

Crime & Punishment: A Rethink

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The author has no funding sources or conflicts of interest to declare.

Abstract

Incarceration remains the foremost form of sentence for serious crimes in Western democracies. At the same time, the management of prisons and of the prison population has become a major real-world challenge, with growing concerns about overcrowding, the offenders' well-being, and the failure of achieving the distal *desideratum* of reduced criminality, all of which have a moral dimension. In no small part motivated by these practical problems, the focus of the present article is on the ethical framework which we use in thinking about and administering criminal justice. I start with an analysis of imprisonment and its permissibility as a punitive tool of justice. In particular, I present a novel argument against punitive imprisonment, showing it to fall short in meeting two key criteria of just punishment, namely (i) that the appropriate individual is being punished, and (ii) that the punishment can be adequately moderated to reflect the seriousness of the crime. The principles I argue for and which the aforementioned analysis brings to the fore, rooted in the sentient experience, firstly of victims, and not only of victims but also of the offenders as well as the society at large, then lead me to elucidate the broader framework of jurisprudence which I then apply more widely. Hence, while rejecting punitive imprisonment, I use its identified shortcomings to argue for the reinstatement of forms of punishment which are, incongruently, presently not seen as permissible, such as corporal punishment and punishments dismissed on the basis of being seen as humiliating. I also present a novel view of capital punishment which, in contradiction to its name, I reject for punitive aims, but which I argue is permissible on compassionate grounds.

Keywords: incarceration; imprisonment; jail; prison; offender; retribution.

1 Introduction

The challenge of the conception, the organization, and the management of the penal system has been at the centre of a pitched socio-political battle that has been ongoing and indeed intensifying since the 17th century (Melossi and Pavarini, 2018) when imprisonment started being more widely used as a means of punishment rather than primarily as temporary detainment, the evolution of the streams of thought underlying it tracking the transformative social changes which have characterized this period. The key present-day ideological conflict which has emerged in the 20th century is that between punitive and rehabilitative justice (Bullock and Bunce, 2020) for ‘serious’ crime¹, the former seeing as the primary role of the penal system the punishment of wrong-doing and the deterrent of the same by virtue of the said punishment (Hough, 2002), and the latter having its ideological roots in what its proponents see as a more compassionate and humane treatment of individuals (Dugdale and Hean, 2021), aiming to reduce offending and recidivism by means of behavioural change rooted in compassion and the provision of positive opportunity (Ganapathy, 2018). Fuelling this battle are two major considerations, one of a practical nature and the other driven by fundamental axiological beliefs.

¹The reader should note that what is classified as serious crime varies by the jurisdiction. It generally involves such offences as murder, manslaughter, rape, robbery, kidnapping, arson, drug trafficking, human trafficking, terrorism, etc. That serious crime is variously defined is not an issue of concern to the argument herein, seeing that my focus is on the punishment, the punishment of the sort which is *usually* imposed to the perpetrators of crimes which are in a particular jurisdiction considered ‘serious’. Indeed, as shall become apparent, I reject that there is any fundamental philosophical need to make this delineation, though I recognize the possible utility of such formalizations

The foremost practical concern stems from the worldwide experienced crisis of managing the growing prison population (even when adjusted for the overall population growth) and the consequent shortage of resources (Harrison and Karberg, 2004; Warmley, 2005; Fair and Walmsley, 2021), such as prisons themselves, the prison staff, etc. Indeed, in many jurisdictions the custodial sentence remains the most frequent sentencing outcome for indictable offences which include a range of crimes of varied kinds (Ministry of Justice, 2020). A poignant illustration of the challenge can be readily found in the incarceration statistics in the USA, its incarceration rate being 629 per 100,000 individuals, and its prison population reaching circa 2.1 million in 2019 (World Prison Brief, 2021), having grown more than fourfold since 1980 (then being approximately 500,000), continuing the previously established trend (it was approximately 345,000 in 1960 and 265,00 in 1940). The same challenges are observed in other Western democracies. For example, in England and Wales where the incarceration rate is 159 per 100,000, the prison population increased from approximately 9,400 in 1940, to 27,000 in 1960, 42,000 in 1980, and finally 83,000 in 2019; official estimates project it to reach close to 99,000 by 2026 (Sturge and Tunnicliffe, 2022).

On the other hand, the ideological divide is that over whether justice demands punishment, or if punishment is unduly cruel (Bonta and Gendreau, 1990; Hartman, 2013), imposing suffering on individuals who are not innately malicious, but instead who find themselves at odds with the judicial system for extrinsic reasons, such as poor upbringing, trauma, poverty, etc. (Rafter, 1997), and who could be helped

in juridical practice.

rather than punished, and made productive members of the society (Dissel, 2008). Of course, the practical and the philosophical do not coexist independently, nor are they wholly separate one from the other, but rather often interact and overlap in their substantial crux. For example, some of the suffering experienced by prisoners is not inherent in the imprisonment as such, but is rather a consequence of limited resources (Baybutt et al., 2019). Extreme positions (n.b. I use this term without prejudice, merely as an objective epithet describing minority views significantly out-with the mainstream), such as those advocated by Zeki et al. (2004), argue for a nearly complete abolishment of imprisonment as a punishment (save for its incapacitating role, when applicable, as I discuss in the next section) and a medicalization of offenders, this view being based on the materialistic rejection of free will and thus the notions of ‘blame’ and ‘guilt’ (as well as, equally, the opposites in the form of ‘pride’, ‘deservedness’, etc.) which are instrumental in the justification of punitive actions. In the words of Zeki et al. (2004):

“To understand is not to forgive or to do nothing; whereas you do not ponder whether to forgive a car that, because of problems with its brakes, has injured someone, you nevertheless protect society from it.”.

Indeed, in the present article I too advocate for the abandonment of imprisonment for punitive means, reserving its use for incapacitation of dangerous offenders (or, equivalently, the protection of their likely victims), which would have prisons change both in their nature and appearance, though on a philosophical basis quite unlike that of Zeki et al. (2004). My overall thesis is premised on the basis which can be described as sentientist (Arandjelović, 2023b), centering on subjective experiences,

firstly of victims, and not only of victims but also of the offenders as well as the society at large, and on reasoning about these in terms informed by empiricism, that is the human mind as it is rather than as an abstract and arbitrarily malleable entity. My argument also draws strength from an examination of the relevant ontology which I contend is presently confounded by linguistic limitations and, in particular, the confusion which is caused by the use of colloquial notions, appropriate for everyday discourse but insufficiently philosophically nuanced for the ethics discussion at hand. Indeed any ethics that is based not on human minds as they are, an understanding of which can be reached by means of objective apprehension and empiricism, but rather on some wishful neo-Platonic ideal of the mind void of grounding in the material reality, can be defended neither on a practical basis nor a philosophical one.

2 The pentacephalous Janus of justice

In this section I review the different and in principle mutually independent levers and aims of a judicial system's treatment of criminality, which levers are pulled to various extents in different jurisdictions, their optimal balance and their practical hypostatization, as I argue, lying at the crux of much of the ongoing debate. My aims herein are multifold. Firstly, I would like to contextualize and set the backdrop for the transformative proposals I put forward in the section that follows, the said proposals departing significantly from the present-day legal practice. Secondly, I wish to highlight the variety of contemporary views of each of the aforementioned facets, these showing that the issues at hand are often more intricate than their

initial, superficial appearance might suggest.

2.1 Head 1: reparatory

The reparatory, or restorative, aspect of justice involves a form of correction of the harm by the guilty party caused to the victim; as Muddell and Hawkins (2018) put it:

“Reparative justice measures seek to repair, in some way, the harm done to victims as a result of...violations committed against them.”.

Thus, the direct loss incurred to the victim of a monetary theft, for example, may be undone by a financial compensation. In this simple example, the nature of the reparation is straightforward (noting that I am focusing on the direct and inherent loss caused by the criminal act, and for the time being leaving any consequent harm, e.g. that in the form of emotional distress, aside), as monetary loss is easily compensated for in kind, to wit, by an equal financial repayment. An important aspect of reparatory justice which should be highlighted here is that the reparation should be in proportion to the harm it seeks to correct. It is in this, that is the weighing up of different kinds of harms, and the sense that different kinds of harm are in principle not comparable, i.e. that they are not merely quantitatively but also qualitatively different, whence a major stumbling block emerges. How can, say, a person who ends up being permanently disabled, having been hit by a speeding driver, be compensated for their loss? How can the family of a murder victim (Geistfeld, 2007)? Indeed, this proposition can be offensive to the victims (Hulst and Akkermans, 2011). Hence, the sweeping optimism expressed by some, such as Weitekamp (1993):

“Rather than blaming the offender, his system considers crime as a problem to be solved collectively. With the input of the courts and the community, restitution is used fairly to deal with nearly all crimes.”,

finds itself at odds with empirical evidence and the innate nature of the human mind as it is, rather than as one might wish it to be (Chester and Martelli, 2019). An enshrinement of reparatory procedures in Law — such as that by Article 75 of the Rome Statute which came into force in 1998, for the victims of heinous crimes that fall within the jurisdiction of the International Criminal Court:

“The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”.

— can be helpful in this regard: it establishes a uniform and independent compensatory framework which removes the need for negotiation, this negotiation having been described by some victims as reducing the impact of crime to the bargaining on a flea market (Hulst and Akkermans, 2011).

While undoubtedly a useful element in the overall judiciary system, the extent to which a reparatory act can rectify the damage of crime is limited. Indeed, for the reasons outlined above, its use as a significant instrument of criminal justice in individual citizen crime is largely limited to offences against property (Carlen, 2013). However, owing to a more distal connection between an act and the harm consequent on it, the notion of the reparatory redress finds a greater degree of acceptance and use in addressing inter-societal wrongs, be they historic, that is separated by time,

or global, that is separated by physical distance. There are two key reasons why the previously highlighted challenge, to wit, the dissonant nature of a great harm and the possible consequent compensation for it, is easier to accept in this context. Firstly, in many instances, the wrongdoer, to the extent that there is one, is difficult to identify with precision and confidence; instead, the action that effects the eventual harm is dispersed amongst many actors, each of whom is constrained in their choices and not necessarily acting either in an illegal or an ethically objectionable manner. Examples include climate change, that is the mismatch between a nation's impact on it and the consequent harm thereof (Buxton, 2019), and the unequal contribution of a society to the spread of an infectious disease and the society's access to vaccination (Harman et al., 2021). To the extent that it has often been found satisfactory to all parties, reparatory justice has been successfully argued for and employed in such cases (Wyns, 2022). The other inter-societal context which permits a ready application of reparatory justice concerns harms which were perpetrated historically (the wrongdoers thus not being able to face justice themselves and the primary victims not being able to benefit from it), but which harms have a differential impact felt in the present. In such instances, the flow of compensation is not from wrongdoers to victims, but rather from innocent parties who benefited from the wrongdoing to those who feel the consequences of the harm. Examples include reparations for colonization (Agozino, 2021; Aertsen and Pali, 2017) and genocide (Tirrell, 2015).

2.2 Head 2: incapacitating

The overarching principle of the incapacitating aspect of justice lies in the idea that harm to potential victims can be reduced by denying the opportunity of criminal behaviour to a likely offender (Zimring and Hawkins, 1995). The most pervasive and familiar application of incapacitating justice is that of imprisonment (Shavell, 1987), a rather extreme means, in that the individual concerned is stripped of many liberties: the freedom to move freely, to associate with others, to work, to pursue their interests as desired, and so on (Hughes, 2017). However, other incapacitating means are also possible, such as the imposition of supervision or restrictions to the kinds of public spaces an offender can visit (Ashenden, 2002), the prohibition of access to the Internet (Habib, 2003), and others. Conceptually, the idea that harm to potential victims can be reduced by denying the opportunity of criminal behaviour to a likely offender is rather incontestable. However, challenges emerge with the concretization of the principle in practice. For example, looking at first-time imprisonment in the Netherlands, Wermink et al. (2013) find that:

“...a general increase in the use of incarceration as the sanction of choice is not likely to yield major crime control benefits.”

Thus, the crucial challenge in making incapacitating justice effective is that of the identification of those offenders are indeed likely to re-offend, making incapacitation selective. Closely related is the problem of proportionate apportioning of the duration of incapacitation. In practice, both are difficult, as observed by Visher (1987):

“Selective incapacitation strategies target a small group of convicted of-

fenders, those who are predicted to commit serious crimes at high rates, for incarceration. These high-rate serious offenders, however, are difficult to identify accurately with information currently available in official criminal history records. Preliminary research, assuming moderate accuracy, suggests that selective incapacitation may prevent some crimes, such as 5 to 10 percent of robberies by adults...”.

Yet, not only in the realm of the practical, this approach too is not void of fundamental, philosophical challenges. Unlike most aspects of justice, which act *post hoc*, addressing crimes which have happened, here one is dealing with the hypothetical, the potential, with crime that *may* happen in future, the prediction of which is predicated on something observable and measurable from the past. As pointed out by Cohen (1983):

“Recent efforts to use predictions of individual crime rates as a basis for selective incapacitation are plagued by ethical and empirical problems.”

2.3 Head 3: deterrent

An interesting view of the deterring aspect of justice emerges when one views it through the prism of challenge I highlighted in the context of the incapacitating potential of justice (Petrich et al., 2021). Here, the prevention of future crimes is not done by virtue of an *a priori* differential treatment of individuals deemed to be likely offenders, which I have noted as being ethically problematic, but rather by erecting another hypothetical which is realized only if crime is committed, and which, or such is the hope, being imagined by a potential criminal actor, will serve to

steer their decision-making away from criminal behaviour (Apel and Nagin, 2011). The inherent premise behind the deterrent head of justice, which has become a major topic of debate in 1960s, is that the motivational power of the consequences to the wrongdoer are sufficiently strong to overpower the attraction to break the law. Hence, the notion of deterrence is inherently tied to punishment, that is the punitive (Osgood, 2017; Apel and Nagin, 2011), discussed in Section 2.5.

Despite the strongly motivating nature of fear (Tappolet, 2010), while on the whole evidence unsurprisingly suggests that that deterrent justice does have a crime reducing effect, this effect is at best moderate in magnitude. A comprehensive review by Paternoster (1987) found that:

“...cross-sectional correlations between perceptions of sanction threats and self-reported criminal/deviant behavior are moderately negative for diverse offenses...”

with a similar finding by Kobrin et al. (1972) that:

“...higher sanction levels were almost uniformly associated with lower crime levels...”

Seemingly bizarrely, in some instances the perceived risk of sanction even plays a *counterproductive* role in the likelihood of re-offending (Murphy et al., 2016). Overwhelmingly, empirical data speaks against the model of behaviour which treats criminal offenders as rational actors (Paternoster, 2010), instead suggesting that (Kobrin et al., 1972):

“...social factors had considerably greater effect on crime levels than did criminal justice operations”,

with, for some types of crime at last, one’s perceived identity (Murphy et al., 2016) being a factor of some importance. Perhaps most importantly, for arguably the most serious of crimes, such as murder, and arguably the most severe punishment, that is the death penalty, the desired impact of deterrence seems to diminish; as noted by Donohue and Wolfers (2006):

“...the existing evidence for deterrence [by capital punishment] is surprisingly fragile...”.

This lack of success of deterrence is observed even in the acute stages, that is following an execution of a murderer, with some studies even finding a negative effect (Lamperti et al., 1994), to wit, an *increase* in the homicide rate.

On balance, while noting the difficulty of disentangling the signal from noise in a highly multi-variate phenomenon, it would appear that the practical difficulty in realizing a successful application of deterrent justice in the real world is conceptually similar to that highlighted in the previous section with regard to incapacitating justice: for certain kinds of crime and for certain individuals, deterrence provides an effective means for reducing crime, while for others, it does not, potentially even increasing it (Petrich et al., 2021). The former, that is crime specificity, is the lesser challenge, which can be adequately addressed by the legal imposition of mandatory minimal penalties (Mauer, 2010). These, of course, need to be informed by empirical evidence which has historically not necessarily been the case, the focus rather often

being coloured by socio-political and punitive factors (Hofer, 2012). On the other hand, in its general form, the targeting of specific individuals who may be most responsive to deterrence, is unviable in that it would violate the universally accepted principle of equality before law. The extent to which the idea can be applied in practice is limited to repeat offenders and the use of suspended sentences (Bottoms, 1981), the accounting of an individual's criminal past in sentence determination (Roberts, 1997), and similar means.

2.4 Head 4: rehabilitative

Unlike the other aspects of justice, namely punitive, restorative, incapacitating, and deterring, whose developments have thousands of years' long histories of employment and conceptual development, the rehabilitative facet of justice is a relatively new one (Bailey, 2019). Though arising from the 18th century philosophical paradigm change that was the Enlightenment (Sherman, 2005), with its refocusing of values towards the individual, the notion of rehabilitation for criminal offenders took more than a century to crystalize, the move from the predominantly punitive first requiring a shift in the Overton window to permit a concern about the well-being of the offender (Howard, 1780), and the pragmatic application of utilitarian ideas on the level of the society as a whole (Robinson, 2008). Indeed, therein we find the two major proverbial selling points of the rehabilitative ideal: one value based, and the other utilitarian, instrumental. The former focuses on the expression of the society's concern for the well-being of the offender as an individual (Emener, 1986), aiming to improve it both in the immediate aftermath of the offence as well as in the long

run, thus standing in what some see as its antithesis in the form of the rational, penal response which instead *enforces* the offender's adherence to the social morality through punishment (Durkheim, 1973; Kaempf, 2009; Garland, 2013; Tallgren, 2013; Hakeem, 1996; Carvalho and Chamberlen, 2018). In contrast, the rationalistic and instrumental utilitarian aim of rehabilitation sees rehabilitation as beneficial to the society itself, leading to less crime through the decrease in recidivism (Mastrobuoni and Terlizzese, 2014), as well as in more economical management of the penal system, prisons primarily, which has been experiencing major strains worldwide (Harrison and Karberg, 2004; Warmesley, 2005; Fair and Walmsley, 2021).

Rehabilitative goals can be achieved indirectly, not by an explicit focus on the offenders criminality but rather by virtue of mediate exercise of benevolence towards to offender and the provision of personal development (Johnson, 2008; Clements, 2004; Tett et al., 2012), such as through, though not restricted to, the provision of education (Spark and Harris, 2005; Coates, 2016; Rentzmann, 1996; Esperian, 2010) or vocational training (Simon, 2005). Such reformatory programmes are premised on the idea — one which is supported by empirical evidence (Vacca, 2004; Esperian, 2010) — that some criminality is a result not of innate character flaws, but rather a lack of opportunity and the perception of social injustice suffered, without this necessarily denying the offender's responsibility and the wilful choice to break the law.

Following the initial enthusiasm with rehabilitation as a strategy for reducing crime and reinforcing the humanist values by virtue of expansion of our circle of compassion, in the last few decades the tide of scholarly opinion has rather shifted

away from it as a consequence of empirical assessments of its effectiveness (Van Den Haag, 1982). Nevertheless, the question is far from settled, with a major argument challenging the rather bleak appearing practical evidence stemming from what challengers would argue is poor implementation of rehabilitation, rather than its inherent ineffectiveness (Cullen, 2013). In their assessment of systematic reviews on the topic, Weisburd et al. (2017) while conceding that on the whole:

“It was clear that many crime prevention and rehabilitation efforts did not work.”,

also correctly point out that:

“...taken study by study, they [systematic reviews] showed that some programs have large and significant impacts, whereas others do not.”,

much like before, raising the possibility of the importance of targeting and selectiveness in the application of rehabilitation programmes. Taking a different approach and approaching the issue from the ‘lived experience’ point of view, Bullock and Bunce (2020) find that:

“From the perspective of prisoners, the prison climate – characterized by a lack of interest in rehabilitation among correctional staff, lack of empathy and concern, and mixed but often impersonal and sometimes antagonistic relationships between prisoners and correctional staff – disrupts any ethos of rehabilitation.”.

In other words, a lack of belief in the effectiveness of rehabilitation and of genuine concern, both given and perceived, make this ineffectiveness a self-fulfilling prophecy.

Many also point out the insufficiency of resources, financial as well as material ones as a major real-world barrier (Schrink and Hamm, 1990)

2.5 Head 5: punitive

Probably the most philosophically contentious face of justice concerns punitive responses to wrongdoing. On the one hand, there is a wealth of neurological evidence that evidences the innate nature of the impulse to punish an offender, perhaps worryingly this act eliciting positive emotions by those who see themselves as direct or indirect victims of crime (Bagaric, 2005; Dressler, 1990). Indeed, this behaviour, that is a form of negative reciprocity, has been observed in non-human social animals too (Clutton-Brock and Parker, 1995). All this makes unsurprising the observation that retribution is historically one of oldest practised forms of redress of transgressions against an individual or a society (Miethe and Lu, 2005). For humans, being cognitively sophisticated and living in societies with complex structures rich in social signals, punitive justice also has a symbolic, expressive role, as noted by Robinson (2008):

“Expressive punishment need not have instrumental goals: it does not necessarily aim to reduce crime or render offenders better people: rather, it seeks to communicate to the offender and to wider society the moral wrong inherent in the offender’s actions.”

On the other hand, the dissonance with the retributive sentiment, which some see as a primal instinct at odds with the civilizing process, and the modern rationalistic and humanistic ideas is evident (Garland, 2013). Durkheim’s view of punishment as

absurd and irrational, and as an unthinking and fear driven emotion, epitomizes this school of thought (Kaempf, 2009). The claim that punishment in its own right has no instrumental role is crucial to pragmatically minded arguments against the desire to punish, though possibly considering it permissible on the account of its indirect and distal action via the previously discussed deterrent aspect of justice which it feeds into and is fundamental to (Gibbs, 1968). I shall return to this point in more detail shortly in the next section, but for now I would like to note the present author's disagreement with this view. In particular, what the claim of a lack of instrumental value in the punitive misses is the satisfaction of that which must underlie every ethical consideration: the effect on the sentient experience, that is, the emotions of individuals, be they direct victims of crime, or indirect ones, including the society as a whole (Bagaric, 2005). These experiences, though subjectively hypostatized, are no less real than objectively apprehensible aspects of the world and lie at the heart of the sentientist view of morality (Arandjelović, 2022) and are materially supported in the form of so-called intrinsic retributivism (Honderich, 1984). Discounting these experiences treats the human mind not as it is but rather as an imagined ideal *in abstracto*, void of empirical reality which would make any emergent conclusions practicable.

That punishment cannot be without instrumental value is readily apparent from the observation that were it otherwise, there would be no criteria according to which its commensurableness with the offence it seeks to redress could be judged. Wherever one stands on the permissibility of penal justice, it is undeniable that when and where it was or is used, its administration is not arbitrary in magnitude or kind,

and that these aspects thereof are sought to reflect the transgression upon which it is contingent (Laxminarayan et al., 2013). Indeed, it is on this basis, to wit, the satisfaction that it provides to the direct and indirect victims of crime, that the effectiveness of retribution in its own right must be judged (Barton, 1999), its distal effects in the form of deterrence not being rooted in retribution *per se* (Klimchuk, 2001). That being said, it is important to note that the victims' need for retribution is independent of the administration of the other judicial aspects. Empirical evidence shows that this need can be modulated, for example by reparatory acts, especially when these acts are not merely demanded by the legal system but rather performed with a sense of genuine remorse and repentance (Gromet et al., 2012).

3 A rethink of structure, permissibility, and aims

In the previous sections I have discussed the five broad desiderata of judicature, which desiderata are independent one of another, with the sole exception being that of deterrence which is inherently predicated on the fear of penal consequences, that is punishment. This conceptual independence stands at sharp variance to the actual real-world practice. For example, by limiting itself to the modes of punishment which have become customary and social acceptable, even if these modes are not necessarily philosophically best conceived, such as imprisonment as the default punishment for more serious crimes, modern judicial systems often produce undesirable effects which have been noted before, e.g. unnecessary unsocialization (Guillot, 2016). As such, this entanglement of the different aspects of justice constrains its expressiveness and

limits the ability of the system to exercise its power in a manner best fitted, morally and instrumentally, to a specific crime. Thus, my first overarching aim in the present paper and in this section in particular, is to shift the Overton window sufficiently to open the possibility of the discussion of judicial application which may at present be considered controversial and inappropriate.

I start with an argument against the use of prisons for punitive aims. While I am not the first to do this, a small number of intellectuals such as Zeki et al. (2004) having done so already, the underpinnings of my arguments are philosophically rather different. In particular, while I also reinforce some of the same points made by others, an important principle that I highlight specifically in the context of crimes which result in the longest imprisonment terms, rests on the idea of personhood and responsibility, the temporal nature of the ‘self’, and the need for punishment to be exercised against the corresponding wrongdoer.

Having rejected punitive imprisonment in part owing to its unduly cruel nature and having argued that it is a form of torture, thus having shown that our society is already open to the idea of torture as a form of punishment even if it is so cynically, without acknowledgement of the fact, I next present a case for the use of what would now be regarded as ‘cruel and unusual’ punishment.

3.1 Against punitive imprisonment

The history of the development of prisons is a long and interesting one, reflecting both ideological and axiological social evolution, as well as practical and managerial demands of the offender population. In order to gain clarity on the extent of possible

use of imprisonment as an instrument of justice, let us consider *seriatim* the five aspects of judicature discussed in the previous section.

Firstly, imprisonment itself cannot achieve material undoing of an injustice, whatever the said injustice may be, so any reparatory utility thereof is non-existent. Less immediately apparent is the observation that although much of the contemporary discussion of prisons involves the *desideratum* of rehabilitation (Phelps, 2011), incarceration itself cannot be thought of rehabilitative, that is, qualitatively no more so than any other form of punishment, which punishment in part serves the role of sending a message to the offender that the criminal act committed is morally unacceptable. The role of imprisonment can thus only be incapacitating, punitive, and, via the punitive, deterring (Schaefer, 2018).

The very nature of imprisonment, to wit, the severe restriction on the movement of the imprisoned and the more or less constant monitoring of their behaviour and whereabouts, make it a *prima facie* effective incapacitating tool; as MacKenzie (1997) put it:

“The concept of incapacitation is simple — for as long as offenders are incarcerated they clearly cannot commit crimes outside of prison. Crime is reduced because the incarcerated offenders are prevented from committing crimes in the community. At least while they are in prison, they cannot continue to commit crimes.”.

Indeed, the role of imprisonment in preventing re-offending by dangerous criminals cannot be challenged, at least in the short term, that is before any potential rehabilitation can take effect.

The use of imprisonment as a punitive measurement and thus mediately as a deterrent, is more contentious, both on practical and ethical grounds. While I by no means dismiss the importance of the former in principle, herein I wish to focus on the latter as the more fundamental ones, for if it can be established that punitive imprisonment is impermissible, any notion of practical considerations premised on imprisonment vanishes.

3.1.1 Punitive imprisonment is torture

Though universally acknowledged as a punitive tool, though as I noted previously not solely as such, it is seldom discussed with clarity through what means the punishing character is exercised. So herein let us be clear. *Any* punitive justice, by its very nature, punishes through the imposition of some form of *suffering*. With many historically practised types of punishment, such as flogging or the use of stocks and the pillory, the immediate suffering inflicted is physical with a further mediately felt psychological anguish emerging from the feelings of humiliation and degradation. On the other hand, a more acceptable form of punitive justice in modern societies, in the form of monetary punishment, that is the imposition of monetary dues in excess of what compensatory justice would demand, imposes suffering by the consequent reduction in the future economic power of the offender, which power would otherwise be used by the offender in the pursuit of pleasure (herein I use the term in the Epicurean, rather than the everyday, colloquial sense) and the avoidance of displeasure.

Returning to the topic of imprisonment, it can be readily appreciated that incar-

ceration imposes suffering by a wide range of various kinds of restrictions on one's otherwise naturally presumed liberty. Most obviously, being imprisoned severely limits one's freedom of movement; one can no longer travel, read a book in a park, or visit a restaurant or a cafe. How torturous must it be for a 'lifer' to face the rest of their life knowing that they will never again be able to enjoy the breeze of the seaside, the awe-inspiring views from a mountaintop, a day of camping away from the happenings of the hustle and bustle of everyday life? Secondly, imprisonment limits one's ability to associate with others freely; one can no longer enjoy social gatherings, and one's contact with their family and friends is restricted in duration, location, and the nature of interaction (Toch, 2003); restrictions on socialization include the ownership of pets, which is a source of joy for many (Thomas and Matusitz, 2016). Moreover, one's pursuit of aesthetic fulfilment is limited; a prisoner cannot choose their living environment, or decorate it as they wish (Marti, 2020). The list continues seemingly indefinitely, and includes limitations on exercise, diet, cultural activities, etc. As Charles (2021) put it:

“Prison can be seen as a tough type of punishment because it takes away your freedom, potential support networks and in many ways, it strips away your identity.”.

How is all of this not demeaning, this being an oft-cited criterion against various other forms of punishment (Bradley, 1999)? By any common understanding of the term, the aforementioned harsh restrictions on some of the most fundamental means by which individuals seek enjoyment in life and self-fulfilment, punitive imprisonment must be seen as a form of torture. Hence, the virtually uncontested acceptance of

punitive imprisonment requires a re-examination of torture. I turn my attention to this issue next.

3.1.2 Torture (or...‘torture’?)

Though historically widely practised and until not so long ago widely accepted as a permissible means of punishment (e.g. on the territory of today’s United Kingdom, although torture was prohibited by the common law, in England and Wales the Privy Council issued torture warrants until 1628, the practice being formally abolished during the Long Parliament in 1640; in Scotland, torture was prohibited by section 5 of the Treason Act in 1708), in most modern societies the very notion of torture invokes repulsion, and reflexive and plenary rejection of its permissibility. Yet, as I have argued in the previous section, under a thin veil, that is to say not *de jure* but *de facto*, torture *is* all but universally accepted in the form of punitive imprisonment. While the potential permissiveness of torture has attracted notable attention from the academic community, all but exclusively the context in which it has been considered has been instrumental, on utilitarian grounds, e.g. as a means of obtaining potentially life-saving information in exceptional emergencies, such in the prevention of terrorism (Miller, 2005; Jones, 1980; McMahan, 2008; Shue, 2015; Gross, 2004; Allhoff, 2005). Torture as a punitive tool is universally seen as ‘beyond the pale’, not even being acceptable as a topic of inquiry or acceptable debating point.

The nominal rejection of the permissibility of torture, not only in judicial contexts but also even in situations where it could in principle be used to extract informa-

tion which could save lives, is enshrined in international human rights law, most significantly in the 1975 UN Declaration against Torture, the 1984 (UN) Convention against Torture (UNCAT), and the 1985 Inter-American Convention to Prevent and Punish Torture (the reader may find it insightful to recall the words, ‘to punish torture’, in the reading of the arguments which follow). Despite this, no general human rights defines what torture actually is. Indeed, in large part, it is both that this lack of clarity causes as well as reflects the difficulty in determining what kind of punishment constitutes torture, allowing punitive imprisonment to be practised without sufficient scrutiny of its moral fundamentals while satisfying the superficial appearance of the equally nebulous, self-serving, and wilfully blind belief in it being a ‘civilized’ form of punishment. In other instances, the proverbial amorphous turtle of ‘torture’ is set to rest upon an equally formless turtle of ‘dignity’ (Bagaric and Allan, 2006):

“At the international law level, numerous instruments use the notion of dignity, often according it cardinal status.”,

which the analysis of Bagaric and Allan (2006) correctly concludes is:

“...itself vacuous. As a legal or philosophical concept it is without bounds and ultimately is one incapable of explaining or justifying any narrower interests; it cannot do the work nonconsequentialist rights adherents demand of it. Instead, it is a notion that is used by academics, judges, and legislators when rational justifications have been exhausted.”.

In the present article I argue that the distinction between torture and non-torture is a semantic irrelevance, and find no need to attempt a delineation between the two.

For the sake of clarity, the avoidance of excessive cumbersome prolixity, and consistency with the usual language, my usage of the term will continue being colloquial, without any fundamental premise behind my arguments hinging on its precise definition.

3.1.3 Retribution

Another basic question that needs to be asked before a coherent vision of a morally coherent judicial framework can be built, is: “Why do we punish?”. Undoubtedly, the answer is multifaceted. For example, punishment has both intended semiotic and deterrent aspects (Charles, 2021):

“Prison sentences are also a message to the wider public that this is what will happen if you commit a crime. Prison advocates would say this is a message to wider society about what is right and wrong and what will happen if you commit a crime.”.

However, apart from these reasons, more congruent with the way the modern society likes to think of itself and its values, there is an undeniable and arguably stronger impetus to punish, one less comfortable to admit to one self and others, which is the desire to punish for the sake of punishment, that is, because effecting punishment on somebody whom we find to have wronged us, evokes a deep rooted sense of pleasure (Bagaric, 2005; De Quervain et al., 2004; Knutson, 2004; Van Prooijen, 2017). While taking this into account by no means implies that we should thoughtlessly surrender ourselves to ‘natural’ drives and desires (for indeed, these can be controlled, curbed, reflected on, and overcome to varying degrees, depending on their aetiology,

context, etc.), ignoring such instincts would be a foolhardy thing to do, one bound to lead to feelings of ‘justice not being done’; a wealth of literature provides evidence that punishment in its own right, rather than its consequents such as deterrence, is demanded by victims of crime (which includes the society at large, their victimhood emanating from the offender’s transgression of socially agreed upon rules, that is the Law) (Van Ginneken and Hayes, 2017; Seron et al., 2006; Samuel and Moulds, 1986; Gwin, 2010; Maxfield et al., 1996; Cavender, 1984; Pickering, 2022). While in ancient cultures without sufficiently developed judicial frameworks, the victim or the members of the victim’s family were allowed to deliver what they see as justice, the existence of organized, unified, and coherent instruments of justice, prevents the imposition of arbitrarily and unduly harsh punishment and allows for a socially agreed upon hypostatization of normative ‘just deserts’ (Carlsmith et al., 2002).

This ingrained retributive desire is readily evident in the sentencing remarks of judges concerning virtually any case of serious offence. For example, in the recent case of *Rex v David Carrick*, Mrs Justice Cheema-Grubb states:

“I have to bear in mind that my function is **to impose appropriate punishment...** I conclude that the notional determinate sentence that would provide a **just and proportionate punishment** is...”. [all emphasis added]

In his sentencing statement in the case of *Her Majesty’s Advocate (HMA) v Andrew Innes*, Lord Beckett’s words also reflect the primality of the focus on the penal, rather than incapacitating, aspects of imprisonment:

“I take account of the limited mitigating factors I have mentioned in

fixing the punishment part of your life sentence which is the period of time you will serve in prison before being considered for parole. In fixing it, **I must reflect the need to punish you for the crime of murder** and deter you and others from committing it. **The law requires me to ignore any risk that you may pose to the public in the future.**".

[all emphasis added]

In *United States v Nassar*, Judge Aquilina is no less clear:

"Sentencing **must** protect, **punish** and deter." [all emphasis added]

Thus, even in the minds of judges, the desire for retribution by means of imprisonment appears unwavering despite the wealth of evidence which should weaken it on practical grounds, summarized well by Drago et al. (2011):

"The measures of prison severity do not reduce the probability of recidivism. Instead, all point estimates suggest that harsh prison conditions increase post-release criminal activity..."

Osgood (2017) makes a similar point:

"Overall, the evidence seems to support a retribution model of revenge over a deterrence model;"

That confinement itself has become the punishment is even reflected in language itself, the Oxford English Dictionary (OED) recording the use of the word 'penal' as a British colloquial term meaning 'penal servitude; a prison sentence' as being in use since 1864.

Indeed, the very first aspect of criminal punishment under the widely recognized Hart-Benn-Flew model (Hart, 1959; Benn, 1958; Flew, 1954) — if by no means unchallenged (Zaibert, 2016; Hanna, 2008; Wringer, 2013; Njoku, 2012), albeit in aspects not of direct relevance to the matter of primary interest in the present article, e.g. concerning case in which the object of inflicted punishment is other than a culpable individual — requires punishment to be unpleasant: punishment must involve something painful or otherwise difficult to endure (Van Ginneken and Hayes, 2017) or in the very direct words of Flew (1954) ‘an evil, an unpleasantness’, often referred to as ‘hard treatment’ (Van Ginneken and Hayes, 2017). In no small part, it is from this characteristic of punishment that the difficulty in delineating a boundary between torture and non-torture is, is to be found, as in the aforementioned lack of clarity on what constitutes torture in the international legislature. Having argued that punitive (rather than incapacitating) imprisonment, particularly in the cases of serious offences which incur often decades long incarceration, imposes multi-faceted and most torturous suffering, I see no need to seek such delineation, and instead offer an alternative argument against imprisonment as a means of punishment, that is, an alternative not in the quantitative sense, in the magnitude of the imposed suffering (for I see no principled *a priori* restriction on the intensity of punishment, considering the heinousness of some crimes; rather, the appropriateness of intensity should be moderated and judged on the basis of individual cases wherein any boundaries should emerge organically from the innate aspects of a specific offence and the social values that in any instance must underlie and give authority to a robust judicial system), but rather on more fundamental, qualitative grounds.

3.1.4 In favour of the permissibility of ‘torture’ but against punitive imprisonment

I would like to focus the reader’s attention on a particular aspect of retribution, which aspect is seldom discussed at much length, given (quite correctly) its obviousness and thus presumption thereof: that punishment must be exercised against the actual offender (Bilz, 2007). It is in the transgression of this fundamental principle that the rejection of penal imprisonment should be sought first and foremost. In particular, the means through which the punitive aspects of imprisonment are hypostatized inherently demand a temporal extension. However, one’s personhood, one’s ‘I’ or ‘self’ — be it seen objectively through one’s behaviours and effected acts, or subjectively through the subject’s own sense of identity, values, and morals — is not a thing, something which can even pragmatically be considered as static, but a process, something that is in constant flux, something that is perpetually undergoing change (Willett and Sayer, 1994; Arandjelović, 2023a; Sheldon, 2005; Armon, 1998). As already noted by others, e.g. Whitehead (2010) and in various forms by a series of other process philosophers, it is neither philosophically nor ontologically sound to consider what we colloquially and on the basis of some superficial physical continuity of embodiment speak as of the same person today, as being the same person in 5, 10, or 20 years’ time. The everyday notion of a persisting person is characterized by an essentialist idea which goes at least as far back as Plato, one which presumes the existence of an enduring and an immutable *essentia*, and which is indefensible in the light of the modern understanding of the mind. Rather, the self must be seen as evolving, evolving with each interaction with the world, with

each new stimulus, sensation, and experience, and with ceaseless self-reflection, having a potential to diverge over time fundamentally from its state in the present, its current self. While not unbounded, for the mind as a phenomenon emanating from a material existence is no less constrained by the laws of the physical world than a rock rolling down a hill, such divergence can undoubtedly be large enough to effect a major moral change² (Jang and Johnson, 2022; Akunesiobike, 2016; Chui and Cheng, 2013). Therefore, sentencing a person to the *punishment* of imprisonment leaves two options: either (i) is the very possibility of change or ‘rehabilitation’ in the usual jargon, denied, with a disregard of evidence that individuals *do* change, even in the absence of being convicted of a crime and being confronted with the suffering of its victims and the disapprobation of the society, to say nothing of it following such traumatic and life-changing impetuous events, or (ii) is the possibility of punishment wilfully being applied to a changed person, and by any ethical measure as such to a *different person*, i.e. one other than the offender, accepted as permissible. It is difficult to see how either of the two can be ethically defended and hence I contend that on these grounds alone punitive imprisonment must be rejected already. It is impossible to imagine that either choice *ut supra* would be admitted to by the judicial decision-makers.

As regards the denial of the possibility of rehabilitation, while the tides of the consensus as regards the empirical evidence on rehabilitation of offenders specifically has been ebbing and flooding (Carlen, 2013; Ganapathy, 2018; Mastrobuoni and Terlizze, 2014; Emener, 1986; Liebling and Maruna, 2013), there is much to be desired

²To emphasise, this does not mean that *every* mind can change to this degree, but merely that *some* can.

in the quality of data which allow for the outright rejection of the idea (Bullock and Bunce, 2020; Mastrobuoni and Terlizese, 2014; Cullen, 2013); it is certainly the case that it very much remains alive as a matter of debate, both in academic and judicio-political circles.

Yet more untenable is the alternative, that is the suggestion that we may be willingly consenting to a punishment being exercised against an guiltless person. Even an inadvertent punishment of the innocent, unavoidable in any real-world practice, is met with universal abhorrence (Alexander, 1983; Lippke, 2010), presenting a major moral challenge in the context of establishing guilt beyond a reasonable doubt; sanctioning the punishment of an innocent person *knowingly* and wilfully is unthinkable.

Though the argument against punitive imprisonment on the basis of the possibility of inappropriately directed punishment is sufficient to reject it, for the sake of explication of permissible alternatives, it is insightful to consider another inherent feature of punitive imprisonment which is objectionable in the context of the use of this punitive measure as the default ‘hard treatment’ (remembering that it is not the hardness of the punishment itself which should be considered as universally inadmissible on *a priori* grounds). In particular, unlike other forms of punishment, e.g. financial or the now forbidden corporal punishment, which incur hardship and suffering in a focused manner, punitive imprisonment entangles several sources of suffering which cannot be independently moderated. Financial punishment incurs the loss of money. Corporal punishment effects physical suffering. On the other hand, incarceration, although primarily thought of as depriving one of their freedom of movement, denies a person of much more than that (Giallombardo, 1966; Goodstein

and Wright, 1989; Liebling and Ludlow, 2016). For example, a prison inmate cannot have a friend or family member visit them and stay over for multiple days. Neither can the person freely buy goods. Neither can they choose and prepare their food at liberty. And so on. The picture is that of a rather arbitrary mishmash of restrictions, the quality of which neither relates to the crime committed nor the offender, with varying contributions to one's sense of hardship suffered (Kolber, 2009; Liebling and Maruna, 2013) – the suffering exhibits a degree of subjective contingency (Bukstel and Kilmann, 1980; Haney et al., 2003).

So, if not punitive imprisonment, what should be considered as an alternative form of punishment which could take its place? As I have already argued, in that *every* form of punishment necessitates an imposition of suffering, I contend that making the distinction between torture and non-torture is unnecessary. A *particular* punishment should be rejected in a concrete instance not because it is found to be on the side of a largely arbitrarily drawn line in sand, effecting it being labelled as 'torture', but rather because it is disproportionate, too harsh, too severe for that *specific* offence. Instead, the primary focus should be on normative proportionality and the fulfilment of the two *desiderata* highlighted as not being met by punitive imprisonment, namely its indubitable (within the limitations of the practical) application to the correct offender, and its correspondence to the crime and the offender whose punishment is being sought. Indeed, punitive proportionality has to be normative, for unlike, say, proportionality in the context of deterrence, it lacks an objective basis; in other words, it is impossible to erect a framework of proportionality which is independent of social sensitivities and values of a particular place and time (Jones

et al., 1990). The aforementioned case of *Rex v David Carrick* serves well to illustrate my point. Carrick’s sentencing which, as I have already remarked, notably emphasised the punitive aspects of the sentence, resulted in complaints concerning the leniency of the sentence as the complainants saw it³:

“The Attorney General’s Office has received ‘multiple requests’ to appeal the ‘unduly lenient’ sentence prolific rapist David Carrick was handed down today. ”.

The complainants’ retributive desire is palpable, the complaint being entirely void of other possible concerns, such as that of public safety (i.e. concerning the incapacitating potential of incarceration); the demand for *lex talionis* was left unsatisfied.

On the other hand, in addition to the existing safeguards which aim to ensure that punishment is imposed against the correct offender, for the reasons already explicated, I argue that the duration over which punishment is administered must be reasonably short-lasting, the time-scale being shorter than what can practically be considered sufficient for a significant change in personhood.

The aforementioned delineations admit a wide range of punishments which have fallen out of favour in modernity, so for the sake of example I will highlight three kinds which are well-known, namely (i) corporal, (ii) embarrassing, and (iii) capital.

Corporal punishment As Wilson (2002) points out, and as the reader would have seen often to be the case in the existing descriptions of permissible and impermissible punishments, the meaning of the term ‘corporal punishment’ is rather vague as it

³<https://www.dailymail.co.uk/news/article-11723081/David-Carrick-country-s-worst-sex-offenders.html>

stands, its nuances readily becoming apparent upon closer inspection. Very much in agreement with my argument, Wilson also points out that imprisonment can reasonably understood as falling under the umbrella of corporal punishments:

“I say ‘corporal punishment’, but it is not clear what ground ‘corporal’ is to cover. If I lock people up in prison...it is clear that their bodies (Latin *corpora*) and not just their minds may be unpleasantly affected: the punishment, if it is a punishment, is physical and not just mental.”.

I concur and hence adopt the following definition (Wilson, 2002), which though less nuanced, is more in line with the spirit of the common use of the term:

“We have in mind, I suppose, some fairly direct kind of attack or assault on a person’s body: either (a) by the infliction of physical pain, as when someone is smacked or beaten or put in the stocks, and/or (b) by the infliction of physical damage, as when thieves have their hands amputated or rapists are castrated.”.

On the basis of the *desideratum* that the permissible punitive suffering imposed upon the offender must be strictly limited in duration, corporal punishments falling under the ground (b) can be immediately rejected – by its very nature *lasting* damage (be it physical or psychological) itself is a *prima facie* disqualifying trait. The infliction of physical pain though, satisfies both *desiderata* which imprisonment does not: it can be limited in duration and arbitrarily moderated, from being low in magnitude to effectively arbitrarily high (whereupon I wish to stress that the actual maximum suffering will in practice be limited though the satisfaction of the requirement of proportionality). Thus, I agree and strengthen the view expressed by Scarre (2003):

“...I do not myself think that it has been shown that corporal punishment is an unacceptably demeaning form of punishment, or that it is morally inferior to imprisonment...”.

The wide rejection of corporal punishment by the public at large, but as I have evidenced not the ethicist community, can be seen as little other than a form of hypocrisy, of cognitive dissonance, shown by a society which seeks to punish (Newman, 1983):

“The general public does not believe prisons are tough enough...”,

but which does not wish to witness the consequences of the said punishment and their choices. Thus, there are sound reasons to expect that the reintroduction of a wider application of corporal punishment in lieu of punitive imprisonment can act so as to *moderate* punishment, rather than to lead to a(n even) harsher treatment of offenders; this potential benefit is, of course, further to the rectification of all other transgressions of punitive incarceration previously discussed.

Embarrassing punishment While, as many before me have already pointed out, corporal punishment, if not always then often, also inflicts suffering in the form of embarrassment and humiliation (Scarre, 2003), its primary focus is on physical pain, felt immediately, with embarrassment and humiliation being effected mediately, that is, it is hypostatized by means of the social context within which punishment is inevitably experienced. In contrast, embarrassing punishment imposes no physical suffering, its aim being purely to embarrass and humiliate.

The very idea of public humiliation in a ‘civilized society’ — a vacuous notion, being little else but a form of the begging the question fallacy — all but universally evokes immediate repulsion and rejection. Indeed, Article 5 of the 1948 Universal Declaration of Human Rights states:

“No one shall be subjected to...degrading treatment or punishment.”.

Yet, what ‘degrading’ exactly refers to is a question left largely unanswered (to say nothing of the fact that, much like in my previous discussion of torture, a whole series of the prison experiences would be difficult to see otherwise but as humiliating, such as strip searches, limited privacy, etc.). As I discussed previously, it is often relegated to the notion of personal dignity, dignity itself being another specious concept which Bagaric and Allan (2006) correctly note is:

“...vacuous...without bounds and ultimately is one incapable of explaining or justifying any narrower interests;...”.

A part of the reason why the explication of the notions of ‘dignity’, ‘degrading’, ‘humiliating’, etc., is so problematic in this context lies in their social contextual dependency (Jones et al., 1990). On the basis of the arguments I provided, I see no reason why *all* punishment aimed at humiliating should be summarily rejected. For example, there is no reason why the humiliation of the wrongdoer by forcing them to stand in a public place with a description of their transgressions or by forcing them to wear a certain symbol designating the crime committed for a limited period of time, should be beyond the boundaries of permissible punishment.

A possible challenge to this proposal can be invoked on the basis of the potential long-lasting psychological harm, which would violate the requirement I elucidated

previously, namely that the punishment must be exercised against the correct individual, which, as I argued earlier, in turn cannot be ensured to an acceptable degree with suffering that extends over a prolonged period of time. I acknowledge the validity of this concern but argue that rather than resulting in the dismissal of embarrassing punishment, it should instead be used to guide us in the discrimination of which specific humiliations are permissible and which not, what their intensity should be, and, consequently, what kinds of crimes could result in their being levied. Specifically, if a crime is serious enough to warrant on the grounds of proportionality extreme humiliation, one which would leave long-lasting psychological wounds, this would render embarrassing punishment unfit for the crime and a means of punishment more severe but within the confines of the permissible, such as corporal punishment, should be sought instead. Humiliating punishment should thus only be permissible for lesser crimes, this leading to lesser humiliation, and on the whole a low chance of enduring stigmatization and suffering.

Capital punishment Lastly, I come to the punishment often referred to as the ultimate punishment, namely capital punishment. In the consideration thereof, I would like to take an unusual course and begin with what may seem like a strange question, one not asked previously, which is in what sense can capital punishment be considered to be a punishment at all. Whence does this question arise? Is the answer not obvious and does it not lie in the *taking* of one's ultimate possession, life itself, of the possibilities that living has to offer? The crux of the problem is readily seen when the question is approached from the sentientist view I advocate and which, although not explicitly recognized and acknowledged, underlies the main-

stream view of punishment, namely the subjective experience. As noted previously, the Hart-Benn-Flew model requires punishment to be unpleasant, which requires a sentient and hence living object, one capable of experience, just as does ‘an evil, an unpleasantness’ of Flew (1954). The state of being dead, that is the state of not being alive, does not permit such experience. Neither does the process of dying, that is the change of one’s being to not being, itself not necessarily involving suffering or an unpleasantness (Arandjelović, 2022).

Much of the confusion here emanates from language itself, which language has for the most part evolved for the exchange of rather mundane, everyday information, rather than the communication of philosophical subtleties and nuances. As argued before (Arandjelović, 2022), in the sentence that one “has had their life taken”, life is treated as something external to the subject it is associated with. The structurally similar-sounding sentences “has had their life taken” and “has had their laptop taken” do not express the same subject-object relationship between an individual, and respectively “their life” or “their laptop”. In the former sentence, despite the apparent grammatical suggestion, rather than merely being the passive object, “life” is inseparable from the subject, that is the individual in question. Similarly, “life;” cannot be understood as standing in attributive relationship to the individual. Being in any state presumes *being*. “Being dead” can thus only be understood as a linguistic shorthand, rather than a meaningful philosophical claim pertaining to being – one cannot be dead for there is no one to *be*.

Nevertheless, capital punishment indeed is a punishment, its punitive aspect not emerging from the “taking of one’s life” itself, but rather from the experience of ex-

pecting death and imagining the fantastical notion of *being dead* (Smullyan, 2003). In particular, the suffering in this case originates in the difficulty, if not outright impossibility, of escape from conceiving us persisting as witnesses of the world without us, experiencing for eternity the denial of all the pleasures that real existence offers. The intensity of this suffering, much as I have previously shown to be the case with imprisonment, is highly individual, that is, it is contingent on one's personality and values, including those stemming from religious or spiritual views (Arandjelović, 2023b). More importantly and also alike imprisonment, this intensity cannot be moderated otherwise than by time, i.e. by prolonging it, which makes capital punishment impermissible *as a form of punishment* on the same grounds, constraining its permissibility to the servicing of extreme incapacitation demands when it should be on compassionate grounds be considered as more humane than decades or lifetime long incarceration.

4 Conclusion

The focus of the present article was on the ethical framework upon which the contemporary penal system in Western democracies rests. Motivated by a number of inconsistencies of the present-day judicature which I identified and analysed, I set upon the task of establishing a principled basis for a framework capable of dealing with the aforementioned challenges in a manner that is consonant with contemporary moral thought, and which is empirically informed and guided by evidence from human psychology, sociology, and neuroscience.

I started by contextualizing my analysis through an examination of the different goals and levers of justice, and used the derived insight to re-examine the existing views of imprisonment, imprisonment being the foremost form of sentence for serious crimes globally. I showed that one of the key aspects thereof is retributive and hence highlighted a series of inconsistencies in how this *desideratum* is treated by judiciary and the society at large. By examining the origins of suffering effected by imprisonment — suffering being a necessary component for a treatment to be considered punitive — I demonstrated that imprisonment fits the criteria which subsume it under the umbrella of torture and, given its all but universal acceptance, argue that the distinction between torture and non-torture is unnecessary. Premising my discussion on sentientist grounds and concentrating instead on the subjective experience of the punished offender, as well as the victims and the society at large, I rejected the permissibility of punitive imprisonment, restricting its use purely for incapacitating goals and cases of dangerous individuals. The crux of my argument rests on a challenge to the presumed persistence of the offender's person throughout their punishment, and the practical impossibility of independent moderation of the different origins of suffering of the incarcerated.

Next, I showed how the principles which I developed through the aforementioned analysis of imprisonment, can serve as a basis of the framework at the nexus of my inquiry, and consequently applied them to the judicial practice more broadly. In particular, I argued for the permissibility of forms of punishment which have a long history of use but which are, incongruently, nowadays considered beyond the pale. As hypostatizing examples, I discussed and advocated for the reinstatement of

corporal punishment and the kinds of punishment presently summarily dismissed on the basis of being seen as humiliating (e.g. various forms of public shaming). In opposition to the currently predominant views and the accepted practice, I argued that unlike incarceration, by virtue of being limited in duration, thereby alleviating concerns that punishment is not applied to the correct person, and of being arbitrarily moderated across a single, well-understood dimension, such punishments are ethically permissible. Through these examples, I illustrated the application of the principles at the heart of my proposals, examining the circumstances in which each punishment is appropriate as well as those in which it is not, and discussing the boundaries of their permissible employment, thereby drawing attention to and preventing potential misuse or abuse.

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