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# The Harms Beyond Imprisonment: Do We Have Special Moral Obligations Towards the Families and Children of Prisoners?

William Bülow

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**Abstract** This paper discusses whether the collateral harm of imprisonment to the close family members and children of prison inmates may give rise to special moral obligations towards them. Several collateral harms, including decreased psychological wellbeing, financial costs, loss of economic opportunities, and intrusion and control over their private lives, are identified. Two competing perspectives in moral philosophy are then applied in order to assess whether the harms are permissible. The first is consequentialist and the second is deontological. It is argued that both of them fails and therefore it is hard to defend the position that allowing for these harms would be morally permissible, even for the sake of the overall aims of incarceration. Instead, it is argued that these harms imply that imprisonment should only be used as a last resort. Where it is necessary, it should give rise to special moral obligations. Using the notion of residual obligation, these obligations are defended, categorized and clarified.

**Keywords** Collateral harm · Consequentialism · Doctrine of double effect · Imprisonment · Philosophy of punishment · Residual obligations

## 1 Introduction

Established theories on the moral justification of legal punishment often focus on the relation between the state and the criminal offender. Regardless what aim or aims (e.g. deterrence, retribution, rehabilitation, or moral education) one believes that an institution of punishment should have, the target is primarily individual lawbreakers. For instance, deterrence theory, with its explicit focus on crime reduction, builds on the idea that individuals are rational self-interested individuals who, in order to avoid punishment, will obey the law. Punishment is thus justified in so far as it deters individuals from committing criminal offenses. In comparison, retributivistic theories build on the idea that individuals are moral agents, capable of moral judgment and responsive to moral considerations. To treat individuals as moral agents

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demands that they are treated in accordance to their desert, and also to recognize them as agents capable of responsive conduct and moral judgment.<sup>1</sup> Still, the overall question is whether the harm inflicted on individual lawbreakers through the act of legal punishment is justified and why. In short, offenders are conceived of as free-standing actors and punishment, as state measures imposed on him or her. These pictures do not fit well with real life as ‘no man is an island’, and neither are offenders. Criminological research suggests that the harms of imprisonment go far beyond the prison walls: incarceration does affect and harms families and children of those incarcerated as well as the prisoner (Comfort 2007; Arditti et al. 2003; Murray 2005).

From an ethical perspective, one could reasonably expect discussions on whether collateral harms of punishment are justified; especially when they affect third parties, such as partners, children, families, and friends of the prison inmate. It is arguable that we do have a strong duty not to harm these people, especially since they are not guilty of any criminal offenses. How then, if at all, can it be morally permissible to allow for these harms? Do we have special obligations towards the families and children of prisoners? Surprisingly, these questions have received scant attention from moral philosophers. When it comes to collateral consequences, ethical discussions have rather focused on the consequences affecting the offenders after their release from prison (e.g. LaFollette 2005; Hoskins 2013). This paper attempts to add to this marginalized question in the ethics of punishment.<sup>2</sup>

The paper continues as follows: In Section 2 I give some background information about how imprisonment affects families and children of individuals who are incarcerated. In Section 3 I discuss our moral obligations to third parties. I discuss the moral permissibility of collateral harms from both a consequentialist and a deontological perspective, where the latter is represented by the Doctrine of Double effect. I conclude that in either case, imprisonment should be limited to a last resort. In Section 4 I argue that our duty to not harm others, when overridden, gives rise to *residual obligations* and that this has implications for our obligations towards children and families of prisoners. Here, I also discuss different types of residual obligations and clarify their practical implications when mitigating the harm to the children and families of prisoners. My conclusions are then summarized in Section 5.

## 2 The Collateral Harm to Families and Children

In order to grasp the seriousness of the problem, I will outline and discuss some of the harms and burdens which families and children of prison inmates can face. Though research on collateral consequences is an established sub-discipline in criminology, research on the harms beyond the criminal offender are scant. According to Murray (2005), the effect on prisoners’ families and children is an almost entirely neglected topic in academic research, prison statistics, public policy, and media coverage. Comfort (2007) points out that the studies that exist are rather scant. Still, the studies have pointed out several consequences of imprisonment for families and children of inmates. These consequences include (1) decreased psychological and mental wellbeing, (2) financial costs and loss of economic opportunities, and (3) intrusions and control of private life. The third category suggests that relatives and families of

<sup>1</sup> When applied to imprisonment, it has been argued that retributivism (both positive and negative) does not only require that the individual being punished be a moral agent, but also that, during the sentencing, the prison inmate maintains his capacity of moral agency. Otherwise, it is argued, the inmate will no longer remain the subject for which retributivists hold that punishment is appropriate (Lippke 2007, 2013).

<sup>2</sup> One exception is Manning (2011) who discusses collateral harm to children with incarcerated and detained parents. John Kleinig (2008) discusses briefly how imprisonment can negatively affect prisoners’ families.

incarcerated individuals run the risk of suffering from many of the same infringements shared by prison inmates.

Before I discuss the collateral harm of imprisonment, it should be acknowledged that the incarceration is not without positive effects for the family and children of the inmate. First, there are the obvious cases where family members are the ones who are victims of the crime committed. Second, one study conducted in the US (Arditti et al. 2003) reports that respondents perceive that imprisonment could stop the inmate from drug or alcohol abuse, and that prison can be a “safe haven” for the inmate, helping him to stay out of trouble. The same study also reports that families and relatives may perceive the punishment as an appropriate form of discipline for their incarcerated relative. Some respondents also believed that the punishment has improved communication and relationships within the family. Still, the study reports that the problems resulting from the incarceration were more extensive and the authors hold that despite the potential benefits, the data provides a dismal picture of how imprisonment affects family life (Arditti et al. 2003).

## 2.1 Decreased Psychological and Mental Wellbeing

A central concern of this research is the effects of imprisonment on the psychological wellbeing of the relatives and families of prisoners (Arditti et al. 2003). Potential harm to the psychological wellbeing of families and children is first apparent at the time of arrest (Comfort 2007; Manning 2011). As Comfort (2007) points out, the exposure to a vivid scene of police force and parental disempowerment during an arrest is an early link in the chain of ensuring psychological trauma of children (Comfort 2007, 275–6). The top priority at these events is the capture of the suspect. This implies that attempts of the police to capture a suspect can be sudden and often happens during the night when the suspect is asleep in his/her home. Furthermore, as an arrest can be abrupt, children who are present will, at the very least, experience the removal of their mother or father (or both) and are most likely given no explanation beyond a general assertion that their parent has done something wrong (Comfort 2007).

Besides the arrest, the incarceration is shown to have negative effects on the child as well. Having an incarcerated parent is correlated with emotional and behavioral disturbances, such as depression, anxiety, and aggressiveness (Comfort 2007; Manning 2011).

Children are often very vulnerable members of society, and thus strong moral concern for their wellbeing is indeed appropriate. But, as Comfort (2007) points out, this strong concern has had unintended consequences of its own; neglecting adults who experience a loved one's incarceration. This includes parents of prisoners. Comfort refers to studies showing that there is a significant correlation between having a son in prison and having poor psychological wellbeing (Comfort 2007, 281). She also points out that women with incarcerated partners have not attracted more attention from research beyond their roles as the mother of the prison inmates' children (Comfort 2007, 281). Still, a previous study conducted in the US, found that partners of prisoners suffer from depression and anxiety (Arditti et al. 2003). Moreover, the stigma associated with the involvement of the criminal justice system intensifies these harms. Unlike other separations, such as the death of a family member, the incarceration of a family member does not lead to much sympathy and support from others. This renders the family members to be alone when facing the difficulties and burdens this separation involves (Arditti et al. 2003). Moreover, where partners of prisoners feel shame for their partners' incarceration, this entails higher levels of and persisting psychological distress (Comfort 2007). Although these effects are reported from a U.S context it is not farfetched to assume that these are also present in a European context as well.

It has been pointed out that there are potential benefits from allowing inmates to have social contact with their family (Lippke 2007). I will discuss these benefits briefly. According to Richard Lippke (2007) there are both consequentialistic and retributivistic reasons for allowing inmates to have social contact with family and friends. First of all, these social contacts help to provide support to the inmates and help them from sinking into despair or self-destructive behavior during their punishment. It helps to provide the inmates with hope for the future. Lippke writes:

If someone outside prison cares about them and is permitted to evince that care in various ways, prisoners seem more likely to believe that they have something to live and hew to the straight and narrow for. This might bolster their efforts to stay out of trouble in prison and improve themselves through education, substance abuse treatment, and acquisition of working skills (Lippke 2007, 180).

Lippke also points to long-term crime-reductive effects and risks to the children's wellbeing. He points out that children with incarcerated parents are deprived from the emotional support that this parent could provide and are more at risk of becoming criminal offenders themselves (Lippke 2007). It is of course a question whether it really is the incarceration of one's parents and lack of emotional support that renders these children more likely to become criminal offenders themselves, rather than some other external factors, such as socio-economic circumstances.<sup>3</sup> According to Murray et al. (2009), parental imprisonment is associated with additional risk factors, for example poor educational attainment, poor parental supervision, low family socioeconomic status, and low family income; which all predict child delinquency (Murray et al. 2009, 26–7). The authors conclude that even though children of incarcerated parents are at a greater risk of undesirable consequences than other children, it is not conclusive that parental imprisonment is a causal risk factor for child delinquency. Whether it is a causal risk factor, however, is uninteresting for our case. Rather, it seems that parental imprisonment also affects other variables which Murray et al. mention, such as low family income, socio-economic status and lack of parental supervision.

Though Lippke identifies several consequentialistic reasons for allowing social contacts, he does not advocate a consequentialist theory of punishment. His own theory is retributivistic and he holds that "retributivism requires that legal punishment be structured so that it treats and addresses offenders as rational moral beings." "This", he continues, "entails that the loss or restrictions of punishment imposes must not be permitted to erode or destroy offenders' capacities for responsible citizenship (Lippke 2007, 183)." Lippke holds that extensive isolation might pose severe risks to the inmate's moral agency and moral personality. The deprivation of social contact with families, ones' children<sup>4</sup>, partner, and friends might thus result in the violation of this basic constrain of legal punishment. Also, allowing for social contacts provides an environment where the inmate can exercise and develop his or her responsiveness to moral reasons (Lippke 2007).

Despite these potential benefits, I wish to stress a potential worry as these benefits add to the expectations of prisoners' families, and of their partners in particular. Partners of prison inmates are often exposed to large burdens for which they gain little support to help them cope (Arditti et al. 2003; Murray 2005). During this difficult time, partners with children are expected to take care of the children and provide emotional support to their inmate partner, while they are also dealing with their own problems (Murray 2005). This may become even

<sup>3</sup> That it is hard to disentangle putative causes and effects is also recognized in Murray (2005).

<sup>4</sup> Lippke (2007) does not hold that all prison inmates have a right to their children. In certain cases, such as when the child is the victim, such contact is inappropriate.

more burdensome since imprisonment (as I will discuss further in Section 2.2) also imposes loss of income as well as additional economic costs. It should also be recognized that imprisonment may also cause home moves, divorces and relationship problems (Murray 2005). Thus, regardless if one endorses a retributivist or a consequentialist view on punishment, one should recognize that as partners and families are exposed to large burdens affecting their wellbeing, these burdens may also jeopardize the good effects and the emotional support that may come from allowing prison inmates to have stable contact with their loved ones. Thus, if one holds that these effects are important, one should arguably be concerned with how imprisonment affects the inmates' families.

## 2.2 Financial Costs and Loss of Economic Opportunities

According to Murray (2005) one of the most consistently reported and hardest difficulties for partners of prisoners, in the U.S, the U.K, Ireland and Australia, is the loss of income (Murray 2005, 444–5). This is true for families of both male and female prisoners (Murray 2005). Furthermore, additional expenses, including costs for prison visits, sending money to the inmate, mail and telephone calls add to and intensify this already vulnerably position (Comfort 2007; Arditti et al. 2003; Murray 2005). Notably in the US, prisoners are unable to receive incoming phone calls and make their own calls by calling collect. These calls are, under all circumstances, more expensive than direct-dialed ones; but those which originate from prison facilities are even more expensive as it has become the standard practice for telecommunication companies to levy surcharges on such calls: calls from a prison inmate costs three times, and up to ten times, the cost of a regular phone call. As for prison visits, these may entail financial costs including local or long-distance travel, child care, refreshments during visit, and income forgone if the visit is scheduled during work hours (Arditti et al. 2003; Comfort 2007).

Economic loss goes beyond the actual prison sentence. One collateral consequence of imprisonment affecting former prison inmates and their families is the stigma associated with a criminal record when obtaining employment (Comfort 2007). This affects families and relatives who rely on the financial support of the ex-offender. The lack of job opportunities after prison release is also apparent even in countries where the prison system is more humane. For instance, Sweden is a welfare society characterized by well-developed social safety nets which, together with Denmark and Norway, is referred to as "Scandinavian exceptionalism" (Pettersson and Carlsson 2013). These countries are exceptional both with respect to their low rate of imprisonment as well as to the conditions under which prison sentences are served. Still, a recent study of the collateral consequences of the Swedish prison system points out that loss of job opportunities and income is a consequence of imprisonment and that ex-prisoners are often left dependent on social contacts and friends if they are to get a job at all (Pettersson and Carlsson 2013). This is, of course, a consequence not only of imprisonment, but of punishment as well. For instance, electronic monitoring is considered to be stigmatizing and also relates to prospects of employability (Nellis 2009). This, however, does not mean that we should ignore the collateral harm of imprisonment in these cases. It is arguable that being sentenced to prison is even more stigmatizing than electronic monitoring. Moreover, one benefit of electronic monitoring, compared to imprisonment, is that the offender can be given the opportunity to keep his job while being monitored. This means that the abovementioned loss of income is not necessarily a consequence of electronic monitoring, and also that the offender is able to stay in touch with the labor market.

### 2.3 Intrusions and Control of Private Life

Imprisonment involves many instances of control over the inmates' lives. For the sake of security and control, prison inmates are subjected to a series of controls and intrusions into their private sphere. These include body searches, visitations, cell searches, drug tests, and supervision and censure of their communication. According to sociologist Ervin Goffman, it is an essential feature of all institutions, among which prisons is a paradigmatic example, that it violates the boundaries by which an individual holds objects of self-feeling; such as his body, his immediate actions, and his thoughts and feelings clear of contact and free from the gaze of others (Goffman 1991).<sup>5</sup> Although the European Prison Rules specify that these intrusions into the privacy of the inmate should be kept to the minimum necessary for secure custody, these intrusions appear to be unavoidable parts of imprisonment (Easton 2011).<sup>6</sup> What is important for the purpose of this research is that some of the intrusions of privacy go beyond that of the prison inmates. Comfort (2007) describes prison visits as a situation where the visitor acquires the status of a "quasi-inmate". While inside the prison facility "visitors are subject to the same scrutiny, general withholding of information, required obedience of institutional rules, and periodic reminders of their subordinated status as are the inmates" (Comfort 2007, 277). Among the potential humiliations a visitor may suffer; physical searches, where the visitor is requested to submit to full strip-search, are sometimes required before she is permitted to enter the institution (Comfort 2007).<sup>7</sup> There are also indications that in Sweden, children of incarcerated parents have similar experiences as those Comfort describes, where prison visits can be experienced as stigmatizing and sometimes humiliating (Karlsson 2007).

Visiting rooms in prisons are often ill-equipped and rarely accommodating to children's needs (Comfort 2007). This is unfortunate since it might have an effect on the experience as well as the likelihood of visits. Moreover, the visits may be the only opportunity for families to have conversations without the censure or supervision to which mail or phone-calls may be subjected (Comfort 2007). According to Comfort (2007) the process of supervision of one's correspondence also degrades both the inmates and the recipients and serves to reinforce awareness about their inferior status.

As the exercise of control goes beyond the inmates themselves and affect their families and children as well, this can also be counterproductive. From a reintegrative and crime-reductive perspective, social contact can provide emotional and moral support for the inmate, but it is not obvious that the social climate in prison facilities provides the means to achieve this end. In the following section I will discuss some attempts by which it could be argued that the previously discussed consequences of imprisonment to families and children, as well as the financial loss and decrease in psychological wellbeing, are ethically permissible.

<sup>5</sup> Goffman describes total institutions as having the central feature of "breaking down" the barriers separating the basic social arrangements in modern society in which "the individual tends to sleep, play and work in different places, with different co-participants, under different authorities, and without and overall rational plan" (1991, 17). In total institutions all these spheres of life are conducted in the same limited space under the same authority. Daily routines are carried out collectively and each member is treated alike. All phases are tightly scheduled and incorporated into the rational plan designed for the official aims of the institution.

<sup>6</sup> For philosophical discussions on the ethical foundations for privacy rights in prison, see Lippke (2007) and Falls-Corbitt (1989).

<sup>7</sup> This is not the standard procedure. The standard involves presentation of identification, a visual review of one's attire and passage through a metal detector (Comfort 2007).

### 3 Can Collateral Harms be Morally Justified?

Whether we are allowed to cause harm, why and under what circumstances, is a notoriously hard and central question for moral philosophy. In this section, I will consider two different approaches; one consequentialist, and one deontological, in terms of the doctrine of double effect. I will consider each of these in turn.

#### 3.1 Consequentialism

The most straightforward way to argue for the moral permissibility of collateral harm to the inmate's family members and children due to imprisonment is that this harm is outweighed by the benefits that are gained from having this institution of punishment. This sort of weighing is of course very hard to assess. According to Rita Manning parental imprisonment involves harm that should persuade any deterrence theorist to rethink imprisonment with the specific aim at mitigating and preventing harm (Manning 2011). This involves looking for alternatives. One such alternative, she argues, is that drug-treatment programs should be given for minor drug crimes or other felonies committed such as possession, or under the influence of drugs. Manning points out that a series of prison sentences may be shortened by for instance abandoning "Three-Strikes Laws", which often lead to imprisoning offenders for trivial crimes. Also, she points out that other forms of punishment, such as probation should be preferred and can be more efficient than long prison sentences (Manning 2011, 280–2). Similarly, Thom Brooks points out criminals given suspended sentences and community sentences reoffend less often than criminals imprisoned for under a year (Brooks 2012, 43). Thus, if our aim is to reduce crime rates; the use of prison, compared with other alternatives, may be counterproductive in these cases.

Though I am sympathetic to all of these points, I also believe that there are still some questions which ought to be addressed and that the consequentialistic argument could be further elaborated. Any form of consequentialism must consider all the negative effects of punishment as well as the positive. According to consequentialism, and deterrence theory in particular, imprisonment can prevent crime in at least three ways: (1) Punishment deters. The threat of punishment is a deterrent for those who would otherwise commit crimes. (2) Punishment—and most notably imprisonment—is enforced to prevent the offender from committing additional crimes. This is referred to as the incapacitation effect of punishment. (3) Punishment can reform. Being subject to punishment might provide the initiative for avoiding punishment in the future. Questions about whether imprisonment deters or not are faced with great difficulty. Although the deterrence effect of imprisonment—which sees deterrence as the justificatory aim of criminal punishment—is sometimes discussed in terms of whether being imprisoned affects recidivism rates (e.g. Brooks 2012, 42–44), it is not apparent that this constitutes successful objection to deterrence. The fact that imprisonment does not impact many prisoners does not mean that it does not deter at all. It might in fact have a general deterrent effect on the majority of the rest of us. A proponent of deterrence theory might even hold that from this perspective it could be desirable to have the collateral consequences outlined in the previous sections, if this would add to the overall deterrent effect of imprisonment. Hence, it seems possible to formulate a consequentialistic argument for accepting the collateral harms of imprisonment.

Still, I believe that we should resist this argument. It seems to rest on a dubious claim about peoples' motivations. The deterrent argument above suggests that if there were no punishment at all—or if the act of punishment was very humane—people who are now deterred would commit crimes. This, however, does not describe why people do not commit crimes in the first



place. I think it is reasonable that most of us are law-abiding citizens, not because we fear punishment, but because we believe that being such is the right thing to do. In contrast, the premise underlying the claim about general deterrence is something close to a pessimistic Hobbesian state of nature. To make this point more clear, we can compare deterrence theory to fair-play retributivism.<sup>8</sup> This view builds on the idea that society is the distribution of burdens and benefits, where the burdens are understood as compliance to the criminal law. Each individual is imposed by the burden of adhering to this equal and fair distribution of burdens as well as its benefits. Punishment, on this view, is seen as a way of restoring fairness and justice when someone has breached the initial fairness. Still, as Christopher Bennett points out, this view seems to rest on the assumption that committing a crime is a failure to restrain oneself. This, Bennett argues, is a problem for the fair-play view of retributivism, since this picture seems irrelevant to how we actually view serious crimes, such as rape, murder, and assaults; from which most of us do not have to restrain ourselves (Bennett 2008, 30–1).<sup>9</sup>

Imprisonment is probably most needed for incapacitating dangerous offenders. But I believe there are reasons to be skeptic about the prospects of reform as a crime-preventing effect of imprisonment. For if we want imprisonment to have this effect, I believe that there are good reasons, even for the deterrence theorist to allow prisoners and their families to have meaningful contacts, and thus mitigate some of the harms. Support and encouragement from loved ones could, as was pointed out in the previous section, help and provide an initiative for the inmate to reform. Moreover, one argument against imprisonment is that prison often makes criminals better criminals, where the offender is thought to be a criminal laborer, or expand a new criminal network (Brooks 2012, 43). This further relates to the idea of ‘prisonization’, i.e. “the process by which inmates take on, to a greater or lesser extent, the folkways, mores, customs, and general culture of the penitentiary” (Lippke 2007, 179). This includes the inmates forming expectations of others (most notably prison officers) to provide them with basic needs, and also that they internalize norms against cooperating with prison authority, or embracing a view of oneself as having a low social status. Of course, this process is not permanent, nor irreversible or unavoidable. There are ways in which we could counter these tendencies, most notably by allowing prisoners to have good social contacts and visits from friends, families and other people from outside the institution. As Lippke points out, where such contacts are denied, “inmates tend to identify with those human beings with whom they have most social contact—their fellow prisoners” (Lippke 2007, 179).

In summary, I believe that there are reasons why it is hard to justify collateral harm to prisoners’ families and children from a consequentialist perspective. As we saw in the previous section, these harms are extensive, even though there are potential good effects. To conclude, I have stressed that the consequentialistic reasons for allowing for these harms are not obvious.

### 3.2 Doctrine of Double Effect

The deontologist view on permissible harm is different from the consequentialist one. In contrast to consequentialism, a deontologist might argue that it is wrong to intentionally cause harm to an innocent person, even though this would minimize overall harm. In the present context we should consider prison inmates’ families and children as innocent persons in this sense. Still, a deontologist could argue that current usage of imprisonment in reasonably just

<sup>8</sup> For defense of this view, see Morris (1968). For a critic of fair-play retributivism, see Boonin (2008, 119–143).

<sup>9</sup> Another problem of this view is that it seems implausible that the purported unfairness which is the result of a criminal wrongdoing really explains why it is wrong or why it should be punishable (see Bennett 2008, 31).

societies is by and large morally justified despite its collateral consequences; since these effects are not intended. The harm caused to families and children of prisoners is only a foreseen side effect of promoting a further good, such as punishing those who deserve it and/or to protect the public. One could thus appeal to the doctrine of double effect (DDE), which is often invoked to explain the moral permissibility of an act that causes a serious harm, in so far as this harm is a foreseen side effect of promoting some other good (Woodward 2001).

Before we can tell whether it can be used in order to explain the moral permissibility of collateral harm to prison inmates' families and children, we must have a clearer idea about what the DDE involves. Following Jonathan Bennett (2001), I will adopt the following conditions for the application of the doctrine:

- (i) The act is not bad in itself.
- (ii) The agent's intentions are good.
- (iii) The good does not flow from the bad and/or the agent does not intend the bad as a means to the good.
- (iv) The good is good enough, compared to the bad, and there is no better route to the former.

The DDE states that if each of the conditions is fulfilled, one is permitted to act in a way that predictably leads to bad results.

In her recent paper, Manning argues that the DDE fails to justify the collateral harm that children of incarcerated and detained parents suffer (Manning 2011). According to Manning, one problem with the DDE, when applied to collateral harm, that children of incarcerated parents suffer, is "that it is incompatible with the bedrock retributivist principle that guilt is a necessary condition for the infliction of punishment (Manning 2011, 277)." Manning points out that this principle is widely shared among theories of punishment and that the problem with collateral harm "is that it results in the suffering of innocent parties, regardless of the intention that motivates it" (Manning 2011, 277). In short, Manning's objection to the DDE seems to be that the children are taking part in their parents' punishment even though they (the children that is) are innocent.<sup>10</sup>

I believe that Manning is mistaken and that the innocence of the third parties does not pose a problem for the DDE. It is not obvious in what way the collateral harm to children is incompatible with the retributivist principle in the way that Manning proposes. If this is the case, this presupposes that the children are being punished for their parents' behavior. I am skeptical about whether the collateral harm that the children suffer is in fact punishment. If it is, it seems that Manning's argument must rest on the underlying premise that as a punishment, incarceration involves more than the intentional deprivation of freedom and liberty for the criminal offenders. Rather, she must assume that all harm; direct or indirect, intended or unintended, *are parts of the punishment*, including harm that go beyond the offender. If this is true, then imprisonment would indeed entail the punishing of innocent children. This is a very controversial standpoint. Instead I would say that it is misleading to talk about collateral consequences *as punishment* beyond the offender or as punishment for innocents. Rather, collateral harms are *harms due to the punishment*.<sup>11</sup> A more

<sup>10</sup> Later in her paper, where she briefly discusses various normative theories of punishment, Manning further points out that retributivism is committed to the condemnation of punishing the innocent and that "collateral damage to innocent children ought, then, to be a factor in retributivist conceptions of punishment" (Manning 2011, 281).

<sup>11</sup> To make this point more clear, we could acknowledge what legal punishment is, i.e. what its appropriate definition is. At a minimum, the infliction of harm or some form of deprivation is a necessary condition for something to be called punishment. Still, legal punishment is more than merely the infliction of harm. It is the *intentional* infliction of harm authorized by the state in response to some criminal act, expressing disapproval of this act (see e.g. Boonin 2008). But as collateral harms by definition aren't intended, nor expressing disapproval, they are not part of the punishment.

general worry, however, is that even though the DDE allows for collateral harms to innocent children it is not clear why their innocence is a problem for the doctrine. It is in fact the moral permissibility to harm innocent parties which the DDE is sometimes held to explain. For instance, the DDE is invoked in order to show why there is a moral difference between strategic bombing on the one hand, and terror bombing on the other. The difference between them is that while the strategic bomber merely foresees the death of civilians, the terror bomber intends the same effect. Still, both cases assume that the harm, whether it is foreseen or intended, is imposed on innocent third parties (Woodward 2001).

Even though Manning's argument here is unconvincing, there are at least two ways in which we could argue against the DDE and the moral permissibility of collateral harm. One can either argue that there is some inherent problem with the doctrine itself, or that though valid in some cases, it is not sound in the case at hand. Here I will focus on the second issue.

Recall the abovementioned conditions of the DDE which states that if each of the conditions are fulfilled, one is permitted to act in a way that predictably leads to bad results. Now, consider each of these conditions in turn in relation to the problem at hand. Though some people hold that imprisonment, or any form of punishment, is always morally bad, it is reasonable to assume that these are only a minority.<sup>12</sup> Thus we may, for the sake of the argument, assume that at least condition (i) is fulfilled. Equally we may also accept (ii) and assume that no one, either when distributing or executing the punishment intends to harm the families and children of the person being incarcerated. Rather, the intention is that punishment brings about good effects. As for the aims of punishment, whether they are crime-prevention, moral education or retribution, these are held to be directly related to imprisonment. They are not, or at least are not intended to be, a product of the harm caused to families and children of the prisoners. Thus, I believe that condition (iii) is also satisfied. Still, there are potential worries about the last condition (iv). Is the good consequences good enough compared to the bad effects? The fulfillment of this condition depends on what we believe is the supposed good effect of punishment; which in turn depends on what normative theory of punishment we endorse. We might hold that the overall aim of imprisonment is consequentialist, and more specifically crime-reductive. In such a case, I wish to point to the arguments given above in relation to consequentialism, since they will hold here as well. A good which has not been addressed here, however, is retribution. Does this provide the good effect sufficiently desirable to compensate for the collateral harms to the prisoner's family and children? Some proponents of retributivism hold that a distinctive characteristic of retributivism is the claim that retribution is an intrinsic good (e.g. Moore 1993; Kershnar 2000). Based on this view, punishing the guilty would *ceteris paribus* be a better state of affairs than not punishing the guilty, even though this would not have any further positive effects. But what exactly does this imply when it comes to weighing the collateral harms of imprisonment against the supposed intrinsic good of punishing the guilty? Is punishing the guilty so valuable in itself that it compensates for, or even outweighs the harms to families and children of the person being imprisoned? I believe that retributivists should not accept this rather strong view. In some rare individual cases children and families suffer very little, and outweigh the value of retribution, but this does not justify the practice as a whole. Moreover, even if we accept that retribution is intrinsically valuable, it is so compared to not punishing the guilty. We can imagine that someone can be punished, and thus given what he deserves, without having this result in the same collateral harm to families and children. This can be done for instance by using other forms of

<sup>12</sup> For examples of philosophers who hold that legal punishment is never morally justified, see Boonin (2008) and Zimmerman (2011). For a moral argument directly against imprisonment as a criminal sanction, see Brookes (2001).

punishment than imprisonment, where this is appropriate.<sup>13</sup> One could also imagine that prisons which allow for social contact with friends and families, and actively engage in mitigating collateral harm, are compatible with just desert. This shows that there seems to be, as the fourth condition in the DDE suggests that it mustn't, a better route to the good of retribution without having families and children to suffer. I thus conclude that there are sufficient reasons to refute the DDE as an explanation for a supposed justification for the collateral harm of imprisonment to families and children.

#### 4 What are Our Moral Obligations Towards Prisoners' Families and Children?

All individuals have a *prima facie* moral right not to be harmed. Conversely, everyone has a corresponding *prima facie* moral obligation not to harm others. I take these to be self-evident moral claims which need no further argument. Thus, any act which involves the infliction of extensive harm therefore stands in need of some grounding reason which explains why that particular act is morally justified. As we saw in the previous section, the DDE may initially provide one potential explanation why it could be morally permissible to indirectly harm families and children of prison inmates. As I argued, this strategy does not appear to be successful.

It has been argued that due to the collateral harms of imprisonment to children and families of prisoners, imprisonment should be a restricted criminal sanction considered only as a last resort (Arditti et al. 2003; Manning 2011). If the arguments given in the previous section are correct, this is indeed true.<sup>14</sup> By 'last resort' I mean that the use of imprisonment should be limited and that its use requires further justification compared to other sanctions. This implies that other means of punishment, such as probation and community service, should be used to a larger extent.<sup>15</sup> What amounts to "further justification" is of course a matter of dispute. At the minimum I hold that cases where there is a high risk of continued criminal activity and where there are high risks of further harms incarceration is appropriate.<sup>16</sup> But even in those cases, and thus where certain harms are unavoidable, I will argue that our failure to avoid harming families and children of prisoners creates *residual obligations* towards them. I will present this idea in more detail and its implication for prison conditions and policy.

##### 4.1 The Notion of Residual Obligations

According to Rosalind Hursthouse (1999), philosophers working in applied ethics often fail to say anything about moral residues or reminders. Hursthouse believes that this is the result of having committed the fallacy of false dilemmas where writers in applied ethics hold that either

<sup>13</sup> One consequence of retributivism seems to be that certain offenses should not be punished by imprisonment at all, since this would entail too much of a punishment. For a discussion on this matter, see Lippke (2007) Chapter 3.

<sup>14</sup> I do not hold that these alternatives are without problems. For a discussion on ethical problems in relation to community-based sanctions, see von Hirsh (1990).

<sup>15</sup> From a European perspective, this is arguably uncontroversial since the use of imprisonment as a last resort is already among the basic principles in European prison law and policy (van Zyl Smit and Snacken 2009). What is different, however, is that the argument here reaches this conclusion, not by considering the prisoners' rights, but through focusing directly on the rights of families and children of prisoners.

<sup>16</sup> One possible way in order to assess whether imprisonment is an appropriate sentence is to encourage restorative justice conferences as a 'first resort'. In such a conferences families and children of the offender, as well as the victim's family could be brought together in a conversation about the next steps forward. For philosophical discussions on restorative justice, see Brooks (2012) and Bennett (2008).

X or Y is a morally right action without qualification. They fail to recognize the further possibility that both X and Y can be bad to some extent (Hursthouse 1999, 47–8). Instead of focusing exclusively on which action of a set of alternatives is morally right in hard cases, we should acknowledge that further moral reminders or moral residues, such as the feeling of regret when one has to do something bad, are appropriate. Similarly, Bernard Williams (1973) argues that moral conflicts give rise to residual obligations which make sense of the remaining moral force of the obligation which has been overridden.<sup>17</sup> An illustrative example of a residual obligation is that one ought to apologize when one has broken a promise which was overridden by another, conflicting moral obligation. One ought also to avoid getting into similar situations again.<sup>18</sup>

A residual obligation will thus only arise when an original moral obligation has been overridden. According to Hansson and Peterson (2001) it does not matter whether the violation of an original obligation is either intended or unintended and it may also be justified or unjustified. They give the following example to illustrate this:

As an example of a residual obligation arising from unintended breaches of moral obligations, suppose that I have taken photographs at a friend's wedding, and promised to give them to her. I can fail to fulfill this promise either because the photo lab mislaid the negatives or because I myself did so. In both of these cases I have (at least) a residual obligation to sincerely apologise (Hansson and Peterson 2001, 159).

As every individual has a right not to be harmed, the state also has a corresponding moral obligation not to harm its citizens. At the same time, the state has an obligation to protect its citizens from potential assaults. Put together, we can see that when using legal punishment, the state creates a moral conflict. In order to fulfill its obligation towards its citizens, it has to uphold safety and security and respect for individual rights, but in doing so it also violates prison inmates' family members and children's' right not to be harmed. It is therefore reasonable to say that the use of imprisonment as a legal sanction gives rise to residual obligations at least towards those being indirectly harmed as an inevitable side effect of this sanction.

#### 4.2 Our Moral Obligations Towards Prisoners' Children and Families

The claim that the collateral harms of imprisonment give rise to residual obligations towards families and children does not say anything about what exactly these obligations involve. In order to address this question, we must look at different forms of residual obligations. Hansson and Peterson (2001) provide an informative typology, and propose that residual obligations are of the following five categories: (1) Obligations to communicate (2) Obligations to improve (3) Obligations to search for knowledge (4) Attitudinal obligations (5) Obligations to compensate. The collateral harm of imprisonment, to some extent, gives rise to all the types of obligations listed above. I will discuss each of them and how they may affect the work in mitigating harm to families and children of prisoners.

<sup>17</sup> As Hansson and Peterson (2001) note, the term "moral residue" is more general and broader than residual obligation. In this paper, I will stick to the term residual obligation.

<sup>18</sup> The idea of residual obligation is not new. It is claimed to originate from the moral philosophy of Ross and Stratton-Lake (2002). According James J. Brummer (1996) Ross was the first moral philosopher who maintained that overridden obligations make some kind of added claim upon the agent, even though it is not clear that Ross himself held that one always has to act on these additional obligations. According to Williams, it is in fact not certain that the idea of residual obligations fits into Ross's own ethical theory (see Williams 1973).

Obligations to communicate are of different kinds. If I am unable to attend a meeting as I promised, I have an obligation to communicate that I will fail to attend, or as soon as possible inform why I have missed the meeting. More related to the topic of concern here, obligations to communicate also involve being under an obligation to listening to the other party about the complaints and suggestions they may have. These obligations correspond well to harm due to privacy invasiveness and control that I discussed in Section 2.3. Families and children might feel that they have been mistreated during visits, for instance, and thus prison officers are under obligations to listen to them. There are also residual obligations to admit mistakes and moral errors, and to express regret and apologies where such are appropriate.

Obligations to communicate do not save everything. There are also obligations to improve conditions where wrongs have been done and there is a duty to take measures to prevent these from happening again. It should thus be apparent that due to the harm inflicted on families and children, there is a strong moral obligation to improve the current prison situation. This can be done in several ways. Prison facilities should be made more accessible and friendly when it comes to visits and accommodations should be made for this purpose. It is also arguable that in some cases, where it is in the child's best interest, female prisons shall allow babies to stay with their mothers. In cases where manageable, prisons could be expected to provide guest apartments for long-distance traveling families and enable longer visits in a family and child friendly environment.

In order to improve prison conditions to mitigate harm to families and children of prisoners', further knowledge about their situation is needed. According to Hansson and Peterson (2001), searching for knowledge has only instrumental value as it is important in order to exercise the other types of residual obligations. But when applied to the issue at hand, it is important to stress that it is not only the search for knowledge that is important, but also the distribution thereof. Police, prison officers and social workers should thus gain knowledge about families and children's different life situations. As we also know that this is a neglected area of research (Murray 2005; Comfort 2007), there are obligations to conduct further research in this area.

Attitudinal obligations refer to the attitudes of the one who violated an original obligation. These include feelings of regret (Hansson and Peterson 2001). As for the concern for families and children of prisoners, I want to suggest that these also involve treating them with respect. This again corresponds to the potential harm one might suffer from the risk of stigmatization and decrease of wellbeing. These potential risks of degradation and stigmatization, which families and children of prisoners might experience, should not be further intensified by how they are treated by prison staff and other social workers.

When it comes to obligations of compensation, previous harms should arguably be compensated for, in ways that may enable families to get back off the ground. Manning (2011) argues that necessary financial support should be given to children with incarcerated parents. She also suggests that services to address emotional problems should be provided. I agree with Manning, and her conclusion can be further expanded to include partners and families of prisoners as a whole. One potential obligation could also be to reduce the financial costs and economic losses associated with imprisonment of family members, especially by providing support when it comes to prison visits and contacts with their loved ones. Doing so would mitigate some of the harms due to increased economic costs and the loss of income that I addressed in Section 3.2. One could also argue that economic support and aid should be given in order to prevent for instance moving, which can result in further dramatic changes for children, such as having to change schools. Also, family therapy should be an integral part of any reentry or pre-release program.

## 5 Conclusion

I have argued that the collateral consequences of imprisonment on families and children of prison inmates give rise to special obligations towards them in terms of residual obligations. This calls for radical changes in many current prison systems, how they treat and support families and children as well as the inmates themselves. More information and knowledge is needed and should be distributed within the whole criminal justice system as well as to social workers who are in contact with families where one or more family members are incarcerated. There are obligations to improve prison conditions in such a way that they can provide good visitation and perhaps even a guest apartment. Financial support should be given where it is needed in order to assist those to whom staying in touch with the prison inmates has large economic costs. For if it is true, as I believe that there are good reasons to suppose, that social contact with one's loved ones has desirable consequences from a crime-preventive and reintegrative perspective. Concern for families and children's wellbeing should be part of the overall reformatory aim which imprisonment often is held to serve.

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