
PUNISHMENT AS PLACEBO

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ABSTRACT

The modern criminal punishment regime has failed to deliver on its promise of public safety. For all of the resources expended and all of the human costs incurred, the ever-growing carceral state does not make us safer. Scholars across the social sciences have studied these shortcomings for decades using various methodologies. The burgeoning prison population has little relation to the crime rate, which advocates have argued supports decarceration efforts to remedy the inefficiency, inequality, and subordinating effects of harsh sentencing policies and institutional design choices that have supported the mass incarceration crisis. What then justifies the continued propagation of this failed regime?

This Article proposes a new balancing of considerations to answer this question that innovates punishment theory through the medical and experimental lens of placebos. The efficacy of policy must be balanced with its public perception; thus, a policy may not be effective at fixing a problem, but this is often less important than the perception of the policy. A medical placebo treatment may be physiologically inert, but it still can have a positive psychological and therapeutic impact by making the patient feel better because they think they are receiving effective treatment. In the same way, the cultural value of mass incarceration extends beyond its failed effectiveness by providing psychological and therapeutic value to help the public cope with their fear of crime, their moral commitments to justice, and their socialized feelings towards offenders.

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This placebo methodology offers several unique insights about punishment theory and practice that learn from the extensive medical research and ethics literatures. By viewing punishment as a placebo, the modern punishment regime must confront unique questions concerning the social harm of punishment, the justifications for public deception, the ethics of experimentation, and the perverse economics of inefficacy. These theoretical synergies also provide practical insights into how to reverse and regulate such placebo punishments while focusing on a more humane and ethical punishment future.

TABLE OF CONTENTS

INTRODUCTION	514
I. THE PLACEBO OF PUNISHMENT THEORY	520
A. THE PLACEBO METHODOLOGY	521
B. THE PLACEBO EFFECT	531
II. MASS INCARCERATION AS PLACEBO	535
A. RESEARCH AND DEVELOPMENT	537
B. TREATMENT EFFICACY	539
C. PLACEBO RESPONSES	544
III. SOCIO-MEDICAL ETHICS AND JUSTIFICATIONS	546
A. PLACEBOS AS HARM	548
B. DECEPTION VERSUS CONSENT	552
C. EXPERIMENTATION ETHICS	561
D. PLACEBO ECONOMICS	568
IV. BEYOND PUNISHMENT AND PLACEBOS	575
A. BEYOND PUNISHMENT	576
B. BEYOND PLACEBOS	580
CONCLUSION	584

INTRODUCTION

“Freedom from fear is a basic right of every American. We must restore it.”¹ Richard Nixon’s bold message to America illustrates one of the most underappreciated aspects of modern criminal punishment policies: the fear and perception of crime is just as important as the actual presence of crime.

1. Robyn Price Pierre, *How a Conservative Wins the Presidency in a Liberal Decade*, ATLANTIC (July 9, 2016), <https://www.theatlantic.com/politics/archive/2016/07/fear-and-voting-in-america/490631> [https://web.archive.org/web/20240416060851/https://www.theatlantic.com/politics/archive/2016/07/fear-and-voting-in-america/490631].

Nixon understood these political winds and social yearnings, and he ushered in a new vision of law-and-order national leadership through his War on Crime.² This “fear of crime” was the overriding concern of Ronald Reagan’s administration that passed some of the most sweeping crime bills and policies in modern history.³ George H.W. Bush picked up this thread when he declared that “freedom from crime and the fear that stalks our cities” was a “fundamental civil right” that he was committed to protecting through crime control legislation.⁴ And not to be outdone by Republicans, Bill Clinton continued this trend when supporting further crime legislation by arguing that if “the American people do not feel safe on their streets, . . . then it is difficult to say that the American people are free.”⁵

These words from past presidents highlight an important duality in criminal law that has shaped an entire generation of policy yet is curiously understudied in the legal academy: the relationship between efficacy and perception. In other words, there are two values that criminal law and punishment seek to deliver as a public policy. First is the value of efficacy, which measures how *effective* the law is in actually achieving public safety goals by lowering crime rates and making us safer. Second is the value of public perception, which measures how the law assuages public fear and controls how we *perceive* or *feel* about our safety and the prevalence of crime. Both of these values have explanatory weight in how we study and think about criminal law and punishment. While there has been robust consensus that harsh, tough-on-crime policies have not delivered on their promises of *efficacy* in making Americans any safer, these discussions miss perhaps the more important value at play in our system. As we can see from former chief executives,⁶ crime policy is just as (or even more) concerned

2. See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 56 (2016).

3. JOHN HAGAN, WHO ARE THE CRIMINALS?: THE POLITICS OF CRIME POLICY FROM THE AGE OF ROOSEVELT TO THE AGE OF REAGAN 10 (2010) (“Fear of crime was the [Reagan] administration’s overriding concern.”); see also Ronald Reagan, Radio Address to the Nation on Crime and Criminal Justice Reform (Sept. 11, 1982), in RONALD REAGAN PRESIDENTIAL LIBR. & MUSEUM, <https://www.reaganlibrary.gov/archives/speech/radio-address-nation-crime-and-criminal-justice-reform> [<https://perma.cc/LG6F-389K>] (referencing how “afraid” Americans are and the “many moments of fear” they suffer, in tandem with the rising crime rates that justify criminal justice reform).

4. *Transcript of President’s State of the Union Message to Nation*, N.Y. TIMES, Jan. 30, 1991, at A12, <https://timesmachine.nytimes.com/timesmachine/1991/01/30/issue.html> [<https://web.archive.org/web/20200108065209/https://www.nytimes.com/1991/01/30/us/state-union-transcript-president-s-state-union-message-nation.html>].

5. William J. Clinton, Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994 (Sept. 13, 1994), in AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-signing-the-violent-crime-control-and-law-enforcement-act-1994> [<https://perma.cc/MJB3-2UWV>].

6. These statements from presidents of the United States were all made in the context of their support of criminal justice reform at the federal level. But these federal policies trickled down, incentivized, and emboldened the states to adopt similar policies. Sheldon A. Evans, Towards a

with assuaging public fear and controlling public *perception* as it is with the law's *efficacy*.

This Article takes the path less travelled by focusing on the value of *perception* in criminal legal policy. Even if we accept *arguendo* that criminal law enforcement and policies have objectively failed to lower crime rates, do these policies nevertheless hold some value in making Americans *feel* better about crime? This Article tackles that question through a theoretical methodology that brings to bear medical, social, and ethical considerations in a framework that portrays modern punishment as a placebo: something that is not *efficacious* at fixing the underlying problems of crime yet might have psychological and therapeutic value in impacting society's *perceptions* of crime.⁷

Placebos have been a part of medical research for generations, but they have also become a respected tool for studying social behavior.⁸ For example, a person's lucky hat might make them *feel* more confident; as a result, social scientists can conceptualize and measure a positive placebo effect on this person's perception and expectations when wearing this lucky hat.⁹

At a societal level, the same can be true of legal rules. Anup Malani has considered how legal regulations in healthcare and even tort law shape people's perceptions and expectations similar to placebo effects.¹⁰ Amitai Aviram has also studied the law's role in manipulating perceptions when a law is designed to signal an increased or decreased risk of certain activity.¹¹ Regardless of a law's efficacy, Aviram recognized the law's role in

Federalism(s) Framework of Punishment 21–40 (Mar. 2024) (unpublished manuscript) (on file with author).

7. See Andrea Corradi & Eric P. Baumer, *Did Mass Incarceration Leave Americans Feeling Less Afraid? A Multilevel Analysis of Cumulative Imprisonment and Individual Perceptions of Fear*, 39 JUST. Q. 1378, 1393 (2022) (finding that increased levels of incarceration did not translate into lessened fear of crime in individuals).

8. See Charlotte Blease, *Consensus in Placebo Studies: Lessons from the Philosophy of Science*, 61 PERSP. BIOLOGY & MED. 412, 419 (2018) (describing the Society for Interdisciplinary Placebo Studies, which covers “an unusually wide range of disciplines and academic scholars for an academic society, encompassing anthropology, biology, cognitive science, clinical research, genetics, psychology, psychotherapy, medicine, neuroscience, philosophy of science, and health-care ethics, as well as related subfields”); Melanie K. T. Takarangi & Elizabeth F. Loftus, *Suggestion, Placebos, and False Memories*, in PLACEBO TALKS: MODERN PERSPECTIVES ON PLACEBOS IN SOCIETY 204, 213 (Amir Raz & Cory Harris eds., 2015).

9. Takarangi & Loftus, *supra* note 8, at 224; see also Jake Linford, *Placebo Marks*, 47 PEPP. L. REV. 45, 50, 62–63 (2019) (arguing that high-performance trademarks that are associated with boosting athletic performance deliver a positive placebo effect to users).

10. See Anup Malani, *Regulation with Placebo Effects*, 58 DUKE L.J. 411, 413 (2008).

11. See Amitai Aviram, *The Placebo Effect of Law: Law's Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54, 56–57 (2006).

impacting social perceptions of safety.¹² In this way, the law *may* have created a safer environment, but its primary value in increasing social welfare was a psychological placebo.¹³

In the criminal legal context, this Article argues that modern punishment policies—and specifically, mass incarceration as a case study—would benefit from being conceived as a placebo. These policies promise to address the social problem of crime, but they are no longer designed or implemented efficaciously to fix that underlying problem. Instead, the primary value of these policies to the public is their ability to control, assuage, and in some cases manipulate feelings, perceptions, and expectations toward crime.

To build out the analogy a bit further, let's liken punishment to a form of medical treatment. A patient may go to see their doctor with a particular physical health problem; the doctor may choose to prescribe the patient a placebo treatment that is not meant to *efficaciously* treat the patient's physical problem but instead is meant to make the patient think they are receiving an effective treatment. The placebo is only delivering a psychological or therapeutic benefit to the patient. And because of the interesting ways that placebos work, the patient does indeed *feel* better. Applying this logic to punishment requires a bit of imagination, but nevertheless has conceptual value. The patient is the public, who is dealing with the social ill of crime. Thus, the public/patient seeks solutions from social decisionmakers such as politicians, police officers, prosecutors, and other actors who diagnose the problem and purport to give an effective solution; however, like a placebo, these policies that have increased the surveillance state, police power, and mass incarceration have not delivered on the *efficacy* front but are instead meant to control public *perception* and make the public feel better about crime. I understand this is not a perfect analogy and there are nuances to be explored below, but using this methodology of placebos is an important turning point in how we should think about criminal policy and how the *efficacy* and *perception* values interact. The objective study of efficacy must be balanced with these more subjective studies of feelings and perceptions of crime to understand the social currency of punishment.¹⁴

Using interdisciplinary tools of medicine, sociology, and ethics, this Article explores more than a mere metaphor by developing a fuller methodology that reframes criminal punishment in ways that hold valuable

12. *Id.*

13. *Id.*

14. See PHILIP SMITH, PUNISHMENT AND CULTURE 1 (2008) (explaining that punishment “cannot be understood without reference to public meaning”).

insights and complexities for the criminal theory literature. First, the placebo methodology studies and illuminates the types of social cues that impact public perception in the criminal space, such as the emotion of fear and the social and cultural meanings of punishment.¹⁵ Second, it refocuses the punishment literature on the oft-forgotten history that the medical field shares with criminal law.¹⁶ The so-called disease of the criminal mind,¹⁷ the dangerousness of the disabled,¹⁸ and the criminalization of illness¹⁹ are just some examples. Just as individual people could be perceived as dangerous due to an illness or impairment, so too have we used the criminal law to excise people from society that threatened our fragile moral and cultural foundations. Third, the socio-medical ethics of placebo treatments frame unique questions specific to that field that provide an opportunity to discuss the larger ethical questions of punishment. For example, the crossover between the ethics of harm, benevolent deception of the public/patient, using placebos and punishments as tools of experimentation, and the economic incentives at play are important considerations of both the theoretical and practical stakes.

Finally, the above theoretical framings are foundational to the practical interventions that the placebo methodology might inspire.²⁰ As with all punishment, underlying theory heavily impacts the types of practical

15. See Aviram, *supra* note 11, at 54 (discussing the “psychic” effects of the law, which are distinct from the “real” effects); Kathleen M. Boozang, *The Therapeutic Placebo: The Case for Patient Deception*, 54 FLA. L. REV. 687, 700 (2002) (outlining medical literature that emphasize a placebo’s ability to improve the patient’s “spiritual, emotional, cognitive, physical, social, and environmental functioning which facilitate the individual’s development”); MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 189 (1964) (arguing one of the principal functions of legislation is to provide symbolic reassurance to the public that the people in power are indeed “doing something” about a *perceived* problem).

16. See BRYAN S. TURNER, *THE BODY & SOCIETY: EXPLORATIONS IN SOCIAL THEORY* 181 (3d ed. 2008) (emphasizing the social influences and policy connections between the medical and legal fields).

17. See generally Stephen Garton, *Criminal Minds: Psychiatry, Psychopathology, and the Government of Criminality*, in *THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE* (Paul Knepper & Anja Johansen eds., 2016) (outlining the history of using criminal psychology to diagnose and profile criminal offenders); STANTON E. SAMENOW, *INSIDE THE CRIMINAL MIND* (1984) (same).

18. See Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1404–05 (2021) (describing how the disabled are disproportionately represented in police killings and more ordinary forms of policing); SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 1–2, 33 (2009) (cataloging the history of laws that prohibited and criminalized the public appearance of the “unsightly” and disabled).

19. See, e.g., *HIV Criminalization and Ending the HIV Epidemic in the U.S.*, CTR. FOR DISEASE CONTROL & PREVENTION (Jan. 2023), <https://www.cdc.gov/hiv/pdf/policies/law/cdc-hiv-criminal-ehe-2023.pdf> [<https://perma.cc/KVJ5-E7WK>] (finding dozens of states’ laws that criminalize HIV exposure that are now outdated and do not reflect our current understanding of HIV).

20. See SMITH, *supra* note 14, at 2 (citing Paul Kahn’s argument that the first step of legal reform is “to undertake a thick description of the meanings of criminal justice” without being prejudiced with the practical impacts).

punishments we impose on people who have violated criminal laws.²¹ Throughout the analysis of the placebo methodology, this Article explores unique policy solutions gleaned from medical and scientific literature to consider how to fix the problems that overreliance on placebos can bring. This includes unique interventions rarely trodden in the punishment literature, such as new approaches to government regulation, ethical boundaries, policy experimentation, and cultural messaging. Thus, after a generation of failing to solve the problems of mass incarceration and the ballooning punishment regime, the placebo methodology hopes to elucidate innovative practical interventions.²²

The placebo methodology and all its theoretical and practical draping must ultimately answer the most important question of punishment scholarship: Is punishment justified? If punishment does indeed operate as a placebo and provides meaningful value to public *perception*, is this enough to justify the status quo? Many people would agree that in general, we police and punish too much in this country. And even if it does not make us any safer, we should not give short shrift to the law's power to make us feel better. These are questions that address the ultimate payoff of the criminal legal system and the degrees of punishment severity to which we are willing to condemn our fellow man for the utilitarian benefit of our collective feelings.

This Article humbly contributes to these discussions in four parts. Part I builds out the placebo methodology by diving deeper into the shared logic between placebos and punishment as treatments for physical and social ills, respectively. Part II applies the placebo methodology to the mass incarceration crisis as the most salient case study that dominates modern conversations about punishment. Part III further explores the placebo methodology as it applies to mass incarceration under a host of different socio-medical considerations, including the harm principle, justified deceptive practices, the ethics of experimentation, and economic incentives. Further, this Part also confronts the all-important question of whether punishment is justified under the placebo methodology. Part IV closes the Article by broadening the framework to other worthwhile legal disciplines, as well as considering tangential socio-medical framings of punishment that

21. For example, the placebo methodology as applied to mass incarceration is premised on the medical principles of quarantine and incapacitation as a way of making those of us who have not run afoul of the criminal law feel safer. *See also infra* notes 61–62 and accompanying text.

22. *See, e.g.,* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2416 (2021) (extolling the virtue of using new toolsets to tackle longstanding legal problems); DAVID A. JOPLING, *TALKING CURES AND PLACEBO EFFECTS* 161 (2008) (extolling the benefits of “philosophical insights” that “may, for example, help to break exploratory impasses, stimulate new avenues of exploration, and frame psychological problems in a new light”).

might also be worthy of future exploration. This Article hopes to advocate for the placebo methodology as a malleable toolset that should be utilized in future legal research exploring social modeling of behavior and policy.

Exploring punishment as a placebo policy is more than just a clever alliterative analogy. The placebo methodology gives punishment theory and policy interventions a new set of tools that fully appreciate the cultural and social impacts of criminal punishment. And with such an outlook that values both *actual* and *perceived* goals and benefits, we can establish a more careful and nuanced critique of the status quo that calls for a rejection of placebos in favor of panaceas.

I. THE PLACEBO OF PUNISHMENT THEORY

When boiled down to its purest form, the placebo methodology seeks to add a set of social and cultural tools to understanding modern punishment based on how placebos work in the medical field.²³ Such analogies are not new in legal scholarship and often add value by discovering latent assumptions or highlighting underappreciated aspects of legal analysis through a new theoretical framing.²⁴ Following this tradition, this Part pushes deeper by explaining why framing punishment as a placebo is more than a metaphor, but a more fulsome methodology. Section I.A fleshes out the theoretical and literal connections between punishments and placebo treatments by focusing on the actors in each system. Section I.B explores the placebo effect of punishment and whether it succeeds in making us feel safer. These Sections offer important insights into the socialization of punishment and how we should think about the causes of crime, as well as introducing the ethical and practical dilemmas of power, politics, and subjective perceptions to be explored in later Parts.

23. Daniel E. Moerman & Wayne B. Jonas, *Deconstructing the Placebo Effect and Finding the Meaning Response*, 136 ANNALS INTERNAL MED. 471, 472–73 (2002) (explaining the many cultural variables that help produce a placebo effect).

24. See, e.g., Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1854 (1999) (using theological and secular understandings of atonement to argue for a restorative and libertarian punishment regime); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714–15 (1993) (analogizing and exploring the relationship between race and property rights); Chaz Arnett, *Data, the New Cotton*, U. OF MD. FRANCIS KING SCH. OF L. STUD. RSCH. PAPER SERIES 2–6 (2022) (explaining the commonalities between the use of Black people to pick cotton and to mine data for profit). One might even argue that the entire foundation of legal analysis is based on analogizing cases and other legal texts to be similar or dissimilar to the case at hand.

A. THE PLACEBO METHODOLOGY

The theoretical and logical connections between placebo treatments and criminal punishment is a simple idea: Like a medical treatment, punishment has been prescribed to our modern society to solve the underlying problems of crime; but like a placebo, our modern punishment system does not deliver on its promises of efficacy by lowering crime rates but rather is meant to control and mitigate public perception of crime.

Although the exact definition of a placebo treatment is contested in the medical literature,²⁵ placebos, for purposes of this Article, can be defined as treatment that is administered by a person in power (usually a doctor or medical researcher) to provide psychological or otherwise therapeutic benefits to make patients feel better, with little or no active ingredients that would be efficacious to treat the physical medical problem.²⁶

In this methodology, the individual patient being treated is the body politic. This is based on a larger relationship between the study of the physical body and its relation to society as a whole.²⁷ Since ancient times, the human body has served as a structural archetype of society and its institutions.²⁸ The Greek and Latin traditions had a double meaning for the term “diet.” It meant both a mode of ordering one’s life, as well as a political assembly of princes that performed legislative and administrative duties.²⁹ The term “regimen” also had a dual meaning, referring both to a medical means of therapy and also a system of government that we refer to as a “regime.”³⁰ This is part of the larger Western tradition that has found a double and connected linguistic and cultural meaning between caring for the

25. See Blease, *supra* note 8, at 413 (cataloging the different definitions and expansions of the term “placebo” as a medical methodology); Moerman & Jonas, *supra* note 23, at 471 (“[T]he most recent serious attempt to try logically to define the placebo effect failed utterly.”).

26. There are two types of placebos recognized by the medical community: pure and impure. A pure placebo is a substance that has no active ingredient that would be beneficial for the patient’s condition. An impure placebo refers to a substance that does indeed have an active ingredient that *may* be beneficial, but that active ingredient has not been scientifically shown to be beneficial or is at a dosage too low to convey a physical benefit. See Alfredo Jose Pardo-Cabello, Victoria Manzano-Gamero & Emilio Puche-Cañas, *Placebo: A Brief Updated Review*, 395 NAUNYN-SCHMIEDEBERG’S ARCHIVES PHARMACOLOGY 1343, 1344 (2022) (describing the differences and frequency between pure and impure placebos).

27. See generally ALEXANDRA HOWSON, *THE BODY IN SOCIETY: AN INTRODUCTION* (2d ed. 2013) (studying the cultural and social feedback loops connecting the individual physical human body with society and nature); CHRIS SHILLING, *THE BODY AND SOCIAL THEORY* 77 (3d ed. 2012) (“[T]he body is above all a metaphor of society as a whole.”).

28. See SHILLING, *supra* note 27, at 25–44 (charting the relationship between classical sociology and archetypes of the body as a framework for understanding society); see also TURNER, *supra* note 16, at 16, 151 (citing and crediting social anthropologists “from Robert Hertz to Mary Douglas” for their studies of how civilizations have commonly used the body as an important metaphor for society).

29. See TURNER, *supra* note 16, at 142.

30. See *id.*

individual body and upholding the larger social body. Political tradition borrows from human and natural traits to name its institutions, such as the “head” of organizations and governments, “branches” and “arms” of the same, and using the “body politic” to identify an entire society as one social organism.³¹ Religious tradition is rife with such symbols, often using the body as a metaphor for spiritual insights: the body of Christ was a symbol for the institutional church; Adam’s rib was a symbol of patriarchy; the flesh versus spirit dichotomy that represented moral weakness and strength respectively; and the list can go on.³² These examples do not do justice to the sheer number of body-as-society analogies that abound to illustrate the body’s enduring importance into how we think about society and its institutions. The human body is a foundational lens of Western thought and philosophy on social order.³³ Society is personified because our political and philosophical tradition recognizes that institutions mirror the very humans they seek to regulate.³⁴

The body’s dysfunction and disease has also been an important characterization of social disorder in Western thought. Physical diseases were frequently interpreted as manifestations of a “deeper malaise in the social structure.”³⁵ Consequently, the concept of disease was used as a symbol of social problems that could break down and destroy the body politic just as actual disease could break down the physical body. Only a few hundred years ago, obesity was considered to be an individual “manifestation of the flabbiness of the social system,” especially as it exposed the sedentary lifestyle of the rich.³⁶ Even cancer has a history of being described as a “disease of civilization” that manifested during certain social failings.³⁷ This is an interesting cause-and-effect relationship because in many ways, social hierarchies have always exposed some classes of society to various diseases. For example, the social hierarchy of the rich allowed those in agrarian societies to live less active lifestyles.³⁸ Thus, social ordering can certainly impact the development of individual diseases, which in turn communicates a broader identity of a society in accordance with its social priorities.

31. *Id.* at 151–52.

32. *See id.* at 16, 30 (connecting the rich religious history of using the body as a metaphor for society, citing both Greek and later Christian traditions).

33. *Id.* at 151.

34. R. H. TAWNEY, *EQUALITY* 35–36 (1938) (explaining that society, like the human body, is an organism composed of different members, each with its own function that is suited to its station); TURNER, *supra* note 16, at 79 (“The body politic is thus the artificial body which provides the framework within which the real bodies of men can find security and peace.”).

35. TURNER, *supra* note 16, at 143.

36. *Id.*

37. *Id.* (citation omitted).

38. *Id.*

Consequently, the history of associating the presence of physical disease as a larger sign of social disorder, malaise, and even moral decay is well documented.³⁹

The individual human body is more than biological muck; it is our tool for interacting with and understanding the natural and social world. The body serves as a mirror image to help us understand social institutions, and in turn, those social institutions help shape the roles of our bodies in social structure. The intersection between our bodies and our institutions govern issues of “health, gender, childhood, ethnicity[,] and disability[,] and many more substantive areas[,]”⁴⁰ including crime and punishment.

If the patient is the public, then the patient’s disease can be understood as crime itself that threatens the health of social order just as physical disease causes strain and breakdown of the physical body. To let such a social disease fester and ferment would be tantamount to allowing a physical plague to spread without proper intervention of cultural sanitation.⁴¹

The disease/crime comparison is a longstanding principle in our social understanding and moral disapproval of deviant and antisocial behavior. Academics, commentators, and public officials have often used this crime/disease analogy to display their disgust and rally public and intellectual opinion. Emile Durkheim and contemporary scholar Martha Grace Duncan have separately written about how society treats crime and criminals as socially unclean things that must be resolved through institutional intervention.⁴² Academics have built on this concept by discussing a “quarantine” model of criminal justice that evokes the need to separate people with the contagious disease of criminality from the rest of society;⁴³ there are frequent comparisons to crime as a cancer of society that

39. See, e.g., Damian R. Murray, Nicholas Kerry & Will M. Gervais, *On Disease and Deontology: Multiple Tests of the Influence of Disease Threat on Moral Vigilance*, 10 SOC. PSYCH. & PERSONALITY SCI. 44, 44 (2019) (finding social links between upholding social norms of morality and conformity to the prevention of disease); Melissa A. Wheeler, Melanie J. McGrath & Nick Haslam, *Twentieth Century Morality: The Rise and Fall of Moral Concepts from 1900 to 2007*, PLoS ONE 1, 2 (2019) (describing how some view the decline of morality as a social contagion).

40. HOWSON, *supra* note 27, at 12.

41. See TURNER, *supra* note 16, at 72 (studying medical reformers and how this movement’s normative priors aligned with theories of social pollution and disease).

42. See *infra* note 48 and accompanying text; MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS 119–87 (1996) (exploring the historical and modern comparisons of offenders and incarcerated persons as slime and filth).

43. See, e.g., Gregg D. Caruso, *Free Will Skepticism and Criminal Behavior: A Public Health-Quarantine Model*, 32 SW. PHIL. REV. 25, 30–31 (2016); Derk Pereboom, *Free Will Skepticism and Criminal Punishment*, in THE FUTURE OF PUNISHMENT 49–78 (Thomas A. Nadelhoffer ed., 2013); Ferdinand D. Schoeman, *On Incapacitating the Dangerous*, 16 AM. PHIL. Q. 27, 27 (1979); see also Ashley T. Rubin, *Prisons and Jails Are Coronavirus Epicenters—But They Were Once Designed to Prevent Disease Outbreaks*, THE CONVERSATION (Apr. 15, 2020, 5:59 PM), <https://theconversation.com/>

suggest it will metastasize unless properly dealt with.⁴⁴ Even our most liberal politicians have fallen prey to such logic, comparing the spread of violent crime to “a national plague.”⁴⁵

Given these rhetorical similarities, it comes as no surprise that the criminal law has often found an ally in the medical sciences. First, we can consider how disease and crime were understood together throughout our history, which captures how physical diseases have been criminalized to various extents as a method of preserving social order and public health. Criminal laws have often been used to identify medically “dangerous” and “contagious” people who suffer from a host of diseases and ailments and excises them from the community through the same logic of medical quarantine. As medicine was used to diagnose a host of illnesses that illustrated social anxieties toward what dominant groups deemed unacceptable behavior,⁴⁶ crime policy followed close behind to regulate and punish such behavior.⁴⁷ Religious laws that determined cleanliness go back for thousands of years, and were used to regulate and criminalize behavior of people suffering from leprosy and bloodborne diseases.⁴⁸ In the era of the HIV/AIDS epidemic, intentional spread of the communicable disease was at one point criminalized as first-degree murder; only in the 1990s were these doctrines struck down in favor of lesser criminal offenses.⁴⁹ Thus, the

prisons-and-jails-are-coronavirus-epicenters-but-they-were-once-designed-to-prevent-disease-outbreaks -136036 [https://perma.cc/GY6U-QJJU] (describing the connection between morality and physical disease, in which the criminally “infected” were quarantined in prisons).

44. See Emily Wagster Pettus, *US Judge Condemns Mississippi City’s ‘Crime Cancer’ as He Removes State Justice from Lawsuit*, ASSOCIATED PRESS (June 2, 2023, 12:58 PM), <https://apnews.com/article/jackson-mississippi-appointed-judges-lawsuit-28492017a8397f624b72d4f756ae392e> [https://perma.cc/4QVP-7JUR] (reporting that a federal judge referred to a city’s crime problem as a “crime cancer”); Priscilla A. Clapp & Jason Tower, *A Criminal Cancer Spreads in Southeast Asia*, U.S. INST. OF PEACE (June 26, 2023), <https://www.usip.org/publications/2023/06/criminal-cancer-spreads-southeast-asia> [https://perma.cc/L45V-CGGA] (describing a crime wave in Myanmar as a growing cancer to that country’s social order); Norman E. Sharpless & Ronald A. DePinho, *Crime and Punishment*, 436 NATURE 636, 636 (2005) (using crime policy as an analogy to what healthy cells do when encountering cancer in the body).

45. Edward M. Kennedy, *Punishing the Offenders*, N.Y. TIMES, Dec. 6, 1975, at L 29, <https://timesmachine.nytimes.com/timesmachine/1975/12/06/79109347.html?pageNumber=29> [https://perma.cc/L5DA-7QPW].

46. See PETER CONRAD & JOSEPH W. SCHNEIDER, *DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS* 17 (Temp. Univ. Press 1992) (1980) (“[O]ur approach focuses on how certain categories of deviant behavior become defined as medical rather than moral problems and how medicine, rather than, for example, the family, church, or state, has become the dominant agent of social control for those so identified.”).

47. See Morgan, *supra* note 18, at 1425 (“Medicalization provides pathways to criminalization in part because it positions disability as a problem to be cured—through medication, treatment, therapy, and containment.”).

48. See HOWSON, *supra* note 27, at 95 (explaining the social theories of Mary Douglas and Emile Durkheim that realized that society sees everything that is out of place socially as dirt and unclean, and thus uses laws and other social mores to “clean” that what is unclean).

49. See, e.g., *Smallwood v. State*, 680 A.2d 512, 512–13 (Md. App. Ct. 1996) (reversing multiple

medical authority of the era always determines which individuals are dangerous to public health, and criminal law has been a part of the infrastructure used to prevent spread of these diseases. It has also been used to assuage the public that they would be safe from such “dangerous” individuals because the law would keep them in their appropriate place.

Mental illness and disability have a jaded past that continues in criminal law to this day. Homosexuality was treated like a mental illness up until only a few decades ago,⁵⁰ and was criminalized accordingly.⁵¹ Alcoholism, substance abuse, malingering, and even political dissent have been subsumed under various definitions of mental or physical disease to be regulated by the criminal law.⁵² People dealing with various mental health issues have often suffered from stereotypes that they possess characteristics of criminality.⁵³ These people are often mischaracterized by police and bystanders as being more dangerous, which then justifies legal use of force and coerced treatment through criminal law.⁵⁴ Consequently, the prison as an institution has turned into the neoliberal mental health facility,⁵⁵ often responsible for distributing more prescription mental health treatments than any other institution.⁵⁶ This

attempted murder convictions for a defendant who knew he was HIV positive and yet still committed sexual assaults); *see also* HOWSON, *supra* note 27, at 98–100 (describing the stigmatization of HIV by associating it with socially denigrated groups such as “gay men, Haitians, drug users, sex workers[,]” and the continent of Africa). Perhaps unsurprisingly, the COVID-19 pandemic did not bring such harsh criminal sanctions toward those who intentionally or negligently spread the disease that caused harm.

50. *See generally* Sarah Baughey-Gill, *When Gay Was Not Okay with the APA: A Historical Overview of Homosexuality and its Status as Mental Disorder*, 1 OCCAM’S RAZOR 5 (2011) (outlining the history of homosexuality’s classification as a mental illness from the 1950s through the 2000s).

51. *See* Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986) (upholding statute criminalizing consensual homosexual sexual activity), *rev’d*, Lawrence v. Texas, 539 U.S. 558 (2003).

52. *See* TURNER, *supra* note 16, at 181.

53. *See* Morgan, *supra* note 18, at 1423–24 (explaining the historic and modern treatment of people suffering from mental health episodes and their interactions with police).

54. *See, e.g.*, Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHIATRY 121, 121 (2003) (finding that “[m]embers of the public exaggerate both the strength of the association between mental illness and violence and their own personal risk”); Bernice A. Pescosolido, John Monahan, Bruce G. Link, Ann Stueve & Saeko Kikuzawa, *The Public’s View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 AM. J. PUB. HEALTH, 1339, 1339–45 (1999) (finding that public misperceptions of people suffering from mental health issues are central to stigmas and discriminations because people are more likely to condone legal action and coerced treatment of these individuals).

55. *See generally* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (discussing the neoliberal shifts of closing health institutions and instead criminalizing public health problems as a way of managing the poor); JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014) (discussing the move away from the medical model in 1970s due to growing fear and anxiety about people who break the law, especially after several notable prison riots in 1970s).

56. *See, e.g.*, Lili Holzer-Glier, *Inside the Massive Jail that Doubles as Chicago’s Largest Mental Health Facility*, VERA (May 26, 2016), <https://www.vera.org/the-human-toll-of-jail-2016/inside-the-massive-jail-that-doubles-as-chicagos-largest-mental-health-facility> [<https://perma.cc/U9QM-6KUH>] (discussing the Chicago jail as the largest mental health provider in the state).

should come as no surprise because over one-third of incarcerated persons have been diagnosed with a mental illness.⁵⁷

The criminality of physical ailments and the treatment of mental illness change according to social constructions of who the dominant social group deems deserving of criminal punishment. As Jamelia Morgan has studied, mental and physical disability is just one area that has been “conceived of as a social contagion or pathology to be contained through policing and carceral control.”⁵⁸ All of these criminal laws are socio-medical reactions that were purportedly meant to keep society safe based on the best science of the time; but they often functioned by subjugating the sick, disabled, and the most vulnerable. Fear was central in these criminal responses; it was fear of the unknown, fear of the unclean, and fear of the transmission of such conditions in the general public.⁵⁹

This interaction between the patient/public and disease/crime raises even more interesting questions. For one, the entire public may not be suffering from the disease of crime, just as a medical malady might not be spread throughout the entire body. Just as diseases are often concentrated in certain areas of the body, crime too is unfortunately concentrated in certain pockets of our body politic. Crime tends to be concentrated in poor areas with high population density.⁶⁰ Perhaps there is a further lesson here in the methodology; neglect can often lead to problems. If an individual neglects to care for their body through nutrition, hygiene, or general maintenance, we might not be surprised that such neglect correlates with medical problems down the road. So too should we think about our body politic neglecting our

57. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 941 (11th ed. 2022) (“[Thirty-Seven] percent of people in prison and 44 percent of the people in jail have been told by a mental health professional that they had a mental illness.” (citation omitted)).

58. Morgan, *supra* note 18, at 1414; see also Adrienne Phelps Coco, *Diseased, Maimed, Mutilated: Categorizations of Disability and an Ugly Law in Late Nineteenth-Century Chicago*, 44 J. SOC. HIST. 23, 23 (2010) (describing statutes that explicitly criminalized “[a]ny person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object, or an improper person to be allowed in . . . public places in this city[.]” stating that they “shall not therein or thereon expose himself or herself to public view”). See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (arguing that crime policy and fear is used as a tool of governance).

59. See HOWSON, *supra* note 27, at 100–01 (citing the work of Douglas by explaining the socialization of a “polluting person” as being connected to moral wrong, and their wrong “unleashes danger for someone” else); see also JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 4, 38–39 (1997) (analyzing legal arguments that seek to institutionalize and justify irrational fear of Black men).

60. See David Weisburd, Taryn Zastrow, Kiseong Kuen & Martin A. Andresen, *Crime Concentrations at Micro Places: A Review of the Evidence*, 78 AGGRESSION & VIOLENT BEHAV. 1, 13 (2024) (confirming previous studies that found that crime is concentrated at the street level and is most prevalent on densely populated streets in cities).

inner cities, our less financially fortunate citizens, and how such social and institutional neglect leads to problems of crime.

Also, conceptualizing crime as a social ill or disease can lead to some problematic conclusions unless properly contextualized. Framing crime as a disease is a tool of dehumanization that seeks to justify treating criminal offenders as a cancer: something to be removed or excised from society, or even killed.⁶¹ Humans have a pattern of dehumanizing others by comparing them to animals, nonconscious life forms, or inanimate objects to justify treating them as nonhumans. This is one of the darkest corners of our collective psyche; labelling people as rats, roaches, diseases to be cured, mud and filth, and a whole host of other analogies that form the basis for treating human beings like those things being analogized.⁶² Cages and steel bars are suitable for animals; a dustpan and trashcan are suitable for dirt and grime; excising and killing unhealthy cells is quite appropriate for cancer and biological diseases. We must resist the urge from our ancestors to go down this dehumanizing path because history bears witness to where it often leads. Labelling people that violate criminal laws as animals, dirt, or cancerous cells has the danger of repeating the punishment mistakes of the past.

Instead of using the cancer analogy and the broader disease/crime framing to dehumanize and justify excising or segregating cancerous cells, we should instead address the underlying problems to prevent the disease in the first place and to make conscious interventions for the social body to heal cells to prevent their criminal or antisocial growth.⁶³

The disease/crime framing also challenges us to consider the possibility that a treatment itself has become harmful to the social body. Just as chemotherapy introduces a carefully regulated level of poison to the body to kill cancerous cells, such a treatment can also wreak havoc on healthy cells and the body as a whole.⁶⁴ Unfortunately, chemotherapy also has the

61. See generally Anna Roberts, *Criminal Terms*, 107 MINN. L. REV. 1495 (2023) (criticizing the use of terms and language that dehumanize and mischaracterize people who commit crimes, those impacted by crimes, and the criminal legal system as a whole).

62. See Nick Haslam, *The Many Roles of Dehumanization in Genocide*, in CONFRONTING HUMANITY AT ITS WORST: SOCIAL PSYCHOLOGICAL PERSPECTIVES ON GENOCIDE 119–21 (Leonard S. Newman ed., 2020) (explaining the important role that the language of dehumanization has when seeking to treat others as less than human); DUNCAN, *supra* note 42, at 119–87 (1996) (exploring the historical and modern comparisons of offenders and incarcerated persons as slime and filth).

63. See Dariusz Adamek & Anastazja Stoj, *Cancer as a “Mafia” Within the Body: A Proposition of Conceptual Approach That Seems Congruent to the Complex Biology of the Disease*, 1 INTEGRATIVE CANCER SCI. & THERAPEUTICS 51, 51 (2014) (describing cancer cells as acting similar to an organized criminal organization, stating that they are not “aliens,” but rather “alienated” from their normal counterparts).

64. See KEVIN H. WOZNIAK, THE POLITICS OF CRIME PREVENTION: RACE, PUBLIC OPINION, AND THE MEANING OF COMMUNITY SAFETY, 198–99 (John Hagan ed., 2023) (“[U]se of surveillance, arrest, and punishment to fight crime is like chemotherapy to fight cancer. It may reduce the problem, but it

potential to lead to adverse health outcomes, including death, as part of the natural course of the treatment.⁶⁵ The considerations of punishment and mass incarceration must ask these same questions. How much has punishment had external and downstream impacts on the rest of society, and might it too also lead to negative outcomes for the body as a whole? And as will be discussed below, has the placebo treatment of mass incarceration itself become harmful to the body? The final part of the placebo analogy connects the role of doctors to various actors in the criminal justice system who prescribe and apply the treatment of punishment. Doctors play an important role in the healthcare system as care providers, and they deal directly with patients to give medical advice and prescribe treatments. Even with all of the medical advancements and growth in scientific knowledge, doctors continue to this very day to prescribe placebo treatments to their patients in clinical settings.⁶⁶ In this way, public officials in our executive departments and legislatures have built similar relationships of trust with their constituencies who have decried the social disease of crime; these decisionmakers have prescribed a solution of harsh criminal punishment as a way of treating this disease and returning society back to a state of health and harmony.⁶⁷ High-level politicians help facilitate and work with legislators and state actors such as police and prosecutors to deliver the treatment of punishment at the street level.⁶⁸

However, the incentives of politicians are not congruent with those of doctors. Consequently, we see politicians wield their prescribed treatment of punishment in a perverse loop meant to keep themselves in power. Instead of using criminal policies to make Americans *feel* safer, they use these policies to control public perception of crime in a way that ensures it will be politically advantageous. This is accomplished through the somewhat oversimplified political process that follows: Politicians and media whip up

inevitably sickens the patient in the process, and it may fail and kill the patient regardless.”).

65. See Katrina Megget, *Chemotherapy Causes Death in More than 25% of Cancer Patients*, PHARMATIMES ONLINE (Nov. 13, 2008), https://pharmatimes.com/news/chemotherapy_causes_death_in_more_than_25_of_cancer_patients [<https://perma.cc/9EKS-U8BZ>] (citing a study stating that “the use of chemotherapy to treat seriously ill cancer patients has found the treatment caused or hastened death in 27% of cases”).

66. See Franklin G. Miller & Luana Colloca, *The Legitimacy of Placebo Treatments in Clinical Practice: Evidence and Ethics*, 9 AM. J. BIOETHICS 39, 40 (2009) (citing studies stating that the use of impure placebos is seen positively by contemporary physicians); Pardo-Cabello et al., *supra* note 26, at 1344 (using survey data that found that 77% of the surveyed physicians prescribed placebo at least once a week).

67. See JEFFREY BELLIN, *MASS INCARCERATION NATION: HOW THE UNITED STATES BECAME ADDICTED TO PRISONS AND JAILS AND HOW IT CAN RECOVER* 5 (2023) (“Politicians claimed to be trying to solve the problem of crime. The critical flaw in the last fifty years of ‘tough on crime’ policies is that this never works.”).

68. See Evans, *supra* note 6, at 34–48 (discussing how federal law-enforcement initiatives trickle down to the local level).

and create fear of crime in the populace because fear drives votes⁶⁹ and views⁷⁰ respectively, and voters give power to these politicians who promise to fix the problem.⁷¹ While crime is indeed real and its impacts often terrible on an individual and societal level, politicians perversely operationalize fear of wrongdoing to bolster their political power.⁷² Therefore, there is an incentive to maintain an optimal level of fear and to push the “fear” button every few years to ensure that voters continue to trust in the politician and their policies. In 2022, for example, Fox News ramped up its coverage of crime to prime the public to vote for law-and-order Republican candidates before the congressional midterm elections; after the elections, their coverage of crime dropped by a stunning 50%.⁷³ Studies have also shown that Americans’ perception of crime changes favorably when a member of their party occupies the White House.⁷⁴ Thus, while Americans do not *feel* safer from crime, they do *feel* that they are in safe hands when voting their preferred politician into office.⁷⁵ Putting these principles together, the placebo methodology takes shape by explaining the operation and incentives

69. See John A. Shjarback & Jacob T. N. Young, *The “Tough on Crime” Competition: A Network Approach to Understanding the Social Mechanisms Leading to Federal Crime Control Legislation in the United States from 1973–2014*, 43 AM. J. CRIM. JUST. 197, 201–02 (2018) (citing studies showing that politicians, starting in the 1960s, stirred up public concern about crime to win votes, as opposed to the more popular political theory that politicians were merely responding to existing fears about crime; “[i]n sum, research indicates that politicians and governments can, and do, influence public perception of crime.”); see also Corradi & Baumer, *supra* note 7, at 1395 (“[P]oliticians often used sensational and exaggerated claims about crime in a fearmongering campaign designed to appeal to potential voters, offering increasingly punitive policies as a way to address the fears they stoked.”).

70. See Valerie J. Callanan, *Media Consumption, Perceptions of Crime Risk and Fear of Crime: Examining Race/Ethnic Differences*, 55 SOC. PERSPS. 93, 93–95 (2012) (describing how increased media coverage of crime increases public fear and perception of being victimized).

71. See e.g., BELLIN, *supra* note 67, at 67–70 (discussing a case study of New York’s harsh drug laws in the 1970s that were passed under the leadership of Governor Nelson Rockefeller based on the promise that it would put drug dealers out of business and deter crime).

72. See Michael Orsini & Paul Saurette, “Take Two and Vote in the Morning”: *Reflections on the Political Placebo Effect*, in PLACEBO TALKS: MODERN PERSPECTIVES ON PLACEBOS IN SOCIETY 239, 250 (Amir Raz & Cory Harris eds., 2015) (studying political placebo effects when politicians “tap into emotional landscapes of fear and anger” to enjoy “demonstrable political gains even if the larger cause is not affected”); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 6 (2019) (describing the political campaign ad of George H.W. Bush featuring the crimes of Willie Horton as a means to instill fear, cast doubt on Bush’s political rival’s ability to keep the country safe, and highlight Horton’s race through a prevalent dog whistle).

73. See Adam Gabbatt, *Crime Coverage on Fox News Halved Once US Midterms Were Over*, THE GUARDIAN (Nov. 25, 2022, 5:00 AM), <https://www.theguardian.com/media/2022/nov/25/fox-news-crime-coverage-decline-us-midterm-elections> [<https://perma.cc/787K-5YE4>] (comparing the 141 crime segments from Labor Day to the election with the 71 crime segments the week after the election).

74. See Megan Brennan, *Record-High 56% in U.S. Perceive Local Crime Has Increased*, GALLUP (Oct. 28, 2022), <https://news.gallup.com/poll/404048/record-high-perceive-local-crime-increased.aspx> [<https://perma.cc/EC2Y-S2XA>] (finding that Republicans traditionally think crime rates are higher when Democrats are in office and vice versa).

75. See Corradi & Baumer, *supra* note 7, at 1394–95 (finding that Americans still have the same level of fear toward crime even after decades of mass incarceration).

of using punishment as a treatment that turns out to be a mere placebo as a consequentialist project.⁷⁶ Most people, even in high-crime areas, aren't often witnesses to actual crimes that unfold before them.⁷⁷ They hear about crime from their friends, they see it on the news, and they feel the anxiety of their neighbors.⁷⁸ Thus, lowering these perceptions of crime would have multiple social benefits. Businesses are more likely to invest in areas that they perceive as low-crime, individuals are more likely to civically engage in these communities, and even property values can be impacted by market perceptions of crime.⁷⁹ Thus, if a placebo policy of punishment made society *feel* better, the law would be justified as yielding positive future outcomes. This explains in part why politicians and decisionmakers have been so adamant to prioritize public perception of crime.⁸⁰ It is indeed a social lever they can turn to yield the social and political outcomes they desire.

The social and political aspects of crime policy are all tied together in a muddled mess that prioritizes perceptions of crime over the efficacy of crime policy. Thus, the placebo of crime and punishment in the modern era is indeed meant to control *perception*, but in a way that benefits the very people who prescribe the treatment.

Punishment operates on a placebo treatment cycle. The placebo methodology shows how punishment policies utilize similar social and cultural dynamics to control public *perception* and *feeling* toward the diagnosed problem, as opposed to treating the actual problem through effective means. Ultimately, this operates according to power, which is a similar motivation in most policy, medical and criminal alike.

76. Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 590–95 (2011) (arguing that one of the primary functions of law is to manage the balance between good and bad subjective experiences).

77. Prevailing crime rates measure how many particular crimes are reported in proportion to every 100,000 people. For example, during some of the highest crime rates in the country, robbery was reported to have a crime rate of 60.1, meaning that there were 60 robberies for every 100,000 people. *See infra* note 107. This illustrates that robberies—even as problematic as they are—are relatively rare, and a person's chance of being the victim of a robbery is relatively low.

78. *See* Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 758–59 (2003) (“Many perceived ‘epidemics’ are in reality no such thing, but instead a product of media coverage of gripping, unrepresentative incidents.”).

79. *See* Arthur Acolin, Rebecca J. Walter, Marie Skubak Tillyer, Johanna Lacoe & Raphael Bostic, *Spatial Spillover Effects of Crime on Private Investment at Nearby Micro-Places*, 59 URB. STUD. 834, 836–38 (2022) (outlining literature showing that private businesses and property owners base their investment decisions, in part, on perceived crime rates); Johanna Lacoe, Raphael W. Bostic & Arthur Acolin, *Crime and Private Investment in Urban Neighborhoods*, 108 J. URB. ECON. 154, 155–56 (2018).

80. *See* Aviram, *supra* note 11, at 59, 78–79 (stating that “[b]y enacting a law to address an overestimated risk, politicians may capture some of the credit for what individuals perceive to be a reduction in the risk”).

B. THE PLACEBO EFFECT

Conceptualizing punishment as a placebo gets even more nuanced if we theorize the placebo effect, which refers to the physical benefit that placebos can produce for patients. So far, this Article has focused on the dichotomy between *efficacy* and *perception*, arguing that punishment acts like a placebo because these criminal policies have little *efficacy* but instead operate to control public *perception* in ways that benefit politicians, law enforcement, and even the broader Prison Industrial Complex (“PIC”).⁸¹ But placebos provide more than mere psychological benefits. One of the curious miracles of placebo treatments is that if a doctor prescribes such a treatment to a patient, the patient will certainly *feel* better; but in some circumstances, the placebo will actually deliver a measurable physical benefit in which the patient’s body will actually improve from a biological and medical perspective. The medical literature has extensively studied this phenomenon called the “placebo effect,” in which a treatment that has little physical benefit can somewhat trick the patient’s body into activating its own powerful disease-fighting and recovery systems.⁸² This Section theorizes what this means for thinking about punishment as a placebo.

Modern medicine and sociology have come together to understand the mysteries of how the positive placebo effect works. Scientists have hypothesized that placebos release endorphins and dopamine in the brain, which have been shown to increase pleasure and decrease the feeling of pain;⁸³ these natural chemicals in the brain also impact a patient’s positive motivation and psychological outlook on their medical condition.⁸⁴ Sociologists add to this understanding by explaining the cultural and social meanings that give placebos such power.⁸⁵ First, the disease must be socially

81. See Sheldon A. Evans, *Punishment Externalities and the Prison Tax*, 111 CALIF. L. REV. 683, 706–07 (2023) (discussing the Prison Industrial Complex as a system of private and public interests that include politics and businesses that work together to build, lobby, and perpetuate the mass incarceration system).

82. See JOPLING, *supra* note 22, at 21 (describing the placebo effect as stemming from the body’s “powerful innate capacity to heal itself, to restore itself to equilibrium, and to repair damage”); Malani, *supra* note 10, at 434 (characterizing the placebo effect as the body’s reallocation of resources toward the healing process, which also has application in social institutions).

83. Anne Harrington, *Foreward*, in PLACEBO TALKS: MODERN PERSPECTIVES ON PLACEBOS IN SOCIETY vii, viii (Amir Raz & Cory Harris eds., 2015); Ginger A. Hoffman, Anne Harrington & Howard L. Fields, *Pain and the Placebo: What We Have Learned*, 48 PERSPS. BIOLOGY & MED. 248, 258–62 (2005) (finding evidence suggesting that placebo responses and responses caused by morphine or another opioid are mediated by largely overlapping pain receptors in the brain).

84. See Caglar Irmak, Lauren G. Block & Gavan J. Fitzsimons, *The Placebo Effect in Marketing: Sometimes You Just Have to Want It to Work*, 42 J. MKTG. RSCH. 406, 408 (2005) (pointing to a placebo’s role in increasing motivation).

85. See Daniel E. Moerman, *Looking at Placebos Through a Cultural Lens and Finding Meaning*, in PLACEBO TALKS: MODERN PERSPECTIVES ON PLACEBOS IN SOCIETY 99, 102–07 (Amir Raz & Cory Harris eds., 2015) (explaining the social and cultural aspects that shape expectation and placebo effects);

conceptualized since the diagnosis dictates the treatment. In some cultures, a headache might be the affliction of demonic forces, or it might be chemical activity in the brain.⁸⁶ Thus, the meaning and definition of the disease is the starting point to understand the cultural and social power of the placebo. Second, the doctor's relationship to the patient also carries weight; Anne Harrington—a prominent leader in placebo studies—once characterized doctors as walking placebos because of their powerful role in shaping patient expectations.⁸⁷ If the doctor, healer, or shaman in the community is somebody whom a patient respects, trusts, and recognizes as a person of high social standing, these feelings will increase the patient's own subjective belief that the doctor is prescribing them a treatment that is actually *efficacious*.⁸⁸ Third, patients' own experiences shape their subjective social understanding and response to placebos. Research shows that patients who have had positive experiences with placebos in the past are good candidates for future placebo treatments.⁸⁹ Thus, hypothetically, if a patient had a good experience with eye of newt to treat their previous malady, this could subjectively impact their belief that eye of newt will perform well with a new ailment, or they would just as soon trust their doctor's prescription of a crocodile tooth.

There is something about these medical and sociological factors that trigger the body's own immune system towards positive physical results. Placebos can deliver positive medical results when treating things like the common cold and cardiovascular disease.⁹⁰ Placebos are also incredibly

Clara M.A. de Bruijn, Marc A. Benninga & Arine M. Vlieger, *Teenagers' and Parental Attitudes Towards the Use of Placebo Pills*, 182 EUR. J. PEDIATRICS 1425, 1425 (2023) (explaining that the positive placebo effect operates through multiple factors "involving a complex interaction between patients' beliefs and expectations, social and physical environmental perceptions, and conditioning from past experiences").

86. See David B. Morris, *Placebo, Pain, and Belief: A Biocultural Model*, in THE PLACEBO EFFECT: AN INTERDISCIPLINARY EXPLORATION 192, 196 (Anne Harrington ed., 1997) (detailing how cultures of faith can impact the view of illness, where Babylonians believed a headache was a demonic assault, and even modern Christian denominations associate health outcomes as determinants of faith).

87. See Natasha K.J. Campbell & Amir Raz, *Placebo Science in Medical Education*, in PLACEBO TALKS: MODERN PERSPECTIVES ON PLACEBOS IN SOCIETY 83, 88 (Amir Raz & Cory Harris eds., 2015) (citing Anne Harrington).

88. See Howard Spiro, *Clinical Reflections on the Placebo Phenomenon*, in THE PLACEBO EFFECT: AN INTERDISCIPLINARY EXPLORATION 37, 47 (Anne Harrington ed., 1997) (explaining the historical and traditional role of doctors as a power conduit through which they determined health outcomes of entire communities); Howard Brody, *The Doctor as Therapeutic Agent: A Placebo Effect Research Agenda*, in THE PLACEBO EFFECT: AN INTERDISCIPLINARY EXPLORATION 77, 83 (Anne Harrington ed., 1997) (describing the powerful impact that trusted doctors wielded in their historical communities).

89. Donald D. Price & Howard L. Fields, *The Contribution of Desire and Expectation to Placebo Analgesia: Implications for New Research Strategies*, in THE PLACEBO EFFECT: AN INTERDISCIPLINARY EXPLORATION 117, 120 (Anne Harrington ed., 1997).

90. See Boozang, *supra* note 15, at 692–98 (outlining medical literature that claims placebos can serve as an actual physical cure for all ailments); see, e.g., Laura Bienenfeld, William Frishman & Stephen P. Glasser, *The Placebo Effect in Cardiovascular Disease*, 132 AM. HEART J. 1207, 1210–19 (1996).

effective at treating more subjective medical ailments such as pain and depression.⁹¹ As it turns out, placebos can deliver positive psychological and physical results.

The placebo effect offers an interesting insight into crime and punishment as a social institution that also prioritizes and capitalizes on the subjective perceptions of the public in ironic ways that might indirectly produce public safety benefits. The crime and punishment literature has long had to grapple with two seemingly contradictory truths. On the one hand, crime rates have steadily declined in this country since the 1990s, which means we are actually getting safer.⁹² On the other hand, there is near universal agreement among criminologists, sociologists, and economists that modern incarceration policies have contributed very little, if it all, to this public safety outcome.⁹³

Scholars have tried to answer the all-important question of the factors that cause the rise and fall of crime. This Article offers a unique contribution to this literature by conceptualizing the placebo effect of punishment, which describes the indirect ways that punishing offenders over the past generation has triggered other social and institutional movements that are much more responsible for the actual drop in crime than the actual placebo of punishment itself. In other words, punishment acts like a placebo because it manipulates how the public *perceives* crime in ways that trigger other social and institutional behaviors that actually are responsible for the lower crime rate. While punishment may have a very small direct effect on crime, it has much more indirect impact on crime.

For instance, more prisons and the growth of the PIC might mean more police officers on the streets to fill these prisons. While the police and prisons are two separate institutions, there is tremendous practical overlap in how they complement each other and work together. Consequently, as the number of prisons across the nation skyrocketed during the 1990s prison-building boom, so too did politicians dedicate tremendous funds to hiring thousands

(measuring a positive placebo effect in cardiovascular disease).

91. See, e.g., Marco Annoni, *The Ethics of Placebo Effects in Clinical Practice and Research*, 139 INT'L REV. NEUROBIOLOGY 463, 469 (2018) (citing robust empirical evidence that placebos match or surpass that of conventional medications for conditions like pain, depression, recurring migraine, and irritable bowel syndrome); Tor D. Wager, James K. Rilling, Edward E. Smith, Alex Sokolik, Kenneth L. Casey, Richard J. Davidson, Stephen M. Kosslyn, Robert M. Rose & Jonathan D. Cohen, *Placebo-Induced Changes in fMRI in the Anticipation and Experience of Pain*, 303 SCI. 1162, 1162–64 (2004) (finding placebo effects account for both lower reported pain and reduced activity in pain processing areas of the brain).

92. See Eric P. Baumer & Kevin T. Wolff, *Evaluating Contemporary Crime Drop(s) in America, New York City, and Many Other Places*, 31 JUST. Q. 5, 8–11 (2014) (analyzing the declining crime rates in America since the 1990s).

93. See *infra* notes 121–130 and accompanying text.

of police officers to enforce the rising drug war.⁹⁴ In this way, punishment policies of incarceration indirectly supported the growth of police forces. And there is evidence that the presence of additional police officers on the street deters would-be offenders because it increases the likelihood that they will be caught in the act or effectively tracked down soon after committing a crime.⁹⁵ Similar to a placebo, punishment policies did not contribute to actually treating the disease of crime; instead, they triggered other institutional behavior to increase police presence in a way that more effectively lowered the crime rate.

In some places, there might also be a self-fulfilling prophecy for communities that *feel* safer and employ social behavior that then makes them safer. Pedestrian traffic is a well-documented feedback loop in this regard, because people who feel that their neighborhood is a safe place to walk will choose to walk more places during day and night hours; in turn, this increased pedestrian traffic means that there are more eyes, ears, and potential witnesses which deter criminal behavior in these neighborhoods.⁹⁶ It also might be interesting to theorize how punishment policies indirectly impact other social behaviors that have been linked to lower crime rates, such as increasing employment and high school graduation rates,⁹⁷ among others.

These few paragraphs are not meant to be exhaustive and represent a short foray into digging into the empirics of crime policy to understand how punishment policies might be impacting social and institutional behavior to indirectly have positive impacts on the social ill of crime. Just as placebos operate according to biological functions that are triggered through a patient's social understandings and expectations, so too can punishment be

94. See Lauren-Brooke Eisen, *The Federal Funding That Fuels Mass Incarceration*, in EXCESSIVE PUNISHMENT: HOW THE JUSTICE SYSTEM CREATES MASS INCARCERATION 43, 44–46 (Lauren-Brooke Eisen ed., 2024) (describing the hundreds of millions of dollars that the federal government used to fund the militarization of local police departments and the hiring of new police officers during the tough-on-crime era).

95. See Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 13–22 (2017) (finding that police deployment and presence has a measurable impact on deterrence).

96. See Hongwei Dong, *Does Walkability Undermine Neighborhood Safety?*, 22 J. URB. DESIGN 59, 73–74 (2018) (finding that the impact of walkable neighborhoods depends on crime type and that other factors such as mixed-use land might increase crime). *But see* Narae Lee & Christopher Contreras, *Neighborhood Walkability and Crime: Does the Relationship Vary by Crime Type?*, 53 ENV'T & BEHAV. 753, 780 (2021) (finding that walkable and dense neighborhoods increase victimizations of crime).

97. See *infra* note 126 and accompanying text, which highlights the impact that high school graduation and job training has on crime rates.

theorized as a treatment to the social ill of crime that triggers beneficial behaviors that produce lower crime rates.

* * *

As a closing thought to this Part, I implore readers to not lose the forest for the trees. This Article has thus far argued that mass incarceration policies can be conceptualized as a placebo treatment that while not *efficacious*, may nevertheless deliver benefits to public *perception*. But admittedly, analogizing criminal punishment to medical placebo treatments is not a 1:1 comparison; nor is it a perfect analogy that is seamlessly intuitive or foolproof to the avid intellectual. For example, comparing politicians, police, and others to doctors leaves a bit to be desired given the unique doctor/patient relationship that may not be fully captured in the punishment context. Some might find that analogizing crime to a social disease is also problematic and might struggle to make the connection between an individual's reaction to a placebo treatment and society's reaction to the institution of punishment. But the frustration that comes from trying to perfectly fit an octagon peg into a round hole misses the fact that the shapes are similar enough to make observations that might be shared by both. Sure, it doesn't fit perfectly, but they are indeed from the same family and the same logic of design.⁹⁸ Like all analogies, theorizing punishment as a placebo helps us conceptualize and understand similar principles in seemingly unrelated subjects.

The placebo methodology that this Article builds must be judged according to its ability to highlight latent truths about punishment policies. Consequently, this punishment as placebo analogy should be justified because its theoretical and explanatory contributions outweigh its imperfections around the edges.

II. MASS INCARCERATION AS PLACEBO

The theoretical grounding of placebo punishment policies is perhaps most impactful in how we should reconceptualize the study and discussion of mass incarceration. Although the placebo methodology could be applied to many case studies of different punishment tools,⁹⁹ mass incarceration is the "beating heart"¹⁰⁰ of the criminal punishment system. It is the prison, as an institution, that is at the center of the wider penal imagination and has been imbedded with so much social and cultural meaning as to how we

98. My apologies to readers for using an analogy (octagon to circle) to explain another analogy (punishment to placebo).

99. See *infra* Part IV.

100. See Evans, *supra* note 81, at 685.

separate society from dangerous “others.”¹⁰¹ While the national population of incarcerated persons is declining,¹⁰² the carceral system still boasts physical control over 1.9 million people.¹⁰³ Nearly 7 million are surveilled under a growing e-carceration and parole population.¹⁰⁴ And the carceral state extends even further to the experiences of the 113 million individuals who have had close relatives incarcerated at some point in their lives.¹⁰⁵ In effect, one-third of Americans have been impacted by the wide and unforgiving reach of mass incarceration.

The placebo methodology as applied to mass incarceration argues that it is best understood as a set of laws and policies meant to control public perception of crime, playing on the subjective emotions of fear, safety, and the ever-elusive ideal of justice. Much has already been written about the failed efficacy of mass incarceration policies to improve public safety,¹⁰⁶ but this misses one of the foundational principles of the policy’s placebo: regardless of its actual effects, it still delivers costs and benefits based on how it controls public perception of crime.

This Part builds on the existing mass incarceration literature by discussing whether the benefits of perception are worth the costs of mass incarceration. Section II.A develops the history of mass incarceration

101. See SMITH, *supra* note 14, at 57, 59–61 (capturing the prison as the center of “the wider penal imaginary” and as a social and cultural icon at “intersecting discourses on crime, morals, civilization, and the state”).

102. The U.S. prison population reached its height in 2010 at 2.3 million people. Ever since, it has plateaued and declined to its present number. This has been in large part a result of progressive decarceration efforts of a few large states and counties, but a total of thirty-nine states have enjoyed incremental decreases in prison populations over the past decade. See Ashley Nellis, *Mass Incarceration Trends*, THE SENT’G PROJECT (May 21, 2024), <https://www.sentencingproject.org/reports/mass-incarceration-trends> [<https://perma.cc/NJ7B-G4M8>].

103. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL’Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html> [<https://perma.cc/5S2K-HPZZ>] (documenting how many people are incarcerated in different conditions, under different governments and circumstances).

104. See VICTORIA LAW, “PRISONS MAKE US SAFER”: AND 20 OTHER MYTHS ABOUT MASS INCARCERATION 9 (2021) (estimating that 6.7 million people in the United States are subject to other “forms of supervision includ[ing] house arrest, electronic monitoring, parole, and probation”).

105. BRIAN ELDERBROOM, LAURA BENNETT, SHANNA GONG, FELICITY ROSE & ZOË TOWNS, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA’S FAMILIES 10 (2018), <https://everysecond.fwd.us/downloads/everysecond.fwd.us.pdf> [<https://perma.cc/N87T-TVEF>] (“[A]pproximately one in two adults (approximately 113 million people) has had an immediate family member incarcerated for at least one night in jail or prison. One in seven adults has had an immediate family member incarcerated for at least one year, and one in 34 adults has had an immediate family member spend 10 years or longer in prison.”)

106. See *infra* notes 120–137 and accompanying text; see also Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2119–20 (2017) (“It is now widely recognized that mass incarceration has been too costly with respect to long prison sentences, the loss of human capital, the racial disparities in convictions, the financial toll of mass incarceration, and the ineffectual nature of prisons to stop crime.”).

through the lens of policies that would assuage public fears, and Section II.B continues by discussing the policies' ineffectual impacts on public safety. In light of these historical and modern conclusions, Section II.C argues that the placebo methodology more accurately captures the intent and impacts of mass incarceration policies.

A. RESEARCH AND DEVELOPMENT

The history of fear and mass incarceration in the modern era begins with the unprecedented crime wave in the 1960s and 1970s. During these two decades, violent crime rose by 271%, burglary and robbery rose by 231% and 318%, respectively, and similar increases were reported for sex crimes and property crimes.¹⁰⁷ This fear of the “other” was further cemented by studies during the 1970s showing that a small number of offenders were responsible for a high proportion of offenses committed.¹⁰⁸ Further, criminological studies began persuading lawmakers that rehabilitation did not work consistently¹⁰⁹ and that high levels of recidivism would continue without more incapacitation efforts.¹¹⁰

107. According to the UCR Data Tool, the violent crime rate was 160.9 reported offenses per 100,000 population in 1960 and 596.6 reported offenses per 100,000 population in 1980. The burglary rate was 508.6 reported offenses per 100,000 population in 1960 and 1,684.1 reported offenses per 100,000 population in 1980. The robbery rate was 60.1 reported offenses per 100,000 population in 1960 and 151.1 reported offenses per 100,000 population in 1980. Michael Schearer, *The Armed Career Criminal Act: Imprecise, Indeterminate, and Unconstitutional* 3 (Dec. 3, 2015) (unpublished manuscript). See also LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS* 104 (2016) (stating that “there is little dispute that violent crime grew dramatically between 1960 and the 1990s and within every state”).

108. See, e.g., Robert J. Sampson & L. Ash Smith, *Rethinking Criminal Propensity and Character: Cohort Inequalities and the Power of Social Change*, 50 CRIME & JUST. 13, 14 (2021) (citing a 1972 study showing that “just 6 percent of males in a Philadelphia birth cohort committed over 50 percent of all offenses through age 18”); Natalie N. Martinez, YongJei Lee, John E. Eck & SooHyun O, *Ravenous Wolves Revisited: A Systematic Review of Offending Concentration*, 6 CRIME SCI. 1, 1 (2017) (citing similar studies finding a small percentage of offenders are responsible for a large share of criminal activity); MARK A. PETERSON, HARRIET B. BRAIKER & SUZANNE M. POLICH, *DOING CRIME: A SURVEY OF CALIFORNIA PRISON INMATES* 39–40 (1980) (determining that 10% of incarcerated persons are “criminal specialists” that are responsible for 58% of all armed robberies, 65% of all burglaries, 60% of all motor vehicle thefts, and 46% of all assaults).

109. See, e.g., DOUGLAS LIPTON, ROBERT MARTINSON & JUDITH WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 53 (1975) (compiling 231 studies over 20 years from multiple jurisdictions and finding that there were no reliable predictors for rehabilitative efficacy in prisons). But see FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* 2–5 (1982) (finding that rehabilitative tools did work in the prison system when developed and applied in the proper contexts); D.A. Andrews, Ivan Zinger, Robert D. Hoge, James Bonta, Paul Gendreau & Francis T. Cullen, *Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis*, 28 CRIMINOLOGY 369, 384–86 (1990) (finding that rehabilitative tools did work in the prison system when developed and applied in the proper contexts).

110. See KADISH ET AL., *supra* note 57, at 25 (stating that despite modern evidence that rehabilitative programs worked to reduce recidivism, “the conventional wisdom that ‘nothing works’ had become fixed in the public mind”).

The Nixon administration, for its part, was driven by its own fear of political opposition, namely from recently empowered African Americans after the Civil Rights movement and anti-war “Hippies,” two groups that threatened Nixon in national politics.¹¹¹ Thus, Nixonian criminal politics was defined by convincing the nation that “the whole problem is really the blacks . . . The key is to devise a system that recognizes this while not appearing to.”¹¹² While there was already a racialized fear of the dangerous “other” imbedded in American culture,¹¹³ the rise in crime during the same era as the Civil Rights and anti-war movements prompted an unprecedented fear of crime that was directed towards certain communities.¹¹⁴

By targeting these “others”—groups that were outside of the mainstream social and cultural understandings of American white middle-class identity—Nixon captured the populism of his era. Social scientists have long recognized that the fear of crime became a defining “cultural theme” during this era that called for policies that “aim[ed] to reduce fear levels.”¹¹⁵ Empirical criminologists of the time were baffled by these changes. The mass incarceration policies developing before their very eyes had little to do with actual crime control or preventing victimization but were instead driven by fear and myth that traded on racial and cultural stereotypes emerging from the anxieties of suburbanite imagination and political rhetoric.¹¹⁶ And this penal populism of fear has been carefully nurtured as a winning political

111. See Tom LoBianco, *Report: Aide Says Nixon's War on Drugs Targeted Blacks, Hippies*, CNN (Mar. 24, 2016), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie> [<https://perma.cc/BR2R-HWDV>] (quoting a 1994 interview with John Ehrlichman, Nixon's domestic policy chief, focusing on anti-war “hippies” and “black people” that sought to disrupt those communities by “arrest[ing] their leaders, raid[ing] their homes, break[ing] up their meetings, and vilify[ing] them night after night on the evening news”).

112. HINTON, *supra* note 2, at 142 (quoting Nixon's chief of staff).

113. See generally KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* (2010) (tracking the historical roots of the overcriminalization of Black Americans and the association of Blackness with criminality).

114. See Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 *STUD. AM. POL. DEV.* 230, 230–31 (2007) (recognizing that while the rise of violent crime played an important backdrop, Republicans framed the issue in punitive ways to slow the civil rights momentum of the 1960s and 1970s); see, e.g., DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* 241, 294–96 (3d ed. 1999) (explaining how government officials associated drugs with certain demographics that were seen as being socially deviant and threatening to the social fabric of society such as Blacks, Chinese, Bolsheviks, Hispanics, and others and how fear of the “other” fueled social and criminal drug policy).

115. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 10 (2001).

116. See SMITH, *supra* note 14, at 5, 86–89 (highlighting the importance of these themes of fear and crime, the racialized aspects of punishment and its connection to American culture, and how different they were from effective crime policy); see also David L. Bazelon, *The Hidden Politics of American Criminology*, 42 *FED. PROB.* 3, 3 (1978) (stating in the late 1970s that “politics is at the heart of American criminology”).

strategy ever since.¹¹⁷ National and local actors alike adopted this tough-on-crime strategy, promising more punitive punishment as a way of promising to reduce fear and anxiety related to crime.¹¹⁸ Consequently, fear was increasingly used as a justification and catalyst for harsher punishments, and politicians were all too willing to stoke, control, and benefit from these public fears.¹¹⁹

B. TREATMENT EFFICACY

Although controlling public perception and fear of crime was one of the primary drivers of developing mass incarceration policies, their efficacy in reducing crime should not be ignored. The mass incarceration policies of the 1980s and onward have enjoyed association with lower crime rates because crime has generally gone down over the past thirty years.¹²⁰ But there is debate among criminologists and economists about the actual correlation between incarceration rates and crime rates.

The weight of analysis tends to agree that there is some correlation between the population of incarcerated persons and the crime rate, but the connection is minimal.¹²¹ In just twenty years, between 1980 and 2000, the incarceration rate exploded by over 300%.¹²² And yet, this treatment has

117. See, e.g., Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR. AM. L. & POL'Y 3, 16–18 (2013) (discussing Nixon's and Reagan's impact on the infusion of criminal law, race, and politics); BARKOW, *supra* note 72, at 6 (discussing George H.W. Bush's presidential campaign that activated fear and politicized crime by using ads featuring Willie Horton, a Black man, who had recently committed a terrible crime); Harry A. Chernoff, Christopher M. Kelly & John R. Kroger, *The Politics of Crime*, 33 HARV. J. LEGIS. 527, 529–30 (1996) (discussing the impacts and the political failure of Clinton's 1994 Crime Bill); Anne Gearan & Abby Phillip, *Clinton Regrets 1996 Remarks on 'Super-Predators' After Encounter with Activist*, WASH. POST (Feb. 25, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist> [<https://perma.cc/NT6E-BNUW>] (discussing Hillary Clinton's rhetoric in the 1990s, referring to young Black offenders as “super predators”).

118. See Michael C. Campbell & Heather Schoenfeld, *The Transformation of America's Penal Order: A Historicized Political Sociology of Punishment*, 118 AM. J. SOCIO. 1375, 1390–97 (2013) (discussing the political synergy between local and state actors supporting a national, party-wide tough-on-crime agenda).

119. See Corradi & Baumer, *supra* note 7, at 1379 (finding that “a promised reduction in fear and increase in personal safety were frequent claims throughout the [tough-on-crime] period”).

120. See Matthew Friedman, Ames C. Grawert & James Cullen, *Crime Trends: 1990–2016*, BRENNAN CTR. FOR JUST. (2017), <https://search.issuelab.org/resources/27693/27693.pdf> [<https://perma.cc/NF8N-B3F9>] (measuring falling crime rates from 1991 to 2016 in all major categories).

121. See, e.g., Joan Petersilia, *Beyond the Prison Bubble*, 268 NAT'L INST. JUST. J. 26, 27 (2011) (“Mass imprisonment has helped reduce crime rates, but most specialists agree that the effects have been considerably smaller than proponents claim . . .”).

122. See *Growth in Mass Incarceration*, THE SENT'G PROJECT, <https://www.sentencingproject.org/research> [<https://perma.cc/TM3H-H4L4>] (reporting the prison population in 1980 and 2000 at 315,974 and 1,334,170, respectively).

yielded marginal utility. For example, Steven Levitt found that increased rates of incarceration in the 1990s were only responsible for 25% of the drop in crime during that time.¹²³ Don Stemen found that between 1980 and 2000, every 10% increase in the prison population was only responsible for a 2% to 4% decrease in the crime rate.¹²⁴ Additionally, many others have come to argue that there is a much lower correlation; they posit that the exploding incarceration rate was only responsible for a 2% to 15% decrease in crime rates.¹²⁵ But even the high watermark of a 25% impact should make us question whether such a use of resources is justified when these resources could be reinvested in programs that have been proven to be far more efficient at lowering crime rates.¹²⁶

Another group of scholars refutes the above by arguing that there is no statistically significant correlation between the increase in the population of incarcerated persons and the decrease in crime.¹²⁷ Starting in the 1990s, the

123. Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSPS. 163, 178–79 (2004) (estimating that as much as 25% of the crime drop during the 1990s came from higher incarceration rates).

124. Don Stemen, *The Prison Paradox: More Incarceration Will Not Make Us Safer*, VERA RSCH. ADVISORY BD. (July 2017), https://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [<https://perma.cc/N3JB-22V4>] (finding that between 1980 and 2000, every 10% increase in incarceration rates yielded a 2% to 4% reduction in crime rates).

125. See, e.g., JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 218 (2018) (summarizing criminology literature that credits “[t]he tough on crime movement” and incarceration for lowering the crime rate, although acknowledging other contributing factors); THOM BROOKS, PUNISHMENT: A CRITICAL INTRODUCTION 52 (2d ed. 2021) (summarizing studies that “reveal that the effects of deterrence upon crime rates are at most between about a 2 and 5 per cent decrease in crime following a 10 per cent increase in the prison population” (citations omitted)); Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 183 (Marc Mauer & Meda Chesney-Lind eds., 2002) (finding that low levels of incarceration within a neighborhood increased public safety); Robert J. Sampson, *The Incarceration Ledger: Toward a New Era in Assessing Societal Consequences*, 10 CRIMINOLOGY & PUB. POL’Y 819, 822 (2011) (estimating incarceration has had a 10 to 15% reduction in crime rates).

126. There are dozens of such programs that range from early childhood education to drug and mental health courts and a number of things in between. See, e.g., Carrie Pettus-Davis & Matthew W. Epperson, *From Mass Incarceration to Smart Decarceration* 3, 8 (Am. Acad. of Soc. Work & Soc. Welfare, Working Paper No. 4, 2015) (finding that specialized drug and mental health courts significantly reduce recidivism and a need for incarceration); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 160, 183 (2004) (finding that “a 1-percent increase in male high school graduation rates would save as much as \$1.4 billion, or about \$2,100 per additional male high school graduate.”); BROOKS, *supra* note 125, at 64 (discussing the success of juvenile drug and alcohol treatment and mental health treatment that reduce recidivism); Paula Smith & Myrinda Schweitzer, *The Therapeutic Prison*, in THE AMERICAN PRISON: IMAGINING A DIFFERENT FUTURE 4 (Francis T. Cullen, Cheryl Lero Jonson & Mary K. Stohr eds., 2014) (describing the success of a 141-prong instrument to measure rehabilitative qualities of prison programs that reduce recidivism); Kate Weisburd, *Rights Violations as Punishment*, 111 CALIF. L. REV. 1305, 1314 (2023) (describing over ten incarceration alternatives, such as specialty courts, electronic monitoring, diversion programs, religious programs, and others).

127. See, e.g., John E. Eck & Emily B. Eck, *Crime Place and Pollution: Expanding Crime Reduction Options Through a Regulatory Approach*, 11 CRIMINOLOGY & PUB. POL’Y 281, 282 (2012)

National Criminal Justice Commission found that there is “little or no correlation between rates of crime and the number of people in prison.”¹²⁸ Twenty years later, during a time when the incarcerated population reached its height,¹²⁹ Jeffrey Fagan and Tracey Mears found that increasing the number of people incarcerated resulted in “stable if not *higher* levels of crime.” They decried the lack of commensurate public safety benefit for the ever-increasing rates of incarceration.¹³⁰

A smaller group of scholars have come to even starker conclusions, arguing that mass incarceration has had negative impacts on public safety, causing a criminogenic effect. Don Stemen found that when incarceration rates increase past 325 to 492 inmates per 100,000 people (of which many states have far surpassed), crime rates begin to rise.¹³¹ Francis Cullen, Cheryl Jonson, and Daniel Nagin performed a systematic review of multiple meta-analyses of the impacts that incarceration has on crime rates and reported that in the most compelling studies, incarceration was not associated with any deterrent effects but instead increased recidivism rates anywhere from 7 to 14%.¹³² These authors have linked this data to a number of potential explanations since incarcerating large numbers of people can depress economies, threaten social network formation, and politically disenfranchise communities, which can then lead to criminal behavior.¹³³

On the other end of the spectrum, there are scholars that have defended the status quo, arguing that mass incarceration policies in the 1990s were causally related to lower crime rates. This literature is most associated with the harshest criminal sentencing policies, such as the three strikes laws that

(“After a decade of enquiry, for example, researchers cannot confidently attribute the dramatic decline in U.S. crime during the 1990s to any government policy: police hiring, police practices, incarceration policies, or other criminal justice strategies.”).

128. See STEVEN R. DONZIGER, *THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION* 42 (1996) (summarizing National Criminal Justice Commission findings).

129. See *supra* note 102 and accompanying text, indicating that the population of incarcerated persons reached its recorded height in 2010.

130. Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 176 (2008).

131. Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, VERA INST. OF JUST. 7 (Jan. 2007), <https://www.vera.org/publications/reconsidering-incarceration-new-directions-for-reducing-crime> [<https://perma.cc/FPW8-NJJG>] (calling the point at which incarceration rates start to yield criminogenic effects an “inflection point”).

132. Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 54S–58S (2011) (reviewing several studies that separately found custodial incarceration increased crime rates).

133. See Evans, *supra* note 81, at 708–14. See also Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 336 (2011) (“Through its criminogenic impact, imprisonment has cross-cutting effects for the wider population, promising safety through deterrence at the same time as it increases victimization at the hands of former inmates.”).

went into effect during that time.¹³⁴ But even among these scholars, there was growing unease about the continued growth and marginal impacts of the carceral state. The intellectual and empirical journey of John DiIulio, Jr. illustrates this point. In 1996, he argued that prisons were a bargain since locking up a person for “about \$25,000” per year in the prison system saved society from the potential murder and mayhem he or she would otherwise be committing on the streets.¹³⁵ As a Democrat, he channeled bipartisan fears in the 1990s, stating that “a wave of young, violent, mostly minority, remorseless juvenile delinquents, known as super-predators would plague the country and increase crime rates” without harsh incapacitation measures.¹³⁶ Yet only a few years later in 1999, he realized that mass incarceration had reached the limits of its utility. He argued that locking up more people would not have any further public safety benefit and that it was time to shift the penal focus to drug treatment and effective parole programs.¹³⁷ Unfortunately, politicians benefiting from mass incarceration were not so keen to heed his advice.

These seemingly conflicting streams of data can be best harmonized with a general model of marginal utility across four stages.¹³⁸ At the first stage, studies have shown that incarceration is most effective as a deterrent and incapacitation tool when the crime rate is high.¹³⁹ For every unit of

134. See, e.g., Bill Jones, *Why the Three Strikes Law Is Working in California*, 11 STAN. L. & POL'Y REV. 23, 24–25 (1999) (claiming there were sharp declines in crime from 1994–1999, which arguably could only be explained by the three strikes law that went into effect at that time); Eric Helland & Alexander Tabarrok, *Does Three Strikes Deter?: A Nonparametric Estimation*, 42 J. HUM. RES. 309, 326–28 (2007) (finding a deterrence effect of three strikes laws on second strike offenders, concentrated among violent offenders). But see Walter L. Gordon III, *California's Three Strikes Law: Tyranny of the Majority*, 20 WHITTIER L. REV. 577, 587–88 (1999) (finding that three strikes laws had marginal impact on crime in California).

135. John J. DiIulio, Jr., *Prisons are a Bargain, by Any Measure*, BROOKINGS (Jan. 16, 1996), <https://www.brookings.edu/articles/prisons-are-a-bargain-by-any-measure> [https://perma.cc/3JU5-LS8E].

136. See Matt Delisi, Brendan D. Dooley & Kevin M. Beaver, *Super-Predators Revisited*, CRIMINOLOGY RSCH. FOCUS 21, 21 (2007).

137. See John J. DiIulio, Jr., *Two Million Prisoners Are Enough*, WALL ST. J. (Mar. 12, 1999, 12:37 AM), <https://www.wsj.com/articles/SB921187476975066509> [https://web.archive.org/web/20201024103321/https://www.wsj.com/articles/SB921187476975066509]; see also *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later> [https://perma.cc/6YYA-KALF] (discussing DiIulio's participation in an amicus brief in 2012 stating that predictions of superpredator recidivists were unfounded).

138. I use the term “general model” here because this Article is not embarking on its own empirical project that analyzes an original data set regarding incarceration rates and their impact on violent crime and property crime. Instead, it interprets others' data in a way that generalizes the findings.

139. See Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. 275, 300–02 (2012) (finding that between 1978 and 1990, each additional prison year (for example, locking one more person up for one more year) prevented 2.5 violent crimes and 11.4 property crimes; between 1991 and 2004, however, those numbers fell to 0.3 violent crimes and 2.7 property crimes).

punishment, you get a higher payoff in crime reduction. At the second stage, punishment suffers from the law of diminishing returns, in which every unit of punishment still achieves a measure of crime reduction but much less than the previous stage.¹⁴⁰ At the third stage, the crime rate levels off, during which every unit of punishment does not achieve any payoff in crime reduction.¹⁴¹ At the fourth stage, there is an inflection point at which punishing offenders actually increases the crime rate.¹⁴²

Like many medical treatments, law and policy can have similar diminishing returns over time as social problems and disease adapt in the same way that all organisms adapt and evolve in the physical and social body. As a result, a treatment program must be adaptive to long-term illnesses and should be administered differently in different phases.

These statistical studies, cost-benefit analyses, and other tools of administrative expertise have been abandoned in the criminal punishment regime.¹⁴³ There are decades of data to which this Article cannot do justice that question and prove the inefficacy of mass incarceration policies to improve public safety. Thus, a policy that fails to track and account for actual impacts on public safety should be understood as prioritizing the placebo methodology's focus on tracking and accounting for public perception of crime, which is all too vulnerable to political power, abuse, and perverse incentives.

140. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 245 (2011) (reviewing deterrence literature and concluding that “[i]f punishment deters crime, we seem to be getting much less deterrent bang for the imprisonment buck than we once did”).

141. See David Roodman, *The Impacts of Incarceration on Crime*, OPEN PHILANTHROPY (Sept. 2017), https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/The_impacts_of_incarceration_on_crime_10.pdf [<https://perma.cc/4VGL-ZYSB>] (estimating that the impact of incarceration on crime in the US today is zero).

142. See Wesley Vaughn, Opinion, *Does Putting More People in Prison Reduce Crime? Maybe Not Anymore: Opinion*, AL.COM (Sept. 15, 2014, 2:19 PM), https://www.al.com/opinion/2014/09/does_putting_more_people_in_pr.html [<https://perma.cc/84DJ-28SN>] (reviewing Pew research and interviewing experts to conclude that “as prison populations continue to grow, the benefit of incarceration declines and reverses, and you even see crime increase. That seems to [the author] to be where we are now”).

143. See Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1438 (2022) (stating that in the policy area of incarceration and incarcerated persons' rights, “costs and benefits are not weighed, and alternatives are not assessed, either by courts considering constitutional claims or even necessarily by carceral agencies during their internal rulemaking processes” (citations omitted)). See generally Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515 (2021) (documenting the inconsistencies and lack of regulatory analysis by courts and administrative agencies of prison conditions and prisoners' rights).

C. PLACEBO RESPONSES

To summarize, mass incarceration policies do not deliver on their public safety promises and were never solely designed to do so. Out of a culture of fear, myth, and superstition, our society decided to pivot from careful, rehabilitative carceral efforts to a mass incapacitation effort to satisfy collective retributive cultural morality and expressive condemnation of the “others” who we feared.¹⁴⁴ We now benefit from thirty years of data that shows that mass incarceration policies are no longer (and may never have been) effective at lowering crime rates. Yet we still choose to punish harshly and ineffectively. This Article concludes that modern punishment can no longer be justified under the veneer of public safety. Rather, it is motivated by controlling public perception and fear of crime in a way that subjugates entire communities to the benefit of those in power. This Section further cements the data connecting medical and social placebos in the punishment context. First, placebos enjoy the largest impacts on patient outcomes when the patient is experiencing the highest amount of symptoms. For example, placebos deliver the highest amount of pain relief when the patient is experiencing the most amount of pain.¹⁴⁵ This makes intuitive sense; when somebody is experiencing pain, their main concern is finding something to subside that pain, so they are more susceptible to and even desperate for any treatment that a trusted doctor tells them will provide relief. The subjective aspect of pain means that the placebo’s effects are judged in relation to the level of pain the patient is suffering. The higher the pain, the more the placebo relieves.¹⁴⁶ The very nature of placebos means that they do not deliver an objective and consistent level of psychological and therapeutic benefit; it is all relative to the patient’s perception of their problem.¹⁴⁷

This finding also makes intuitive sense when considering the placebo methodology approach to punishment. Public support for mass incarceration policies was highest when the “disease” of crime had the most crippling impacts on public fear. Data shows that public support of harsh tough-on-crime policies was highest from the 1970s through the 1990s but has declined as of the late 2000s.¹⁴⁸ Criminologist Lisa Miller has documented this by

144. See Aliza Hochman Bloom, *Reviving Rehabilitation as a Decarceral Tool*, 101 WASH. U. L. REV. 1989, 1997–99 (discussing the dominant rehabilitative goals of criminal punishment before the 1970s).

145. See Price & Fields, *supra* note 89, at 118.

146. See *id.*

147. See *supra* notes 107–110 and accompanying text; see also Aviram, *supra* note 11, at 78 (“Placebo effects are most visible, and most conveniently illustrated, in cases of widespread panics.”).

148. See Peter K. Enns, *The Public’s Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 861–64 (2014) (showing trend patterns of Americans’ attitudes towards harsh criminal justice policies increasing from the 1970s to the 1990s but starting to decrease and level off in the late 2000s).

studying public perception of crime and concluded that politicians' ability to manipulate public perception of crime for political gain is highest when violent crime rates are high; this power of perception sharply declines when violent crime rates are lower.¹⁴⁹ To simplify, the public enjoys a higher positive reaction to the placebo treatment of mass incarceration when its fear of crime is at its highest. As the disease subsides, so does the effectiveness of the placebo.

Second, placebos also share in the law of diminishing returns. This is described as a "placebo sag" in the medical literature to indicate that there is a danger of treatment complacency.¹⁵⁰ Although patients may receive tremendous therapeutic benefit from Placebo A, the benefit wanes over time as patient perceptions of what they believe to be an efficacious treatment continues to decline. It is an understandable psychological cycle if a patient perceives Placebo A as not having the same effect as it did a month ago; thus, their future expectations based on their own experience contribute to the sag. Continuing to prescribe Placebo A will not deceive patients forever—or society for that matter.

The support for mass incarceration has also started to sag. Indeed, this goes a long way in explaining recent movements for criminal justice reform;¹⁵¹ after over thirty years of mass incarceration policies, the public is starting to realize that the placebo is losing some of its luster. There has been a steady drumbeat toward reform, but this must be tempered with continued fluctuation in public perception of crime. When the public is confronted with political and media messaging that suggests a spike in crime, public support for harsh criminal punishments returns in certain segments of the social body.¹⁵² This ever-changing landscape of public perception—and the powerful harbingers of doom that continue to press these "fear" buttons—is

149. See generally MILLER, *supra* note 107.

150. See Boozang, *supra* note 15, at 719 (describing how placebos lose their impact over time based on a patient's past experience); Bennett Foddy, *Justifying Deceptive Placebos*, in PLACEBO TALKS: MODERN PERSPECTIVES ON PLACEBOS IN SOCIETY 52, 63 (Amir Raz & Cory Harris eds., 2015) ("Another reasonable objection against the clinical placebo is that, if the use of placebo becomes too widespread, its effectiveness will diminish . . .").

151. See Press Release, ACLU, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/UJM7-47BF>] (finding that 91% of Americans "say that the criminal justice system has problems that need fixing" and 71% "say it is important to reduce the prison population in America").

152. See Megan Brennan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), <https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx> [<https://perma.cc/G328-UMX8>] (finding in 2023 that 58% of Americans do not think the criminal justice system is harsh enough, up sharply since 2020). This finding of an increase of people supporting tougher crime policies tracks the small spike in crime that happened after the COVID-19 lockdowns ended in 2020–2021.

best understood as a placebo method of controlling public perception to maximize political gain.

Finally, perhaps the most consequential aspect of placebo treatments is that placebos can indirectly have a negative impact on a patient's health by giving them a false sense of healing. When a patient takes a placebo treatment, three things can happen regarding the patient's *actual* physical health. First, the placebo makes the patient *feel* better, which has a positive impact on the body's ability to physiologically fight the disease and the patient *actually* gets better. Second, the placebo has some effect on the patient's feelings but has no impact on the body; in this scenario, the disease is allowed to run its natural course and may result in the patient's natural immune system fighting off the disease and the patient improving. Third, take the same scenario, but the disease runs its natural course, resulting in the patient getting worse.¹⁵³ As a result, placebos can indeed be dangerous depending on the seriousness of the affliction. All the while, the patient believes they are receiving an efficacious treatment and forgoes seeking other treatments that might be more effective.

This third scenario has important ramifications for the status quo and how we chart future treatments for the social problem of crime. If we are indeed in an era in which mass incarceration has a criminogenic effect,¹⁵⁴ then the placebo is truly lulling society into a false sense of *feeling* better. Because mass incarceration policies operate in the modern era primarily as a placebo, this comes at the expense of the disease of crime being permitted to run its natural course and make us all worse off than we would otherwise be under a different punishment regime.

III. SOCIO-MEDICAL ETHICS AND JUSTIFICATIONS

The study, theory, and practice of punishment can benefit from the same reflection that placebos have sparked in medicine, but the synergies between these fields still spark questions of ethics and justifications. This Part builds on this theme by applying considerations of socio-medical ethics to frame and answer whether placebos in the punishment sphere can be justified. Like medicine, these answers are nuanced and context specific.¹⁵⁵ There are indeed a number of different ethical justifications to consider, but this Part focuses on the issues that carry the most insight for future discussion inside

153. See JOPLING, *supra* note 22, at 122 (discussing the importance of three research arm studies to measure the impact of placebos, the active drug, and the natural progression of the disease).

154. See Evans, *supra* note 81, at 708–14.

155. See Annoni, *supra* note 91, at 470 (arguing against categorical bans of placebos in the medical field and instead focusing on the particular contexts in which the ethics and harm of placebos can be mitigated).

the punishment literature. This Part also focuses on perhaps the most important question of punishment theory and answers in the negative: Is punishment justified under the placebo methodology?

Section III.A considers perhaps the most important question in the placebo methodology, which is the harm principle of punishment when considered against the “do no harm” principle of medicine. These different approaches are important when considering the harm and social costs that punishment wreaks across entire communities. Section III.B explores the important ethical differences between the doctor-patient and politician-constituent power dynamics. Benevolent deception and medical expertise are at the heart of the doctor-patient placebo treatment schedule, but such benevolence and policy expertise are missing from the politician-constituent power dynamic. Section III.C discusses the ethics of experimentation with placebo research toward finding efficacious treatments. This contributes to how we might view the dark past of experimenting with harsh punishments and informs us towards a more ethical future. Section III.D covers the economics of placebos and their continued popularity and use in the medical field. Just as economic markets have a way of shaping how placebos are prescribed by doctors and perceived by patients, so too can the economics of punishment shape our social and cultural understandings in ways that can lead toward a different punishment regime. In turn, each vignette also considers policy solutions that seek to remedy the ethical and practical problems of punishment placebos and their overreliance on controlling and even manipulating public perception.

The discussion and solutions proposed throughout each Section are not magical or mystical cures that can solve all of the many problems and social harms of mass incarceration. These realities and strategies of punishment reform—which are unique to placebo understandings of punishment—are meant to mitigate and not propagate. The most important concern is whether these discussions and solutions *themselves* become placebos, proposed and advocated by a school of scholars as a way of assuring and placating more revolutionary thinkers away from pursuing transformational work.¹⁵⁶ Getting closer to equitable justice is worthwhile, and trading among lesser evils is often the difficult choice scholars and policymakers must pursue to achieve incremental progress that is transformative in scope.¹⁵⁷

156. See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1466 (2016) (criticizing “ratchets” of incremental criminal legal reform “because they placate and take energy and focus away from the actual transformative work”).

157. See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 186 (2017) (“We can’t go from soaring prisons one day to emptying them of the most serious offenders the next. Progress is incremental, and a reform movement that races ahead of itself could end up foundering as a result.”).

A. PLACEBOS AS HARM

Although this Article focuses on the synergies between the medical field of placebos and the policy design of mass incarceration, there are important differences that shed light on the theoretical and practical framing of punishment. Perhaps the biggest shortcoming of the placebo methodology of punishment is the difference between how these fields view harm.¹⁵⁸ By recognizing these shortcomings, this Section seeks to further refine and tailor the placebo methodology to the specific attributes of the punishment context.

The medical field's approach to "do no harm" is an important foundational ethic upon which the entire institution is built. This principle traces back to the Hippocratic Oath¹⁵⁹ and undergirds the purpose of the entire medical field. This is of prime importance when applied to placebo treatments. Placebos, by definition, must be either inert or have active ingredients that will not harm the patient.¹⁶⁰ At best, they may help the patient; at worst, they will do no harm.¹⁶¹

The opposite is true of the punishment field, which is specifically designed to impose harm on the criminal offender.¹⁶² This harm has come in many forms throughout history,¹⁶³ and modern criminal punishment continues to take away some aspect of the offender's liberty by exerting government control over the offender's body, including incarceration, e-carceration, and parole.¹⁶⁴ Capital punishment, of course, imposes the

158. See Aviram, *supra* note 11, at 58 (discussing this difference between medical and legal placebos).

159. See Stavros A. Antoniou, George A. Antoniou, Frank A. Granderath, Anna Mavroforou, Athanasios D. Giannoukas & Athanasios I. Antoniou, *Reflections of the Hippocratic Oath in Modern Medicine*, 34 *WORLD J. SURGERY* 3075, 3075–77 (2010) (reflecting on modern practices of the Hippocratic Oath).

160. See Veronica de Jong & Amir Raz, *Active Expectations: Insights on the Prescription of Sub-Therapeutic Doses of Antidepressants for Depression*, in *PLACEBO TALKS: MODERN PERSPECTIVES ON PLACEBOS IN SOCIETY* 33, 33 (Amir Raz & Cory Harris eds., 2015) (explaining the differences between pure and impure placebos that differ based on whether there are active pharmaceutical ingredients in the treatment).

161. See Orsini & Saurette, *supra* note 72, at 252 (discussing the difference between medical and political placebos). *But see* Annoni, *supra* note 91, at 467 (noting that even placebos are not always inert and can also have the negative impact of inducing "psychological addiction").

162. See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4–5 (1968); JOEL FEINBERG, *DOING AND DESERVING* 98 (1970); JOHN RAWLS, *COLLECTED PAPERS* 26 (Samuel Freeman ed., 1999).

163. See ROB CANTON, *WHY PUNISH? AN INTRODUCTION TO THE PHILOSOPHY OF PUNISHMENT* 16 (2017) (outlining various means of punishment throughout history that philosophers had to justify through their theories of punishment); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *COLUM. L. REV.* 1193, 1211–12 (1985) (outlining a litany of medieval and cultural punishment practices that viewed punishment as an economic tool to help society reach optimal deterrence and that justified the severity of punishment as compensation for law enforcement inefficiency).

164. See David Gray, *Punishment as Suffering*, 63 *VAND. L. REV.* 1617, 1624–26 (2010) (defending an objective view of punishment as intending to impose suffering or harsh treatment, no matter the subjective experience of the offender); John Bronsteen, Christopher Buccafusco & Jonathan Masur,

ultimate harm upon the offender by ending their life. This is not merely an accidental byproduct; it is the intended purpose of punishment.

This requires at least two analyses that can be bifurcated into theoretical harm and practical harm, both of which are important to answer whether these harms of punishment might be justified under the placebo methodology. On the theoretical side, we must remember the conceptual framework outlined in Part I. If society is like the body, and crime is like a disease, then treating the disease benefits the body at the expense of the disease. If punishment were effective, it would serve the same purpose as medicine by treating and getting rid of the disease of crime to the benefit of society. This becomes more problematic when this social disease is being directly caused by humans in society. As discussed above, this need not require inhumane treatment to punish and/or rehabilitate them. Thus, punishment is intended to impose some level of accountability on the offender just as medicine is intended to treat infirmities and the body of society benefits.

Under this theoretical treatment, the placebo policies of punishment become problematic because punishment is used to deliver harm to offenders regardless of any *actual* benefit to society. The punishment placebo would not merely be inert as in the medical context but would be delivering harm to a large segment of society—primarily poor people of color¹⁶⁵—for the mere psychological or therapeutic benefit of everybody else and for the political benefit of the powerful. Delivering this level of theoretical harm would not be justified under utilitarian or deontological justifications. The utilitarian might be persuaded, but ultimately must consider the costs and benefits of the policy to understand the greater good. Here, placebo policies are pitting the minimal benefits of manipulating public perception against the social costs of imposing harm on millions of people and tens of millions of families.¹⁶⁶ The level of harm hardly seems justified according to the minimal benefits and the perverse political incentives behind it. Kantian deontologists would also oppose a placebo justification, since this school of thought rejects using a person as some means to achieve a broader social goal.¹⁶⁷ But modern retributivists may still justify a placebo punishment if it

Happiness and Punishment, 76 U. CHI. L. REV. 1037, 1037 (2009) (“When the state punishes a criminal, it inflicts suffering.”).

165. See *infra* notes 169–177 and accompanying text.

166. See *supra* notes 103–105 and accompanying text.

167. See Immanuel Kant, *The Metaphysics of Morals*, in THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY 353, 429 (Mary J. Gregor ed. and trans., 1st ed. 1996) (articulating that a person as a moral individual is an end in and of themselves, and should not be treated merely as a means); Annoni, *supra* note 91, at 468 (explaining Kantian ethics in the placebo context).

indeed makes society *feel* that moral justice has been paid to the offender.¹⁶⁸

On the practical side, the placebo of punishment policies results in actual harm being visited upon entire communities that face the brunt of mass incarceration, which adds further consideration to the utilitarian balancing above. It is not enough to recognize the tremendous harm done to the individual offender during and after their time incarcerated, but these harms extend to their communities as underappreciated externalities.

Mass incarceration policies have devastated economic growth in these communities.¹⁶⁹ Working-age men and boys are often the most targeted due to their involvement with criminal behavior; when these communities are hollowed by the incarceration of these men, small and large businesses alike are less likely to invest and survive in these communities.¹⁷⁰ And even when incarcerated persons are on parole or get out of prison, they face an uphill battle when finding a job and are often paid less than their non-offender competition.¹⁷¹

Social networks and family formation also suffer objectively negative outcomes from mass incarceration. In heterosexual relationships, it becomes harder for women to find suitable mates if many potential options are incarcerated or have difficulty assimilating back into society after being incarcerated.¹⁷² Incarceration also leads to the breakdown of strong family dynamics, since so many incarcerated persons are held in places that are geographically far away and thus prevent in-person visits from their family. In addition, the exploitative prison-phone industry creates cost prohibitive conditions for many poor families to stay in touch over the phone.¹⁷³ Also,

168. See KADISH ET AL., *supra* note 57, at 33–37 (cataloging different variations of retributivism); BARKOW, *supra* note 72, at 3 (admitting that retributivists may still justify such a system that makes them *feel* better even with little consequentialist benefit).

169. See Evans, *supra* note 81, at 708–09 (explaining negative economic externalities of mass incarceration).

170. See *supra* note 79 and accompanying text.

171. See ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 1, 4 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [<https://perma.cc/XH5U-X7NF>] (describing the difficulties in finding employment, as well as the lack of educational or training programs); James Kilgore, *Progress or More of the Same? Electronic Monitoring and Parole in the Age of Mass Incarceration*, 21 CRITICAL CRIMINOLOGY 123, 130–31 (2013) (discussing the difficulty of people on parole finding jobs if they have a criminal record, and how electronic monitoring and other restrictive conditions of release limit a person's ability to go to interviews or respond to employment opportunities).

172. See Evans, *supra* note 81, at 709–10 (explaining negative family formation dynamics in heterosexual and LGBTQ+ romantic relationships); Joyce A. Arditti, *Families and Incarceration: An Ecological Approach*, 86 FAMS. SOC'Y: J. CONTEMP. SOC. SERVS. 251, 254 (2005) (discussing “prison widowhood” as an often-ignored social status).

173. See Peter Wagner & Wanda Bertram, *State of Phone Justice 2022: The Problem, the Progress, and What's Next*, PRISON POL'Y INITIATIVE (Dec. 2022), <https://www.prisonpolicy.org/phones/>

many incarcerated persons are parents, which has negative behavioral and educational impacts on their children who grow up without them.¹⁷⁴

There are also tremendous negative political impacts on these communities. Voting-age incarcerated persons are not able to vote during their incarceration. In some jurisdictions, these persons are permanently disenfranchised even after their incarceration.¹⁷⁵ Not only does this have measurable impact on elections, but it also contributes to the individual offender's sense of self as a nonpolitical actor. Political scientists and sociologists have shown how affected communities have developed a sense of isolationism from civic discourse.¹⁷⁶ This impacts the politician-constituent relationship and has served to undermine the legitimacy of the criminal legal system as a whole in these communities.¹⁷⁷ Further, as explained above, mass incarceration can have a criminogenic effect if it contributes to community perceptions of illegitimacy that following the rule of law has little benefit.¹⁷⁸

state_of_phone_justice_2022.html [https://perma.cc/5S2K-HPZZ] (describing high costs of phone calls for incarcerated persons to keep in touch with their family).

174. See Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOCIO. 387, 398 (2010) (estimating that “52% of state prison inmates and 63% of federal inmates are parents” and that “[a]n estimated 2.2 million children (about 3% of the total population under 18 in the United States) currently have a parent incarcerated”); Sara Wakefield & Christopher Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavioral Problems*, 10 CRIMINOLOGY & PUB. POL’Y 793, 794–96 (2011) (discussing how a father’s incarceration produces harmful effects on children’s behavioral and mental health); Bruce Western & Christopher Muller, *Mass Incarceration, Macrosociology, and the Poor*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 166, 172 (2013) (summarizing studies showing higher levels of aggressive behavior, depressive symptoms, and reduced academic achievement among children whose parents have been incarcerated); Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369, 388 (2004) (finding elevated incarceration rates for the national male cohort in fatherless households).

175. See *Disenfranchisement Laws*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-rights-restoration/disenfranchisement-laws> [https://perma.cc/2LX5-KH8D] (giving a visual representation of states and their approach to disenfranchising offenders with criminal convictions).

176. See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2085–88 (2017) (discussing legal estrangement and how it contributes to a better understanding of the literature of law enforcement legitimacy); Todd R. Clear & Dina R. Rose, *Individual Sentencing Practices and Aggregate Social Problems*, in CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 27, 42 (Darnell F. Hawkins, Samuel L. Myers, Jr. & Randolph N. Stone eds., 2003) (describing a kind of “social isolation” from the state where “residents in disadvantaged communities become more disenfranchised” and “more removed from the civic community”).

177. See PFAFF, *supra* note 157, at 10–11 (considering a host of incarceration costs and the difficulty in measuring them); ZACHARY HOSKINS, BEYOND PUNISHMENT? A NORMATIVE ACCOUNT OF THE COLLATERAL LEGAL CONSEQUENCES OF CONVICTION 4–5 (2019).

178. See generally TOMMIE SHELBY, DARK GHETTOS: INJUSTICE, DISSENT, AND REFORM (2016) (describing the phenomena among people’s failure to obey the law as a result of having to live under unjust conditions); CANTON, *supra* note 163, at 28 (recognizing the importance of legitimacy in the context of punishment’s role in maintaining social order).

This short summary of actual harm caused by the placebo of mass incarceration policies cannot be justified under any view other than those that recognize mass incarceration's intent to maintain political power and use that power to subjugate communities.¹⁷⁹ If the goal is to make the streets safer, that goal has failed. If the goal is to maintain existing power dynamics, then placebos in medical and punishment contexts are quite effective at controlling perceptions of crime and disease and cementing the doctor and politician as the conduit through which things will be perceived as getting "better."

Perhaps Vincent Chiao said it best: "To rely on criminal punishment solely . . . to make other people feel safer, even when doing so does not make them actually safer" is not justified because it is hard to see how these people's subjective feelings "could be sufficiently important to justify imposing such serious costs on others."¹⁸⁰

B. DECEPTION VERSUS CONSENT

Placebos also introduce the ethical dilemma in medical treatment of utilitarian notions of deception, which is all too relevant to the punishment policies of the modern era. In the broader social context, lying, fraud, and deception are viewed as unacceptable social behaviors that can emotionally hurt and financially injure a victim.¹⁸¹ But like most social mores, there are exceptions to this general rule that might be applicable to the placebo punishment context. For instance, intentionally lying might be justified if it produces beneficial results and emotions or even serves as a lesser evil to avoid more harm.¹⁸² Indeed, we paternalistically deceive our children;¹⁸³ we might sugarcoat the truth to shield the feelings of a spouse or loved one; and even in the cold world of legal ethics, it is ethical to intentionally withhold information from a client for their benefit.¹⁸⁴

179. See Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 4 (2019) (arguing that "[c]riminal punishment has been instrumental in reinstating the subjugated status of [B]lack people"); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY* 35–37 (2005) (connecting the foundations of the PIC with the persistence of racism).

180. See VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE* 94 (2018).

181. See Boozang, *supra* note 15, at 724–34 (analyzing the moral acceptance and justifications for lying).

182. See JOPLING, *supra* note 22, at 236–37 (outlining the utilitarian approach of placebo ethics).

183. Intentionally using myth and caricatures are accepted parts of modern parenting, such as deceiving our children about the existence of Santa Claus or the Tooth Fairy. We often use these benevolent deceptions as ways of teaching our children important lessons or incentivizing good behavior.

184. See MODEL RULES OF PRO. CONDUCT r. 1.4 cmt. 7 (AM. BAR ASS'N 2023) (deeming it ethical to withhold information from a client for a reasonable amount of time if immediate transmission might cause the client to act imprudently).

There are at least three ethical considerations that, when considered together, might be used to justify placebo treatments in the medical field that are found lacking in the context of punishment policies. The first considers the expertise of the person in power. In the medical field, placebo practitioners are medical experts who can correctly dose and administer placebos as a treatment specialized for each individual patient.¹⁸⁵ Doctors prescribe placebos because they often follow the science showing how effective they are in assuaging subjective patient ailments such as pain, depression, and other complaints.¹⁸⁶ Indeed, it is this very expertise, built on years of experience and advanced studies, that supports any potential deception. The only reason the doctor knows such a treatment will work is because they have likely used these placebos in the past to provide therapeutic treatment and have tracked the progress of past patients in conjunction with studying the scientific literature.

To illustrate the importance of expertise and how it implicates trust, contrast the following situations: first, a doctor prescribes a placebo to a patient; second, a person pretending to be a doctor prescribes a placebo to a patient. Deception is taking place in both scenarios, but most would admit to being more comfortable with the former. If a doctor prescribes a placebo, there is a certain level of trust on the part of the patient toward the doctor that the doctor knows what they are doing; a patient may not like the doctor's decision to prescribe a placebo, but many would feel comfortable trusting the doctor's experience. In the latter situation, the ultimate medical result might be the same, but many would still be uncomfortable since the fake doctor has no expertise whatsoever. The patient received a placebo in both situations but would no longer have the same trust and understanding of the treatment in the hands of a fraud. Even if the patient experienced a positive placebo effect in both situations, the expertise and trust in the doctor in the first situation seems more justified than the deception and lack of expertise in the second situation.

In the punishment context, there is a much looser sense of expertise from our legislators and executive actors who are prescribing and delivering the treatment of punishment and mass incarceration to society.¹⁸⁷ Politicians are not experts and many are not even former practitioners of criminal policy and punishment.¹⁸⁸ They are lawyers, businesspeople, career public servants,

185. See Orsini & Saurette, *supra* note 72, at 251 (criticizing the desire for a one-to-one analogy between political and medical placebos).

186. See *id.*

187. See *id.*

188. BARKOW, *supra* note 72, at 111 (identifying that “most politicians have no expertise or training in criminal justice policy”).

and the like that bring generalist viewpoints to a host of different issues. Rachel Barkow opens her book *Prisoners of Politics* with the stark statement that “[w]e do not rely on experts or use studies and rational assessment to minimize crime” but instead base criminal policy “on emotions and the gut reactions of laypeople.”¹⁸⁹ This is a far cry from nearly every other consequential policy area, including public health, the environment, financial institutions, and other complex social issues.¹⁹⁰ Instead, political incentives, penal populism, and fear of the “other” all rule supreme in crime policy.¹⁹¹

Practitioners like police and prosecutors are a bit more mixed. There are still many who subscribe to outdated and disproved methods such as the broken-windows theory,¹⁹² predictive policing,¹⁹³ overcharging and stacking,¹⁹⁴ and pushing for harsh sentences for incapacitation purposes. However, there are several more progressive practitioners who are challenging the old guard and trying to use emerging data to facilitate more effective policies.¹⁹⁵ This is the double-edged sword of expertise, because both of these camps can be considered to be “experts” due to their level of practical experience. Just like doctors who prescribe a large number of placebos to patients with the hope that it will have a placebo effect, these practitioners on the ground are prescribing punishment policies that they hope will have some effect on public safety, whether directly or indirectly. And we the public have some sense of trust in these practitioners, in part,

189. *Id.* at 1; see also Darryl Brown, *History's Challenge to Criminal Law Theory*, 3 CRIM. L. & PHIL. 271, 283 (2009) (recognizing that criminal law is unique because unlike other areas such as evidence, commercial law, or procedural law that are the product of specialized commissions operating within legislative oversight, criminal law is largely the product of the democratic political process); EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 44 (Steven Lukes ed., W.D. Halls trans., Palgrave Macmillan 1984) (1893) (arguing that punishment constitutes a collective emotional response).

190. See Sonja B. Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to The Prisoner's Dilemma*, 98 IOWA L. REV. BULL. 97, 99 (2013) (“Regulatory [cost-benefit analysis] is now a well-established feature of the administrative state, and it is perhaps curious that nothing like it has ever been incorporated into the carceral state. Incarceration, after all, is one of the most profound exercises of state authority.”).

191. See *id.*

192. See Daniel T. O'Brien, Chelsea Farrell & Brandon C. Welsh, *Looking Through Broken Windows: The Impact of Neighborhood Disorder on Aggression and Fear of Crime Is an Artifact of Research Design*, 129 ANN. REV. CRIMINOLOGY 53, 64–68 (2019) (finding through a meta-analysis of nearly 300 studies that the theory was based on a flawed reading of the data).

193. See Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1114–15 (2017) (arguing for careful regulation and oversight of predictive policing technology given the potential drawbacks).

194. See Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1313–16 (2018) (describing the prosecutorial strategies of piling on multiple overlapping criminal charges for the same criminal conduct and overreaching on charges that the prosecutor may not believe are supported by evidence).

195. See BARKOW, *supra* note 72, at 155–60 (documenting the progressive prosecutor movement across the country and the potential for reform).

because of their expertise.¹⁹⁶ The takeaway from this analysis is that there can be no placebo-like justification for non-expert legislators who enact criminal statutes, but there may be some argument that the expertise of police and prosecutors should be given some weight.

The second ethical consideration that might justify deception is the intent of the person in power, which also highlights stark differences between the medical and punishment fields. Many doctors prescribe placebos out of benevolent care only when they view it to be in the best interests of the patient.¹⁹⁷ This gestures toward the “classical paternalistic paradigm that dominated traditional medicine.”¹⁹⁸ Like parents who benevolently guide, deceive, and withhold information from their children because of large gaps in information, intellectual ability, and emotional stability, the traditional practice of medicine justified treatments under a paternalistic view of patients.¹⁹⁹ Not only does this ethical justification substantiate the earlier requirements of expertise, but it also highlights the necessary selfless intent of doctors to justify deception. Parents deceive their children most often for the sole benefit of the child, and while there are indeed some that might use such deception for their own parental gain, this is often not accepted as best practice. Similarly, doctors may be justified in using benevolent deception if the primary purpose is the sole benefit of the patient. As argued above, this is a complex question in which a doctor (or politician) must consider the full range of costs and benefits of deception. But the ultimate takeaway is that deception is partly justified by benevolent and selfless intent.

Using this methodology to analyze politicians and their role in punishment leaves much to be desired. In a perfect world, politicians would be public servants who seek to serve their constituents’ best interests, but political theory has long disproved this romanticized ideal.²⁰⁰ Lawmakers are not bound by a comparable code of medical ethics where constituent

196. See, e.g., *Trust in America: Do Americans Trust the Police?*, PEW RSCH. CTR. (Jan. 5, 2022), <https://www.pewresearch.org/politics/2022/01/05/trust-in-america-do-americans-trust-the-police> [<https://perma.cc/R8GM-H5DE>] (finding that the majority of Americans have some confidence that police officers act in the best interest of the public and 26% saying they have great confidence).

197. See JOPLING, *supra* note 22, at 238–39 (discussing the importance of benevolence in placebo treatments); Boozang, *supra* note 15, at 724–25 (considering the justifications of benevolent deception when doctors apply placebo treatments).

198. Annoni, *supra* note 91, at 464; see also JOPLING, *supra* note 22, at 108–09 (quoting Hippocrates as subscribing to and perhaps creating this traditional paternalistic view).

199. See Spiro, *supra* note 88, at 47 (explaining the historical and traditional role of doctors as a power conduit through which they determined health outcomes of entire communities, including their role as parents of the community).

200. See Sheldon A. Evans, *Interest-Based Incorporation: Statutory Realism Exploring Federalism, Delegation, and Democratic Design*, 170 U. PA. L. REV. 341, 385–92 (2022) (outlining political theories that assert politicians are self-interested in getting re-elected and maintaining power).

interests are placed at the forefront.²⁰¹ They do indeed seek to serve their constituents but are also incentivized into doing what is necessary to maintain their power.²⁰² There may be an argument that politicians believe they are serving society by assuaging fears with placebo punishment policies if they believe that fixing the actual crime rate is not as important to public health as controlling perceptions of crime. However, as argued above, there are simply too many self-interested incentives involved in the tough-on-crime movement from those wishing to maintain their power. The lies that politicians maintain about mass incarceration, the manipulation of public fear, and the withholding of the truth from the public cannot be justified under the medical ethics of benevolence,²⁰³ but should be characterized as maleficent and at least partially self-interested deception that wreaks havoc in the form of underappreciated social costs.

Yet there is some nuance to consider regarding intent among lawmakers, police, prosecutors, and others who prescribe and deliver the placebo treatment of punishment. As in the substantive criminal law, we assign blameworthiness according to a person's level of intent for their wrongdoing. The highest level of culpability is committing an act with purpose, meaning that it was the person's conscious desire to commit the act or to procure the desired result of the crime.²⁰⁴ Next comes knowledge, which describes a person who has near certainty that their action will procure the result of the crime.²⁰⁵ Then there is recklessness and negligence, which capture situations in which a person knows or should have known that their actions will procure a certain result.²⁰⁶ There are indeed actors in the criminal legal system who are purposive or at least have sufficient knowledge that these punishment policies are ineffective but nevertheless have some placebo effects towards public safety. These are the most culpable actors in the mass incarceration crisis. But there are others who are less culpable but still responsible for contributing to the crisis. These decisionmakers might honestly believe the status quo is an effective system that they seek to propagate and expand. At best, these lawmakers, law enforcement officials, and prosecutors can be said to be reckless or even negligent because they are

201. See, e.g., *Code of Medical Ethics*, AM. MED. ASSOC., <https://code-medical-ethics.ama-assn.org> [<https://perma.cc/GYD7-J73C>] (describing the code of ethics for medical professionals).

202. See, e.g., Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 114–15 (2001) (recognizing some of Congress's attempts to federalize criminal law as nothing more than press releases for political gain, having little to do with public safety).

203. See also J.A. BARNES, A PACK OF LIES: TOWARDS A SOCIOLOGY OF LYING 14 (1994) (differentiating between benevolent and malicious lies depending on the liar's intent to benefit the victim or to benefit themselves, respectively).

204. MODEL PENAL CODE § 2.02(2)(a).

205. *Id.* § 2.02(2)(b).

206. *Id.* §§ 2.02(2)(c)–(d).

consciously disregarding the danger of these policies or really do not perceive any dangerousness but nevertheless should have known the dangerousness of these policies. Given the amount of scholarship, the accessibility of experts, and the continued deterioration of the criminal legal system, these decisionmakers are at best negligent, and at worst purposive, in their culpability of the mass incarceration crisis.

The third ethical consideration that might justify deception in the use of placebos is the issue of consent. Modern medicine has largely departed from the benevolent paternalism of the past and has been sharply redefined towards a progressive ideal that fosters partnership between doctor and patient.²⁰⁷ This type of dynamic has restructured the entire culture of medical treatment, in which doctors are resources of information that a patient can consult; by explaining complex medical information and treatments to their patients, doctors can partner with their patients and ultimately allow the patient to make the final decision on what treatment they receive. Thus, the modern ethics of prescribing placebos is complicated by the issue of consent.

This ethical dynamic is resolved through a fascinating aspect of placebo treatments, namely the consent of self-deception. Patients may desire to gain the benefits of placebos or other unverified alternative medical treatments for the sake of achieving a larger health goal.²⁰⁸ Perhaps an active medication is known to have side effects, whereas a placebo might deliver similar therapeutic relief without the side effects. Or perhaps active medication is cost-prohibitive to patients whereas placebos are more cost-effective for the relative benefit the patient receives.²⁰⁹ Medical ethicists have considered these possibilities and ultimately come out in favor of patient discretion; in other words, patients should have the power and control over their treatment to give doctors the green light to deceive them.²¹⁰ Under such treatment plans, the patient will never know *which* treatment is a placebo or *when* the deception is coming. That way, they can still enjoy the ignorant bliss of placebo benefits. This adds yet another wrinkle in an already complicated ethical space. As opposed to the principle of informed consent, in which the patient must consent to each separate treatment, a doctor-patient relationship

207. See Boozang, *supra* note 15, at 742 (stating that paternalism in the modern medical ethics context has largely been rejected as a justification for prescribing treatment). The legal principles of informed consent are also applicable in medical malpractice cases. See *id.* at 731 nn.258–60 (discussing the contours of informed consent to medical treatments and its exceptions in legal precedent).

208. See Shlomo Cohen & Haim Shapiro, “Comparable Placebo Treatment” and the Ethics of Deception, 38 J. MED. PHIL. 696, 703 (2013) (stating that some patients may “want to be locally manipulated [with a placebo treatment] for the sake of achieving [a] larger goal,” such as pain relief).

209. See Annoni, *supra* note 91, at 467 (considering potential economic justifications for placebo treatments when factoring in the relative amount of therapeutic relief they offer).

210. See Boozang, *supra* note 15, at 734; Adam J. Kolber, *A Limited Defense of Clinical Placebo Deception*, 26 YALE L. & POL’Y REV. 75, 75–78 (2007).

may also be formed on the basis of general consent under which the patient consents to the doctor or the overall treatment plan.²¹¹ This obviates the need to consent to each individual treatment and instead gives the patient the power to consent to the doctor and all of their subsequent methods.²¹² If patients want to be deceived, and give consent to be deceived,²¹³ placebos might also be justified under a consensual doctor-patient relationship.

The self-deception model of consent is an interesting consideration of collective cognitive dissonance and might also have some explanatory value in placebo punishment policies. Let us first consider that most Americans want criminal justice reform.²¹⁴ There may indeed be much disagreement among these constituents about what such reform would look like, but there is a growing dissatisfaction. But like most political opinions, these Americans are looking for a type of general consent as opposed to informed consent. These constituents simply want the problem to get better and are not necessarily invested in each reform proposal that might come to the table. This is our system of republican government: we vote in politicians, thereby giving some form of majoritarian consent, and we expect them to fix the problems we have elected them to fix. Whether it be sentencing reform, decriminalization of drug crimes, or defunding the carceral state and reinvesting in other social programs, the average American voter is not concerned with the specifics of how politicians address these problems.

The public has accepted the diagnosis of the social problem of crime, and they are giving general consent to the overall treatment plan of mass incarceration with little care or concern about the overall placebo of the treatment. This is quite different from saying that the public *wants* to be deceived, but the political system allows for some consent for elected officials to deceive us, even after the public collectively understands that the criminal legal system is broken.²¹⁵ A political theory of self-deception, as realized through the placebo methodology, might be the strongest case that justifies politicians intentionally deceiving the public through mass incarceration and punishment placebos. If the public implicitly agrees to deception, politicians should be allowed to deceive.

211. See Annoni, *supra* note 91, at 468 (explaining the difference between informed medical consent and general medical consent).

212. See Malani, *supra* note 10, at 449 (“In other words, the patient consents to the doctor rather than consent to the treatments.”).

213. See JOPLING, *supra* note 22, at 224–25 (characterizing this phenomenon as a type of cognitive dissonance in which patients lie to themselves and know they are lying to themselves).

214. See *supra* note 151 and accompanying text.

215. *Id.*

Most considerations in this Section have failed to justify the use of placebo policies in the punishment context, and these medical ethical concerns can also inform some future policy safeguards. Whatever the next tectonic shift in carceral policies may bring, we must be aware of the placebo nature and politics of these policies. Politicians will support what makes voters *feel* better; for the Left, this may look like progressive policies that make them *feel* like criminal justice is no longer targeting certain communities; for the Right, this may look like less costly and more efficient policies that make them *feel* safer and more fiscally responsible.²¹⁶ There is indeed political will to make a change, as Red and Blue states across the country have experimented with new punishment policies,²¹⁷ presidential administrations from both parties have pushed through reformist legislation,²¹⁸ and grassroots organizations have become part of the mainstream decarceration movement.²¹⁹ But even with this bipartisan support to change *something* about the system, will the resulting change be yet another placebo? The next generation must not make the same mistakes of our past by settling for yet another placebo punishment policy.

There are no easy answers to what appears to be an insurmountable social and cultural problem based on political incentives and unethical behavior. An informed consent punishment model would be an interesting thought experiment, requiring partnership and active participation between

216. See Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1391 (2018) (surveying the political and legislative difficulties of criminal legal reform); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001) (describing the political economy that favors overcriminalization).

217. See LAUREN-BROOKE EISEN & INIMAI CHETTIAR, BRENNAN CTR. FOR JUST., *THE REVERSE MASS INCARCERATION ACT 10* (2015) (tracking California's decarceration between 2006–2012 that saw a 23% drop in its prison population and a 21% and 13% drop in violent and property crime, respectively, as well as New York's progress between 1994–2014 that saw a 28% drop in its prison population and a 31% and 28% drop in violent and property crime, respectively); see also *id.* (tracking Texas's investment of \$55 million in 2005 to incentivize local governments to adopt alternative punishment tools and decarcerate and in 2007, spending \$241 million to fund more such programs instead of investing \$500 million to build new prisons, which resulted in a 12% drop in crime from 2011–2014 and also tracking Mississippi's progress from 2008–14, which saw a 21% drop in its prison population that corresponded with a drop in crime rates).

218. See, e.g., Jamiles Lartey, *Trump Signs Bipartisan Criminal Justice Overhaul First Step Act into Law*, THE GUARDIAN (Dec. 21, 2018, 2:12 PM), <https://www.theguardian.com/us-news/2018/dec/21/trump-prison-reform-first-step-act-signed-law> [<https://perma.cc/5828-NB9H>] (covering the legislative passage of the First Step Act, a bipartisan piece of legislation that expanded rehabilitative opportunities); Ames Grawert, Lauren-Brooke Eisen, Stephanie Wylie & Noah Kim, *Criminal Justice Reform Halfway Through the Biden Administration*, BRENNAN CTR. FOR JUST. (Jan. 10, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/criminal-justice-reform-halfway-through-biden-administration> [<https://perma.cc/XAP8-6KCD>] (tracking the criminal justice policy changes of the Biden Administration).

219. See generally Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021) (studying legal avenues in which grassroots social movements can buck trends and challenge the status quo).

politicians and constituents before any new criminal law, punishment, or reform was adopted. However, such an informed consent model would be practically impossible and would also theoretically fail to address the problems of punishment placebos. Putting so much power in the hands of uninformed constituents carries the risk of even more criminal legal policy falling prey to fear-based penal populism.²²⁰ Providing the public with more information, facts, studies, statistics, and so forth in an effort to educate the masses through public service announcements is unlikely to decouple the social and cultural feelings of punishment and its connection to safety. Using direct voter ballot initiatives is another interesting proposal because they have had success in legalizing marijuana and banning forced prison labor,²²¹ but have also maintained capital punishment²²² and a number of harsh sentencing laws.²²³ There is simply no safeguard for people's fear and none for politicians' penchant for exploiting it.

This Section has leaned heavily into diagnoses and has been light on effectual treatments. The ethics of social deception of placebo punishment policies cannot be justified through the same traditional medical lens of paternalism nor the benevolent power that doctors use to maintain public health in the community. Neither can placebo punishment policies be fully justified through modern medical ethics of informed consent, but the concept of general consent and self-deception paints a dismal picture of the American public's apathy toward specific involvement in criminal justice. This leaves hope that further examination of placebo ethics can lead to some policy interventions, especially when considering the infrastructure of expertise below.

220. See generally John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711 (2020) (discussing the potential downsides to fully democratizing criminal justice). But see Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 579–82 (2020) (advocating for more community involvement in policymaking by focusing on the "[d]eliberative mechanisms [that] would ideally open a dialogue between the enforcement bureaucracy and the various communities of interest that comprise the criminal justice public").

221. See Hanna Darroll, *Three Key Criminal Legal Reform Takeaways from the 2022 Midterms*, ACLU (Nov. 15, 2022), <https://www.aclu.org/news/criminal-law-reform/three-key-criminal-legal-reform-takeaways-voting-in-2022-midterms> [<https://perma.cc/7U35-Q2YN>] (recording results from several states that voted to further legalize medical and recreational use of marijuana, as well as outlawing forced prison labor for low wages).

222. See *Death Penalty Repeal Effort Fails Again*, CBS NEWS (Nov. 9, 2016, 10:51 AM), <https://www.cbsnews.com/losangeles/news/death-penalty-repeal-effort-fails-again> [<https://perma.cc/B3C2-L3P7>] (reporting that California—one of the most progressive states in the union—voted down a measure that would eliminate the death penalty).

223. See Anna Simonton & Daniel Nicheanian, *How Criminal Justice Reform Fared at the Ballot Box on Tuesday*, THE APPEAL (Nov. 5, 2020), <https://theappeal.org/politicalreport/criminal-justice-reform-2020-election-results> [<https://perma.cc/SQ6H-ANLW>] (reporting the mixed results of ballot initiatives in California, Oklahoma, and Kentucky, many of which recorded voters deciding to uphold the status quo of harsh sentencing).

C. EXPERIMENTATION ETHICS

The placebo ethics of scientific experimentation introduces another tool that shifts the discussion of punishment theory and mass incarceration. The medical field often uses placebo trials as a methodology for finding treatments that are more effective than their predecessors, which justifies the use of the placebos toward the gain of medical knowledge. This Section uses this ethical justification of placebos to explore the unjustified experimentation of punishment policies and mass incarceration.

Starting with the medical context, double-blind placebo studies are the gold standard in the experimental setting to determine the efficacy of pharmaceutical drugs.²²⁴ There are at least two groups²²⁵ of consenting patients,²²⁶ both of whom are suffering from a disease or ailment that serves as the subject of the treatment. The first blind describes the patients who are unaware of what treatment they are receiving. The first group is given the drug being tested by the trial, while the second group is given a placebo.²²⁷ The second blind describes the researchers themselves. To avoid the power, bias, and favoritism of researchers who are administering the treatments,²²⁸ the researchers are also blind to which group is getting the drug versus placebo treatments. Thus, the efficacy of the drug being tested is the positive difference between the medical outcomes of the drug group and the placebo group. If both the drug group and placebo group enjoy physical improvements, isolating the positive impact of the placebo is paramount to determining the actual *effectiveness* of the drug apart from any placebo effects.²²⁹

224. See JOPLING, *supra* note 22, at 191 (discussing the “enviable degree of success” of double-blind placebo studies in determining the “relative effectiveness of medications and medical procedures”); Megan T. Stevenson, *Cause, Effect, and the Structure of the Social World*, 103 B.U. L. REV. 2001, 2003–04 (2023) (explaining placebos as parts of randomized control trials as the gold standard for measuring efficacy).

225. See JOPLING, *supra* note 22, at 122 (explaining the procedure of placebo trials and advocating for at least three groups, to include a group that receives no treatment to track the natural progressions of the disease with no medical intervention).

226. See Pilar Hereu, Eulàlia Pérez, Inma Fuentes, Xavier Vidal, Pilar Suñé & Josep Maria Arnau, *Consent in Clinical Trials: What Do Patients Know?*, 31 CONTEMP. CLINICAL TRIALS 443, 443–46 (2010) (detailing what consents and disclosures are part of the average placebo clinical trial).

227. See Shobha Misra, *Randomized Double Blind Placebo Control Studies, the “Gold Standard” in Intervention Based Studies*, 33 INDIAN J. SEXUALLY TRANSMITTED DISEASES & AIDS 131, 132–33 (2012) (explaining the process of designing a double-blind study).

228. See Brody, *supra* note 88, at 83 (capturing how the power and stature of a doctor can shape patient’s subjective expectations in furtherance of placebo treatments); Moerman, *supra* note 85, at 102 (describing the social importance that doctors serve and the language they use as a means of impacting patient expectations).

229. See, e.g., Irving Kirsch, *Antidepressants and the Placebo Effect*, in PLACEBO TALKS: MODERN PERSPECTIVES ON PLACEBOS IN SOCIETY 17, 18–21 (Amir Raz & Cory Harris eds., 2015) (explaining the difference between positive placebo effects and the actual efficacy of the drug being tested by the trial).

The utilitarian outcomes of experimenting to develop more effective medicines justify the necessary deception of the placebo groups along the way. If the placebo group knew they were getting the placebo and the drug group knew they were getting the active drug, the positive placebo effects would be lost and would jeopardize the utility of the study.²³⁰

Medical ethicists have raised concerns based on deontological grounds of the duty of doctors to always provide the best available care.²³¹ This goes past the Hippocratic Oath to do no harm and requires doctors to provide the best care possible based on the inherent worth of a human life and its connection to individual health. These ethicists have criticized placebo trials as exploitative and have argued that it is inherently unethical to evaluate new treatments when there are already proven treatments available.²³²

For example, if a research trial is trying to find the next generation of treatments for a non-deadly disease, such as depression, a placebo trial may be organized. The new drug to be tested is X, even though Y is already on the market and available to patients. Y has an efficacy rating of one, which is quite effective at helping depression patients. However, the placebo group will not receive any effective treatment for their depression. Thus, their depression may get better or worse based on the placebo effect or the natural course of the disease. The drug group receiving X, on the other hand, sees a great improvement, measured at an efficacy rating of two. This result is traditionally seen as a success in medical science because X will benefit countless future depression patients, but it came at the expense of the placebo group who all the while could have gotten better if they had been prescribed Y.

In the punishment placebo context, there are many lessons to learn from medicine's more developed and sophisticated rules of ethics. Placebo methodologies have long been used in sociological and policy studies to determine the efficacy of criminal law and policy when compared to the status quo or an inert placebo policy.²³³ These types of experiments and

230. There have been a small number of studies suggesting that patients can still enjoy positive placebo effects if they are told they are taking a placebo. See JOPLING, *supra* note 22, at 206–08; Azgad Gold & Pesach Lichtenberg, *The Moral Case for the Clinical Placebo*, 40 J. MED. ETHICS 219, 221 n.254 (2014) (citing studies showing mixed results of positive placebo effects when disclosing placebo treatments).

231. See Franklin G. Miller & Howard Brody, *What Makes Placebo-Controlled Trials Unethical?*, 2 AM. J. BIOETHICS 3, 3 (2002) (citing several ethicists with these concerns, including a 1994 petition to include new language in the Declaration of Helsinki, which governs the ethics of placebo trials).

232. See Ilja Richard Pavone, *Legal Responses to Placebo-Controlled Trials in Developing Countries*, 27 GLOBAL BIOETHICS 76, 79 (2016).

233. See JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MASTERING 'METRICS: THE PATH FROM CAUSE TO EFFECT* 1–46 (2015) (describing the general use and utility of randomized control trials in social science); see, e.g., Yu-Wei Luke Chu & Wilbur Townsend, *Joint Culpability: The Effects of*

analyses have also been a hallmark of Our Federalism.²³⁴ The Brandeisian ideal of state laboratories has yielded new innovations in punishment practice but has often yielded harsher and more ineffective punishments as a result of the fear and penal populism that has taken hold since the tough-on-crime era.²³⁵ Three strikes laws, ending parole for certain offenses, and even the very development of prisons as an institution, were all policies started and championed by various states until they were more widely adopted.²³⁶ And while states have been experimenting with many decarceration policies,²³⁷ the norm still rests on the harsh side of the scale.

Given the placebo nature of mass incarceration policies, they are difficult to justify unless the punishment system is becoming more efficacious, like the ethics in the medical field. States will continue to experiment with various progressive and harsh punishment policies, and they do so in part to align these policies with the preferences of their constituency.²³⁸ Thus, if Jurisdiction A continues with the status quo of mass incarceration policies and Jurisdiction B decides to experiment with bail reform, lower sentences, or drug courts, there would be a value to criminology and punishment theory if the delta between these similarly situated jurisdictions could be measured. Jurisdiction B might prove that these new policies are ineffective, or they might create support for a new paradigm in punishment, as has been the case throughout federalism's state

Medical Marijuana Laws on Crime, 159 J. ECON. BEHAV. & ORG. 502, 507 (2019) (explaining the use of statistical placebo methodology to measure the impacts of medical marijuana laws on crime rates); Eric Helland & Alexander Tabarrok, *Using Placebo Laws to Test "More Guns, Less Crime"*, 4 ADVANCES ECON. ANALYSIS & POL'Y 1 (2004) (using a similar methodology to measure the impact that "shall-issue" gun laws have on crime rates).

234. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); see also *Fed. Energy Regul. Comm'n v. Mississippi*, 456 U.S. 742, 787–88 (1982) (O'Connor, J., concurring in part and dissenting in part) ("[T]he Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.").

235. See Evans, *supra* note 6, at 28–31 (citing harsh punishments that were the fruits of federalism experimentation from states that were later nationalized).

236. See *id.* at 36.

237. See *supra* note 217 and accompanying text.

238. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (positing an explanation of federalism in which states compete horizontally with one another for constituents. "The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods."); see, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222 (1992) (arguing that "there ought to be an affirmative justification for federal intervention" in environmental regulation and listing market-failure and public choice arguments as two possible justifications); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 705 (1974) (arguing that state competition for business in the corporate world would create a race to the bottom).

experimentation in criminal law.

For the reform-minded utilitarian, mass incarceration is a necessary part of the experiment to prove to politicians and bureaucrats around the country that progressive punishment reform is more efficacious than the current placebo. The delta between the placebo of mass incarceration policies and the growing number of programs that have been shown to reduce first-time offenses and recidivism²³⁹ is a powerful policy tool that justifies change. This is true even though it comes at the cost measured in years of human lives. But while such reformers use metrics to prove their efficacy points, mass incarceration as a placebo is allowed to remain across the country, and the disease of crime is allowed to fester.

For the abolitionist-minded deontologist, there are two groups of people to consider. The first is the communities in Jurisdiction A who are not benefiting from the placebo of mass incarceration policies, although they may indeed enjoy psychological or therapeutic benefit.²⁴⁰ The second group is the millions of people who are suffering because of the harm and social costs of mass incarceration. These people did not consent to be a part of this grand thought experiment but have been caught in the middle of this ethical dilemma and human rights crisis.²⁴¹

The moral supremacy of the deontological and abolitionist arguments cannot be denied, but the uncomfortable truth is that utilitarians hold the pragmatic high ground.²⁴² Experimentation is at the heart of placebo and punishment policy alike. It is a double-edged sword that can bring about tremendous positive change, but it can also be captured by political incentives and penal populism. Consequently, the only utilitarian justification for continuing to use mass incarceration as a placebo would be to wean ourselves off from relying on placebos and begin rigorous analysis that will lead to improved public safety.

The ethics of using placebos in experimentation provides a unique starting point to discuss potential ways to mitigate the harm and justify the practices of placebos in the punishment context. Just as the government plays a key regulatory role in the administration of new drugs, this process might

239. See *supra* note 126 and accompanying text.

240. But see Corradi & Baumer, *supra* note 7, at 1394 (finding that “people from states/counties with starkly divergent cumulative imprisonment, crime trends, and crime rates—contrasts that are presumably more likely to be known and appreciated—exhibited levels of fear that were statistically indistinguishable from one another”).

241. But see Claire Finkelstein, *Punishment as Contract*, 8 OHIO ST. J. CRIM. L. 319, 331–34 (2011) (arguing for a social contract theory of punishment, in which people implicitly enter a contract with the state to enjoy the benefits of citizenship and then must abide by the consequences of punishment).

242. See Evans, *supra* note 81, at 717 (stating that “abolition activists may hold the moral high ground, but reformists and economists hold the pragmatic high ground”).

have some value in approving the next generation of punishment policies. Drugs often undergo a rigorous regulatory process that can last years before they are approved for doctors to prescribe, and placebo human trials are merely a step along that long journey.²⁴³

What this experimentation ethic requires is an FDA-like project that gives experts the space, the time, and the resources to approve, reject, or reform new and existing punishment policies. This FDA model would hand over full regulatory power to expert agencies and commissions. The legislature would no longer be in control because they simply do not have the expertise required and the stakes are too high to trust generalists.²⁴⁴ Just as Congress does not have much say in whether Drug A is both efficacious and safe for the market, legislatures would not have much say in whether getting rid of mandatory minimums, for example, would be efficacious and safe for the public.

As Barkow has suggested, there is already an infrastructure of expertise that can be readily tapped for such a transition. Sentencing commissions exist across the country that serve advisory roles to federal and state legislatures; although quite different from the FDA, they are comprised of expert scholars, advocates, and judges.²⁴⁵ While existing commissions have succeeded in recommending reforms and pushing back against penal populist policies, most have little teeth and their policy recommendations can often be ignored if they do not line up with the political incentives ruling their respective legislatures.²⁴⁶ Consequently, there would only need to be a formal legislative delegation and other adjustments to ensure these existing commissions have the necessary power to assume regulatory control over punishment policies.

243. See Phillip Zhang, Preeti Patel & Nicole R. Winston, *Federal Medication Development Regulation*, NAT'L LIBR. OF MED. (Feb. 12, 2024), <https://www.ncbi.nlm.nih.gov/books/NBK574558> [<https://perma.cc/SH7E-U9VQ>] (explaining the step-by-step regulatory process by which the FDA approves pharmaceutical drugs).

244. See Rappaport, *supra* note 220, at 809–12 (discussing the alternatives to the democratization approach that rely on expert administration). But see Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 849–58 (2021) (challenging the traditional determination of who is considered an “expert” in criminal policy and arguing that community members who actually experience the brunt of policing and punishment should also be recognized as experts). For a discussion on the disagreements between these positions, see Benjamin Levin, *Criminal Justice Expertise*, 90 FORDHAM L. REV. 2777 (2022).

245. See BARKOW, *supra* note 72, at 10, 136–37 (proposing the creation of more sentencing commissions and recognizing that more than half of the states do not have such commissions); see also Judge Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 262–63 (2009) (calling on the U.S. Sentencing Commission to “become a repository of studies on recidivism, alternatives to incarceration, and evidence-based practices”).

246. See BARKOW, *supra* note 72, at 43–44, 171–73 (detailing the U.S. Sentencing Commission's success at lowering sentencing for crack cocaine to be more in line with powder cocaine as well as the success of commissions in Minnesota and Washington).

One of the flaws of this FDA punishment model, however, is that the marketplace of regulating food and drugs is vastly different from regulating criminal acts in material ways. Whereas the FDA is a government agency that regulates private companies, a government agency that regulates other government actors usually takes the form of checks and balances. Since any proposed expert agency of punishment policies would be the progenitor of new policies, there would need to be sufficient checks against these new policies. Thus, if the expert agency adopts a new punishment regulation, the courts would still have the ability to strike it down as a check against the administrative state. Executives would still have the discretion to fire appointees, and the legislature would still be able to impeach such appointees.

This author has also contemplated that such punishment agencies could work in the federalism context, whereby the federal government agency serves as a watchdog over state punishment practices.²⁴⁷ Since 94% of criminal convictions²⁴⁸ and around 83% of incarcerated persons are handled by the states,²⁴⁹ most of the harm of placebo punishment policies are being felt at the state level. This federalism approach would borrow less from the FDA and more from the DOJ's Civil Rights Division and the preclearance process of the Voting Rights Act.²⁵⁰ The preclearance process gave the federal government power to approve or reject new voting laws before they went into effect in certain states and counties to mitigate voting discrimination. The DOJ could indeed perform similar watchdog functions over various state punishment policies, and it might also have the benefit of creating some uniform accountability for both carceral and non-carceral punishments.²⁵¹ Admittedly, this structure would lack the power of the Voting Rights Act to prevent policies from going into effect. However, the DOJ and the federal government could more easily tie federal funding to this punishment approval process. For instance, if Louisiana wanted to increase penalties for drug offenses, they would maintain their sovereignty to do so. However, if the DOJ disapproved of this policy, it would be well within its

247. See Evans, *supra* note 6, at 45–50 (explaining reimagining of federal criminal justice as a watchdog and check against abuse of state prison systems).

248. See KATE BERRY, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 1 (2015).

249. See Sawyer & Wagner, *supra* note 103 (estimating that 1,561,000 people are incarcerated in state prisons and local jails out of the total 1,873,000 incarcerated population).

250. Although the preclearance process of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(a), was struck down in *Shelby County v. Holder*, 570 U.S. 529 (2013), it still serves as a useful example of federal government oversight over states that violate federal civil rights.

251. See generally Driver & Kaufman, *supra* note 143; Littman, *supra* note 143 (describing the lack of regulation on various prison conditions and prisoners' rights issues); Weisburd, *supra* note 126, at 1333–34 (detailing the lack of federal or state regulation of noncarceral tools such as halfway houses, electronic monitoring, and more).

purview to rescind federal funding for criminal legal projects,²⁵² and it could partner with other federal agencies to discuss their funding options as well.²⁵³

Handing over so much power to agencies filled with experts is not without its own concerns. Many scholars have expressed reservations about shifting power to experts in ways that might not be productive. Megan Stevenson's study of more than two dozen meta-analyses led her to conclude that there is very little evidence from randomized control trials that many of the rehabilitation reformist interventions are effective at reducing recidivism or first-time offenses.²⁵⁴ The reliance on "evidence-based reform" might also give people a false sense of efficacy, reliability, and neutrality when discretion is still being used to draw lines, make judgment calls, and enshrine perverse incentives.²⁵⁵ Even experts can be influenced by their own moral and social views on punishment, and these views will often impact which experts are selected by the government to serve on these commissions. Therefore, there is potential for political capture of such agencies, as we see in the administrative state quite commonly.²⁵⁶ Agencies and commissions can be vulnerable to corporate capture, especially if lobbyists or other interests seek to influence commission members by employing them as consultants outside of their government duties. These are important considerations that require careful institutional design choices to mitigate such influences.

The takeaway of this Section is that a placebo punishment methodology enlightens the discussion of ethical experimentation and requires careful consideration of the utilitarian benefits and social costs. Using the mass

252. To this day, states continue to receive federal funding through Byrne Justice Assistance Grants, which are important funds that states usually need to shore up budget shortfalls in their criminal legal systems. See Evans, *supra* note 6, at 31.

253. See *id.* at 55–57 (proposing multi-agency efforts to fund programs that mitigate underlying causes of crime, such as education, homelessness, and public health).

254. See Stevenson, *supra* note 224, at 2020–23 (arguing that only 29 out of 122 studies looking at various reformist interventions were effective at reducing recidivism or first-time offenses and of those twenty-nine studies, many had experimental defects).

255. See *id.* at 2040–41; see, e.g., Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2007 (2022) (arguing that supposed neutral pretrial algorithms reproduce inequities because they are built with "carceral knowledge sources"); Erin Collins, *Abolishing the Evidence-Based Paradigm*, 48 BYU L. REV. 403, 403 (2022) (arguing that the evidence-based movement is political, with agendas that strengthen rather than challenge the existing system); Cecelia Klingele, *The Promises and Perils of Evidence-Based Corrections*, 91 NOTRE DAME L. REV. 537, 537 (2016) (illustrating how evidence-based practices that were originally designed to improve the criminal legal system have turned into reforms used to empower the carceral state).

256. See Mirko Bagaric and Richard Edney, *The Sentencing Advisory Commission and the Hope of Smarter Sentencing*, 16 CURRENT ISSUES CRIM. JUST. 125, 171 (2004) (realizing the limitations of existing sentencing commissions); see also Rachel E. Barkow, *The Evolving Role of the United States Sentencing Commission*, 33 FED. SENT'G REP. 3, 4–7 (2020) (explaining how politics has impacted and weakened the original purpose of the U.S. Sentencing Commission).

incarceration placebo is unfortunately a necessary evil to pave a way forward, as justified by creating better consequentialist punishment outcomes. And further, allowing experts into the experimentation process is key to mitigate the past generation of perverse political incentives and penal populism. Allowing experts to conduct these experiments and approve the experiments of others would begin to yield the type of results to turn back the tide of mass incarceration. And while the data, studies, and policies of these experts may not alone be enough to change the social and cultural sentiments towards punishment,²⁵⁷ they can get much closer to punishment policies that *effectively* make us safer.

D. PLACEBO ECONOMICS

The placebo ethics of economic incentives holds further insight for the marketplace of placebo punishment policies. Ethicists criticize the use of placebos on economic grounds because it requires a patient to pay for a product that is physiologically inert. Placebos are tantamount to snake oil, even if sold or prescribed benevolently by the doctor acting as a salesman. The same ethical criticism should be made of placebo punishment policies and the larger economic debates that have the potential of influencing the very social and cultural meanings necessary to change public views on punishment.

The economic aspect of placebos may be important to shaping the patient's subjective expectations and perceptions of the treatment. When a doctor prescribes a treatment or drug, this usually necessitates some pecuniary commitment of the patient to go the pharmacy and buy the drug or over-the-counter product.²⁵⁸ Imposing this economic cost may be necessary to the placebo's impact because a patient would *perceive* an effective drug to require such out-of-pocket expense. This imposes costs on patients and insurance companies for products that carry little physical benefit but nevertheless provide some psychological and therapeutic benefit. Thus, patients and insurance companies are required to pay for products that are designed to deceive the patient into *feeling* better, as opposed to a physiologically efficacious treatment.²⁵⁹

257. See IAN LOADER & RICHARD SPARKS, PUBLIC CRIMINOLOGY? 60, 107–08 (2011) (criticizing the “narrowly instrumental focus” of expert- and evidence-based reformers because crime policy is political, which accounts for questions of power and how society feels about what constitutes a good society); BARKOW, *supra* note 72, at 15 (realizing that even expert analysis as a solution faces an uphill battle because “criminal justice policy-making cannot be completely removed from politics and the populist desire for severe responses to high-profile crimes”).

258. See Annoni, *supra* note 91, at 467 (acknowledging that “[m]any [placebos] involve the expenditure of time and money”).

259. See JOPLING, *supra* note 22, at xviii–xix (summarizing other ethicists’ views on the justification for insurance companies and other third parties to pay for placebos).

In addition to the doctor-patient relationship, there is also a robust, direct-to-consumer placebo market of supplements, vitamins, and other remedies that claim to contribute to health benefits without any scientific proof.²⁶⁰ In fact, many of these so-called health supplements have been scientifically debunked, and yet consumers still flock to this marketplace—which sells substances that are not regulated by the FDA—to the tune of \$40 billion every year.²⁶¹ Thus, these alternative treatments that have no scientific backing still make up a “significant segment of the healthcare industry.”²⁶²

Economic incentives also complicate the ethics of the medical industry. Doctors can be incentivized by personal economic gain, receiving stipends, cash bonuses, expensive trips and a whole host of other extra benefits based on their prescriptions. The underworld of pharmaceutical companies paying doctors to increase prescriptions has been uncovered to great public outcry.²⁶³ Even the government could not turn a blind eye to these perverse

260. See, e.g., Kirsch, *supra* note 229, at 18–24 (arguing that the majority of antidepressant medications have little more efficacy than placebos); Bruce P. Barrett, Roger L. Brown, Kristin Locken, Rob Maberry, James A. Bobula & Donn D’Alessio, *Treatment of the Common Cold with Unrefined Echinacea: A Randomized, Double-Blind, Placebo-Controlled Trial*, 137 ANNALS INTERNAL MED. 939, 939 (2002) (finding no statistically significant differences between the echinacea and placebo groups for any of the measured outcomes); Ondine van de Rest, Johanna M. Geleijnse, Frans J. Kok, Wija A. van Staveren, Willibrord H. Hoefnagels, Aartjan TF Beekman & Lisette CPGM de Groot, *Effect of Fish-Oil Supplementation on Mental Well-Being in Older Subjects: A Randomized, Double-Blind, Placebo-Controlled Trial*, 88 AM. J. CLINICAL NUTRITION 706, 710–12 (2008) (finding no effect of fish oil supplementation on mental well-being in older patients).

261. See Malani, *supra* note 10, at 439 (describing the “\$36–47 billion [market] in 1997” of alternative medications); Arthur K. Shapiro & Elaine Shapiro, *The Placebo: Is It Much Ado About Nothing?*, in THE PLACEBO EFFECT: AN INTERDISCIPLINARY EXPLORATION 12, 24 (Anne Harrington ed., 1997) (citing the \$30 billion spent annually on medical and supplement “fraud”; the \$13.9 billion spent annually on “vitamins, organic diets, excessive jogging, holistic treatment, and alternative treatment”; and other fads).

262. Boozang, *supra* note 15, at 691 (citing David M. Eisenberg, Roger B. Davis, Susan L. Ettner, Scott Appel, Sonja Wilkey, Maria Van Rompay & Ronald C. Kessler, *Trends in Alternative Medicine Use in the United States, 1990–1997: Results of a Follow-up National Survey*, 280 J. AM. MED. ASS’N 1569, 1569 (1998)).

263. See, e.g., Neil Vigdor, *It Paid Doctors Kickbacks. Now, Novartis Will Pay a \$678 Million Settlement*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/business/Novartis-kickbacks-diabetes-heart-drugs.html> [<https://web.archive.org/web/20240111004529/https://www.nytimes.com/2020/07/01/business/Novartis-kickbacks-diabetes-heart-drugs.html>] (describing the hundreds of millions of dollars that Novartis paid to doctors through “fishing junkets, golf outings and . . . six-figure honorariums”); Katie Thomas, Agustin Armendariz & Sarah Cohen, *Detailing Financial Links of Doctors and Drug Makers*, N.Y. TIMES (Sept. 30, 2014), <https://www.nytimes.com/2014/10/01/business/Database-of-payments-to-doctors-by-drug-and-medical-device-makers.html> [<http://web.archive.org/web/20220802195929/https://www.nytimes.com/2014/10/01/business/Database-of-payments-to-doctors-by-drug-and-medical-device-makers.html>] (“From August to December 2013, drug and device companies made 4.4 million payments to more than half a million health care professionals and teaching hospitals—adding up to about \$3.5 billion.”); see also Aaron P. Mitchell, Niti U. Trivedi, Renee L. Gennarelli, Susan Chimonas, Sara M. Tabatabai, Johanna Goldberg, Luis A. Diaz Jr. & Deborah Korenstein, *Are Financial*

medical incentives and has been active in investigating and increasing regulations to mitigate these harms.²⁶⁴ This is relevant to the current discussion because, according to some experts, these personal incentives exist for doctors to prescribe drugs they know to be placebos.²⁶⁵

Applying these economic ethical concerns to the placebo punishment sphere, taxpayers should not be expected to pay the expensive costs for a punishment regime that is both inefficient and not efficacious. The prison system itself costs taxpayers approximately \$80 billion annually according to conservative estimates and as much as \$182 billion annually according to more liberal estimates.²⁶⁶ During the height of the mass incarceration era, state and local expenditures for the incarceration system rose by 946%, outpacing the very social programs better equipped to handle rising crime rates such as education, healthcare, and public welfare.²⁶⁷ And this is just a fraction of the \$305 billion that conservatively estimates the total cost of the criminal legal system.²⁶⁸ This is quite the sum for government services that do not effectively deliver public safety benefits.

Politicians are also incentivized to support the punishment marketplace through the PIC. The broader PIC supports a multi-billion-dollar industry that includes a host of private and non-profit companies outside of the prisons' walls.²⁶⁹ Private prisons alone are estimated to bring in \$4 billion in

Payments from the Pharmaceutical Industry Associated with Physician Prescribing?: A Systematic Review, 174 ANNALS INTERNAL MED. 353, 358 (2021) (finding that doctors' receipts of financial payments and benefits from pharmaceutical companies were consistently associated with higher and increased prescriptions from those respective companies).

264. See David Grande, *Limiting the Influence of Pharmaceutical Industry Gifts on Physicians: Self-Regulation or Government Intervention?*, 25 J. GEN. INTERNAL MED. 79, 80–82 (2009) (detailing different approaches that state and federal governments have used to regulate the pharmaceutical industry from incentivizing doctors to prescribe medications); Robert Pear, *Drug Industry Is Told to Stop Gifts to Doctors*, N.Y. TIMES (Oct. 1, 2002), <https://www.nytimes.com/2002/10/01/us/drug-industry-is-told-to-stop-gifts-to-doctors.html> [<http://web.archive.org/web/20240806025732/https://www.nytimes.com/2002/10/01/us/drug-industry-is-told-to-stop-gifts-to-doctors.html>] (reporting governmental warnings to pharmaceutical companies to stop incentivization for doctors to prescribe medications).

265. See, e.g., Kirsch, *supra* note 229, at 18–24 (arguing that the majority of antidepressant medications have little more efficacy than placebos).

266. See Vanessa Taylor, *E-Carceration Brings the Oppression of the Prison System into Your Own Home*, MIC (Mar. 30, 2021), <https://www.mic.com/impact/what-is-e-carceration-understanding-the-us-justice-systems-dirty-little-secret-66261004> [<https://perma.cc/84VX-HN9X>] (reporting conservative estimates from the Bureau of Justice Statistics and liberal estimates from the Prison Policy Initiative).

267. See BARKOW, *supra* note 72, at 173 (“Between 1977 and 1999, state and local expenditures for corrections rose by 946 percent, far outpacing the growth in outlays for education (370 percent), hospitals and health care (411 percent), and public welfare (510 percent).” (citation omitted)).

268. See Emily D. Buehler, *Justice Expenditures and Employment in the United States, 2017*, U.S. DEP’T OF JUST. BULL. (July 2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/jeeus17.pdf> [<https://perma.cc/56YA-FVWW>] (reporting the growth in criminal justice spending from \$188 billion in 1997 to \$305 billion in 2017).

269. See, e.g., Steven Obadia, *Those Profiting from the Prison-Industrial Complex*, SNOQAP (Aug. 1, 2020), <https://www.snoqap.com/posts/2020/8/1/those-profiting-from-the-prison-industrial->

profit,²⁷⁰ and incarcerated people who are forced to work at slave wages produce \$11 billion in goods and services.²⁷¹ This is a small sample of the larger PIC, which supports the carceral industry by providing soap, clothes, food, surveillance, weapons, construction, and other goods and services that uphold the status quo. Although not nearly as scandalous as private companies making direct payments to doctors, lobby organizations and unions for the PIC contribute to political campaigns in ways that incentivize politicians, benefit private companies, and incentivize locking up and surveilling more and more people.²⁷²

Placebo ethics questions the economic practice of requiring people to pay for a product that is known to be ineffective and scrutinizes the perverse economic incentives at play. But looking forward, a focus on inefficient or ineffective economic practices can also play a role in changing the very social behavior and cultural understandings necessary for a new punishment paradigm.

The last generational shift in punishment was based on this very placebo ethic, but in slightly different terms. The dominant rehabilitative model was believed by scholars and politicians of the time to be far too ineffective for the relative economic costs. This logic took hold in the 1960s and 1970s,

complex [<https://perma.cc/V4B3-7WPK>] (highlighting the massive growth in the prison population between 1980 and 2008, its contribution to the proliferation of private prisons, and the tensions produced through the privatization of incarceration); INCITE! Women of Color Against Violence & Critical Resistance, *The Critical Resistance INCITE! Statement on Gender Violence and the Prison Industrial Complex*, in *ABOLITION NOW! TEN YEARS OF STRATEGY AND STRUGGLE AGAINST THE PRISON INDUSTRIAL COMPLEX* 15, 19–20 (CR10 Publications Collective ed., 2008) (finding that even nonprofits are a part of the PIC because they can be used to monitor and control social justice movements, divert public monies, redirect activist energies, allow corporations to mask involvement in mass incarceration through donations and philanthropic work, and other activities).

270. See Clyde Haberman, *For Private Prisons, Detaining Immigrants Is Big Business*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html> [<https://web.archive.org/web/20201112023703/https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html?0p19G=3248>].

271. See Dani Anguiano, *US Prison Workers Produce \$11bn Worth of Goods and Services a Year for Pittance*, THE GUARDIAN (June 15, 2022), <https://www.theguardian.com/us-news/2022/jun/15/us-prison-workers-low-wages-exploited> [<https://perma.cc/WSG7-APYN>] (detailing the economic contribution and the “pennies an hour in wages” incarcerated persons make).

272. See Heather Ann Thompson, *The Prison Industrial Complex: A Growth Industry in a Shrinking Economy*, 21 NEW LAB. F. 39, 41 (2012) (describing the powerful “American Legislative Exchange Council (ALEC), a powerful new political lobby committed to beating back unions, locking people up, and accessing cheap labor” and other efforts that lobby for longer prison sentences that increase profits); Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about> [<https://web.archive.org/web/20225000154/https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/#expand>]; see also James Kilgore, *Mass Incarceration and Working Class Interests: Which Side Are the Unions On?*, 37 LAB. STUD. J. 356, 367 (2013) (studying the political impact that prison guard unions and PIC lobbying efforts have on political discourse of maintaining mass incarceration).

when the federal government spent billions of dollars to improve existing prisons and jails to lower recidivism,²⁷³ all just to see the crime rate rise.²⁷⁴ Politicians and taxpayers alike lost their logical patience to see the long-term positive impacts that rehabilitative models were having²⁷⁵ and instead turned to fear and emotion by favoring harsher sentencing. This paved the way for the implementation of mass incarceration policies during Reagan's 1980s²⁷⁶ and Clinton's 1990s.²⁷⁷ It took nearly twenty years of frustrations (1960s and 70s) to boil into a generational shift in policies over the next twenty years (1980s and 1990s).

We have started to see this same multi-decade cycle reflected in the current twenty year frustration period in the 2000s and 2010s. Fiscal conservatives and libertarians—who might have traditionally been the staunchest supporters of law-and-order politics—have started to ring the alarm bells that mass incarceration policies are simply too expensive for the relatively small social benefits.²⁷⁸ Perhaps the surest bet in decarceration over the past fifteen years is that economic downturn has yielded the most significant reforms. The smart-on-crime movement, which boasted more efficient and effective punishment policies, started in the early 2010s as it was spurred by state budgetary cost concerns coming out of the Great Recession of 2008.²⁷⁹ The country's recent battle with COVID-19 also

273. See CONG. BUDGET OFF., FEDERAL LAW ENFORCEMENT ASSISTANCE: ALTERNATIVE APPROACHES ix, 8 (1978), <https://www.cbo.gov/sites/default/files/95th-congress-1977-1978/reports/78-cbo-032.pdf> [<https://perma.cc/DJQ7-UESJ>] (describing the \$6.6 billion spent on seed programs to improve recidivism and lower crime at the state and local level).

274. See *supra* note 107 and accompanying text.

275. See *supra* notes 108–110 and accompanying text.

276. See, e.g., Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1796 (1984); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988).

277. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

278. See, e.g., DAVID DAGAN & STEVEN TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION 39 (2016) (explaining how the Tea Party movement characterized mass incarceration as government overreach); John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, 5 FEDERALIST SOC'Y FOR LAW & PUB. POL'Y STUD. 23, 27–28 (2004) (“The federal government is supposedly a government of limited powers and, therefore, limited jurisdiction. Every new crime expands the jurisdiction of federal law enforcement and federal courts.”); see also Marie Gottschalk, *Democracy and the Carceral State in America*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 288, 290–91 (2014) (stating that institutions on the political Left and Right “have embraced framing the problem of the carceral state as primarily a dollar-and-cents issue that begs for a bipartisan solution”).

279. See Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, THE SENT'G PROJECT (Sept. 17, 2019), <https://www.sentencingproject.org/app/uploads/2022/08/U.S.-Prison-Population-Trends.pdf> [<https://perma.cc/U56Z-SF8C>]; see, e.g., Jeremy W. Peters, *Albany Reaches Deal to Repeal '70s Drug Laws*, N.Y. TIMES (Mar. 25, 2009), <https://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html> [<https://web.archive.org/web/20240126031152/https://www.nytimes.com/2009/03/26/nyregion/26rockefeller.html>] (describing how budgetary pressure to reduce imprisonment rates and shifting political winds combined to permit legislation to reduce drug penalties).

sparked increased debate about penal spending when states struggled to balance their budgets given the tremendous negative economic impacts of the pandemic.²⁸⁰

Economics were not the entire story, but they were part of the social and cultural shift of these times. Social and cultural expectations shape a patient's positive and negative experience with a placebo and so too are we seeing the social and cultural expectations of economics impact how Americans are starting to negatively view the placebo of mass incarceration. There are few things more "American" from a cultural standpoint than demanding to get your money's worth. And as *perceptions* of the costs of mass incarceration change,²⁸¹ so too will economics impact our cultural rejection of placebo punishment policies.

The placebo punishment framework and the broader health literature it incorporates not only help us think about these ethical economic problems but also gesture towards unique health-related solutions that can inform punishment reform. One approach would be to regulate the market with economic tools like a "sin tax" of some type. This author and others have previously proposed various methods for increasing the economic costs of incarceration on government actors to disincentivize them from over relying on carceral punishment tools,²⁸² such as imposing a tax on local prosecutors when charging and prosecuting a person and suggesting prison time.²⁸³ These types of sin taxes have been applied across the public health sphere from cigarettes to sugary drinks.²⁸⁴ Passing along these costs onto

280. See Louise Sheiner & Sophia Campbell, *How Much Is COVID-19 Hurting State and Local Revenues?*, BROOKINGS (Sept. 24, 2020), <https://www.brookings.edu/blog/up-front/2020/09/24/how-much-is-covid-19-hurting-state-and-local-revenues> [<https://perma.cc/3Z8C-K548>] ("We project that state and local government revenues will decline \$155 billion in 2020, \$167 billion in 2021, and \$145 billion in 2022—about 5.5 percent, 5.7 percent, and 4.7 percent, respectively—excluding the declines in fees to hospitals and higher education. Including those fees to hospitals and higher education would bring these totals to \$188 billion, \$189 billion, and \$167 billion."); see also *States Grappling with Hit to Tax Collections*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 6, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/4-2-20sfp.pdf> [<https://perma.cc/Z4RS-RKP7>] (discussing states having to make cuts to meet budget shortfalls caused by the coronavirus pandemic).

281. See, e.g., *supra* notes 135–137 and accompanying text.

282. See, e.g., Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47 (2008) (arguing that prosecutors should be made aware of prison capacity and incarceration rates to inform their decision-making); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1278 (2005) (arguing the benefits of focusing on the costs of incarceration due to state sensitivity to balancing their budgets). See generally Russell M. Gold, *The Price of Criminal Law*, 56 ARIZ. ST. L.J. 841 (2024) (arguing that local county-level decision-makers should be forced to consider the local costs of criminal justice without enjoying a correctional free lunch by being covered by state and federal programs).

283. See Evans, *supra* note 81, at 729–35 (explaining the considerations and potential operation of a state- or federal-imposed prison tax on local prosecutorial budgets).

284. See *How Do State and Local Cigarette and Vaping Taxes Work?*, TAX POL'Y CTR. (Jan. 2024), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state->

constituents, such as raising taxes for the express purpose of maintaining the prison population, would also likely change the social and cultural expectations of the mass incarceration placebo and could result in further public outcry for reform.²⁸⁵

Another economic insight from the placebo punishment framework is its focus on effective treatments and diagnoses alike. The crime-as-disease framing diagnoses crime as our social and cultural norms have defined it: as the thing to be focused upon for economic investment in the punishment remedy. However, drug addiction, gun violence, mental health and educational problems, and disparities in economic opportunity are the more accurate diagnoses. It is understandable that if a doctor diagnoses cancer, the medical priority is to immediately address that life-threatening problem; but the secondary treatment should be to do everything possible to prevent the cancer from coming back as part of a preventative medical treatment regimen. While this does not condone the use of placebo punishment policies in the past, we must now focus on economically investing in the right treatments for the right diagnoses. This calls for a multivariate investment in punishment policy into education, health policy, job training, and the “all of the above” approach that reformists have advocated for since the beginning of the mass incarceration era.²⁸⁶ Further, the broader we understand this preventative medicine approach so as to avoid future need for placebos, the more we can rely on a multi-agency funding campaign involving the likes of HHS, HUD, DOE, and a host of other governmental grant and funding partners that can tackle the crime problem.²⁸⁷

These economic interventions are not without critics, but dismantling the placebo punishment policies of mass incarceration is designed to take into account more than just dollars and cents. For instance, Marie Gottschalk has levied a series of criticisms against exclusively focusing on economic

and-local-backgrounders/cigarette-and-vaping-taxes (discussing how different tobacco products, such as cigarettes and vaping products, are taxed and the variances in tax rates among different states); Susan M. Kansagra, Maura O. Kennelly, Cathy A. Nonas, Christine J. Curtis, Gretchen Van Wye, Andrew Goodman & Thomas A. Farley, *Reducing Sugary Drink Consumption: New York City's Approach*, 105 AM. J. PUB. HEALTH e61, e63 (2015) (describing taxes imposed on sugary drinks in New York City and other jurisdictions and its impact at reducing consumption).

285. See Evans, *supra* note 81, at 748 (arguing that passing carceral costs directly onto constituents would introduce a new level of political accountability onto state and local prosecutors).

286. See FORMAN, *supra* note 125, at 31–32 (documenting that Black leaders in the 1980s and 1990s wanted such an “all of the above” approach but had to settle when politicians were only willing to deliver more prisons and police); BARKOW, *supra* note 72, at 4 (calling for the same “all-of-the-above approach to crime prevention and not just [to] rely on a criminal justice response”).

287. See Evans, *supra* note 6, at 55–57 (advocating for cooperative federalism funding from multiple federal agencies); see also Littman, *supra* note 143, at 1469 (calling for the support of “[f]ree-world regulatory agencies with words like ‘safety,’ ‘health,’ and ‘protection’ in their names” as “the arms of government that provide the kinds of services abolitionists hope will replace carceral responses”).

cost-benefit analysis to solve the mass incarceration crisis in part because it fails to capture the human rights deprivations of incarceration and only serves to reinforce the neoliberal zeal to further cut costs of the welfare state.²⁸⁸ Just like in the 1970s and 1980s, economics will not be the only factor that leads to a generational shift in punishment policy.²⁸⁹ Neither do these tools of economic accountability and reinvestment seek to hollow out the welfare state; rather, they propose the opposite. By focusing on the right diagnoses, we transform the social and cultural tradition from viewing human offenders as a cancer to viewing the institutional failures of the social welfare state as the disease to be remedied with robust reinvestment.

This Section's focus on highlighting the ethical concerns of placebo economics adds another analytical tool to the placebo methodology of punishment. It is hard to justify mass incarcerations' placebo focus on controlling public perception of crime based on the actual price tag for such ineffective policies. But this Section also highlights that economics play an important role in shaping public perception and expectation of punishment policies. The more something costs, the more we expect as a society and the more we resent the waste when the policies do not work. Economics can indeed shape the social and cultural perceptions of our punishment future by imposing interventions that increase costs or that refocus policy on the underlying causes of the crime/disease we seek to prevent.

IV. BEYOND PUNISHMENT AND PLACEBOS

The comparisons, synergies, and differences between the medical use of placebos and legal punishment policies offer numerous insights into how we might think about and approach the biggest problems of mass incarceration, but these placebo analyses also offer several insights across criminal legal policy and society as a whole. This Part zooms out to briefly consider these broader questions and applications. Section IV.A illustrates that a placebo methodology can be valuable in legal analysis whenever there is need to compare the effectiveness of a policy with its value on changing the public's perception of the problem it was purported to address. Section IV.B considers a few alternatives to the placebo methodology that utilize some of the same truths about punishment but according to different, but tangential, socio-medical frameworks.

288. See Marie Gottschalk, *The Folly of Neoliberal Prison Reform*, BOS. REV. (June 8, 2015), <https://www.bostonreview.net/articles/marie-gottschalk-neoliberal-prison-reform-caught> [<https://perma.cc/FZ4U-QUU2>]; see also Gottschalk, *supra* note 278, at 290–91.

289. See Gottschalk, *supra* note 278, at 291 (stating that since no single factor explains the rise of mass incarceration, no single factor such as economics will “bring about its demise”).

A. BEYOND PUNISHMENT

The placebo methodology need not be limited to punishment. Learning from medical ethics and public health literatures, placebo analyses offer an underutilized methodology that impacts theoretical framing and practical problem solving. This Section briefly considers this bigger picture by developing the placebo methodology around a few case studies to spark further scholarly inquiry.

First, it is interesting to consider how much the future use of placebos in the legal literature would contribute to other well-established methodologies. For example, political economists have developed an entire field studying the symbolic value of law and policy.²⁹⁰ Analyzing the law as a symbol implicates some of the same themes as the placebo methodology because they both consider how law impacts both perceptions of society and perceptions of the lawmakers enacting such symbols. Thus, scholars have studied the theoretical symbolisms of tax policy, the environment, health law, and numerous other fields.²⁹¹ One of the key differences is that this symbolic methodology generally focuses on how lawmakers avoid political accountability through passing symbolic laws; in other words, they can gain the benefit of public perception by appearing to do something meaningful through symbolic legislation, and need not be answerable for the law's actual effects.²⁹² The focus on political accountability and shirking can certainly add to the placebo methodology, but the methodology focuses more on the effectiveness versus perception value proposition along with the ethical considerations of policy justifications.

Behavioral economics walks a parallel path by studying how social contexts and heuristics impact decision-making.²⁹³ This discipline adds tremendous explanatory value to a host of legal and policy decisions by studying the extent to which social norms can contribute to irrational

290. See, e.g., EDELMAN, *supra* note 15, at 189 (arguing that one of the purposes of most legislation is to provide symbolic reassurance to the public).

291. See Aviram, *supra* note 11, at 90 n.106 (citing John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 234–36 (1990)) (discussing symbolic environmental, health, and safety laws); Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 *IOWA L. REV.* 413, 446–58 (1999) (discussing the forces that lead to symbolic tax laws with no real effect).

292. John W. Lee & W. Eugene Seago, *Policy Entrepreneurship, Public Choice, and Symbolic Reform Analysis of Section 198, The Brownfields Tax Incentive: Carrot or Stick or Just Never Mind?*, 26 *WM. & MARY ENV'T L. & POL'Y REV.* 613, 620 (2002) (describing how “symbolism” is used in the political science literature to mean the use of symbols to demonize political enemies and gain political advantage).

293. See EDWARD CARTWRIGHT, *BEHAVIORAL ECONOMICS* 3–4, 10–12 (2011) (explaining the basic precepts of behavioral economics and its differences with the rational actor standard economic model).

decisions.²⁹⁴ Feel-enomics—or how people *feel* about the economy—is often more important than the actual economy.²⁹⁵ For example, negotiators will seek to punish their adversary when they perceive unfair treatment, which can actually lead to a negative result for both parties.²⁹⁶ Thus, a person's *perception* of what is socially right and wrong behavior can impact their decision-making, which can lead to net-negative results for all.²⁹⁷ Heuristics have also been an important contribution of behavioral economics, which study the mental shortcuts we use when making snap decisions about people, the natural world, and social conventions that can lead to erroneous assumptions.²⁹⁸ This spans the gamut of making snap judgements about a person's profession, their guilt in committing some offense, or other attributes based on stereotypes that function as judgmental heuristics.²⁹⁹ Heuristics are often informed by learning social cues and stereotypes about different classes of people, and this social context impacts a person's *perception* of others at the danger of making a bad and inaccurate judgment call.³⁰⁰

294. See *id.* See generally RICHARD H. THALER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* (2011) (applying the concepts of behavioral economics to a host of human decision-making processes, including buying stocks, assigning faculty offices, and home finances).

295. See, e.g., ROLAND T. RUST & MING-HUI HUANG, *THE FEELING ECONOMY: HOW ARTIFICIAL INTELLIGENCE IS CREATING THE ERA OF EMPATHY 2* (2021) (arguing that the rise of artificial intelligence has allowed human decisionmakers to focus less on rational thinking and more on feelings); Christina Pazzanese, *We'll Gather Together—Even Though Everything Seems So Much More Expensive*, HARV. GAZETTE (Nov. 21, 2023), <https://news.harvard.edu/gazette/story/2023/11/why-americans-feel-inflation-economy-are-much-worse-than-they-are> [<https://perma.cc/2HNX-F9V6>] (explaining why Americans often *feel* that the economy is worse than it actually is).

296. See Johan Almenberg, Anna Dreber, Coren L. Apicella & David G. Rand, *Third Party Reward and Punishment: Group Size, Efficiency, and Public Goods*, in *PSYCHOLOGY OF PUNISHMENT: PSYCHOLOGY OF EMOTIONS, MOTIVATIONS AND ACTIONS* 73, 73–88 (Nicolas M. Palmetti & Jennifer P. Russo eds., 2011) (citing the literature that covers social and psychological experiments of punishing adverse parties in what is designed to be mutually beneficial negotiations).

297. See *id.* at 74 (“Shared beliefs of what constitutes appropriate behavior greatly affect human decision making in many social domains, ranging from dress codes and marriage practices to personal conflicts and public policy.”).

298. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124–30 (1974) (discussing common errors in the assessment of probabilities and the prediction of values).

299. See, e.g., Janis E. Jacobs & Maria Potenza, *The Use of Judgment Heuristics to Make Social and Object Decisions: A Developmental Perspective*, 62 CHILD DEV. 166, 166 (1991) (citing a study that found that people used personality descriptions and stereotypes when asked to assess their likely profession); Galen V. Bodenhausen, *Stereotypes as Judgmental Heuristics: Evidence of Circadian Variations in Discrimination*, 1 PSYCH. SCI. 319, 320–21 (1990) (finding that “stereotypes function as judgmental heuristics and, as such, are likely to be more influential under circumstances in which people are less motivated or less able to engage in more systematic and careful judgment” as applied in studies involving the misbehavior of college students and their guilt).

300. See, e.g., BAILEY MARYFIELD, JUST. RSCH. & STAT. ASS'N, *IMPLICIT RACIAL BIAS*, 2–6 (2018) (finding that implicit biases negatively impacted criminal justice outcomes for Black Americans).

The similarities between behavioral economics and the placebo methodology of criminal punishment should not go unnoticed. Behavioral economics focuses on social contexts and operationalizes the importance of a decisionmaker's social perception. The placebo methodology benefits from this literature, but it prioritizes public perception as opposed to that of the decisionmaker. Heuristic judgements are often a theme in criminal legal scholarship addressing racial profiling and sentencing disparities, and this relates to how the crime-as-disease framing characterizes certain people and communities as being part of the crime problem.

Within this broader context of using these themes about perception and accountability in legal scholarship, placebos have found some limited value. Aviram has already used slightly different placebo methods to analyze travel regulations.³⁰¹ Malani has also convincingly applied placebo methods to analyze pharmaceutical regulations, health law, consumer protection, and torts.³⁰² Others have invoked the language and terminology of placebos but often as a hollow comparison meant to denote an ineffective legal policy in fields such as financial regulation,³⁰³ labor and employment,³⁰⁴ and environmental policy.³⁰⁵

Narrowing this to the criminal legal context, there are myriad values of the placebo methodology outside of studying mass incarceration. This could extend to other punishment policies such as whether placebo policies might factor into the state of e-carceration and bail reform. In the same way that mass incarceration policies have been used to control public fear and perception, it *might* be possible that similar goals are imbedded in the pre-conviction bail context and even the post-conviction surveillance context.³⁰⁶

301. See Aviram, *supra* note 11, at 56–59.

302. See Malani, *supra* note 10, at 435–65.

303. See, e.g., Florian Heeb, Julian F. Kölbel, Stefano Ramelli & Anna Vasileva, *Is Sustainable Finance a Dangerous Placebo?*, 2023 SWISS FIN. INST. RSCH. PAPER NO. 23-46, at 2; Usha Rodrigues & Mike Stegemoller, *Placebo Ethics: A Study in Securities Disclosure Arbitrage*, 96 VA. L. REV. 1, 10 (2010).

304. See Seth Katsuya Endo, *Neither Panacea, Placebo, Nor Poison: Examining the Rise of Anti-Unemployment Discrimination Laws*, 33 PACE L. REV. 1007, 1008 (2013); Anne O'Rourke & Sarah Kathryn Antioch, *Workplace Bullying Laws in Australia: Placebo or Panacea?*, 45 COMMON L. WORLD REV. 3, 21 (2016).

305. See Ruth Greenspan Bell, *The Kyoto Placebo*, 22 ISSUES SCI. & TECH. 28, 28 (2006); see also Orsini & Saurette, *supra* note 72, at 240 (explaining the common, yet shallow, placebo analogies of public policy).

306. Controlling public fear has been associated with bail reform and policy since at least the early 1980s. See, e.g., John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 16, 53–54 (1985) (acknowledging the connection between the public's heightened fears of crime and pre-trial detention policies); Steven R. Schlesinger, *Bail Reform: Protecting the Community and the Accused*, 9 HARV. J.L. & PUB. POL'Y 173, 189 (1986) (citing resources from the early 1970s and 1980s discussing how preventative incarceration can help “lessen the oppressive fear of crime that hangs so heavily over the American society”).

Courts are willing and ready to add to this literature, often looking for unique ways to characterize problems as placebos in the punishment regime.³⁰⁷

Policing is also a ripe field that might benefit from placebo methodologies. Deterrence advocates are often at odds with critical race theorists and abolitionists in this debate, disagreeing about the effectiveness of police presence on catching offenders and deterring future crime. While there are convincing criminological studies suggesting that more police officers can deter crime if it increases an offender's likelihood of getting caught,³⁰⁸ many Critical Race Theory ("CRT") scholars argue that policing comes at too heavy a cost for poor and minority communities subjected to surveillance, excessive use of force, and police killings.³⁰⁹ A placebo analysis of policing has some precedent, since the American Public Health Association adopted a policy recognizing policing as a public health issue.³¹⁰ This recharacterization paves a smoother path for a placebo analysis that may focus on how policing impacts perceptions of public safety versus its actual efficacy on public safety; this would, of course, include the nuances of racial politics such as considerations of *who* the police are meant to keep safe, who benefits from *feeling* more safe, and who suffers the social costs and consequences of police presence.

This Section is not meant to be exhaustive, but it illustrates the broader appeal and applicability of deeper examinations and use of placebo methodologies in legal scholarship. The ongoing discussions that pit the objective effectiveness of policies against how the police impact public perception of the problem will continue to shape future decision-making. By adding socio-medical ethics and policy solutions to these discussions,

307. See, e.g., *State v. Williams*, 550 A.2d 1172, 1216 (N.J. 1988) (Handler, J., concurring) (describing the majority's failure to identify prosecutorial misconduct as "a placebo for the public," because it allowed the public to believe justice was being served when in reality it allowed pernicious prosecutorial practices to continue); *Rose v. State*, 724 S.W.2d 832 (Tex. Crim. App. 1986) (describing problems of sentencing by saying that "[t]he Legislature has heeded the clamor of the mob; it has cast an ineffectual placebo into the public arena; it has quelled the outcry but avoided an effective solution; it has committed legislative cowardice").

308. See Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2 AM. J.L. & EQUAL. 85, 99 (2022) (stating that "[t]he empirical literature on deterrence is unequivocal that increasing the size of police forces is a much more efficient way to prevent crime than increasing the length of prison sentences"); see also *supra* note 95 and accompanying text.

309. See PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 9–13, 81–83 (2017) (explaining the use of criminal law and policing to control and subjugate Black men); Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485 (2016) (conveying the idea that frequent police encounters in the Black community increase exposure of those communities to police violence).

310. See Littman, *supra* note 143, at 1470; see also *Advancing Public Health Interventions to Address the Harms of the Carceral System*, END POLICE VIOLENCE COLLECTIVE (Oct. 26, 2021), <https://www.endingpoliceviolence.com> [<https://perma.cc/742C-53VJ>] (containing the text of a resolution passed at an American Public Health Association conference).

multiple literatures can benefit from the placebo methodology as deeper considerations of the law's value and continued role in society.

B. BEYOND PLACEBOS

As this Article has highlighted, comparing punishment policies to a medical placebo treatment is a worthwhile methodology but one that is not a perfect analogy. This Section considers a number of alternative socio-medical framings that also have value for future consideration. Each of these alternative framings expand on different aspects of our social understanding of punishment in ways that highlight latent truths that might impact how we should think about future policy.

Perhaps the most analogous framing is thinking about punishment as a penicillin treatment. The core value of this alternative is that it highlights the changing efficacy of punishment policies across time. Penicillin is an antibacterial treatment that has significant diminishing returns. As penicillin continues to be administered to a patient and a broader population, bacteria will begin forming new strains that are resistant to this treatment.³¹¹ These diminishing returns are shared among many antibacterial treatments, which is why many doctors do not prescribe the treatment long enough for any leftover bacteria to develop immunity. These so-called "superbugs" are incredibly dangerous because they can withstand antibacterial treatments, leaving very few options to treat them otherwise.³¹²

As discussed in Section II.B, there are indeed diminishing returns in the mass incarceration context. Many scholars believe that harsh incarceration policies may have been necessary in a time when violent crime was high but would now argue that these same policies are ineffective and potentially damaging to society in the modern age.³¹³ Perhaps, like penicillin, crime and those who commit it have adapted. People who are sent to prison have an incredibly high recidivism rate in part because prison has been known to increase offenders' access to criminal networks.³¹⁴ Therefore, the very

311. See Patricia T. Alpert, *Superbugs: Antibiotic Resistance Is Becoming a Major Public Health Concern*, 29 HOME HEALTH CARE MGMT. & PRAC. 130, 130 (2016) (discussing the process of antibiotic treatment's role in the evolution of resistant superbugs).

312. See Christopher T. Walsh & Michael A. Fischbach, *New Ways to Squash Superbugs*, 301 SCI. AM. 44, 45, 47-49 (2009) (discussing the rise and resistance of superbugs and describing the cutting-edge research being conducted to fight them).

313. See *supra* notes 123-26 and accompanying text.

314. See Erica Bryant, *Why Punishing People in Jail and Prison Isn't Working*, VERA INST. (Oct. 24, 2023), <https://www.vera.org/news/why-punishing-people-in-jail-and-prison-isnt-working> [<https://perma.cc/452P-SPEK>] (citing studies showing that incarceration increases recidivism). See generally JENS SOERING, AN EXPENSIVE WAY TO MAKE BAD PEOPLE WORSE: AN ESSAY ON PRISON REFORM FROM AN INSIDER'S PERSPECTIVE (2004) (discussing the ways that prisons contribute to hardening offenders at an enormous cost to society).

people we are trying to quarantine from society in such a medical model of punishment are the very people the criminal justice system is responsible for turning into so-called “super predators” as many in the 1990s believed.³¹⁵

If this penicillin model has any practical value, the most important thing we can learn is that we must transition away from the penicillin of prisons. Perhaps prisons served their role in the 1980s and 1990s when violent crime was high. But like penicillin, this “treatment” is not effective over long periods of time; in fact, it is actually dangerous if used long-term. Instead, using prisons effectively to mitigate the growth of crime is important, and now we are in an era of transitioning to second-order treatments meant to ensure the infection or social disease of crime can be managed long-term.

Another alternative framing in the same vein is to consider punishment as an addictive drug. This controversial concept results in quite a different set of considerations in which there is very little benefit and almost entirely unjustifiable costs. For many abolitionists and progressive reformers, mass incarceration might fit within this description. It is a social institution to which society seems to be addicted. Every time we attempt to make reforms, the same system reemerges, and we go back to our carceral fix. Worst yet, just like a drug, many in our society realize how bad mass incarceration is.³¹⁶ Yet we cannot help ourselves. We are addicted to the retributive ideas, the incapacitation logic, and the dopamine feelings of safety. If we honor the alliterative patterns of this Article, we might portray this framing of punishment as a type of poison. The cost of continuing to ingest such a substance is a slow assured death given the harm it is causing the body politic.

This framing is a bit more radical, but it may nevertheless have some kernel of truth to it. How then does this make us think about punishment and mass incarceration? Like an illicit substance, we must break our addiction from these policies. But not even an abolitionist would support such a cold-turkey approach in abolishing prisons. Prison abolition is a generational project that will take years and even decades to accomplish,³¹⁷ which is

315. See *supra* notes 136–137 and accompanying text.

316. See *New Polling Shows Criminal Justice Reform Is a Winning Issue for 2024 Election*, FWD.US (Oct. 9, 2024), <https://www.fwd.us/news/new-2024-polling-demonstrates-ongoing-support-for-criminal-justice-reform> [https://perma.cc/8T95-HXZY] (finding that “76% of Republicans, 82% of Independents, and 85% of Democrats” support criminal justice reform, with strong support for reducing prison and jail populations).

317. See Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199, 1213 (2022) (describing the long-term goals and commitments of the abolitionist movement); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019) (“Prison abolition is a long-term project that requires strategically working toward the complete elimination of carceral punishment.”).

comparable to a long-term weaning off from the substance. Perhaps we can make annual benchmarks and create a five-, ten-, and twenty-year plan to gradually lower the incarceration rate in ways that will not result in millions of offenders being released back into society all at once.

But even the most stalwart survivor who has dedicated themselves to sobriety knows that relapse is only one moment of weakness away. Whenever crime ticks up, even infinitesimally, we see people rallying for a return to tough-on-crime principles.³¹⁸ It only takes the slightest trigger of crime—whether it be a summer crime wave or even just one particularly egregious crime that gets news coverage—to make society crave retributivism, incapacitation, and the *feeling* of safety and justice that comes with locking people up and throwing away the key.

Another fascinating socio-medical framework to consider is malingering by proxy, which describes a psychological condition in which a person tells others that their own child or loved one is sick in order to garner sympathy, attention, and financial gain.³¹⁹ This is most prevalent among parents, who will tell others in the community that their child is sick.³²⁰ The parent will make their otherwise healthy child appear sick by mimicking symptoms, such as shaving the child's head to mimic hair loss suffered by chemotherapy, or by forcing the child to wear bandages or a face mask to mimic injuries or an immune-compromised disorder.³²¹ By mistreating their child in this way, parents often hope to garner sympathy from the community, to be seen as a hero in their own right for taking care of their

318. See Abdallah Fayyad, *Lawmakers Are Overreacting to Crime*, VOX (Apr. 25, 2024), <https://www.vox.com/policy/24139552/crime-rates-falling-tough-laws-mass-incarceration> [https://perma.cc/7VHH-4KM7] (discussing that even as crime rates have been falling, overblown media reports on a few instances of crime have caused lawmakers to crack down and pass traditional tough-on-crime policies); Amanda Hernández, *'Tough-on-Crime' Policies Are Back in Some Places That Had Reimagined Criminal Justice*, STATELINE (Mar. 18, 2024), <https://stateline.org/2024/03/18/tough-on-crime-policies-are-back-in-some-places-that-had-reimagined-criminal-justice> [https://perma.cc/QLC9-DKDU] (discussing how communities such as Minneapolis, Portland, and those that experimented with criminal justice reform are responding to “knee-jerk” reactions with minor crimes and rolling back such reforms).

319. See Adam Amlani, Gurinder S. Grewal & Marc D. Feldman, *Malingering by Proxy: A Literature Review and Current Perspectives*, 61 J. FORENSIC SCI. S171, S171 (2016) (defining malingering as a psychological condition in which the person intentionally falsifies some physical or psychological disease or symptoms to achieve tangible personal gain, and that doing this by proxy means the person playing the “sick” role is somebody other than the malingerer).

320. See, e.g., Eden Gillespie, *Malingering by Proxy: Parents Who Make Kids Sick for Profit*, N. Z. HERALD (May 26, 2017), <https://www.nzherald.co.nz/lifestyle/malingering-by-proxy-parents-who-make-kids-sick-for-profit/FM2XC22SVW2UITTW3X232N3KY4> [https://perma.cc/8D3V-E2DY] (describing individual stories of a mother who told her community that her child had cancer in order to garner more than \$43,500 in donations, which included shaving the child's head and forcing the child to wear bandages and a face mask).

321. See *id.*

sick child, and even to ask for donations to help them pay for fake medical treatments.

Malingering is an interesting framing when conceptualizing the role of politicians, law enforcement, prosecutors, and others who are delivering mass incarceration services to the public. Under the placebo framework, these actors were likened to doctors prescribing treatment; but unlike doctors, these actors were deceiving the public for political gain. Under a malingering framing, these actors would similarly be deceiving the public for their own gain by trying to convince the public of the fake malady of criminal behavior in a way that garners public support for their cause. Like the placebo methodology, this framing is rough around the edges and requires the reader not to lose the forest for the trees. Instead of looking for exact 1:1 comparisons, the big picture takeaway is that this framing highlights the perverse incentives of politicians and decisionmakers in advocating for and convincing the public about the merits of harsh punishment policies.

The medical literature is still exploring the level and types of treatment for malingerers, having to confront whether this condition should be considered a psychological disorder.³²² Regardless of this medical question, malingering by proxy is an incredibly harmful antisocial behavior that harms both the communities subject to the false information and the proxy, a usually-vulnerable party who must pretend to be sick. The takeaway from such a framing would be to hold our lawmakers, police officers, prosecutors, and all others who are using deceptive means (whether purposely, knowledgeably, recklessly, or negligently)³²³ accountable for their mischaracterizations that have damaged the community and the public trust.

This Section is meant to be creative, thought-provoking, and controversial. In the same way that the placebo methodology challenges the status quo and our assumptions about mass incarceration, the framings of penicillin, illicit drugs, and malingering offer brief vignettes of alternative ways to highlight different aspects of the modern punishment crisis and how to resolve it. This Section illustrates the value of socio-medical tools to break free of stale approaches to crime and punishment, and I hope it sparks new discussion and theories of the criminal legal system to push the boundaries

322. See, e.g., Christopher Bass & Derick T. Wade, *Malingering and Factitious Disorder*, 19 PRAC. NEUROLOGY 96, 104 (2019) (concluding that there is little evidence and few studies about effective ways to treat people with these disorders and that many patients continue to feign sickness for many years); Amlani et al., *supra* note 319, at S176 (suggesting a detailed fact-finding endeavor to confirm deception of symptoms, a team-based approach to treating the malingeringer, and potential referral to child protective agencies to secure the safety of the proxy).

323. See *supra* notes 203–207 and accompanying text.

of what is possible toward reformist interventions.

CONCLUSION

The medical study of placebos offers a unique approach to theorizing criminal punishment. Because crime is often considered a social disease and punishment is seen as its treatment, mass incarceration policies truly deliver a placebo impact. The placebo methodology captures the importance of the social and cultural context required for mass incarceration policies to control the public's fear and perception of crime, without having commensurate value on impacting public safety.

This approach offers multiple innovations that raise interesting questions about the future of mass incarceration policies. The interdisciplinary insights from medical ethics provide a stark picture of the sheer lack of justifications for using placebo policy in the punishment context. The negative social costs and harm, malevolent use of deception, the pervasive use of experimentation toward harsher punishment, and the perverse economic incentives require us to abandon placebo policies and move toward punishment practices that can actually make us safer by focusing on what causes the crime/cancer problem through preventative medical and social means.

This is the double-edged sword of the placebo methodology. It reveals the latent problems of punishment policies, but it also provides insight into avoiding the same placebos in the coming generation. This Article hopes to contribute to the larger conversation, ensuring that the sword is slicing in the right direction toward a safer, fairer, and more justified punishment future.