

## **Penal Coercion in Contexts of Unjust Inequality<sup>1</sup>**

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### Introduction

This article addresses the theoretical difficulty of justifying the use of penal coercion in circumstances of marked, unjustified social inequality. The intuitive belief behind the text is that in such a context – that of an indecent State – justifying penal coercion becomes very problematic, particularly when directed against the most disfavored members of society. This affirmation requires a high degree of nuance which I will try to furnish progressively. In any case, before continuing it seems appropriate to delimit in greater detail the problem itself.

In the first place, I would hold that there is no more important discussion in current political philosophy than that of the legitimate use of the State's coercive power. Such reflection is central to some of the primary works produced by the discipline over the past century (Rawls 1971). Hence the value of questions such as whether to obey political authority when one dissents; whether to pay taxes destined to the financing of war; or when civil disobedience or conscientious objection are justified (actions that, it should be noted, acknowledge the general validity of criminal law).

The significance of the reflection on legitimate state coercion is, then, an assumption that provides the premise for this piece. In relation to this premise I would stipulate two precisions. Firstly, I hold that if the use of state coercion turns out to be difficult to justify in general, it becomes even more difficult to justify when dealing with punitive coercion. Once punishment is

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<sup>1</sup> Special thanks go to Gustavo Beade for his comments, as well as to the colleagues and students with whom I have discussed previous versions of the current piece at the University of Buenos Aires.

defined as suffering intentionally imposed because of an improper act committed by some individual (see, for example, Hart 1968), or if we at least accept that the harm imposed is an essential element of punishment (Bedau 1991), then the difficulty of justifying such an extensive practice can be better understood. Just as Nicola Lacey has shown, punishment “puts the burden of justification onto the state” because it is a practice that is “costly both in human and financial terms and is moreover a practice whose practical and moral benefits are ordinarily uncertain” (Lacey 2001, 12; 1995).

The second precision I want to introduce is more important for the purposes of this work and is the following: (1) general problems are encountered when justifying the use of state coercion, (2) these problems are aggravated when dealing with penal coercion, and (3) they become extremely difficult to resolve – and this is the point – when we are trying to justify the practice in the context of deep social injustice. At this stage (3), the arguments for justification lose their strength for a variety of reasons which I will analyze below, yet at this early point I would like to make reference to a particular problem.

In contexts of grave, unjustified, and systematic social injustice, there is a serious risk that the coercive means of the State will be used for maintaining the inequalities that characterize that society. The debate that ensues from this affirmation is partly empirical (although this approach will not be the center of my attention). The usual response, which happens to have its basis in reason, is that societies become less tolerant in times of economic crisis and punish offenders more severely (Carlen 1989, 12). The focus of my attention, however, relates to theory. It so happens that (i) if we conceive of democracy – as those of us here generally do – as a system whose justification lies in its propensity for generating impartial decisions; and (ii) we understand – as in this case – that impartiality is intimately related to the capacity of every

individual and group to express themselves and be taken into account in the public sphere (Nino 1996); and (iii) we use as a starting point the hypothesis that there are broad sectors of the population that are unjustifiably excluded from the public sphere; then it holds that (iv) there are reasons to believe that the system in place will tilt in favor of those who have the most influence over the decision-making process (to be precise, over the wording, application, and interpretation of the law). In this context, then, the already complex task of justifying coercion (in this case penal coercion), becomes especially arduous. The chances for arriving at fair judgments amid circumstances marked by extremely unfair inequality are predictably very low. At the same time, the chances that the most disfavored sectors of the population will suffer biased treatment in the same circumstances are excessively high (as empirical evidence confirms on a daily basis). The State must prove to the members of society who are the worst-off – and to anyone else whose interests do not involve maintaining a blatantly immoral society – that there are reasons why they should trust that it will treat them as equal and will provide the proper treatment it has systematically denied them for years, on every occasion, time and time again. This is the type of situation I am interested in exploring.<sup>2</sup>

### Criminal Injustice and Social Injustice

Most authors writing on punitive justice explicitly recognize the importance of the aforementioned connection between punitive justice and social justice and express concern over it. In recent decades, the efforts to connect both topics for reflection (punitive justice and social justice) have at least become evident since the publication of the influential book, *Doing Justice*, by Andrew Von Hirsch in 1976, whose last chapter is dedicated to the theme of “just desserts in

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<sup>2</sup> My piece will not include, then, concrete responses to what “reproaches” might be justified in a “well-organized society.” I have provided some observations on the subject in other works (i.e., Gargarella 2008).

an unjust society.”<sup>3</sup> Moreover, most authors associated with this line of reasoning have identified the problems inherent in the connection between punitive injustice and social injustice and how it undermines the justification for punishment.

Notably, the last sentence of Von Hirsch’s book affirms that, “As long as a substantial segment of the population is denied adequate opportunities for a livelihood, any scheme for punishing must be morally flawed.” Although it is a strong statement it is one that, surprisingly or not, many other influential scholars in the field apparently share.

Authors such as Jeffrie Murphy have reached similar conclusions. Murphy maintains in principle a retributive vision of punishment but in the end concludes that, “to a large degree, modern societies lack the moral grounds for punishment” (Ibid., 221), such that “lacking significant social change” the penal institutions must be “resisted by those who consider human rights morally serious” (Ibid., 222). Distinguished legal philosophers such H.L. Hart seem to share a similar viewpoint. In the opinion of this author, “we should incorporate as a further excusing condition the pressure of gross forms of economic necessity” (Hart 1968, 51). Other respected writers in the field, including Andrew von Hirsch and Ted Honderich, also seem persuaded by this kind of affirmation (Tonry 1994, 153).<sup>4</sup>

All of these authors, to my understanding, appear to harbor genuine concern for what Antony Duff called the preconditions of criminal liability (Duff 1998, 2001). In his words, “any explanation for punishment that gives a central role to the offender in determining the justness of

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<sup>3</sup> For some time attempts have also been made to demonstrate the existing continuities between the principles governing distributive justice and hence the relevance of social justice when considering criminal liability (Rawls 1995, 1971; Sadurski 1985, 1989).

<sup>4</sup> According to Hirsch, “as long as adequate opportunities to pursue prosperity are denied to significant portions of society, any system of punishment will be morally imperfect;” and according to Honderich, “Resolving the question of moral justification for punishment is impossible if account is not taken of the decisive importance of the distribution of wealth in society” (both cited in Tonry 1994, 153).

the punishment must address the problem of whether we can fairly punish subjects whose offenses are closely linked to social injustices they have suffered” (Duff 1998, 197).<sup>5</sup> This would be so because the majority of individuals and groups that appear before criminal courts “have suffered such severe forms of exclusion that the essential preconditions for criminal responsibility are not sufficiently met” (Ibid 196). Delinquents cannot, then, be fairly judged, condemned, or punished as long as these unjust conditions persist.

### Rights and Democracy

I would like to address in the following section what I understand to be the two principal underlying lines of argument in the literature cited in the previous section challenging the use of penal coercion in unequal societies. It is a matter of the two visions that I consider (for reasons that will be elucidated) the most plausible and propitious for the purpose. The first of these argumentative lines implicitly present in the works reviewed is based on the idea of rights, and the other on the idea of democracy. More precisely, the first is related to a contractualist position, while the second takes us to a particular conception of democracy as *dialogue*.

**Rights.** The principal line of argumentation that Jeffrie Murphy resorted to in the work cited above was connected to contractualism – a version of contractualism that owed as much to Kant as to Rousseau’s “general will.” The point of departure for this approach holds that punishment can be justified if the punishment itself can be plausibly considered the product of consensus between every individual – if the decision of the State to punish me can be, then, plausibly reconstructed as my own decision (Murphy 1973). Murphy thus reconstructs the Kantian theory of punishment, grounding it in the notion of “unfair advantage”: the idea that the law must

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<sup>5</sup> Duff adopted this perspective in later years after having spent a long period resisting, according to his own account, taking such a step. See Duff 2001, ch 5.3.

prevent those who disobey it from obtaining an unfair advantage over those who willfully obey it. From this perspective, the role of punishment is to reestablish an appropriate equilibrium between benefits and obedience. Punishment is thus seen as a debt owed to everyone else in the community given their condition as respectful subjects of justified laws. In this framework it becomes possible to maintain, at least in principle, that even people sanctioned would consent to the punishment inflicted because they would not be able to protest the reproach, knowing as they would that it was their due for having gained or sought an unfair advantage. So it is, Kant would say – as does Murphy – that coercion and autonomy in the end go hand in hand.

For the purposes of this work, I do not intend to endorse a vision such as Murphy's as the basis and justification for punishment. What interests me, rather, is the appeal the vision makes to the logic of contractualism in order to conceptualize the limits of the use of the state's coercive power. The problem that this conceptual mechanism helps identify is, then, the following: in our societies, or at least with regards extensive sectors of the population, it is difficult to identify the benefits resulting from state action that are assumed by contractualist theory. Instead, what often occurs is that the most ignored sectors of the community are relegated to a seriously disadvantaged position by the State, which leaves them to their fate or directly assaults them using criminal law. Subsequently (and to the degree of plausibility of the preceding description), it is unclear what exactly these sectors owe the State. To be specific, this is what Murphy asks: What is that such persons – who live in miserable conditions – give back to the State? He returns, then, to the Marxist suggestion that retributive theory is formally correct but materially inadequate. His conclusion, it follows, is that “modern societies largely lack the moral right to punish” (Murphy 1973, 221), and that “in the absence of major social change,”

institutions of punishment are to be “resisted by all who take human rights to be morally serious” (Ibid 222).

Similarly, Nicola Lacey – who has carried out very important work in the domain where notions of punishment, community, and social justice converge – has affirmed that “[I]f a large proportion of certain groups of offenders are people whose basic citizenship rights – such as the right to physical or sexual integrity – have been violated by abuses from which the state has failed to protect them, this must be a relevant factor in determining the nature, if not the fact, of their punishment. Similarly, at a yet more basic level, where an offender has received less than their fair share of public resources such as education, this should affect . . . other relevant aspects of their sentence” (Lacey 2001, 14).

**Democracy.** The second line of argumentation I want to explore is related to the concepts of democracy, institutional procedures, and “voice” and, as in the first line of argumentation, distant echoes of Rousseau can be heard. The main idea is that justified norms are those of which I can reasonably consider myself the author. In an integrated, self-governed community, each person can examine the applicable norms and see the outline of their own face, reflected as in a mirror. Law would be, then, the living expression of the convictions of the subjects to whom it applies. It is not a contradiction, accordingly, to hold that people gain freedom by becoming “slaves” to the law. Completely opposite to this ideal situation are situations which I would term as *legal alienation*, where we find the reverse; that is, situations in which some people reading or listening to the letter of the law are no longer able to identify their voice at all. What they hear instead is another voice, one that is foreign, incomprehensible, and distant. This strange voice, however, is backed by state force, which enables it to impose its will on those who do not understand it, do not adhere to it, or directly reject it.

The following description by Anthony Duff brings together what has been said in the preceding paragraph using an idea of alienation similar to one that could be cited, or to one that is present (not coincidentally) in Murphy's analysis.<sup>6</sup> Duff says:

If there are individuals or groups within the society who are (in effect, even if not by design) persistently and systematically excluded from participation in its political life and in its material goods, who are normatively excluded in that their treatment at the hands of the society's governing laws and institutions does not display any genuine regard for them as sharing in the community's values and who are linguistically excluded in that the voice of the law (through which the community speaks to its members in the language of their shared values) sounds to them as an alien voice that is not and could not be theirs, then the claim that they are, as citizens, bound by the laws and answerable to the community becomes a hollow one. Sufficiently persistent, systematic, and unrecognized or uncorrected failures to treat individuals or groups as members of the polity who share in its goods undermine the claim that they are bound by its laws. They can be bound only as citizens, but such failures implicitly deny their citizenship by denying them the respect and concern due to citizens (Duff 2001, 195-6).<sup>7</sup>

As in the paraphrase of Rousseau, Duff also links the value of law to the decisive intervention of every citizen in its creation. And, like Rousseau, he assumes there exists a major problem when the individuals who feel the full weight of the law cannot pertinently consider themselves among the law's authors.

The previous paragraphs sketch the outlines of a notion of democracy that I would associate with (what is called today) a deliberative conception of democracy (Elster 1998). Following a possible reformulation of this conception, democratic norms are justifiable only and to the degree that they can be identified as products of an *inclusive discussion*, that is, a discussion in which "everyone potentially affected" has taken part (Habermas 1996). The ties

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<sup>6</sup> According to Murphy: "[c]riminals typically are not members of a shared community of values with their gaolers; they suffer from what Marx calls alienation. And they certainly would be hard pressed to name the benefits for which they are supposed to owe obedience" (1973, 240).

<sup>7</sup> In his opinion, "[w]e cannot say, at least of many criminals, that they have wilfully seized for themselves an unfair advantage by their crimes." In many cases, punishments cannot be seen as a way to "restore a fair balance of benefits and burdens, if no such balance existed in the first place" (Duff 1986, 229).



between this reading of democracy and the vision described above seem clear. As criteria for the acceptability and respectability of legal norms, special emphasis is mainly placed in both approaches on the involvement in law-making of the very people who will be affected by it. It is unsurprising, then, that Duff went so far in recent times as to make explicit the connection between his work on the justification of punishment and the theory of deliberative democracy (Duff and Marshall 2007; Duff, Farmer, et al. 2007). His embracing this theory, lastly, is similar to other authors whose theoretical interests have led them to the problem of punishment, upon which they have looked critically (de Greiff 2002, Nino 1996 and 1996b, Pettit and Braithwaite 1990 and 1994).

The theory of deliberative democracy links normative impartiality with inclusive dynamics of discussion and, in so doing, holds that in situations when any of these basic commitments are infringed (when decisions that are solely the product of pressure by interest groups are made, for example, or when decisions are taken in severely exclusive societies) the chances that public policies either tilt to the favor of those who control the decision-making process or to the detriment of those most removed from it increase enormously. Moreover, this occurs without conspiracy; not even bad faith by the part of the administration in power is necessary. Rather, it is the result of the natural difficulty that each of us experiences when attempting to put ourselves in the place of others, to figure out what is important to them, and to properly weigh the value that they assign that importance.

The relevance of this theme in the context of this work is obvious, for the theory enables us to anticipate how the existing levels of social exclusion and the lack of public debate surrounding the means by which penal coercion is carried out combine to result in a strongly biased and unjustified exercise of it.

This affirmation, sadly, appears to find solid empirical backing when examining – which, it so happens, is perfectly relevant – the appalling conditions that characterize the prisons in the majority of our countries. In them we can see how, without fault, heterogeneous societies produce prison systems whose populations are homogenous and where the most disadvantaged sectors of society are clearly over-represented. This unacceptable situation is the result of many causes, but the way the law is written (what actions are determined to be criminal and which are not) is doubtlessly one of them, as are the way the law is applied and interpreted.<sup>8</sup> Finally, the pretension of the State to make use of the violence under its control becomes decisively questionable when those who are most affected by the violence are also those who had the least involvement in the formulation, application, and interpretation of its violent policies.

#### A negative presumption

In practice, the two argumentative lines explored in the previous section go together even though it might make sense to examine them separately. Each of them raises examples that are all too common in our societies. Whether apartheid in South Africa, the massive violations of human rights carried out by the majority of the Latin American dictatorships of the 1970s, extreme racial discrimination such as that suffered by the African American community of the United States – all represent clearly visible situations in which serious and systematic violence was meted out to certain groups, violence that constituted a grave violation of the rights of those groups, violence that was imputable to the State that controlled the monopoly over the use of force. This is why the examples mentioned illustrate the first theoretical approach so well, which is formulated in terms of rights. At the same time, however, these examples illustrate – as often

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<sup>8</sup> It actually appears we are either choosing to punish crimes that are primarily committed by disadvantaged people and/or within the range of those selected crimes, biasing the penal system against the rights and interests of the worst-off sectors, since they are so systematically selected to bear the force of the State's repressive apparatus.

happens – our second approach based on the notion of democracy in general and deliberative democracy in particular. In this respect, we can say that the groups affected – the black population in South Africa, the African-Americans in the United States, the victims of Latin American dictatorships – were systematically denied a voice in their communities, and that this is why the State could not legitimately employ its coercive authority to punish them.

In other words, either of the two theoretical avenues explored at the outset – the one employing a rights discourse or the one employing the concept of democracy – enables us to reach the same conclusion as regards certain extreme situations: the State loses its justified authority to exercise penal coercion in the ways it has done thus far. We could also say, as others have, that this loss of authority is related to the offenses committed by those heading the government or those that ensue from the substantive violations (of rights) and procedural violations (of democratic principles) by that government. This was, for example, the argument employed by Thomas Jefferson and other leaders of the North American revolution when writing the Declaration of Independence.<sup>9</sup>

In the study that follows below, in any case, what interests me is not (although it might have interested Jefferson) making mention of the means by which certain substantive and procedural failures problematize the very bases of a community's legal foundation. The situation I am focusing on here is more specifically defined in legal terms, since I am speaking of the justification for the use of penal violence by the State in extreme societal conditions related to the existence of blatant exclusion.

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<sup>9</sup> On this occasion the “long chain of abuses” committed by the English authorities in violation of the basic rights of North Americans were listed together with the expression of the colonies’ fundamental right to self-government. The abuses, it was held, deprived the British government of its legal authority over the new territories.

Nor does my criticism suggest there are automatic formulas that imply that the existence of social exclusion necessitates the dissolution of the Criminal Code. The idea in my mind is different, narrower. What I maintain is that, in social conditions as extreme as the ones described, social conditions that qualify the State to be what we could label indecent, we have reason to be much more demanding in terms of the ways the State exercises its penal violence. Instead of presuming, as we currently do, that the exercise of penal authority is justified in every case, we must change the presumption to oblige the State to justify exactly why it wants to do what it has been doing up to now in light of the current social context for which it is directly responsible. One could say that, in these conditions, the presumption should be reversed to the point that the State be compelled to prove that it is making genuine, visible effort to change the situation for which it has provided support up to now, support implicated in severe abuses of rights on a massive scale.<sup>10</sup>

In this respect, it is helpful to point out that the justificatory discourse regarding criminal law happens to be constructed upon the concept of *ultima ratio* – that is, upon a version of negative presumption – that maintains that criminal law must only be turned to . . . in absolutely extreme cases. What has happened is that, over the years, not only government but also scholarly authorities began relaxing the degree of their concern in this regard, accepting the application of penal law indiscriminately, in whatever case, with complete levity (as opposed to applying the standard required by the principle of *ultima ratio*). We are *told*, then, that punitive tools must

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<sup>10</sup> In this paper my interest is shedding light on the principle that is at work, as I understand it, rather than attempting to put forward a categorical formula that would determine when a State can legitimately claim it is making the due effort necessary to dispense it from the justificatory burdens that we have just assigned to it. Whatever the case may be, I would still say that many of our countries are characterized by serious, widespread conditions of inequality that includes millions of people who live in abject poverty, a broad middle class, vast networks of concentrated wealth, and States that consider themselves far from bankrupt. In this context, following my thoughts, the State is in a position to demonstrate its willingness to turn away from its complicit acceptance of situations of such grave injustice.

only be resorted to in extreme cases while in practice and alongside such affirmations, the *actions* of the State reveal a belief that criminal sanctions have been justified once and for all, so that all that remains to be considered is the appropriate sentence to mete out in each actual case.<sup>11</sup>

In the face of this indifferent attitude, we suggest returning to a strong version of negative presumption with regards justifying state action until the change of state attitude is evident to all, to those in power as well as to those in the opposition. This is to say that if the State wishes to recuperate its punitive coercive authority, it should first be clear to anyone that the State is devoting all of its energies to put an end to the injustices which it has until now promoted, both actively and passively. In conditions of unjust inequality that continue sustained through time, it becomes the responsibility of the State to provide explanations and guarantees – to everyone, and in particular to those who it has mistreated the most and the most often – that prove its determination to act impartially and respectfully of the rights of the most disadvantaged individuals, having for years demonstrated the opposite on a daily basis on every occasion that it was called on to intervene.

### Objections

In this section, I would like to address certain familiar points of contention that could be directed to the positions maintained in this piece.

***The demands of political obligation.*** A common observation made by people who are skeptical of my line of reasoning holds that the exclusion that forms the basis for the allegation that the law is lacking in authority does not in fact exist. This is due to the significant fact that, rich or

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<sup>11</sup> More radically, part of the most important penal theory of our time defends positions in close proximity to the so-called “penal minimalism,” which seeks to take greater account of the commitment to the spirit of *ultima ratio* (Ferrajoli 2008, Zaffaroni 2006). It is my understanding, however, that this interesting initiative is open to serious objections (we will explore some of them below).

poor, advantaged or not, everyone has an identical right to vote, which permits them to exercise a non-negligible influence on the decision-making system.<sup>12</sup> In addition, there is the fact that the most excluded sectors of the populations in all of our democracies are guaranteed the right to protest: they are allowed to go into the streets, organize protests, and publicly express their opinions. As for the rest, so these critics hold, the very history of our nations serves as proof of their involvement, since our parliamentary representatives often depend on the backing of workers' groups, as well as parties who take up the interests of the most excluded sectors. Furthermore, it could be said, images of and references to the living conditions of the most disadvantaged portions of society in the media are anything but uncommon, so sustaining that these portions are invisible or absent from the political scene is unrealistic.

In my opinion, the line of argumentation outlined in the preceding paragraph is difficult to support. In the first place, its essential premise is an idea of political obligation that is too weak and undemanding. During the decades, for example, when the doctrine of "separate but equal"<sup>13</sup> held sway, African-Americans in the United States had the right to vote, but this did not negate the existence of extremely grave violations in which the State was complicit; the actuality of which implied "second-class citizenship" for them. Systematically, and for reasons beyond their control, the members of the African-American community were given access to education, healthcare, and even public transportation that were of a much lower quality than what was reserved for the white majority. The fact that they could vote does not diminish the gravity of the State's offenses or their contingent right to contest or ignore the State's authority.

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<sup>12</sup> For a meaningful critical reading of political obligation, see Simmons (1996).

<sup>13</sup> When the most severe discrimination was exercised against African-Americans, and they were legally blocked from entering the same facilities that were constructed for whites. This differentiated regime was deemed constitutional by the U.S. Supreme Court in 1896 in *Plessy v. Ferguson*, 163 U.S. 537.

Similarly, it can also be maintained that the representative systems in most Western democracies contain serious flaws that make it difficult for citizens to gain control over the decision-making process and to hold the principal governmental actors responsible for the omissions and errors of the policies they adopt. This makes it easy for such systems to coexist with situations of extreme marginalization or serious abuse of certain sectors of the community. None of this is countermanded by the existence of a judicial decision in favor of a low-income individual, or the presence in Congress of someone who identifies with the interests of those who are worse off, or televised images expressing commiseration with the complaints or misery of poor people.

Lastly, the objection under exam fails to convince because it assumes that the only serious case capable of justifying a suspension of the duty of obedience occurs in situations of maximum political exclusion – i.e., the emergence of a dictatorship. Against this position, I hold here that it is possible for a loss of political authority to result from not only the “absence of voice” of the marginalized and from democratic collapse (the rise of a dictatorship), but that it also results from, in a special way, the presence of serious and systematic violations of rights.

Saying this does not imply ignorance of the fact that, in decent societies, respect for rights is not always perfect, or that in such a society there may be occasional violations of the rights of an individual or group. Decent societies and such temporary flaws are not incompatible. What I believe are incompatible are decent societies and serious and systematic violations of rights. In these cases, the affirmation that holds that “the most disadvantaged sectors participate in the institutional system so there is no ground for treating them as excluded” loses all sense. The examination we are carrying out does not exclusively depend on greater or lesser political inclusion of disadvantaged sectors (although I would not in any case concede that a universal

right to vote eliminates the arguments that the disadvantaged sectors have for considering themselves excluded from the political system). Our questioning of coercive authority is valid if we can reasonably affirm that the weakest members of society are victims of serious and systematic rights violations.

*A consequentialist objection: All people, but especially those in the most disadvantaged sectors of society, rely on the legal order.* A variant of the previous objection advances the idea that, despite the verisimilitude of the observations we have drawn out, these observations are not sufficient proof of what we mean to show. This is namely because the institutional alternatives that appear available only threaten to exacerbate the violations of rights that we are protesting. According to this critique, putting coercive authority in question can only bring about disastrous consequences, especially for those who are worse off. The predictable results of such change – we are told – could only impair the fortunes of those whom we are trying to protect. Indeed, in a context in which disobedience of the law or indifference to the legal authority of leaders becomes usual, what can be expected other than chaos, social violence, and – worse yet – private violence and vengeance directed at the groups that the most prejudice weighs against – a kind of “free for all” in which the most unprotected will be, predictably, the first to lose?

Versions of this line of reason have been explored by very well-known authors in the local sphere, such as the Italian scholar Luigi Ferrajoli and, with a different nuance, Raúl Zaffaroni from Argentina. Both consider that justice must be committed to the moderate/limited application of punishment due to a series of premises related, in a very direct way, to the tragic consequences which would follow in the absence of criminal law. Emphasis is put on the means by which state coercion helps prevent private acts of violence directed against people who are worse off.



Professor Ferrajoli makes reference to this criterion for the justification of penal coercion that, in his opinion, has its grounds in two fundamental reasons. On one side, he refers to the need to advance the objective of negative general prevention which seeks to maximize the greater good of the majority (Ferrajoli 1997, 332). He then makes reference to the usefulness that criminal sentences may have in minimizing the “necessary suffering of the wayward [sic]” – which qualifies as unjust any sentence that is “harsher than what is necessary to those who must bear it.” At that point another criterion is mentioned; one he calls “*the second, fundamental purpose justifying criminal law*.” It is the purpose of preventing “great reaction – informal, savage, spontaneous, arbitrary, and punitive but not penal – that the absence of criminal sentences could lead to by offended parties or the social forces and institutions supportive of them” (Ibid.). Criminal sentences, then, would comprise a way of minimizing the “violent reaction to crime” (Ibid.)<sup>14</sup> This argument, however, turns out to be problematic for various reasons. Authors such as Ferrajoli at no point offer any empirical evidence (or refer to empirical evidence) that could potentially serve as the basis for the causal relation they establish between the absence of criminal sentences – which is not the same thing as an absence of any reproach by the State – and private vengeance.<sup>15</sup> This problem can be found in the works of other consequentialist authors who tell us that the use of the state’s penal coercion turns out to be definitively beneficial for the poor when it is compared to what would happen in the absence of such power. This position simply ignores the impact on the poor of being permanent targets of suspicion, persecution, and stigmatization for the sectors that exercise that power. Moreover, this

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<sup>14</sup> In the end, Ferrajoli sees his justificatory project as “historically and sociologically” relative. For him, “the severity and quantity of sentences must be adapted to the severity and quantity of violence expressed in society and in the measure it is socially intolerable” (ibid. 344). He concludes, “in this respect contemporary society is undoubtedly less violent” than previous societies.

<sup>15</sup> I want to underscore this aspect of the justification Ferrajoli gives for sentences, given that he himself admits – in the section of his book dedicated to justifying sentences – that “the competence of criminal law to effectively satisfy [its primary objective, that of deterring crime] is dubious . . . [given] the complex social, psychological, and cultural causes of crimes, which certainly cannot be deactivated by the mere fear of imprisonment” (ibid., 334).

position simply fails to consider the existence of forms of communal or non-state justice – such as the famous “peasant patrols” – that, without providing an exemplary model of popular justice, help reveal how the absence of State power in its most recognizable modes does not necessarily imply chaos, or extreme prejudice against the poor in terms of preventing and fighting crime (i.e., Yrigoyen Fajardo, 2003, 2004).

Meanwhile, in similar fashion it is not evident that an absence of criminal sentences would unleash forms of private violence. Likewise, it should also be said that it is not at all apparent that the alternative – in every case exceptional – of private vengeance is prevented or can be prevented in circumstances where full institutional justice does exist. Such aggressive sentiments, it so happens, have more to do with the emotional blow produced by crime than with the presence or absence of institutional justice. Meanwhile, if the goal is avoiding the risks of private vengeance, why not design strategies to protect from it the people accused of or responsible for certain crimes, rather than imprisoning them and thus depriving them of their most basic freedoms?<sup>16</sup> Lastly, theories such as Ferrajoli’s rest on an exaggerated confidence in the work of judges – who for their part have an exaggerated lack of confidence in majority rule, and in the capacity of mass democracy to function properly. Both premises, as I see it, are

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<sup>16</sup> In a similar way, Zaffaroni observes that, if judges are not willing to impose minimum doses of penal repression, “the remaining agencies and especially the formidable propaganda apparatus of the criminal system along with its capacity to distort reality . . . would take it upon themselves to annihilate the agency (of the accused in the case) and their legitimate attempts to limit such actions, taking aim at their delegitimized use of power and threatening the entire legal enterprise to limit violence” (Zaffaroni 2003; also Zaffaroni 2006). The nefarious consequences of this kind of vision can be seen in recent cases decided by the Argentine Supreme Court – and approved by Argentine jurists – such as *García Méndez*, in which the practice of locking up homeless minors was upheld under the notion that this was a good way to protect them. As Judge Carmen Argibay put it after the decision was announced, “We could not send these boys back to the streets without finding out what was happening. If we had, we would have been making easy targets of them. Do not forget that in Argentina there are hair triggers.” ([http://www.lanacion.com.ar/nota.asp?nota\\_id=1077242](http://www.lanacion.com.ar/nota.asp?nota_id=1077242))

unjustified, although a detailed examination of the matter would divert us from the purpose of the present work.<sup>17</sup>

To conclude, I would only add that everyone, but especially those who are critical of criminal sentences (as Zaffaroni and Ferrajoli are), requires extraordinary reasons in arguing that, in spite of their criticism, criminal sentences remain a necessary tool whose use is justified in contexts as dramatic as those we are currently experiencing.

*The disappearance of the State.* What, then, to say to those who maintain that the questions we are formulating comprise an objection to any possible use of the State's coercive apparatus, which would result in a society where the State is virtually absent, a society where "might makes right"?<sup>18</sup>

This question is complex, but it presupposes affirmations that are either not made in this text or are directly rejected. To begin with, I should make clear that the objective of this piece is critically examining the justification for the use of coercion in certain circumstances, not proposing an elaborate public policy to dictate how said power should be exercised. To put what I want to say in a way that might be more understandable, think of the following example. Let us imagine a State that habitually uses torture against its prisoners, maintaining that – as is so commonly the case in these situations – that it only uses torture because it is the only effective

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<sup>17</sup> Ferrajoli actually presents "garantismo penal" as the underside of "political democracy." If the link Ferrajoli sees between neopunitivism and majority rule happens to be correct, then, he would have stronger grounds for his argument. The nexus established, however, has at least two serious problems. In the first place, Ferrajoli does not offer any empirical evidence for his argument. It could well be that the connection between majoritarianism and neopunitivism is more precarious, or more complex, or less unidirectional than he alleges. However, and secondly, there happen to be solid empirical studies that undermine his affirmations and that demonstrate, for example, that major popular interventions into the domains of penal policy and democratic deliberation of the matter do not necessarily result in support for ever more punitive policies, but rather the opposite. In any case – and conceding assumptions that I do not hold, namely the problematic nature of those studies – what is clear is that Ferrajoli cannot maintain his defense of penal minimalism using only the arguments he has put forward; it fails in terms of empirical bases and theoretical foundation. The reasons are more fully discussed in Gargarella (2010).

<sup>18</sup> An enlightening discussion of the subject can be found in Hudson (1995), p. 68.

means of guaranteeing certain benefits that are urgent and advantageous for all (i.e., to avoid imminent terrorist attacks).<sup>19</sup> In the face of such a practice, the affirmation of an unconditional principle of non-torture (based, as it were, in a respect for human dignity or the international commitments made by the State in terms of human rights), should not have to answer provocative and empirically questionable retorts of the type: “If we did things your way it would be impossible to combat terrorism,” not to mention those of the type: “You want the terrorists to win.” Our initial interrogation is based on a philosophical premise that demands a philosophical response. Furthermore, responses such as the ones referred to – if indeed they are really meant to bring some substantive comment to the general debate – need to be reinforced with better empirical evidence: it is not enough to simply proclaim that what we are arguing for would result in the complete dismantling of the system of criminal persecution. As for the rest, questioning certain central aspects of penal policy (the use of torture, the use of deprivation of freedom in contexts of stark inequality), does not necessarily mean calling into question every aspect of the policy. We can say, in the same way, that the practice of expropriating property without due justice in the context of an economic policy of strong state intervention is unjustified without sustaining that all of the other aspects of the economic policy in place are equally questionable. They might be, they might not; each aspect must be evaluated separately.

As a side note, it should be remembered that the conception of democracy and equality that we hold does not go hand in hand with an anti-statist political theory, but rather much the opposite. It accompanies a political theory that allocates a central role to the State in guaranteeing the permanent protection of basic rights for everyone.

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<sup>19</sup> See Posner and Vermeule (2007).

There also exists a problem, which I will not go into deeply, which arises when considering that whoever criticizes certain practices in principle must – if they are to be taken seriously – offer complete proposals for political alternatives to replace the practices in question. To return to our example, those who hold that torture should not be a weapon in the fight against terrorism do not need to offer a viable alternative for successfully combating terrorism in order to have their criticism considered.

Lastly, there are special reasons for concentrating our criticism on the means by which the State exercises its power of penal coercion (instead of directly embarking on an all-encompassing critique of the State). This is not only because these are two analytically distinct questions that can be studied separately, but also and especially because of the extraordinary risks for rights violations inherent in the practice of penal coercion. Even more so when, on a daily basis, we are confronted with serious violations of rights on a massive scale (i.e., those of detainees and defendants), that are in part a direct result of the forms the State's penal coercion takes. We have good cause for striving to eliminate the discretionary use of penal coercion – currently predominant – while at the same time demanding – to counter such use – strong state mechanisms to adequately provision the worst-off sectors of society (a finality that would be directly and mortally affected if, for example, the most advantaged sectors quit paying taxes in protest of the injustices committed by the State). Similarly, it should be clear that our criticism of the use of penal coercion in contexts of extreme inequality does not at all negate the value of examining the other abuses the State commits, or that of embarking a broader critical examination of the means by which the State exercises its authority.

***The victim's place.*** Another common objection that comes up whenever reference is made to the rights of those criminally prosecuted by the State has to do with the rights of the victims of

crime. To echo a popular complaint, there is “a lot of concern for the fate of the criminals, but absolute indifference for the rights of their victims.”

There are many observations against this complaint that warrant mention. In the first place, it is worth emphasizing that demanding strict scrutiny over the means by which the State exercises penal coercion in contexts of unjust inequality does not preclude ignoring other rights. To approach the question from a different angle, when we realize that the majority of disadvantaged people are just that because of their vulnerability to crime; because of the insecurity the State condemns them to; as well as because of the improper way they are judged, it becomes clear that concern over the means by which penal coercion is exercised implies special concern for the fate of the usual victims of crime.

It makes sense, moreover, to bring attention to the suggestion – implicit in the attitude we are examining – that respect for the victims’ rights *requires* the utilization of penal coercion (as it is used today) against their offenders. This insinuation must be emphatically rejected. Taking victims’ rights seriously (i.e., the victims of violent crime), may require listening and paying attention to them during the legal process; it may mean opening assistance centers and shelters for them; it could imply economic allocations and specific state aid; it might mean calling for solidarity and caring from everyone else for them – especially to those who are closest to the victims. In what way, however, does our respect towards such victims make it *necessary* for us to include prison sentences in our interventions? Our legal system is not and must not be driven by vengeance.

One could say, in response to what has just been advanced, that sentencing delinquents to prison is necessary for protecting potential victims in the future. This affirmation, however,

presents the same problems as the other objections. Among other reasons, this is because such future crimes can be avoided using many other means. These crimes, for example, could be reduced by establishing a fund – today inexistent – for the defense of the most vulnerable individuals, groups, and areas of society, while offering greater social protection for those who are currently denied their most basic social rights.

***Criminal responsibility.*** Does the previous discussion defend a position holding that socially marginalized sectors really should not be deemed criminally responsible for their crimes, given the type of misery they have suffered – supposedly – at the hands of the State? The short answer for anyone asking the question is no. There is, however, a long and not particularly encouraging discussion of the subject, which has had an influence on penal doctrine. Among Anglo-Saxon scholars, the debate was provoked following a decision in the middle of the past century in which – unexpectedly – a judge called into question the possibility of holding responsible someone accused of horrendous crimes given their “rotten social background.” It was Judge Bazelon, and the case in question was one in which a penniless black individual who had been subjected to vociferous racial insults at the entrance to a bar was being tried for double homicide.<sup>20</sup> Before this particular case, the judge was persuaded by an ample irresponsibility defense, including both mental abnormality and the effects of extreme disadvantage. In his decision, as well as in works that followed, Bazelon called attention to the importance of taking

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<sup>20</sup>In 1973, and through his famous dissenting opinion in *United States v. Alexander* (471 F. 2nd. 923, 957’65 (D.C. Cir. 1973, Bazelon, C.J., dissenting) Judge Bazelon, from the D.C. Circuit Court of Appeals, suggested the possibility that extreme poverty might give rise a defense for the accused. Notably, in that opinion Judge Bazelon took into consideration the defendant’s “rotten social background” and maintained that the trial judge failed in instructing the jury to disregard the testimony about defendant’s social and economic background. The case involved two black defendants who murdered two white victims, one of them had shouted to one of them “black bastard.” One of the accused reported, in his defense, that he had grown up in conditions of extreme poverty and that he was subjected to racist treatment, learning to fear and hate white people. The psychiatrist supported this view, saying that the offender suffered from an “emotional illness” (Delgado 1985). He also affirmed that the defendant “was denied any meaningful choice when the racial insult triggered the explosion in the restaurant.”

into account the socioeconomic conditions of the accused. He also, moreover, described the connection he saw between violent crime and the distribution of wealth. In his words, there was “a significant causal link between violent crime and rotten social background.” This is why he proposed adopting redistributive measures (in favor of those who do not receive their corresponding due in the economic distribution), while simultaneously affirming the value of a defense based on social origin. At the time only a few people voiced support for Bazelon’s decision in the midst of numerous cutting condemnations (Bazelon 1976, 1976b, Delgado 1985, Green 2009, Hudson 1995, Moore 1985, Morse 1976, 1976b, 2000, Tonry 1995).

Among the people who defend and continue Bazelon’s position, the work of Richard Delgado is especially notable. In it, he examined what crimes the defense suggested by Bazelon can be applied to. Moreover, he explored what options are in the judge’s reach in these situations. In any case, and despite writings such as Delgado’s, the objections to the judge’s decision multiplied. Among these, the objections presented by the well-known criminal theorist Michael Moore stand out. According to Moore, approaches such as the one proposed by Bazelon imply treating members of the disadvantaged sectors “as less than human” (Moore 1985). Moore maintains, furthermore, that this estimation of the worst-off members of society normally implies “elitism and condescension.”<sup>21</sup>

The debate just described, as I see it, has run aground in a difficult place. The responses to the problem put forward so far, furthermore, do not give cause to believe satisfactory ones will

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<sup>21</sup> Michael Tonry objects to Moore’s idea that law should not take into consideration the sympathy we might feel for those criminals whose crime stemmed from factors such as social adversity or psychological abuse in childhood. For Tonry, these affirmations regarding social disadvantages contradict what Moore has written in general about punishment. In his opinion, “It seems inconsistent that he is prepared to trust punitive institutions, and to invoke them as a basis for arguments about the justness of retributive punishment schemes, while distrusting sympathetic intuitions and rejecting them as the basis for arguments about the justness of empathetic punishment schemes.” (Tonry 1995, 145).



ever be found for either side of the dispute. It is partly for this reason that I have chosen to leave in parentheses the question of the criminal responsibility of the poor. The current analysis, after all, does not require a satisfactory response to this complex question. As Antony Duff would say, it is not necessary to do away with the responsibility of marginalized individuals for the crimes they commit in order to demand an answer from State in response to the question, “Who do you think you are, scolding me?”

There are times when one might, in defense of the worst-off members of society, continue searching for a defense affirming that their acts could in part be *excused* as a consequence of “the very coactions of the circumstances, for example, or the lack of opportunities to obtain goods normally available by non-criminal means;” or even (*partially*) *justified*, if the crime can be seen as a way of remedying the injustice (Duff 2004, 258).<sup>22</sup> In his important work, *Malign Neglect*, Michael Tonry explores this line of reflection, concluding that judges should in any case consider mitigating factors when determining sentences, not when determining whether the accused is guilty or not. In this way, judges can give appropriate weight to a regard for the circumstances that led an offender to commit crime – and in so doing reject the traditional concept of “just desserts” – while at the same time avoiding the issue of criminal (non-)responsibility of disadvantaged people (Tonry 1995, 127; McCoy 604).

The point I am trying to make here, however, is that, when the time comes to pass judgment in a case, the juries or judges must not only determine whether there is sufficient proof to establish guilt or innocence and then consider the possible limits of criminal responsibility for the most disadvantaged people (a discussion which upon examination yields extraordinary complications). In these situations, those who judge must also categorically determine whether or

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<sup>22</sup> Regarding the difference between justification and excuses, see Fletcher (1978).

not they themselves have the “legal or moral *standing*” to judge the offender. The question, put more generally, should be whether or not we, as members of the governmental system that must reach a decision in the case before us, “have treated the delinquent as a citizen. The dramatic social conditions that affect the rights of someone to live decently do not necessarily excuse the delinquent, but may condition the State’s position to condemn them.”<sup>23</sup> According to Duff, “it is indeed difficult for those of us who maintain or tolerate a social and legal system that perpetrates gross injustices to claim the right to punish others who act unjustly” (Duff 1986, 289).<sup>24</sup>

The question of transition: Impunity for every crime? Another important issue never missing in analyses of the present type has to do with the “in the meantime” aspect; that is, with the question of transitions. A critic might well acquiesce to certain central aspects of the arguments we have put forward but also state a need to know exactly what will be done in the interim period “from now until then” between the current state of penal injustice to the moment when we achieve fuller conditions of social justice. Specifically, are we going to free all prisoners? Are we going to stop prosecuting criminals? For any crime whatsoever? Not even the crimes committed by the richest members of society?

To a degree, my response follows that of Antony Duff in *Punishment, Communication and Community*. In it, Professor Duff gives an account of how in the past he accepted the idea that such a demanding theory (in terms of preconditions for criminal responsibility) should not be considered until we were much closer to satisfying the necessary conditions. He explained his

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<sup>23</sup> There is an important debate about whether these justifications or excuses only cover those who are directly offended by the State, or also applies to those who act on their behalf, (reasonably) considering themselves offended by the State’s disrespectful attitude.

<sup>24</sup> To develop his opinion regarding the matter, Duff uses the concept of “dismissal.” The idea is that there are some trial-barring pleas according to which “the prior behavior of the accused limits the legal capacity to judge him” (Ibid., 250). This concept has been used in private law to block certain demands (for example, if I promise my renter that I won’t require him to pay the entire amount of rent owed me, then I lose the right to demand the entire sum). Duff attempts to apply the concept in the field of criminal law.

prior acceptance noting the theory was “too distanced from human life to serve as a guide or an end for our own practices” (Duff 2001, 198). In the book cited, however, Duff does not actually maintain this position; instead he defends a more demanding theory. There are several reasons for the change in position, including his conviction that “any plausible theory of punishment must acknowledge that its legitimacy is seriously affected when, as is true in our societies, basic needs are not satisfied” (ibid.).

Personally speaking, I see other reasons to add to his: i) Above all, the generalized attitude authorizing the use of the State’s punitive power in conditions of extreme inequality is not, although its defenders may suggest otherwise, a means of “preserving respect for rights, despite the existence of unjust conditions.” On the contrary, the use of punitive power tends to be ever arbitrary, biased, unacceptable selective – selective in such a way that force is only directed against the weakest groups. We must keep in mind, then, that as regards the most vulnerable group in society, the *continuity* of the intensely biased use of punitive power is an essential cause of the *preservation* of a situation in which rights are regularly violated. ii) Secondly, we must not lose sight of the fact that, in practice, the penal system tends to punish an infinitesimal percentage of the crimes committed: more than 90 or 95% of crimes that occur today go – and will remain – unpunished. iii) The third point we must not forget is that our criticism of the means by which penal justice is exercised is not intended for immediate application to other areas where state power is exercised. As we have already suggested, the gravity of the violence taking place in the domain of criminal justice warrants a separate, more urgent critical revision. It would not be unthinkable, in fact, for the State to continue its use, in such a context, of preventive actions and basic measures to protect individual integrity in order to ensure that everyone respect (what John Rawls would call) the “natural duties” owed to everyone else.

Having reached this point, and before ending, I would like to directly address the difficult question regarding the worrying implications of the proposed analysis: Does it follow from this proposal that all crimes produced from now on should go unpunished?

The question has two parts which I think should be addressed separately: One part refers to “all crimes,” and the other is related to the term “unpunished.” The first question’s relevance lies in the fact that, for many people, an analysis such as the one proposed should be circumscribed so only crimes committed because of social injustice are included. The first problem related to that proposition is that it is very difficult to determine when a crime has its source in social conditions and when it does not. Extreme, unjust inequality is an essential condition that leads desperate individuals to participate in equally extreme and violent activities in which they assume risks that they would otherwise avoid: people living in desperate conditions often feel they have nothing left to lose. Professing to limit the scope of our proposal to crimes committed for “strictly social” reasons, then, would involve an arbitrary choice.

In that case, does it follow that the above proposal implies leaving unpunished the most horrendous crimes? The first thing that should be said in response to a question of this type is that the question itself is rather misleading. The conclusion of this study does not imply impunity for anyone. Its object is a more general principle that holds that an indecent State does not have full authority to legitimately employ penal coercion. Moreover, and counter to what the question suggests, I have maintained here, controversially, that we should “give a green light” to (certain forms of) this coercive power, as long as the State demonstrates a clear disposition to abandon its

indecent behavior.<sup>25</sup> Put another way, a decent State has every right to reproach certain behaviors that are collectively considered unacceptable.<sup>26</sup>

Lastly, would the State be justified in using coactions if it reserved coercion for cases of “white-collar” crime? Should not we limit our complaint to crimes committed by the most disadvantaged groups? The example is somewhat far-fetched, given that in contexts such as the ones described, such a change of attitude by the State is not at all likely. Still, the hypothesis, as such, warrants consideration. Perhaps, this would be one way the State could demonstrate to all – especially to those it has mistreated for years – its disposition to act in a different, more justified way. Without completely denying the possibility, however, I would express a degree of reserve. To begin with, what is being advocated here is not a classist exercise of criminal justice – one to be applied to the rich but not the poor, as it were. What is being advocated, rather, is a more justified use of coercion. Secondly, it should be clear that the justification of coercion does not necessarily imply approving the use of punishment and the infliction of pain as we know it. It is possible that penal sentences understood in this way are never justified (although the question falls outside the bounds of the present work). Lastly, in contradiction of what is suggested by the hypothesis, I would say that the possibility of exercising coercion differently (in a way not unduly biased against the most disadvantaged groups) will be undermined as long as the current judicial, bureaucratic, and policing structures are maintained. Their traditions, the way they are composed, and their lack of public responsibility lead these institutions to operate the way we know they do today. For all of these reasons, one would expect the law to remain in its current

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<sup>25</sup> Naturally, people whose intention is preserving the authority of an indecent State in order to continue employing violence will tend to adopt very light standards to determine when the State has begun to modify its behaviors towards more decent ones. To guard against this attitude, for the time being, I would only ask that the criteria for what qualifies the State as “no longer indecent” not be trivial.

<sup>26</sup> I would like to make clear on this point that what I mean by “reproach” and “punish” is the deliberate imposition of pain.

form to the degree that its creation, application, and interpretation continue to be couched in the structures that shape it at present.

The conclusion we find ourselves at is that an indecent State lacks a clear justification for exercising penal coercion. Can the same thing can be said in relation to alternative forms of resolving criminal conflicts that are more respectful of the rights of the people involved (i.e., forms more reflective of restorative justice; or more related to “dialogical” approaches to penal reprimand)? The answer to this question goes beyond the range of this work, which was meant to focus on a series of especially complex cases as well as the implications – the risks being evident – of deliberately imposed suffering. In principle, reasons why the same conclusions should not simply be extended to the analysis of other types of responses to crime are not at all obvious. I will only say, in this respect, that we should never lose sight of the fact that in societies that are unjustly unequal, the risks of biased state intervention are too high, and the chances of reaching just judgments, too low.

Navigating these difficult areas of the law complicates the task of all members of the legal community, of course: When and to what extent are our actions justified? How can we best, in situations as complicated as the ones described, avoid improper actions or omissions? No one denies the importance or solemnity of these kinds of questions. We must not, however, use the difficulties as an excuse to continue justifying or approving what is unacceptable. The existence of very difficult cases provides us with reasons to employ a more critical and careful approach; not reasons to continue behaving in unjustified ways because of the complexity of the problems these difficult cases present.

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