by itself, the end goal. The actual goal here is to minimize the aggregate social cost of crime, including prevention and imprisonment. And empirically—understood in terms of the cost-benefit ratio—deterrence often fails.[118] When deterrence fails, society should minimize the cost of failure by avoiding the unnecessarily high costs of incarceration. Under these circumstances, refundable fines come in handy.

Finally, we believe that expressive theories of criminal law can readily accommodate our proposal. We do not seek to modify the definitions of criminal offenses or decriminalize certain behaviors. Nor do we advocate leniency in general. Instead, we hope to add a new item to the available menu of penalties for judges to use when sentencing. Under our proposed

---

114. *See* Kevin Bennardo, *Incarceration's Incapacitative Shortcomings*, 54 SANTA CLARA L. REV. 1, 2 (2014) ("Incapacitation is the removal of an offender's ability to commit future crime against a relevant population.").

115. *See supra* Section II.A.

116. *See supra* notes 53–58 and accompanying text.

117. *See supra* notes 59–69 and accompanying text.

118. *See supra* notes 59–70 and accompanying text.

framework, offenders eligible for a refundable fine would be tried and convicted. If the judge chooses to apply a refundable fine, the offender's slate will not be wiped clean—the conviction will stand, and she will retain a criminal record. Therefore, the refundable fine imposed on the offender will not erode the criminal justice system's affirmation of the moral value of the victim, as the offender still faces the prospect of a prison sentence if he does not change his ways. Put differently, we do believe that an offender deserves to be punished and the moral worth of the victim affirmed by the offender's conviction and punishment.[119] But expressive justice provides no compelling reason for depriving each and every offender of the chance to turn the page on their past.

CONCLUSION

The criminal justice system provides a sad, yet powerful, illustration of the definition of insanity as "doing the same thing over and over and expecting different results."[120] Few fair-minded observers would dispute the failures of the criminal justice system. Yet, we somehow expect the same criminal sanctions to miraculously produce different results for us. One can safely predict that it is not going to happen. The dismal state of the criminal justice system and, especially, over-incarceration and high recidivism rates call for innovative solutions. In this Commentary, we introduced one such solution: providing certain offenders a second chance through the imposition of a refundable fine. Refundable fines are uniquely tailored to promote the rehabilitation of offenders and to allow individuals who erred once to avoid future lapses. Furthermore, refundable fines can be tailored in a myriad of creative ways that would ensure this result. As we have demonstrated in this Commentary, refundable fines offer courts a range of equitable options that currently do not exist, allowing them to tailor punishments to the circumstances of the offenders. Just as importantly, in the long run, the use of refundable fines would impose only a minimal cost—if any—on society at large.

To the best of our knowledge, refundable fines have not been adopted anywhere in the world. That said, the prima facie case for implementing such fines, or at least experimenting with them, is overwhelming.

---

119. *See* Kahan, *supra* note 36, at 597–601 (explaining why punishment should reinstate and vindicate victims' moral worth).

120. RITA MAE BROWN, SUDDEN DEATH 68 (1983). This saying is widely misattributed to Albert Einstein. *See* ALICE CALAPRICE, THE ULTIMATE QUOTABLE EINSTEIN 474 (2011).