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Punishment: The Nexus of Human Nature, Power, and Agency

Introduction

While the first instance of punishment remains unknown, punishment has permeated all aspects of life. Punishment is used in prisons, schools, and homes; punishment is pervasive. However, any analysis of punishment necessitates a clear focus in order to avoid simply noting this pervasive and expansive nature. As such, this paper will be limited when discussing punishment. The punishment that this paper will address is what can be called ‘legal punishment’, or the activities of punishment that are conducted by states, courts, and police.¹

To examine punishment, this paper will theoretically examine the institution and nature of punishment. The first section of this paper will seek to answer the question ‘what is punishment?’ Unlike other examinations of punishment, this paper examines punishment as it relates to human nature. A brief genealogy of punishment will be presented, which will be followed by an analysis of human nature through this genealogy. Proceeding from this analysis, the second portion of this paper will explore the idea of how punishment functions. To do so, the theoretical outline of punishment—as derived from human nature—will be juxtaposed with the actuality of modern punishment. In response to the discrepancy between theoretical and practical punishment, various improvements to punishment will be proposed. Namely, these proposals will focus on mediating the theoretical-practical gap. Lastly, the paper will close with a consideration of critiques to the ideas hereby presented.

In order to present a thorough and convincing analysis, each section of this paper will refer to scholarly works. I suppose that some readers of this paper will be knowledgeable concerning the canonical works regarding punishment, such as the work of Michel Foucault. Nevertheless, this paper will examine a variety of authors, mainly political theorists and jurisprudential scholars, while also referencing some empirical data.

Examining punishment as an institution or as a legal practice is a lofty task, thus, this paper will be limited to the aforementioned structure. Likewise, this paper will operate within the paradigm of the current debate on punishment and namely analyze punishment in the United States.²

Human Nature and Punishment

Punishment—upon examination—is related to human nature; it seems impossible to divorce the two. A few clarifying statements should be made before this relation is demonstrated via

¹ The list of those involved in ‘legal punishment’ that is provided above is non-extensive. From here on, ‘punishment’ will refer to ‘legal punishment’, unless otherwise specified.

² The United States is used as the case study of this paper for two reasons: the prevalence of punishment in the United States and the author’s familiarity with the American punishment system.

genealogy and analysis. First, the term ‘human nature’ is an amorphous concept. Among theorists, there is debate on if a *unique* ‘human nature’ exists (Nietzsche, 1969; Deleuze and Guattari, 1983).³ Moreover, even if a human nature does exist, there is no consensus on its essence (Aquinas, 1988; Nietzsche, 1969).⁴ Hence, this paper will present a thorough analysis of human nature that draws off of various authors from different schools of thought. However, it is recognized that other conceptions of human nature lead to the same conception of punishment.

Another brief comment must be made before the genealogy begins. The fact the punishment is related to human nature does not mean that human nature involves punishing. This paper does not preclude the hypothesis that human nature itself desires punishment, yet the link between punishment and human nature supported by this paper is more derivative (Nietzsche, 2007, p. 41).

Presently, this paper will provide a genealogy of punishment that begins with human inequality (Nietzsche, 1969, p. 123; Rousseau, 2008). This inequality, which is natural to man, leads to conflict over similar wants. Namely, some individuals are better suited to achieve their wants, while others are less capable of achieving their wants. As a result of being unequal, when two or more individuals want a good that cannot be divided, the most capable is able to acquire the good. Often times, this zero-sum game leads to conflict as the weaker party seeks retribution (Hobbes, 1985, p. 184).

Because of this conflict, man seeks to establish a type of order, an order that can allow individuals to pursue their ends without the threat of violence (Augustine, 1958, pp. 452-453). Ultimately, this order is established by a superior individual, family, tribe, or group that exerts control and establishes rules in a certain region. Originally, these rules are simply based on custom—or the norms of fair expectations in common-life—but eventually, these expectations gain force with time in that specified region. In short, norms that originally began as customs become binding in a certain area or jurisdiction (Carter, 1907).⁵ Due to their history in custom, these norms are obeyed by the people (Rawls, 1993). Likewise, different regions have different norms or expectations. Therefore, obedience to a certain practice is limited to a specific territory, allowing for a general variation of custom across spatial territories.

Thus, norms seek to apply an objective standard to relative human behavior, given an area’s customs. However, the relativity of human behavior necessitates a mechanism to maintain order and ensure adherence to norms. These sanctions associated with breaking a norm become punishment in the modern-sense. As noted by James C. Carter, sanctions are established alongside the customs, as a way to ensure fair expectations (1907, p. 81).⁶ By having the usurper of a norm—an offender—suffer a punishment, order is reestablished, societal violence is averted, and individuals are allowed to continue pursuing their ends (Fassin, 2018, p. 51). Originally, these punishments were either monetary or physical. The idea of monetary punishment is discussed by Didier Fassin in his lectures, The Will to Punish (2018, pp. 47-51). The idea of

³ See the post-modern and post-structural schools of thought.

⁴ See the difference between Saint Thomas Aquinas and Friedrich Nietzsche.

⁵ See lectures one through five in Carter’s work.

⁶ It is worthy to note that fairness may be more important in some societies than in others.

having physical punishments is discussed by Friedrich Nietzsche in the second essay of his On the Genealogy of Morality (2007, pp. 40-41).

Eventually, with the creation of the state and morality, punishment began to be exercised by centralized legitimate authorities.⁷ Both the state and morality seem crucial for the expansion of tribal-like groups into new areas. Simply, both allow individuals to pursue their ends by placing restrictions on certain activities. The state gains a monopoly on the means of violence—reducing the power of individuals to punish—and begins legitimately punishing offenders.⁸ Important to the monopolization of violence is the codification of norms or general maxims, allowing the state to determine more rigidly when punishment should be applied, such as cases of disputed customs or different expectations. Nevertheless, the state continues the practice of monetary and physical punishment due to the general habituation of the state's inhabitants to these methods of sanction. Moreover, morality in the form of religion places the fear of temporal and eternal punishment in individuals. Thus, with the development of laws and religion, a legal system comes into existence.

Punishment evolves over time with the expansion of the state and the moral-religious apparatus. As wealth accumulates, punishment becomes more merciful and less immediate. Consequently, punishment focuses not on the extraction of some good as the means to reestablish order, but rather on the responsibility of an individual in breaking the norm of law.⁹ With the lawbreaker's individual responsibility being emphasized, punishment focuses on repentance to reestablish order, namely through the prison.¹⁰ Thus, the modern punishment system is born.

In short then, punishment is derived from the desire for order, due to inequality and competing wants. As such, punishment reestablishes order when a standard—originally custom, presently law—is broken. While this genealogy of punishment is relatively brief, it is quite useful in demonstrating the underpinnings of punishment as they relate to human nature.

First, the nature of norms that are established is crucial. Even among tribal groups that precede the advent of the state, punishment is inherently connected to time: past, present, and future. With regard to the past, the idea of a punishment seeks to negate or address a past action by applying a punishment in the present. Similarly, the use of custom—either in primitive societies or in civilized societies—hearkens to the past. Punishment seems to be an attempt by individuals or the state to 'will backwards' (Nietzsche, 1969, p. 1962). However, this willing of the past is impossible, thus, the punisher wills the future by inflicting a punishment on the offender. The future hope is not only that the order of the past and present remains unbroken, but also that the precedent set by the punishment is continued into the future. Punishment also refers itself to the present, punishing the offender at a specific moment and serving as the present standard that determines criminality (Durkheim, 1997, pp.31-33). Therefore, punishment seems to reflect the

⁷ This paper will not delve into the creation of the state or morality, but instead, focus on punishment.

⁸ The idea of 'monopolization of the means of violence' comes from sociologist Max Weber.

⁹ The individual is responsible in various ways. The individual is responsible to himself, to society, and to custom, which is tied to past tradition.

¹⁰ I do not contest here that the idea of individual responsibility did not exist beforehand. Contrarily, I insist that it was solely emphasized at this point in time.

past, present, and future. Time itself seems to be a part of human nature, as ‘time manifest[s] itself as the horizon of Being’, of human nature (Heidegger, 1962, p. 488).

Beyond the temporality of the norms that are established, the customs that are transmuted into law appear tied to other institutions. These institutions highlight parts both the nature of humanity and the nature of punishment. Both the economy and religion appear to reinforce customs and their punishments. For example, the idea of the economy is crucial to punishment, as monetary payment was used as a sanction on offenders, as a way to reestablish order (Fassin, 2018, pp. 47-51). Moreover, the creditor-debtor relationship that Nietzsche posits is crucial to the development of punishment. Simply, the economic transaction of lending served as the basis for punishment in the Nietzschean account (Nietzsche, 2007, p. 40). The Nietzschean account highlights the relationality and inequalities of punishment. Namely, the asymmetry of Nietzsche’s power relations requires two or more parties; thus, no relationship of power can operate in a vacuum. Instead, power is something relational among individuals (Foucault, 1990, pp. 93-94). As such, the penal relationship seems to present a distinct power relationship, derived from the creditor-debtor relationship. Plainly, the creditor exercises an asymmetrical amount of power as he has something that the debtor needs or wants. On the other hand, the debtor has little power to resist. In regard to asymmetry, this creditor-debtor relationship mirrors the punisher-punished relationship.

Likewise, the system of punishment seems bolstered by religion (Taylor, 1984, p. 154). While Nietzsche denounced religion as being part of ‘slave morality’, the fact is that religion reinforces the natural inequality of humans, supposing and imposing hierarchical relationships (Nietzsche, 2007, p. 20). A great case of reinforcing punishment through religion is Plato’s ‘Myth of Er’ (Plato, 1997, pp. 1218-1223, 614b-621d). Myths and morality justify the custom that punishment is based on, and also allow for greater subjection to a societal hierarchy that is based on asymmetric relationships (Arendt, 1968, pp. 129-132). For example, the fear of a poor afterlife highlights man’s concern for extra-temporality, the product of his relationship with a priest or other authority. Moreover, there seems to be a desire for liturgical or ritualistic participation in punishment (Fassin, 2018, p. 85). Take the American courts. The criminal justice system is extremely ritualized—the judge in a robe, the judgment and sentencing, the architecture of the courthouse—similar to religion. But instead of religion, individuals partake in a type of scapegoating, as a way to produce unity, not among man and god, but among man and man (Connolly, 1995, p. 53). Thus, religion highlights the liturgical nature of punishment, along with the desire for unified relationships among men, unity within an established legal and customary hierarchy.

However, this desire for unity highlights the human desire for a unique human order. Namely, the idea of order necessitates some control, seen in the form of established norms or law. Yet, this order may appear as a type of libido that wishes to exact pleasure, but in a more legitimized fashion. Two points on human nature and punishment should be addressed here. First, the emergence of the state may simply be a ‘pleasure, delighted in the promised blood’ (Rabinow, 1984, p. 85). Thus, instead of producing order, the state may simply serve as a means of exacting revenge on other individuals through a legitimized relationship. Due to the legitimacy of the state, it allows for the scapegoating of individuals and the normalization of punishment. It is worth noting that police violence—which Fassin describes as punishment—is legitimized and

allowed to persist by the law (Fassin et al, 2015). Second, the desire for punishment, appears as a type of satisfaction. Simply, for some, there is pleasure in making another individual suffer at will. Punishment, as tied to suffering, appears to be a sadistic relationship of compensation. Rather than repaying money in the creditor-debtor relationship, the loan is replaced by suffering.

But beyond this desire to punish, there seems to be a degree of rationality in punishment, relating to human nature. For example, adults are sanctioned more severely than children for criminal offenses. Thus, it seems that punishment operates on a scale of rationality, as it is supposed that children do not have completely developed faculties of reasonability, or what is generally accepted *amongst* individuals, whereas adults do (Locke, 1960, pp. 322-323). As a result, reestablishing order requires a less severe sanction on children. Additionally, among fully reasonable adults, punishment seems generally acceptable. This general acceptance delineates the perceived reasonableness of a certain punishment *among* a certain people. It appears that habituation and imprinting, both create a paradigm of acceptance regarding punishment, demonstrating the malleable nature of humanity.

Therefore, through a genealogy of punishment, certain aspects of human nature become readily disclosed. As such, punishment appears multifaceted, but likewise contained within a certain paradigm, that of history and custom. Thence, ‘punishment’ appears to be ‘an attempt to reestablish order through a sanction on an offender, in accordance with human nature’.

How to Punish

Many scholars have postulated how punishment should occur. There are two central schools of thought when addressing punishment: the utilitarian school and the retributivist school. As for the former, the utilitarian school draws heavily off of Jeremy Bentham and his principle of utility (Fassin, 2018, pp. 64-67). The utilitarian account seeks to punish for the general benefit of society. As for the latter, the retributivist school descends from the thought of Immanuel Kant (Fassin, 2018, pp. 68-72). The retributivist school supposes that crime creates a moral obligation on others to punish an offender.

While these two schools are often opposed, neither is incommensurable with the other, nor is either theory incompatible with the account of punishment presented in this paper. Rather, both appear useful in providing a theoretical framework on how to punish. Furthermore, both support the notion that punishment is directed towards order, using a sanctioning to reestablish order. On this account, order appears to have a positive normative value, accounting for its primacy in nearly all penal theories.

However, human nature has gone heavily overlooked in both the utilitarian and retributivist theories. To my knowledge, no penal theory has been based on human nature.¹¹ This section of the paper will discuss a theory of how punishment should be practiced—as derived from human nature—and also present the actuality of punishment.

¹¹ Some pieces have only used a discussion of human nature in justifying their views on how punishment should occur (Moore, 1987).

Human nature appears to want order, thereby leading to punishment or sanction, but punishment appears to have secondary aims. Nietzsche identifies a list of punishment aims, besides the primary aim of order. For example, punishment also seeks revenge, deterrence, and reformation (Nietzsche, 2007, pp. 53-54). This paper will now explicate the primary and secondary aims of punishment and analyze their current practice.

Order—the primary goal of punishment—is crucial to the practice of punishment. The basis of order is fair expectations, as has already been discussed. The notion of order, when tied to fair expectations, illustrates two aspects about how to punish.

First, punishment requires a relationship of two or more individuals. The clearest example of this is Nietzsche's creditor-debtor example (2007, p. 40). A relationship between the creditor and the debtor is necessary for the debtor to pay the creditor back, and for the creditor to release the debtor from his debt. Thence, a relationship of one individual to another individual allows for a good to be extracted and a sanction to be applied, which releases the offender from his duty or debt. Thus, it appears evident that punishment must establish a relationship between individuals, thereby allowing for order to exist among the individuals.

Overall, this phenomenon is both practiced and disregarded in modern punishment. The modern offender engages in various relationships—with the warden, with the judge, with the prison-worker, with the doctor, with the criminologist—that allow for a good to be extracted and a duty absolved (Foucault, 1995, p. 256). However, this is not always the case. Solitary confinement is readily practiced in the modern penal system, thereby undermining punishment's goal of reestablishing order, disregarding the fundamental necessity of a relationship (Fassin, 2018, pp. 76-77 and 83).

Second, in regard to order, is the notion of fair expectation. Fair expectations highlight the proportionality of a claim. The notion of 'fairness' is illustrated by the creditor-debtor relationship. The debtor and the creditor have an agreement on how much money should be returned to the creditor. While there exists an asymmetrical power dynamic among the creditor and the debtor, the agreement itself is fair.¹² Thus, punishment seems to require a level of proportionality, due to the fairness of the original agreement. The proportionality of a sanction establishes a reasonable duty that is imposed on an offender, as a means of reestablishing order.

Quite simply, this conception of fairness as it relates to order is rarely practiced. Punishment in the United States is far from proportional, affecting minority and low-income individuals at a much higher level. Moreover, it is doubtful that the cases recounted by William Connolly or Didier Fassin come close to proportionality in punishment (1995, pp. 43-45; 2018, pp. 72-83). Similarly, the modern penal system often places a burden on individuals, aside from the actual punishment. The offender often faces the prospect of losing his job, his family, and his friends (Feeley, 1979, p. xv; Foucault, 1995, p. 268). Hence, disproportionality is endemic of modern punishment.

¹² The need or want of the debtor creates this asymmetry. The asymmetry can also be produced due to natural inequality or dire circumstances. However, within this dynamic, the agreement is fair as both parties reasonably *agree* to it within the asymmetric relationship.

Aside from order, punishment also aims to exact revenge, deterrence, and reformation. Through an analysis of all three secondary aims, it will become clear that there are grand discrepancies between the theory and practice regarding penology.

The idea of revenge being an aim of punishment is grounded in Nietzsche's work, namely his 'slave morality' and his creditor-debtor relationship (Nietzsche, 2007, p. 20 and 40). This revenge is seemingly grounded in the temporality of the asymmetric relationship. Unable to alter the past, the wronged individual seeks to will the present and the future. To do so, punishment deprives the offender of future possibilities, depriving him of a part of his being. Simply then, the offender must repay for his actions in suffering that occur in and possibly over time (Foucault, 1995, p. 232). Revenge, then, desires that the offender suffers. Moreover, revenge is only revenge—not simply violence—when someone affected by an offense acts vengefully; put plainly, revenge seems to require the unique relationship between a victim and an offender. Thus, for punishment with a secondary aim of revenge, punishment must also posit a distinction between the offender and the victim.

In practice though, revenge deviates from its theoretical framework. First, it is forbidden by modern law; second, it is expressive.¹³ As for the former, revenge is viewed negatively, seen by many as a type of desire to be suppressed. Only the law can punish, not private individuals. Nevertheless, the law appears to be a façade for this vengeful desire, concealing this vengefulness in its legitimacy. Although not always physical retribution, the law legitimizes the unsupervised and unwarranted violence of the few, seen in modern police practices (Fassin et al, 2015). Law, then, allows for legitimized suffering, or a façade for revenge, in punishment (Rabinow, 1984, p. 85).

Moreover, punishment as revenge is expressive. Mainly a part of the retributivist framework, revenge is an expressive punishment that allows for the symbolic expression of disapprobation (Fassin, 2018, p. 69). This practice delineates the fact that society utilizes comparisons in creating ingroups and outgroups, along with relational social hierarchies. Simply, punishment creates a new social stratum: the delinquent (Foucault, 1995, pp. 170-184 and 266-268). This social stratum unites society by providing a scapegoat that can be examined, questioned, and blamed. Thus, revenge is cathartic, creating unified relationship between members of society, seen in Connolly's discussion of punishment (1995, p. 53).

Therefore, practical punishment should inflict warranted suffering on an offender and create an offender-victim distinction. However, in practice, revenge inflicts unwarranted violence that scapegoats the offender to unite large groups, perverting the victim-offender relationship.

Deterrence is another aim of punishment, secondary to that of order. The idea of deterring crime suggests that individuals wish to live in an orderly society but have the ability to project into the future. Put simply, individuals can posit future relationships or possibilities where crime affects them. Thus, by punishing, individuals wish to deter other possible offenders from committing similar crimes in the future. However, deterrence supposes two distinct, yet connected ideas. The

¹³ Revenge on the individual level is prohibited, but modern law does not preclude the idea of institutional vengeance.

first is that individuals act rationally; secondly, it supposes that punishment is the appropriate means to deter crime.

The thought goes that by increasing the punishment for a given offense, individuals will be less willing to commit the crime. The lack of willingness is due to the fact that the benefit of committing an offense is overshadowed by the punishment for that offense. Deterrence, in theory, supposes the rationality of possible offenders and their ability to make cost-benefit analyses.

Notwithstanding this consideration, deterrence is very different on a practical level. It is noted by Didier Fassin that the punishment used to deter crime is often aimed at humiliation and shaming, aimed at emotion, instead of rationality and cost-benefit analyses (2018, pp. 72-74).¹⁴ This practical application differs from the theoretical notion of increasing the punishment for a given offense. Therefore, the theory behind deterrence, which is based on the conception of rationality *among* individuals, is overshadowed by practice. Deterrence, in practice, supposes not the rationality and dignity of humans, but rather exploits the social relations of individuals. This may partly answer why punishment aimed at deterrence fails (Foucault, 1995, p. 261).

Lastly, punishment has the secondary aim of rehabilitation. The idea of rehabilitation is important in maintaining the primary goal of order through punishment. In theory, rehabilitation has two key aspects: temporality and relational existence.

Temporality, as has been demonstrated, is crucial to human nature and is thus a part of punishment. However, temporality is unique in the goal of rehabilitating an offender. First off, the idea of rehabilitation supposes that an offender remains the same responsible agent over time, and likewise that the offender can change and adopt the laws and norms of a society (Fuller, 1964, p. 162).¹⁵ By attempting to reform an offender, the offender is forced to face the past and reflect upon the offense that was committed. During such a reflection, part of human nature is unconcealed, in the sense that the individual can gain understanding about himself (Heidegger, 1977, p. 35).¹⁶ With this reflection, the offender is prompted to project into the future, where he will not commit the offense, drawing off the present insight, which is provided by the reflection on the past. As a result, the offender recognizes his own temporality, his possibility aside from crime, and the temporality of the penal system.

Relationality is also tied to rehabilitation. The notion of rehabilitation requires that an individual is aided by another individual. Usually, this takes the form of an offender and an authority figure, such as: a therapist, a teacher, or a doctor. Although the offender-authority relationship is originally based on an asymmetry of power, the rehabilitation process diminishes the asymmetrical power dynamic as the offender reforms. Due to this, the offender can understand his unconcealment, his human nature, his past, and recognize that the future will be based on relationships with other individuals in a given society. Moreover, the offender will also

¹⁴ While it may be possible that these emotional pathways have or include some rational content, appealing to emotions deviates from the original appeal to strict rationality associated with deterrence.

¹⁵ Modern legal systems seem to suppose human responsibility in punishment. This seems to be a key tenet of rehabilitation.

¹⁶ I do think that human nature is linked to Heideggerian 'Being'. This will be explored further.

recognize the role of dialogue with others and forgiveness: all unique to human nature (Arendt, 1958, pp. 176 and 236-243). In short, rehabilitation and its penance will awaken an offender to his human nature.

However, modern punishment falls short of rehabilitating offenders. Instead of engaging offenders with their temporal and relational being, punishment urges recidivism (Foucault, 1995, p. 265). Those who are punished by the modern system are disempowered and hardened in their ways. Rather than operating on the notion of individual responsibility, offenders are maligned, seen in William Connolly's piece; offenders are made out to be 'monster[s]' beyond rehabilitation (1995, p. 45). Likewise, instead of turning offenders to the future and their possibility, the penal system focuses on the past and the asymmetrical power relations created by the past. This is best seen in Fassin ethnographical work, as prisoners are punished simply due to their past (2018, pp. 75-77). Offenders are neither rehabilitated nor empowered; offenders are trapped in the past and in asymmetric power relations.

Punishment, namely how to punish, seems complex but grounded in human nature. Focusing on order, the ideas of relationality and fairness are clearly espoused. In regard to the other aims of punishment, the unique ideas of temporality, suffering, and rationality are clearly presented. Quite simply, the goals of penal theory hearken to the nature of those being punished: humans. However, the goals of penal theory are far from the actuality of penal praxis. Instead, the modern penal system perpetuates asymmetric relationships that alienate offenders and highlights the desire to 'faire le mal pour le plaisir de le faire' (Nietzsche, 2007, p. 41). In such a practice, human nature is blatantly disregarded, necessitating reform in punishment.

Improving Punishment

Obviously, there is a disjunction between punishment in theory and punishment in practice. The question that arises from this disjunction is how to ameliorate the practical penal system. The theory of punishment from the previous section discusses the ideal punishment, the goal *per se*. But the goal does not supply adequate instructions to reach this ideal, rather the theory simply posits the ideal itself. Thus, there remains a gap between penal theory and penal practice.

To bridge this difference between theory and practice, it is important to ask exactly what the practice of punishment should become as it approaches the ideal theory. The answer appears to be that penal practice should become more just, congruent to the ideal. As a concept, justice has a multiplicity of characteristics, however one characteristic seems crucial to justice and is tied to human nature: relationality. Since relationality is tied to justice—which is paramount to reducing the discrepancy between theory and practice—reformation regarding relationships appears crucial to improving punishment.

Of the four virtues of ancient Greece—justice, prudence, temperance, and courage—justice is the only virtue that is characterized as consisting primarily of a relationship (Plato, 1997; Aristotle, 1995). Punishment, as has been discussed, is based on a relationship and can thereby be described as just or unjust. Likewise, practical punishment, as based on a power asymmetry, appears unjust. Therefore, the task of justice, regarding practical punishment, is reducing the power asymmetry between the offender and others.

The root of this aforementioned asymmetry derives its nature from the penal process. Both Connolly and Fassin underscore the asymmetry of the modern penal system in their work. In regard to the former, Connolly illustrates that offenders are treated as ‘monster[s]’; in regard to the latter, Fassin recounts instances where individuals are powerless against authority figures (1995, p. 45; 2018, pp. 72-77). However, both authors highlight how the penal process creates this asymmetric relationship. Quite simply, the penal process creates asymmetrical power dynamics by stripping the offender of his agency. In Connolly’s case, the rhetoric surrounding the offender dehumanizes him, making the offender equivalent to an animal, one that needs to be tamed. In Fassin’s case, the individuals are at the mercy of the penal system, unable to assert their agency as humans. This is further seen in the strict penal regiments of prisons and the rigid punishments of statutes.

When applied to practical punishment, justice unveils itself as multifaceted, hearkening back to the agency of both parties involved in a relationship. Thus, to be just, the penal systems of actuality must reduce the asymmetry of power relations by highlighting the agency of the offender. Instead of passively going through the penal system, the offender must exercise his unique human agency.

To do reduce this asymmetry, I draw off of the ancient Athenian penal system; the case in point will be the trial of Socrates (Plato, 1995). Unlike the modern penal system, where the offender plays a passive role, the ancient Athenian penal system forced the offender to play an active role. Although ancient Greek society and modern society are very different, the penal system of the former appears more just in this respect, as the offenders were forced to use their agency. For example, in the trial of Socrates, Socrates is prompted to give his own defense and cross-examine witnesses. Moreover, once an offender was found guilty—as in Socrates’ case—the offender was required to propose a punishment that would serve as recompense for the offense in question. The Athenian court would then vote to choose between the offender’s proposed punishment and that proposed by the prosecution.

In the modern penal system, the offender is able to defend himself if he wishes, but often defers to an attorney. Most times, the offender defers because he does not have a strong, functional knowledge on the intricacies of the law. Hence, a lawyer—or expert on the law—is brought in to compensate for the offender’s lack of legal knowledge. Nevertheless, the ability to decide who will defend the offender or the ability to decide what defense is presented before the court is still a practice of the modern system.¹⁷ However, the offender lacks agency when a general statute is applied to his particular case.¹⁸ This process strips the offender of his agency and thereby creates an asymmetric power relationship the disadvantages the offender.

Thus, I propose that offenders should be allowed to propose their punishment for crimes in cases where a judge or jury has found the offender guilty. To ensure that all offenders can propose their punishments, *all* citizens should be required to take some course on the law, so that offenders can have more agency during the trial’s proceedings and in sentencing. By allowing

¹⁷ The ability to decide who will defend the offender is namely the decision to have legal representation or not. I do not mean to insinuate that individuals who are defended pro bono have a choice in who their defense attorney is.

¹⁸ While judges maintain a level of discretion during sentencing, the offender does not have this agency.

the individual to present a possible punishment, the offender is forced to assume responsibility for his actions. Quite simply, the offender exercises his agency and presents himself as a responsible agent before the court. Hence, the agency-exercising-offender will create a more symmetric power relationship with others, including those of authority in the penal system. The result of this symmetric relationship will be a more just penal system, with individuals capable of exercising their unique human capacities.

A few brief words should be said on this suggestion. First off, the prosecution would also propose a penalty, like in the Athenian system. Penalty proposals would allow for the judge or jury to decide the punishment of a case, while also maintaining the symmetry of the offender-authority relationship.¹⁹ Similarly, this method does not sacrifice any of the goals of punishment, allowing order and punishment's secondary goals to be pursued. Finally, the idea of having the offender exercise choice in his punishment is not completely unsupported. In Geoffrey Sayre-McCord's piece regarding punishment, he argues that individuals should choose amongst various punishment plans to repay for an offense (2001, pp. 505-506 and 509). As such, the individual takes responsibility and reimburses society with a proportional penalty.

But beyond simply supposing that the offender is a responsible agent, punishment can be further modified to espouse the virtue of justice. As mentioned earlier, justice requires a relationship that is symmetrical, but tacit in this symmetrical relationship is the uniqueness of human nature. Quite simply, having a symmetric relationship with another human is different from having a symmetric relationship with a cat. Hence, punishment should recognize offenders as humans who have a unique human nature, a unique nature that can be disclosed through discourse. This discourse—centered on human nature and human being—would allow the offender to explore and understand his own essence. In doing so, the offender would recognize his value and his future possibilities, making punishment more just and symmetrical.

Practically, I believe that this is possible, and in support, I cite Martin Heidegger and his work on Being. To Heidegger, 'Being' refers to the way a thing uniquely exists, open to the future possibilities of its existence. As such, it is a fair assumption to equate human nature—what it means to be human—to the Heideggerian Being of humanity.

The modern penal system often dehumanizes offenders and uses offenders as a means-to-an-end, usually to exact knowledge that is used to exercise control. In short, punishment devalues humans, disregarding an offender's human nature and treating him without regard to this inherent value. Punishment, then, acts as a type of Heideggerian Enframing. Enframing—according to Heidegger—conceals and unconceals the truth regarding Being (1977, p. 27). However, Enframing is also dangerous as it produces the 'standing-reserve', or state where a thing waits to be ordered, losing its inherent value and solely maintaining the value of possible ordering (Heidegger, 1977, p. 17). By being part of the 'standing-reserve', a thing loses its value as a thing-in-itself. With this paradigm, punishment appears as a type of Enframing that devalues man, simply using him for the extraction and ordering of some good (Foucault, 1995, pp. 294-295).

¹⁹ By allowing the judge or jury to decide between the punishments proposed by the prosecution and defense, the convicted offender is still punished if he proposes a reward as his punishment, as was the case in the trial of Socrates.

Consequently, the Enframed offender is reduced to a dehumanized value that precludes the possibility of a symmetric relationship. Instead of being a human, the offender is viewed as an object. Rehumanizing the offender would create a more symmetric relationship within the penal system. However, to do so, a discourse is necessary to regain and encapsulate the concept of human nature, unique to speech (Arendt, 1958, p. 176; Foucault, 1977, p. 209). Simply, to make punishment more just, there must be discourse on human nature.

In order to turn oneself towards human nature, both the offender and the authority should participate in this discourse, examining the unifying nature of humanity. This unity itself lies in the ability to unconceal human nature, primarily through philosophy, art, or religion (Heidegger, 1977, pp. 34-35).²⁰ Each highlights the unique nature of man, along with his incompleteness, providing the ability to examine and project into the future, to examine and question the past, and to examine and understand the present. All three modes of unconcealment offer a unique perspective to the discourse on human nature, and seemingly offer a beautifully incomplete account of this human nature. It is this incompleteness, this unknown, that unites man. Put plainly, the type of discourse supported by this paper benefits both the offender and the authority. As for the former, the offender is prompted to understand his nature—one that favors order—and his future possibility. The offender, then, better comprehends his being and the unity of his being with other humans. Thence, the offender can be rehabilitated by examining his human nature and can also reduce the antagonism between the offender and authority. As for the latter, the authority benefits in two ways. First off, the breaking of a norm by the offender unconceals the failures of society in dictating human nature. This imparts the authority with a new understanding of his own relative behavior that cannot be controlled by an objective standard. Secondly, the discourse allows the authority to explore his identity—his nature and possibility—just like the offender, thereby creating a more symmetric relationship.

Thus, to make the penal system more just, more like the ideal, it is necessary to have discourse that empowers and allows the offender to examine his particular human nature and the unity of universal human nature. This discourse—namely on philosophy, art, and religion—allows for the unconcealment of human nature, allowing the offender to be opened up to his own possibility, a possibility that is not dehumanized. Moreover, the authority engaged in the discourse also recognizes this nature, forcing the authority to treat the offender as a human-with-value, not as a part of the ‘standing-reserve’.

Practical punishment—when juxtaposed to the ideal theory of punishment—appears to lack justice. This deficit is namely due to asymmetric power relationships, which are caused by the loss of agency and the dehumanization of offenders. Empowering the offender to have a role in choosing his punishment and enabling the offender to engage in a discourse about human nature can reduce this asymmetry. With these changes, punishment becomes more just, and punishment as a practice approaches punishment as an ideal theory.

Self-Criticism

²⁰ While Heidegger only mentions art as having an unconcealing function, I think that philosophy and religion both highlight the possibility and unity of man.

Thus far, this paper has systematically analyzed punishment in three distinct, yet connected ways. The first section of this paper established that punishment is linked to human nature—namely, the desire for order—and illustrated some aspects of this connection. Afterwards, this paper analyzed how punishment should occur in theory, along with the shortcomings of practical punishment when juxtaposed with this ideal theory. Subsequently, two proposals were made on how to improve punishment. With all of this in mind, I have no doubt that various challenges can be advanced against the account I have offered. However, two possible objections regarding the contents of this paper are worth examination. First, there is the challenge that punishment, as I have described it, is ridden with metaphysical assumptions. Second, there may be concern over the feasibility of the proposals that have been provided. Both of these critiques will be examined in the order presented.

A critic of the views espoused in this paper may argue that this paper incorrectly assumes that there is some human nature or Being, which thereby influences punishment. The critic could simply suppose that there is no such thing that is unique to human nature or Being that influences punishment. The Foucauldian would agree with this refutation and suppose that the relationships, not the entities deserve to be examined. Furthermore, the Foucauldian—or other metaphysical opponents—may argue that the idea of human nature or Being is unnecessary as it violates the principle of parsimony.²¹

Theoretically, I recognize that the account of human nature that has been offered is neither provable nor unprovable. Quite simply, the notion of human nature cannot be proven with absolute certainty, leading to scholastic debates on the matter. However, two points can be made to illustrate the utility of positing human nature.

Namely, the Foucauldian would suggest that human nature should be a secondary consideration when examining punishment. Instead of human nature having primacy, the relationship *between* two things should have primacy. Foucault espouses this idea in his works, supposing the importance of relationships over objects in themselves (1990, pp. 93-94). When applied to the penal system, this theory highlights the relationship between the offender and the authority.

To Foucault, a relationship requires two or more things that operate within a given matrix. The way that these two things interact creates the Foucauldian relationship. Foucault and his followers, in challenging the analysis of human nature, place primacy on relationships. But simply, these relationships are predicated on there being two or more things that can engage in some type of relationship. Hence, the idea of a relationship—such as power on Foucault's account—is based on the existence of two or more things.²² From this logic, it appears relatively clear that the things that posit relationships are more important than the relationships themselves, as the latter is a product of the former. Thus, humans—which are the things that posit power relationships—deserve to be analyzed more fundamentally than the relationships, as the unique human nature produces these relationships.

²¹ The idea of parsimony originates with William of Ockham, who argues that the simplest explanation should be offered for practical and theoretical problems because it is more likely that the simplest explanation is correct. Thus, positing more ideas—like human nature or Being—is unnecessary when considering punishment.

²² A discussion on what actually exists, and can thereby engage in a relationship, is a fair ontological question. However, this question is outside the bounds of this paper.

Moreover, if the Foucauldian still supposes that there is no human nature, relationships would still be secondary to the *idea* of human nature. For with such a belief, it appears that the ‘nonexistent’ human nature exists in some way, thereby serving as a necessary condition for the posited relationship. As a result, the penal relationship seems based on the real or created notion of human nature, which thereby produces and influences the character of the subsequent relationship.²³

The Foucauldian is still handicapped if he opposes the notion of a unique human nature on the grounds of Occam’s parsimony. As shown above, human nature is more fundamental than relationships, due to the fact that the former determines the nature of the latter. Thus, if Foucauldian supposes that human nature is superfluous, logic then supposes that the relationship is even more superfluous due to its secondary nature. In other words, if human nature is unnecessary, how can its derivate—the relationship—be necessary? Rather, it seems that the Foucauldian is self-defeating on this account; by challenging human nature on the grounds of parsimony, the Foucauldian undermines the focus he places on relationships. Likewise, I also question the assumption that parsimony would negate the existence of human nature. Instead, it appears that human nature provides a fallback for metaphysical and ontological questions, which would handicap those without such a belief.

Besides simply questioning the plausibility of punishment based on human nature, the feasibility of the proposals offered in this paper can be questioned. Mainly, one can question if the solutions offered here—those of letting the offender choose his punishment and allowing the offender to engage in a discourse on human nature—are even possible as a means to achieve their desired end in modern society. This challenge can be examined at two levels: the practical level and the theoretical level. I shall examine both in the order presented.

One could argue that the solutions offered to ameliorate punishment are impractical in regard to the modern penal society. Such a claim can be based on concerns with the current structure of the penal system or on larger societal concerns. In regard to the former, it could be argued the modern penal system is incapable of adjusting to the recommended changes. For example, an institution—most likely schools—would be required to teach courses on the law, requiring an overhaul of the current curriculum. Similarly, preparing authorities to engage in discourse with offenders may require training and some type of incentivization. However, both of these challenges are easily refuted. Namely, these solutions could be gradually incorporated into the penal system over time, thereby allowing for individual and institutional adjustment. Rather than implementing a radical change, change over time would ease the economic burden incurred by improving the penal system and also allow for individuals to change their biases towards offenders. Moreover, schools alter their curriculum as they incorporate new requirements, such as physical education. Hence, instituting a minimum requirement for knowledge of the law appears feasible, challenging the practical concerns based on the current structure of the penal system.

²³ The argument here advanced may be seen to rest on an affirmation of subjectivity and agency, both of which Foucault would contest. These topics, while crucial to the meta-ontological underpinnings of this argument, are beyond the scope of this paper.

A greater practical concern is the need for societal change as the penal system reforms. It would seem paradoxical if the penal system reduced the asymmetry of the offender-authority power relationship, but society still stigmatized offenders. This proposed stigmatization could take on various forms: increased policing, reduced housing opportunities, or reduced employment opportunities.²⁴ While this is indeed a fair concern, it misunderstands the aims of this paper. I believe that these changes are without a doubt necessary when addressing the issue of punishment, however, this paper only seeks to examine the legal penal system. These societal concerns—while being extremely important to improving punishment—appears outside the bounds of this paper. Nevertheless, I acknowledge that the entirety of punishment, beyond the legal penal system, must be examined to create a more just society and to ensure that there is no asymmetry between the offender and society after the former has repaid for his offense.

From a theoretical standpoint, a critic can assert that this paper engages in what Heidegger calls ‘incomplete nihilism’ (1977, p. 69). On this account, the critic would state that this paper attempts to improve the idea of punishment, but in rejecting aspects of punishment, remains within the same paradigm. Put simply, nothing has been done but a recapitulation of the thing that one wishes to disavow. This theoretical challenge—which is no small charge—has a certain degree of validity. For instance, in creating these solutions, I subconsciously operate within the paradigm of the American prison system. Instead of rejecting the entirety of American penal system, I operate within the system itself. Foucault recognized this when noting that despite there being opponents to prisons, all operated within the framework of prisons (Foucault, 1995, pp. 264-265). Moreover, in positing within this system, one could argue that the solutions hereby offered only provide the façade of improvement.

In response to this, I would argue two things. First, I would counter that there is no such thing as being able to totally reject a thing or move outside a set paradigm. I make this radical claim on the basis that all things inadvertently posit their opposite. For example, when justice is posited as a quality of a relationship, it indirectly posits injustice, or the fact that the just relationship is not unjust. Thus, to break from this paradigm would appear to mean that no worldly content can influence a rejection of an idea or practice. However, this appears logically inconsistent; for without worldly content, how can the thing that one seeks to reject even exist? Secondly, this project does not necessarily aim at theory, which is the subject of Heidegger’s incomplete nihilism. Rather, it aims at improving punishment, which is a *worldly* phenomenon, by positing this worldly phenomenon in an ideal *world*. As such, this analysis seems to require content and refer to the same paradigm—punishment—in order to alter it.

Conclusion

According to Michel Foucault, ‘Western man has become a confessing animal’ (1990, p. 59). Perhaps, however, it is better said that man has become a ‘punishing animal’. While this paper has only addressed legal punishment—that conducted by police, judges, and prisons—punishment is a societal phenomenon. From schools, to homes, to prisons, punishment is everywhere in society. The genealogy of legal punishment that was presented at the beginning of this paper illustrates that punishment is a fundamental derivation of man’s nature. While

²⁴ This list is not extensive but attempts to highlight some of the scenarios that affect offenders due to their offender-status.

punishment may not be natural to man, it is a result of his nature as man. As such, a summary on the conclusions of this paper will help delineate the human nature that influences penal practice.

The ideal of punishment was shown to have both primary and secondary goals. The most important of these goals is order, yet punishment aimed at order requires relationality. The nature of relationships, in the ideal penal theory, were shown to be fair and symmetric. However, when juxtaposed to the realities of modern punishment, it became evident that practical punishment was heavily based on the creation of asymmetrical relationships between the offender and penal authorities, thereby devaluing the human nature of the offender. A combination of increased agency and increased discourse was proposed as a means to reduce this inherent asymmetry. By empowering the offender and turning him to his own being, the penal system appears to become more just. These solutions seem promising and feasible, withstanding refutations that challenge the accounts provided.

Although this paper has addressed punishment, some changes are needed beyond punishment, regarding the social and economic burden that punishment places on the offender and those associated with the offender. Moreover, work must be done to examine the effects of this paper's paradigm on innocent individuals that have been convicted of an offense. However, legal punishment—a crucial aspect of society—has been addressed in these pages. It is not to say that reforming punishment to be more just will create a just society; rather, reforming society to be more just will create a just society. Reforming punishment is only one step towards this more just society. The hopes for such reform are hopeful, among intellectuals and society-at-large: the ideal is not out of sight.

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