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### An Essay:

#### **Punitiveness and resentment**

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#### **Abstract**

We have witnessed in the West over the last forty years or so, a rampant increase in the number and severity of penal sanctions. This has been driven, it has been suggested, by a broadening and an intensification of punitive sentiments or punitiveness (Pratt, 2011). We may take it that what characterizes punitiveness is the desire to punish, however, this idea runs up against serious problems if we don't know what punishment is, hence in part one of this paper I examine what punishment is taken to be, and what it is taken to be for. I suggest that the only claim about the nature of punishment that really holds water is that it involves the infliction of pain, and punitiveness therefore becomes the desire to inflict pain. Revealing as this does that punishment is not necessarily to be equated with the settling of legal harms, in part two of the paper I address a possible candidate for the desire to inflict pain in the emotion resentment. The suggestion that punitiveness is a particular kind of resentment reveals punitiveness' role in the structuring of cultures and as a tool of governance.

#### **Part I**

##### **Introduction**

My target, as always, is the irenic abolition of harm in our social problem solving, and that, at least in part, requires a peacemaking approach to criminal justice. Let us be plain: any kind of peacemaking must harbour an account of penal abolition, at least why, if not how. This must be so, for how can we be at peace with someone upon whom we deliberately inflict pain for no reason other than to inflict pain. Moreover, this pain is not just inflicted upon an offender but upon their loved ones, their children, and their communities; indeed, the whole of society sickens as a result of this canker. My aim in this paper is to show that punitiveness is not a necessary, not completely natural, nor an inevitable part of the way that we solve social problems, indeed, it and its relations

are a cause of many of those problems. A significant feature of this state of affairs is the affect<sup>1</sup> of punitiveness: the desire, or the experience of the desire to punish. Peculiarly, this desire to punish does not appear to need any personal or even real referent. When I watch a film with a particularly heinous baddie, I feel, deep in my innards, a desire to see him punished. This is surely a truth exploited in several Quentin Tarantino films such as *Django Unchained*, *Jackie Brown*, *Inglorious Basterds*, or *Death Proof* for example. Each of these films has an act one involving egregiously nasty behaviour by our villain followed by the rest of the movie which consists of terrible acts of revenge in which we are encouraged vicariously to delight. Indeed, this 'revenge' genre has a long and well stocked history. Perhaps this looks like vicarious revenge on our part, but I think that the attribute of vicariousness rules out revenge. Revenge has about it a sense of the settling of a personal debt, and whilst practices that we may describe as punitive have in the past relied on the notion of settling of debts, the rationalization of punishment in the light of Kant for example brought the notion of equivalence to the fore, and that of Bentham, the consequences of punishing; revenge is supposed no longer to play a part in the juridic act of punishment. There are few accounts of the role of the emotions in standard narratives of what constitutes punishment other than in Nietzsche, indeed, these standard accounts of the nature of punishment also leave much more than an account of emotion to be desired. Bedau & Kelly (2019) for example, have suggested that the efforts to indicate the nature of punishment have about them something of the topology of a moebius strip, following the contours of which always lands one back at the point of one's departure, leaving one unsure what lies inside and what outside of the definition or the justification.

We may take it that what characterizes punitiveness is the desire to punish, however, this idea runs up against serious problems if we don't know what punishment is. The answer to the question 'what is punishment?' in philosophical or penological circles can usually be traced back either to Anthony Flew's (1969 [1954]) *The Justification of Punishment*, or H. L. A. Hart's (2008 [1959]) *Presidential Address: Prolegomenon to the Principles of Punishment*. Walker (1991, pp. 1-3) suggests the following of punishment. 1) It involves the infliction of something which is assumed to be unpleasant. 2) The infliction is intentional and done for a reason. 3) Those who order it are regarded as having the right to do so. 4) The occasion of the infliction is an action or omission which infringes the law. 5) The person punished has played a voluntary part in the infringement. 6) The punisher's reason for punishing is such as to offer a justification for punishing. 7) It is the belief or intention of the person who orders the punishing that settles the question whether it is a punishment. I shall take this as the basis of the first part of our conundrum: What is punishment? I hope to show in part one of this essay, that punitiveness must be more, or different to the desire to punish in any taken-for-granted way since we do not know what punishment is, nor what it is for. In part two I shall examine some of the emotional phenomena associated with punitiveness expressed as resentment. My intent is to show that the persistence of the infliction of harm as punishment cannot be supported by claims that it is the will of the public, since popular punitiveness is not a *necessary*, not completely natural, nor an inevitable part of the way that we solve social problems, and hence that we must conclude that it is eradicable.

### What is punishment?

Let us begin by examining these often taken-to-be-standard definitions of punishment, 1) That it involves the infliction of something which is assumed to be unpleasant. Forgive me, but I am going to sidestep this one for a moment to give myself some clear water later on, and move straight on to, 2) The infliction is intentional and done for a reason. That is, that the victim of punishment is not simply chosen at random, nor a person chosen without regard to their past behaviour. Miscarriages of justice are an immediate example of the weakness of this claim; such is

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<sup>1</sup> Throughout this essay I make use of the word 'affect'. I use it in three ways. First, I use it (rarely), in its most conventional sense as a verb that attaches to effect, second, I use it to indicate an emotional *manifestation*, that is an emergent property of emotional *processes*; and third, a cultural manifestation such as a painting and as in the use by Elias of '*Kultur*' 'as opposed to *Zivilization*'. I will try to be consistent and italicize the 'a' where I mean an emotional manifestation.

straightforward. However, Honderich (2006) appears (to me at least) to think that the punishment of innocents is a minor problem of ‘human’ mistakes (pp. 9-10)<sup>2</sup>, however, what is plain is that truly innocent people and ‘technically’ innocent people are punished in their thousands by the process of remand<sup>3</sup>. It has been taken in response to this claim by Walker (1991), Honderich (2006), Garland (2018), and Brookes, (2012), that sanctions *called* punishments, issued to people who have not broken a law, do not constitute punishments. What this would mean is that the so-called punishment of innocents is not punishment at all but something else, like abuse, or torture, for example. However, this is a mistake. In English usage, ‘the punishment of innocents’ is a legitimate locution, and this is so because it is believed that it is a factual occurrence. That is, as far as the use of language is concerned, innocents *are* punished, and, indeed, more frequently than is conventionally acknowledged to be the case. Even if, as *is* conventionally the case in jurisprudential discussions of the nature of punishment, inflictions of violence upon the innocent is not counted as punishment, this cannot be said of miscarriages of justice. In these circumstances, of course, innocent people are punished, up until such time as the miscarriage is acknowledged; such punishment cannot, retrospectively, be undone – we cannot un-punish people.

David Garland, in his response to Didier Fassin’s (2018) Tanner lectures suggests that [t]o imagine that our jails are full of factually innocent people is pure fantasy. It mistakes the tragic exception for the general rule. ... In these lectures everyone who is on the receiving end of unlawful state punishment, police violence, or penal excess is depicted as a harmless innocent victim, sinned against but never sinning (Garland, 2018, p. 161).

However, Garland here makes of Fassin’s contention that punishment does not do what it claims, a straw man. Garland’s target, *per contra*, is different to that of Fassin, and of this paper. Garland’s target is merely the excessive use of punishment in the form of incarceration of the guilty, that is its use as a first, rather than a last resort. So, in fact, it is revealed that Garland’s concern is limited to the mere *restriction* of the use of incarceration rather than the abolition of punishment *per se*. This permits him to support the status quo with regard to Hart’s (2008 [1959]) legalistic definition of punishment which serves to protect the law. Indeed, in a rhetorical manoeuvre that to my mind reeks of casuistry, Garland seems to think that remand is somehow of little concern and contends that the law says that those awaiting trial in jail are “merely being *detained* and [that] there is an important difference” (Garland, 2018, p. 160 my emphasis). That difference is revealed, he says, when one accepts that “‘innocent until proven guilty’ ... is a legal fiction” (p. 161). We must point out here, something that Garland appears to have missed. When offenders are found guilty after a period on remand, the *state regards* their period on remand as having been a period of punishment and subtracts it from the remainder of the sentence as a portion already served. Into the bargain we should note that among the reasons given for placement on remand are judgements based not on presumed innocence, but guilt, because of the perceived probability of abscondment or reoffending of a *guilty* subject.

What is less plain where the punishment of innocents is concerned is in examples of what might be called police misconduct. Or perhaps more accurately, police punishment. For example, peaceful protest is, theoretically permissible in the United States and Europe<sup>4</sup>, however, since the beginning of the Black Lives Matter (BLM) campaign more than a thousand incidents of police brutality have been recorded in the US (Thomas, Gabbatt, & Barr, 2020). The protestors are present for no reason other than to protest (in the vast majority of cases). That is, they are not

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<sup>2</sup> “... mistakes are made by judges and juries and hence *some* punishment is of ... innocent people. ... since judges and juries make mistakes, not every offender is an offender in the ... ordinary sense.” (p. 10) (my emphasis).

<sup>3</sup> As of 30 June 2020, the remand population in England and Wales was 11,388 (HM Prison Service, 2020).

<sup>4</sup> It is worthy of note that in the UK at the moment there is a move to criminalize a large swathe of protests.

there because they are all drug dealers, they are not there because they are all wanted perpetrators of knife crime who have all bizarrely gathered for a conference, they are legal protestors. Yet how can we say that they are not being punished for the *legal* act of protestation when the police pre-emptively shoot people at random with 'less-lethal' weapons, some suffering serious and sustained injury as a result. Let me suggest that they are being punished for a reason, and that reason is that they are protesting. The situation in France may be supposed as bad if not worse. The French police's reaction to the 'Gillet Jaune' protesters have been similar to the US police's reactions to the BLM protests, although in France the police action has resulted in five occasions of the severing of hands<sup>5</sup>. Perhaps we might then contend that 2) The infliction is intentional and done for a reason, stands on shaky ground because 4) The occasion of (reason for) the infliction is (should be) an action or omission which infringes the law.

This 4), The occasion of the infliction is an action or omission which infringes the law, appears to be a necessary part of the definition because 3) Those who order it should be regarded as having the right to do so. That is, those who order it are expected by the standard definitions to be those officers of the *state* charged with distributing punishment. This too is problematic because in this circumstance the state and the act of punishment become mutually self-justifying: the state justifies those circumstances by which it defines itself in what we might call Weberian terms. In these Weberian terms, the state *is* the state because it *vouchsafes to itself* the monopoly of the legitimate use of violence, which violence it distributes (limits or promotes), among other ways, in the form of punishment. However, in our 3), punishment is justified (at one level at least) *because* it is administered by the state. The state creates the law, (and therefore defines infractions thereof), inflicts sanctions (violence) for those infractions (which it justifies on no better grounds than it is permitted by itself to do so) that is, it gives itself permission to *grant* itself permission to be a state, which condition is defined by its permission to grant itself permission to punish (use violence) monopolistically; that is, this claim is utterly tautologous<sup>6</sup>.

Our 5) The person punished has played a voluntary part in the infringement, whilst being taken for granted, is, of course highly problematic: the concept of voluntariness being wrapped up in disputes about determinism and freedom. And the concept of freedom is one of the most contested concepts in philosophy. What this means in this circumstance is that in order to establish what constitutes freedom, forms of determination are disregarded as being salient for political purposes, that is, the judgement of what counts as determinism, voluntarism, or freedom is in the gift of power; poverty is disregarded as a salient consideration in governmental accounts of what constitutes freedom or constraint for example. It is a truth of power (that is, it is circular), as is the Weberian definition of the state above, that states can do this.

Let us turn now to our 6) The punisher's reason for punishing is such as to offer a justification for punishing. What is being suggested here is an exclusive kind of definition. It says that if such and such is *not* true then what has happened is not punishment, and that such and such is that the reason given for punishing must equate to a satisfactory justification for punishing. So, for example, if the reason for executing someone who is innocent is to further general deterrence, this may not count as punishment because general deterrence is not a satisfactory *justification* for the punishment of this innocent person, on the grounds that the punishment is not *deserved*. This suggests that following our '6)', sanctions grounded in their supposed or desired consequences cannot be so justified. Finally, and briefly we may turn to our 7) It is the belief or intention of the person who orders the punishing that settles the question whether it is a punishment. What is being claimed here by Walker, I believe, simply constitutes a

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<sup>5</sup> "More than 200 alleged abuses related to police handling of the yellow vest protests have been signalled to the General Inspectorate of the National Police watchdog – and the media estimate there have been dozens of protestors including lost eyes and at least five severed hands" (Chrisafis, 2020).

<sup>6</sup> See also Schinkel (2009) on the circularity of the Weberian account of the state.

truth of power. Those who have the power to define what constitutes punishment can (and do) define what constitutes punishment<sup>7</sup>.

Condition 3) Those who order it are regarded as having the right to do so, and 4) The occasion of the infliction is an action or omission which infringes the law, together we have shown to be tautologous, and our engagement with 7) It is the belief or intention of the person who orders the punishing that settles the question whether it is a punishment, discloses the truth-of-power buried within that tautology. 5) The person punished has played a voluntary part in the infringement, falls because of our continuing failure to comprehend freedom and the power-bound, perhaps political definition of claims concerning the salience of different kinds of determinism. 6) The punisher's reason for punishing is such as to offer a justification for punishing, serves to alert us to the problematic nature of attempts to justify or give reasons for punishment: that is to attempt to provide justifications on the grounds of the supposed purposes or telos of punishment, and I shall return to this problem shortly.

We might suggest that the seven parts of our supposed definiens do not really constitute a whole definiens, but merely *some things which may be hoped* of the definiendum. We have noted that six of them are false, insufficiently true, or that they tell us nothing because they are tautologous. This leaves us with one, 1) That it involves the infliction of something which *is assumed* to be unpleasant. Forgive me again, but I am going to sidestep this one once more until I have examined what it is that punishment is claimed to be for.

## What is punishment for?

### *Punishment and the promotion of social solidarity*

Having found significant difficulty embedded in the conventional philosophical account of the definition of punishment, we can, of course turn to a different way of questioning what punishment is, and that is to ask what punishment is for. There are a number of ways of answering this question, notably, a socio-historical one and a philosophical one. The socio-historical group of accounts present a particularly tangled maze of ideas, so I hope that you will forgive that I deal only cursorily with a subject sufficient for substantial and complex book. Let me suggest that for convenience's sake we may identify a number of strands within this socio-historical mode of accounting for punishment. We may identify a theme of social solidarity, a theme of social control, and a theme of actions part of the political economy, at least. So, let me begin with the theme of social solidarity. The key idea here is often traced back to Durkheim's *Division of Labour in Society* (2014 [1893]), *Moral Education* (2002 [1925]), and his *Two Laws of Penal Evolution* (1983 [1902]). For Durkheim, social solidarity is bound up with what he calls the 'Collective Consciousness'<sup>8</sup>. The collective consciousness represents a correspondence in what persons take to be the norms of a group, and social solidarity is augmented when this consciousness is strengthened. Punishment is taken by Durkheim to perform a twofold roll in this augmentation. First, punishment arises from strong social solidarity, that is, the presence of agreement concerning norms or morals provides the grounds of collective support for acts of punishment. Second, punishment acts to cement the collective consciousness by a reaffirmation of the moral and normal structures of the social group. An important observation which Durkheim makes is that the nature of punishment has changed between agrarian societies and industrial societies, and he attributes this to a change in the nature of social solidarity from the mechanical solidarity of agrarian societies to the organic solidarity of industrial society. Two forces are at work here (*Two Laws of Penal Evolution* 1983 [1902]), there is a shift away from governance through religious laws (and their concomitant harsh sanctions), and there is an increase in organically solidaristic societies characterized by the enlightenment practice of the consideration of others as fellow human equals, including *redeemable* offenders. So, our altered solidarity with

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<sup>7</sup> It may, of course, though I doubt it, be Walker simply throwing up his hands and saying, 'I give up trying to define punishment'.

<sup>8</sup> I choose this translation over the sometimes used 'collective conscience', which, to my mind bears connotations with some kind of collective guilt, and this, most certainly, is not what Durkheim has in mind.

others, claims Durkheim (2014 [1893]) results in reduced punitive sentiments, and this, he claims is the source of the shift from somatic punishment to what Foucault would eventually call the punishment of the soul. Punishment became less spectacular, literally. However, let me suggest that the reduction in spectacular, ostensive punishment, increasingly meant a reduction in the visibility of punishment as witnessed in the gradual architectural transformation of the prison from one of dramatic castle with its dungeon, the oppressive 'gothick' Victorian edifices, to the low key, invisible, industrial-unit style prison architecture of the late 20<sup>th</sup> century<sup>9</sup>. This means that punishment has become anthropoemic: convicts are punished, at least in part by being cast out of society. An important concomitant of this shift into relative anthropoemic invisibility has had the effect of a reduction in the solidarity between everyday society and its victims: a lack of public care for our prisoners or even an antipathy or resentment towards them. That is, a reduction in the kind of organic solidarity with them that Durkheim suggests began the reduction of punishment by the torment and mutilation of the flesh. This is a significant problem for those who claim that the purpose of punishment is communication, which is a necessary feature of any account claiming the telos of punishment to be the cementation of social solidarity, since little communication is possible if punishment, the punished, and particularly the punisher, are invisible.

For claims concerning the defence of social solidarity, to be correct, it becomes clear that an account of punishment as communication is required<sup>10</sup>. Punishment as communication may have made more sense when punishment was more public. As Gattrell (1994) tells us, at the hanging of John Amy Bird Bell in 1831 that the report in *The Times* has the fourteen-year old's last words to be "Lord have mercy upon us. All people before me take warning by me" (p. 3). I think it reasonable to suggest that these were not John Bell's words but were put in his mouth as expected by the reporter to communicate to the readership<sup>11</sup>, not just as a warning but as a vicarious exculpation of society by its enjoyment of Bell's apparent repentance before the public and before God. Of course, executions continued to be public in the UK until 1868, including the highly visible gibbetting<sup>12</sup>. Indeed, at times during the 1770s more than a hundred corpses were said to have hung from gibbets on Hounslow heath "so that from whatever quarter the wind blew, it brought with it a cadaverous and pestilential odour" (Gatrell, 1994, pp. 267-268). However, a simple observation may be made concerning punishment as communication in contemporary society and that is that it doesn't seem to communicate very well. We are regularly informed in criminological literature or left-leaning newspapers, that the public's view of what constitutes punishment, perhaps, in part, because of its relative invisibility, is that its prevalence is too low and its severity too soft or claims that prison is like a holiday camp awash with play stations and TVs, is considerably off the mark. Further upon this need for communication if punishment is to

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<sup>9</sup> Sparks *et al.* (1995) have the following to say about Albany, and Long Lartin prisons in the UK. "both were built in architectural styles which deliberately moved away from the traditional English Victorian 'galleried' prison ... externally, like other modern high security prisons Albany and Long Lartin present the passer-by with a somewhat blank appearance". (p. 101). And Garland (1990) has this to say: "punishment has certainly been one of those social activities which has increasingly been put 'behind the scenes' of social life. Instead of forming an aspect of everyday life, located in public space and openly visible to everyone ... the punishment of offenders is nowadays undertaken in special enclaves removed from public view" (p. 234). Bender (1987) has suggested, the disappearance of punishment from public sight has resulted in the "projection of punishment into [the] imagination" (p. 231).

<sup>10</sup> This issue is treated at great length by R. A. Duff in his *Punishment, Communication, and Community* (2003). I must state, however, that, in broad terms, I disagree with him.

<sup>11</sup> Convicts confessions with their warnings provided popular literature in 18<sup>th</sup> century Massachusetts see Towner (1982) *True Confessions and Dying Warnings in Colonial New England*.

<sup>12</sup> The last gibbetting took place in England in 1832 (Gatrell, 1994, p. 268)

cement solidarity, is the question, what is being communicated? To aid the augmentation or bolstering of solidaristic norms, it is the content of these norms that needs to be communicated, however, following from Walker's 4) The occasion of the infliction is an action or omission which infringes the law, what is being communicated (if at all) is the substance of the law, not (necessarily) norms. Moreover, the nature of the law is not solidaristic, far from it, since the law serves to increase inequity in society in that there are "in-groups whom the law protects but does not bind, alongside out-groups whom the law binds but does not protect"<sup>13</sup>. Hence, it would appear that the claim that punishment helps secure solidarity stands on rocky foundations because in order to do so it is necessary that it communicates *solidaristic norms*. First, it is far from clear that it communicates at all, and second it appears that if it does communicate, it communicates the substance of a divisive law. Indeed, following the above, rather than communicating and amplifying any kind of collective consciousness, its purpose *may appear* to be the establishment and consolidation of the authority of the state. It is apposite, then, that we examine the claim often, made that punishment's role is to establish authority.

#### *Punishment and the establishment of authority*

It has been noted (Garland, 1990) that Durkheim's account is absent an historic picture of the transition between community governance and state governance, a process that had been under way in Western Europe since the 11<sup>th</sup> century (Lenman & Parker, 1980). At a simple level, this suggests that in Durkheim's solidaristic account, he has missed those aspects of practices of punishment that appear to serve to establish authority. Garland (1990) suggests, and I agree with him, that instead of thinking of the "*conscience collective* as an emergent property of society as a whole we must conceive of a dominant moral order which is historically established by particular social forces" (p. 53). Punishment, then, would have the purpose of securing the *dominance* of a particular, more powerful class. However, let us remind ourselves of our question: that is, what is the purpose of punishment; what is it *for*? Perhaps what appears *prima facie* the most notable account of the relationship between punishment and authority comes from Foucault (1995), however *Discipline and Punish* is not primarily about punishment but about modes of governance, and contemporary penalty is just one of the exemplars of a new mode of governance which Foucault calls *governmentality*: hence, *Discipline and Punish* does not really tell us what punishment is *for*, only what it does. Surely, however, the largest threat to claims that the purpose of punishment is to aid the construction of authority is the supposed nature of authority itself. This is a problem that has its roots in the conflation of authority with power<sup>14</sup>. Power equates merely to 'can': it is not constructed but *emerges* from solidaristic processes of meaning-making and consolidation. Anyone succeeding in constructing power for themselves must have already had that power (capacity) to do so: the person who does something (construct power) already has the power to do that thing, and until they can do that thing, they do not have the power to do it<sup>15</sup>. Hence the notion of 'the power to construct power' is nonsensical, and a conflation of power with authority brings that same nonsense to discussions of authority. Authority is, however, a *tool of* or a *vehicle*

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<sup>13</sup> To misappropriate Frank Wilhoit's comment (no 26) following Henry's *The Travesty of Liberalism* (2018)

<sup>14</sup> I refer to my own discussion of power 2013. Chap 7: pp 137-164.

<sup>15</sup> This must not be taken to mean that power *equates* to action, even though everything that can happen is happening now, see my discussion of potential in the above mentioned. I issue another *mea culpa* here in that my discussion of 'beginning to act' in that chapter was wrong. To grasp this, we need to conceive of three realms, the possible, all of which is happening now, because if something is not happening, there is some reason it is not happening *now* – something is preventing it, it can't happen; the realm of the impossible, which can *never* happen (time going backwards for example); and a realm of the immanent, or potential. These are capacities which are temporally contingent upon other conditions – that is, in my discussion of power, the 'ifs' of 'could if': when the 'ifs' are satisfied that immanent potential emerges as factual or actual. Someone or something can do that previously merely immanent thing. It *does* happen.

of power: power to do such and such, when that such and such does not require coercion<sup>16</sup>. So, as Hannah Arendt (1958) asks, what is authority? or “What was – and not what is – authority? For it is my contention, that we are tempted and entitled to raise this question because authority has vanished from the modern world.”(p. 81)<sup>17</sup> Authority (*Herrschaft*, in Weber) is (political) power without coercion. That is, according to Weber, authority has three grounds. 1. Rational grounds. “resting on a belief in the legality of normative rules” ... 2. Traditional grounds. “resting upon established belief in the sanctity of immemorial traditions” ... 3. Charismatic grounds. “resting upon devotion to the specific and exceptional sanctity, heroism or exemplary character of an individual person ...” (1978 [1905], p. 215). Each of these conditions relies on belief in, or trust in the authority, and trust cannot be gained by coercion. Indeed Arendt (1958) has this to say “authority precludes the use of external means of coercion; where force is used, authority itself has failed. Authority, on the other hand, is incompatible with persuasion” (p. 81). Nietzsche, in his second essay of *On the Genealogy of Morality* suggests that “It is [possible] to imagine society so conscious of its power that it could allow itself the noblest luxury available to it – that of letting its malefactors go unpunished” (2017 [1887], p. 49)<sup>18</sup>. Surely, rather than “power” Nietzsche here speaks precisely of authority, and authority means, *inter alia*, the capacity to forgo punishment. Indeed, Nietzsche goes on to equate this kind of authority, this forgoing of punishment, with mercy.

Authority, then, appears to be a *cynosure* for the conceptions of what constitutes legitimate governance amongst the authority-granting class, that is, those who have the power to grant such authority<sup>19</sup>. Were punishment to serve the *establishment* of such authority it could not be used as coercion, since what would be achieved, were this the case, would not be authority, but domination. Authority, then, cannot be created, taken, gained, applied, or constituted, it must be granted. To aid in the function of authority, then, punishment must communicate in a way that belief in, and agreement in, can be established, however, as we have seen, punishment does not seem to communicate. Hence, we might suggest that claims that punishment’s purpose lies in the construction of authority, stands on shaky ground.

### *Punishment and the promotion of capitalist economy*

Several commentators have been wont to suggest that punishment reveals in itself a role in the functioning of the economy, most notably Rusche and Kirscheimer (2003). One must note, however, that revealing in itself a role, and disclosing in itself a purpose (as, indeed, we have seen in Foucault), are not the same thing. Amongst the earliest accounts of the imbrication of punitive practices with the economy are perhaps to be found in Marx’s accounts of the theft of wood in Bavaria in the 19<sup>th</sup> century, where the law made the collection of fallen branches for firewood illegal, and prosecutable by the forest owners. Marx has this to say.

The wood thief has robbed the forest owner of wood, but the forest owner has made use of the wood thief to purloin the *state itself*. How literally true this is can be seen from §19<sup>(20)</sup>, the provisions of which do not stop at imposing a fine but also lay claim to the *body and life* of the accused (Marx, 1842).

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<sup>16</sup> A significant quantity of discussions of power characterize it as ‘power over’. Morriss (2002) for example has this to say. “[it] seems [that] all social power becomes power over someone”. This is a mistake. See my (xxxx) (pp. 156-159) on why this is so.

<sup>17</sup> We may find it odd to our contemporary ears to hear Arendt so speak, with the rise of populist authoritarianism in Eastern Europe, the UK and the US, but even though Arendt was writing in the late 50s-early 60s we should not be too quick to dismiss her comments. Authoritarianism is not characterized by authority but by coercion.

<sup>18</sup> The older, Golfing translation (Nietzsche, 1956) has “It is possible to imagine a society flushed with such a sense of power that it could afford to let its offenders go unpunished. What greater luxury is there for a society to indulge in” (p. 205).

<sup>19</sup> And in a democracy, this *should* be the demos.

<sup>20</sup> Of the Sixth Rhine Province Assembly’s law on thefts of wood in 1842.

Clearly, Marx believes that the purpose of punishment in this circumstance, by conceptually divorcing wood from its various social relationships, is to promote a privatization of the state (in the form of the violence of punishment) by the forest owner. A similar analysis is offered by E. P. Thompson in his inquiry into the Black Assizes in *Whigs and Hunters* (1974). The Black Act of 1723 was in part directed at one of the major outcomes of the clearances in England and Scotland, namely that of roving bands of poachers of which the Waltham Blacks were notorious. Well over 300<sup>21</sup> new capital offences were created all of them largely or in part to secure the ownership of the newly cleared estates and their contents. We may feel that this is a genuine case of punishment being *for* the securing of the capital advantage of the land owners, but the Black Act persisted ‘only’ as far as 1823 and as such, may be seen as a relatively short period in which this telos was attached to punishment. Moreover, the punishment was not to clear the land, but to quell the result thereof, namely the problem of indigent groups of unemployed created by the clearances. Rusche and Kirscheimer, however, in their classic *‘Punishment and Social Structure’* (2003) begin with the transfer of penal power in the Middle Ages from the local community to an increasingly punitive central agency and this, evolved from the ‘Roman Law’ practice of settling debts, to one of enriching judges and justiciaries. The law became the preserve of the rich whilst the poor were subject to corporal punishments of branding, whipping, mutilation, and capital punishment with the attendant display of corpses. These practices according to Rusche and Kirscheimer, however were not indicative of a general barbarity of humanity now passed (although Elias (2012 [1939]), I think, would disagree), but part of a transition from local agrarian economies to grander capitalistic and leisured forms of land use attendant on the clearances and the shift of pasturage methods to those favouring the newly cleared estates: the farming of sheep and cattle for example instead of local arable rotation with tithes, previously common. The attendant penal codes, Rusche and Kirscheimer claim, served to protect and promote the wealth of the landowners who included the judiciary and the Church as well as nobles.

Rusche and Kirscheimer (2003) go on to claim that the rise of global mercantilism brought about a change in punishment practices – galley slavery, transportation, and various forms of “penal servitude at hard labour” (p. 24). The authors claim that the driver of this was the persistent shortage of labour throughout Europe due to things like the wars of religion in France, the Thirty years War which raged through most of the 17<sup>th</sup> century<sup>22</sup> and the black death. Rusche and Kirscheimer are convinced that the penal logic at work here is purely economic. Those selected for galley slavery were notable for their bodily strength or special labouring skills, rather than any sort of equivalence with whatever offences they had committed. Selection was “determined solely by the desire to obtain necessary labour on the cheapest possible basis” (Rusche & Kirscheimer, 2003, p. 55). Technical improvements to sailing ships brought an end to galley slavery, which was replaced by transportation to the colonies where the convicts performed work for the new rich administrators and landowners in those colonies on the same capitalistic basis as had been the galley slaves.

The practice of transportation to the United States was brought to an end by the outbreak of the Revolutionary War in 1775. This resulted in the overcrowding of England’s prison hulks and the eventual resumption of transportation in 1786, this time to the British colony of New South Wales. Transportation was eventually brought to an end in England in 1857 with the penal servitude act. Whilst it may appear that galley slavery and transportation were clear examples of the purpose of punishment being to enrich the bourgeoisie, waters are muddied by sentences of penal servitude. These sentences were served in convict prisons and houses of correction, and hard labour was their standard feature. However, these tasks frequently were not productive but sisyphian in nature and included such activities as the treadmill, the crank handle, and lifting the

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<sup>21</sup> “... the approximate number of cases in which the punishment of death could be ordered under the Waltham Black Act [was] close to the fantastic number of over (*sic*) three hundred and fifty.” (Radzinowicz, 1945, p. 72).

<sup>22</sup> and killed approaching 60% of the Central European population, (Outram, 2002).

shot, as Bentham would have it “grinding rogues honest and idle men industrious” (1838, p. 342 Volume IV) Be that as it may, in 1887, 75% of prison inmates were involved in some sort of productive endeavour, mostly in private contract and leasing systems. By 1935 the portion of prisoners working had fallen to 44%, and almost 90% of those worked in state-run programmes rather than for private contractors (Reynolds, 1994). The waters are further muddied by Loïc Wacquant’s more recent (2001) analysis which suggests that what he calls the hyperghetto, which he describes as an extension of the ‘carceral continuum’, now serves the function of ‘warehousing’ a population that used to comprise the ‘reserve army of labour’ (Engels, 2009 [1845]), localized economically surplus populations having been rendered redundant by globalization. As Wacquant puts it, “[i]nstead of providing a reservoir of cheap labor, the hyperghetto now stores a *surplus population* devoid of market utility” (p. 105). We might contend, therefore, that it is far from clear that we can say with any safety that punishment is for the promotion of economic forces. Just as we can say that it is not the case that the reason, as Voltaire’s friend (Voltaire, 1924 [1765]) would have it, that tides ebb and flow is to better facilitate the ingress of ships, so, just because situations are manipulated for political or economic ends does not mean that those situations are the way they are *in order* that they can be put to those political or economic ends. Hence, the fact that convicts were put to work as oarsmen does not mean that the purpose of punishment was to provide maritime labour, any more than the oar was created as a tool of penal misery. That unscrupulous businessmen exploit the conditions provided by punishments does not mean that their gain is the reason for punishing.

Let us, then, take stock. My second attempt to state clearly what punishment is and hence what punitiveness is, has taken the form of asking what punishment it is *for*. I briefly addressed two groups of claims that the purpose of punishment was some kind of social engineering. I suggested that for punishment to exist for the purpose of augmenting social solidarity it is necessary that it communicate solidaristic norms. Unfortunately, it seems that this is not really the case, first because it does not seem to communicate, and second because if it does communicate, then what it communicates is the law, not norms. I also briefly examined claims that punishment’s purpose is to benefit the functioning of a capitalist economy. Regrettably, despite the ostensible appearance of some of the evidence, each of these claims fails due to the fallacious belief that an institution’s purpose can be deduced from its function. However, are we to grasp what punishment is for, there are other claimed functions that may, at least, sound more plausible, and those are the functions of crime control: deterrence, incapacitation, rehabilitation, retribution, and restitution. I shall proceed to illuminate some of the concerns with these claims here.

### *Punishment and the promotion of crime control*

For punishment to deter, it must deter. That is, it must prevent the deterred person from committing a crime *that they were going to* commit. The same is true of incapacitation. Should a person not be going to commit a crime, they have neither been deterred nor incapacitated. The first problem arises in that an offender’s first offence is his first offence. That is, there is no precedent for it, hence no statistical judgements about future crime they may commit can be made. Thus, no judgement can be made about whether a first-time offender will be deterred by any punishment. It is true that first time offenders are regularly not given custodial sentences<sup>23</sup>, but that is not to say that they are not punished. Perpetrators of the most heinous crimes, from whom we may feel we need the greatest protection, whom we wish to be the most deterred are, however, statistically the least likely to recidivate and hence are the least likely to be deterred or incapacitated (Cuthbertson, 2017). The precise converse is true of those guilty of more minor offences; these offenders are much more likely to recidivate, and so more likely to be deterred, and yet we feel that they are less deserving of incapacitatory or deterrent sentencing. Ergo, there

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<sup>23</sup> As of December 2017, “First time offenders account for less than 8% of prison sentences” in England and Wales.(Cuthbertson, 2017)

appears to be an inverse relationship between our ideas of equivalence and desert, and our perception of the risk posed by an offender, and punishment's capacity to deliver either deterrence or incapacitation.

A further problem concerning whether or not punishment can be said to deter or incapacitate has to do with what has been called *criminal careers* in the work of 'life course' criminologists. It has been brought to our attention by writers such as Sampson & Laub (1993, 2005) that most offending takes place in the late teens and early twenties of the offender's life. This means that the longer someone is incapacitated the less are the chances of the incapacitation being actual or real. A further consideration to bring to the table is that if people are deterred from committing crimes, whether it is the facticity of punishment that is doing the deterring. Kleck has this to say on the matter (Kleck, 2014)

Extant evidence indicates that individual perceptions of the certainty, severity, and swiftness of punishment have essentially no correlation with actual levels of those measures of risk prevailing in the area in which the individuals reside. This suggests that public policies that are designed to reduce crime by increasing the deterrent effect of punishment are unlikely to succeed because they are not likely, in general, to increase prospective offenders' perception of the legal risks of committing crime<sup>24</sup>. This does not mean that there are no deterrent effects of the threat of punishment, but only that variations in objective levels of punishment may not affect the magnitude of any deterrent effects that do exist. (p. 1014)

The reason for this may be as Wikström et al (2011) suggest:

Our findings support the assumption derived from situational action theory that one important reason many people do not engage in acts of crime (particular types of crime) is that they do not see crime (a particular crime) as an action alternative, rather than that they abstain from it because they fear the consequences (their assessment of the risk of getting caught). People who do not see crime as an action alternative do not tend to engage in crime regardless of whether they assess the risk of getting caught as very high or very low. (p. 417)

Furthermore, the UK Government appeared to recognize that there is no evidence to support a direct correlation between the severity of punishment and its deterrent effect<sup>25</sup>

[T]here seems to be no link between marginal changes in punishment levels and changes in crime rates ... It is the prospect of getting caught that has deterrence value, rather than alterations to the 'going rate' for severity of sentences ... The evidence suggests that any new sentencing framework should make no new assumptions about deterrence. (Home Office, 2000, pp. 8-9)

It would appear, then, that the number of people actually deterred by the materiality of punishment is very low indeed. Incapacitation fares similarly. Whilst it is largely true (not 100%) that an offender who is incarcerated is not at liberty to commit further offences the judgement of whether this genuinely constitutes incapacitation (prevention of a *real* future crime) runs up against the problem of false positives, in that we cannot know whether or not the person convicted and putatively incapacitated was indeed at risk of committing more crimes.

A similarly risk based intervention came about in 2000 following the murder of Lin and Megan Russell in 1996. In the following year Michael Stone was convicted of the crime. Stone had a history of mental health problems and was known to have issued death threats. Questions were asked concerning why Stone could not have been pre-emptively incarcerated in a mental health institution and the reply from the Home Office was that it was illegal to lock up a person

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<sup>24</sup> Let us note that here, again, is evidence of the failure of punishment to communicate.

<sup>25</sup> See also (Doob & Webster, 2003; Nagin, 1998; von Hirsch, Bottoms, Wokström, & Burney, 1999)

with mental health problems if that problem was not treatable. The response of the then government was to get the psychiatric profession to agree to the definition of a new psychiatric condition which they called Dangerous Severe Personality Disorder, which, it was claimed could be treated, and that those diagnosed with the condition must be housed in special units new for the purpose. The pertinent fact here is that the new units were not placed in mental hospitals, but in high security jails. Whilst the claim that this decision was made on grounds of public safety, it is clear that at least an element of the infliction of punishment, the imposition of pain or harm was involved<sup>26</sup>.

*Punishment as education, treatment, rehabilitation, or correction.*

Neither Education nor treatment, rehabilitation nor corrections, or indeed any form of 're-training' requires the infliction of pain.

*Punishment and the infliction of pain.*

It has been my aim to proceed along these lines, as Sherlock Holmes puts it in *The Sign of the Four* "when you have eliminated the impossible, whatever remains, *however improbable*, must be the truth"<sup>27</sup>. I have considered several assumed claims concerning what constitutes punishment and found them all wanting, that is, all but one, viz, Walker's No.1) It involves the infliction of something which *is assumed* to be unpleasant. Let us not be so prissy; following Christie (1981), it involves the infliction of pain. This is the claim (in Holmes' terms) that "remains". In the Nichomachean ethics, Aristotle brings to our attention the word *epikhairekakia* (ἐπιχαίρεκακία) as one of a group of three terms with *phthonos*<sup>28</sup> (φθόνος), and *nemesis* (νέμεσις). The word has an English equivalent, *epicariacy*, etymologically derived from the terms for 'upon' *epi* (ἐπί), 'joy' *chara* (χαρά) and 'evil' *kakon* (κακόν). It is closely related to the anglicised German word *schadenfreude*: joy at another's (perceived justified) misfortune. These words speak of a commonly expressed sentiment, the joy at so called justice having been done. Justice, (often nothing more than *presumed* 'just deserts') when expressed in this way simply means pain. We can say this because the sentiment does not go along with any reasonable idea of what constitutes justice: that is, desert. Whilst this word *schadenfreude* alerts us to the capacity to delight in another's suffering, it refers to joy at the point of infliction of pain or after it, whereas, punitiveness refers to a period before the infliction: a *desire* or *will* to inflict pain in the *future* if you will. (I will suggest later that the frustrated, future-oriented nature of desire or will to correct a perceived slight, permits resentment of the supposed wrongdoer to fester, such that it evolves into a desire to inflict pain in the name of this impoverished notion of justice.) I cannot conceive of a single occasion of punishment that does not involve the visitation of pain or harm of some sort upon a victim. The question remains, however, whether this is what punishment is *for*. Nietzsche's account, has it that punishment arises out of our capacity to make promises, and that failure to keep promises constitutes debt. The mode of repayment of a debt becomes an issue if the debtor cannot repay the debt in its original form. In this circumstance the creditor is permitted to take something that the debtor still possesses, including parts of his body (this is surely Shylock's pound of flesh). Of interest to Nietzsche here is that no equivalence is involved, and points to this injunction from the twelve tables of Roman law '*si plus minusve secuerunt, ne fraude esto*'<sup>29</sup>. This Nietzsche (2017 [1887]) takes to indicate that compensation for the debt may be taken in the form of pleasure at the suffering of the debtor. This is, surely, in line with his notion of the will to power. Here it is power over the debtor without a thought; that is the pleasure '*de faire de le mal pour le plaisir de la faire*' (p. 42). So, it would seem, that the breach of a promise (to an individual, or to society) which breach we may often conceive of as a crime, may also be seen as a debt for which compensation is required, and that we take

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<sup>26</sup> See also Bruce Arrigo's (2002) Punishing the mentally ill.

<sup>27</sup> This is called the method of agreement by Mill (2015 [1843])

<sup>28</sup> jealousy

<sup>29</sup> If they have cut off more or less, let that not be considered a crime.

pleasure in exacting that payment *through suffering*. We may also see that compensation as the basis of punishment. Hence punishment *is* the infliction of pain, suffering, or harm.

We will certainly be left wondering if it is true that we revel in the suffering of others. Of course, Nietzsche thinks that such delight in suffering is present in the bacchanalian practices of 'the ancients'. "[I]t was not so long ago" he says, "it was unthinkable to hold a royal wedding or full-scale festival for the people without executions, tortures or perhaps an *auto-da-fé*" (2017 [1887], p. 43). A situation or condition which he describes as "human-all-too-human" (p. 44). As Adelson (2005) makes us aware, for example, people with the condition of dwarfism were 'kept' by wealthy families so that the members of the family might entertain themselves by ridiculing the dwarf and by taking delight in their suffering. As testament we may bring to mind the frequent depictions of people with dwarfism in family portraits of the 15<sup>th</sup> to the 18<sup>th</sup> centuries, perhaps most famously in Velasquez's *Las Meninas*<sup>30</sup>. We are also aware, however, that Elias (2012 [1939]) was of the opinion that these cruelties were gradually disappearing from society through the processes of civilization<sup>31</sup>, and this may *prima facie* appear to be so. That is until we see images of lynchings in the US up to the 1930s. It has been contended by Mowatt (2009) that attendance at lynchings was treated as a pleasurable leisure activity<sup>32</sup>, a situation attested to by the photograph of the lynching of Thomas Shipp and Abram Smith<sup>33</sup> where we may witness merrymaking locals grinning inanely into the camera<sup>34</sup>. As I write, the death of the serial killer Peter Sutcliffe aka the Yorkshire ripper is news in the UK. Scenes from his 1980 arrest appear on the news bulletin, with hundreds of people in Dewsbury – a small town in West Yorkshire UK - standing outside the police station braying for 'justice'. More protesters appear today as though wishing he were still alive so that more suffering could be inflicted upon him. What seems to me to be in evidence here is not joy as Nietzsche might expect us to experience but a vacuous hatred, a sheer will to inflict pain. Pain devoid of any pretence of any equivalence or commensurability. Indeed, that capacity to judge equivalence has been precluded by the removal of punishment from the public gaze, and the concomitant *failure* of punishment to communicate. The purpose of punishment, then, appears to be nothing more than the infliction of pain, and that is pain inflicted in a gratuitous, senseless way. Punitiveness, then, must be the will to do this and the human behaviour which conforms to this pattern at least in part, I suggest, is resentment.

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<sup>30</sup> <https://www.bbc.co.uk/programmes/p060c5m8>

<sup>31</sup> See also Pratt (2002).

<sup>32</sup> Professional photographers set up shop at the scene of these lynchings and did a brisk business selling photo-souvenirs of the event. Images of mutilated black bodies, some of them horribly burned and disfigured, were purchased as picture postcards, and passed between friends and families like holiday mementoes, dutifully delivered by the U.S. mail. One postcard, with a photograph showing a large crowd in downtown Dallas, is addressed to "Dr. J.W.F. Williams, Lafayette, Christian County, Kentucky" and reads: "Well John – This is a token of a great day we had in Dallas, March 3rd [1910], a negro was hung for an assault on a three year old girl. I saw this on my noon hour. I was very much in the bunch. You can see the Negro hanging on a telephone pole." Another, carrying an image of the charred, barely recognizable, corpse of Jesse Washington, suspended from a utility pole in Robinson, Texas, was sent by Joe Meyers to his parents in May 1916. The message reads: "This is the Barbecue we had last night my picture is to the left with a cross over it your son Joe." A third carries a photograph showing a group of onlookers (including several young boys), posing with Lige Daniels, who had been hung from an oak in the town square of Center, Texas, in August 1920. The message on the reverse says: "This was made in the court yard, In Center, Texas, he is a 16 year old Black boy, He killed Earl's Grandma, She was Florence's mother. Give this to Bud. From Aunt Myrtle." (Garland, 2005)

<sup>33</sup> <https://www.gettyimages.co.uk/detail/news-photo/the-lynching-of-thomas-shipp-and-abram-smith-the-african-news-photo/520830453?adppopup=true>

<sup>34</sup> See in particular Allen (2000). This is a collection of lynching postcards including the messages sent with them.

## Part Two

It appears from the foregoing that it is inadequate to equate punitiveness *merely* to a desire to punish, on the grounds, a) that we do not appear really to know what punishment is, b) punishment does not appear to actually be what we take it to be, c) it does not do what we want it to do, and d) it does not do what it is claimed that it does. Indeed, I have suggested in line with Christie (1981) that punishment reduces solely to the infliction of pain. Consequently, I wish to move now to a different approach to the analysis of punitiveness. That is, at least in part, to separate it, analytically, from punishment. What I wish to do is examine punitiveness as an affect. That is not in any way to suggest that punitiveness is *not* related to juridic punishment, but to conjecture that those affective processes that propel the desire to punish also propel other emotions, and vice versa, and by so doing show that punitiveness is not a necessary, not completely natural, nor an inevitable part of the way that we solve social problems. In taking this tack, I shall maintain that all societies regulate certain expressions, emotions, and sensibilities, promoting some and restricting or even repressing others. This generates certain characteristically defining affect structures belonging to different societies and cultures<sup>35</sup>. The relative excessive punitiveness of the United States and of the UK, one might suggest, is just one such culturally determined affect structure, and we are right to ask why this is peculiarly so. Above, I suggested that one of the reactive attitudes that appears close to punitiveness, to me at least, is resentment; thus I shall begin.

## Resentment

### *Resentment conventionally*

Conventional philosophical wisdom has it that resentment is a reaction to a demeaning action on the part of another; an action that leaves one feeling that one's status has been lowered in the eyes of others (Murphy, 1998 [1982]). Much of the philosophical literature on resentment concentrates on this individual experience, perhaps following from Murphy's (1998 [1982]) '*Forgiveness and Resentment*'. We should note however, that Murphy's paper is really about forgiveness and his discussion about resentment really only a foil, better to illustrate forgiveness as the *forgoing* of resentment. Hence Murphy has this to say. "[R]esentment ... functions primarily in defense, not of all moral values and norms, but rather of certain *values of the self*" (p. 16). Here Meltzer and Mussolf: (2002) "In common usage, "resentment" refers to a feeling of displeasure induced by being insulted, offended, or deprived. Thus, it is typically a reaction to slights or affronts, to assaults, whether mild or severe, upon one's self" (p. 240). And Hampton (1998 [1988]), the following, "[resentment is] a protest against the demeaning action but also a defense against the action's attack on one's self-esteem" (p. 56). Unfortunately, however, these individualistic accounts of resentment cannot account for resentments which arise out of systemic harms or slights. It cannot account, for example, for resentment of the male establishment for its persistent and insistent undervaluing and mistreatment of women. It cannot account for the resentment of the misogyny that occurs in social life in general. To point then, to just these two examples reveals that resentment can be not just of individuals or individual slights upon ourselves as individuals, but of what we might refer to as circumstances. One can resent having to take a dozen different pills every day, (I do), for example. Such things are not responses to any kind of individual slight or wrongdoing to the self. Walker (2006) has argued that relying on descriptions of the targets of resentment as "harmful and insulting treatment intentionally inflicted" (p. 135) promotes images of personal violence, abuse, and disrespectful behaviour, and makes light of the pervasiveness of resentment in everyday life. Moreover, I may harbour resentment towards the perpetrator of a wrong that is not in my direct experience. I may, as I suggested a moment ago, resent misogynists, whilst, clearly, never having experienced misogyny directed at myself. I resent racists, whilst never

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<sup>35</sup> I refer to my concept of culture as the site of the process of making meanings 'compossible' to use Husserl's term. That is, the site of the process of making and sharing meanings. See my (2013, pp. 170-178 in particular )

having been the victim of racism directly (of course we are all victims of misogyny and racism indirectly). These are aspects of resentment not supported by conventional models of resentment.

#### *Collective resentment*

If popular punitiveness and resentment are related to one another then, contrary to the somewhat individualistic sensibilities discussed above, the resentment of which we would speak is not individualistic in fashion but collective. We are aware that people may experience resentment as part of their response to a perceived threat to a collective to which they belong (Stockdale, 2013). The kidnap and murder of Sarah Everard in London on 3 March (2021) has elicited a significant response from large quantities of women, promoting mass vigils in several places. The resentment felt is not about an individually experienced event but a response to belonging to a particular group of people, women, and that women, collectively, are the victims of abusive and misogynistic behaviour from another class of people: men. The problem with my example here is that this behaviour by men is very real. Not all perceived slights are as factual in this way, and indeed, as Bender (1987) has suggested, the disappearance of punishment from public sight has resulted in the “projection of punishment into [the] imagination” (p. 231). But the point here is that one can feel resentment in regard of a slight to someone other than oneself; one would feel resentment toward the abuser of a member of one’s family or of one’s friend, for example. It is not a big stretch, therefore, to find resentment of an offence against one’s class, culture, peer group, ethnicity etc., not only possible but probable. Another kind of collective resentment may be envisaged, and that is resentment of a slight to the *image* of a group or class. The perpetrator of abuse against women may be resented by men as their actions reinforce an image of all men as abusers who think of women as objects for their sexual gratification.

#### *Resentment, harm and durability.*

Perhaps the most difficult problem when talking about resentment arises from the difference between what we might call the Scottish, and the French conceptions of the phenomenon. According to Adam Smith and his followers – amongst whom we may count Murphy (1998 [1982]) and recent others – resentment is a part of the natural, indispensable equipment of moral and social life, through which we express our investment in social norms and expectations, and where we also express the expectation that the resented will do likewise. In this conception there is little room for the punitive, indeed, it should be noted that it is in part a foundation for notions of the redeemability of offenders. The French conception of the phenomenon one might suggest has its strongest expression in Nietzsche and is quite different. Rather than the perception of resentment as being something rather unfortunate, individual, and fugitive, which to my mind also has about it a quality of American white middle-class equanimity – the reaction to a rude or inattentive boss, perhaps – resentment in Nietzsche (2017 [1887]) and Scheler (1961 [1915]) etc, is a passionate experience. The differences, broadly, are these. Punitive, Nietzschean resentment involves the desire for harm, it is collective in nature, it is durable, manipulable, and contagious, and in line with these differences is given another name, ‘resentiment’. Both Nietzsche and Scheler specify that *ressentiment* comprises feelings of hatred, wrath, envy, revenge, and the like (Meltzer & Musolf, 2002). This is much more in accord with our experience of the kind of feeling attendant upon punitiveness. Indeed, supporting the view that *resentiment* involves desires to inflict harm Scheler (1961 [1915], pp. 177, 198) attributes the French Revolution to an “enormous explosion of *ressentiment*”. Let us suggest that the experience of offence naturally (forgive me) results in the desire for redress or revenge even. Should such feelings have no legitimate outlet, that is, should the desire for revenge be (futrally) frustrated, it might be suggested that it ‘festers’, chronically into a durable punitive *resentiment*. This sensibility now has two of the characteristics outlined above: durability, and the desire for harm. Indeed, Scheler (1961 [1915], p. 50) contends that revenge becomes translated into *resentiment* the more it is directed against long term feelings of impotence in the face of perceived injury. Hence, Solomon (1994) suggests (although contradicting Nietzsche’s and Scheler’s belief in ‘bottom up’ *resentiment*) that perceived impotence or decrease in power, status, or entitlement – or perception of such – is a crucial component of *resentiment*. As Barbalet (1998) has it “[b]oth *resentment* and *ressentiment* are “based not on personal

involvement so much as personal insight in the disjuncture between social rights and social outcomes [(future) DJC]" (p. 137). If this is so – and it appears to correspond with our personal experiences and observation – we should expect the desire to inflict harm to occur chiefly when the agents of acts engendering either resentment or r resentment are of lower status (and power) than the aggrieved. Although, it is the case that we can perceive a slight from free-riders from higher status individuals or classes, where punitiveness is concerned I believe this more commonly the case that resentment is directed downwards, and this is probably the so because those of higher status (for want of a better term) more readily have the capacity for mystification, misdirection, and manipulation, something to which I will now turn.

### *Manipulability: Resentment and punishment*

I wish now to trace evidence of a the development of a certain kind of resentment that can be related to punitive feelings. As we have seen above, and through the work of Driver (2004) and of Reynolds (1994), the workhouse may be thought of as an extension of the penal apparatus in the UK during the 19<sup>th</sup> century, particularly because of its poor conditions and its insistence on sisyphian labour. But we may in addition, think of the workhouse as being a carceral institution, in that one of the injunctions governing the institutions was that those incarcerated were not permitted freedom of movement<sup>36</sup>. Moreover, should they break the rules of the workhouse the inmates were liable for a fine of between five and ten pounds, that is, 500 to a thousand times their typical weekly earnings of two ('old' UK<sup>37</sup>) pennies. These conditions were governed by the Poor Law Amendment Act ("An Act for the Amendment and Better Administration of the Laws Relating to the Poor in England and Wales.," 1834) (also known as the New Poor Law) and its contents of a provision that has become known as 'less eligibility' which states that the situation of the able-bodied recipient of poor relief "on the whole shall not be made really or apparently as eligible as the independent labourer of the lowest class." 'Eligible' in this circumstance means desirable. We may reasonably suggest that the workhouses and the poor laws were not designed to alleviate poverty but pauperism (Driver, 2004): that is, to prevent the supposed indolent poor from benefiting from public assistance, leading Charles Dickens to say, "we have come to this absurd, this dangerous, this monstrous pass, that the dishonest felon is, in respect of cleanliness, order, diet, and accommodation, better provided for, and taken care of, than the honest pauper" (1850). In this light, the New Poor Law is to be seen as a typical piece of Whig-Benthamite utilitarian legislation. Nonetheless, I wish to shed light here on something which I will develop shortly, namely that as an act of governance, the new Poor law acts through the inculcation of resentment both toward the recipient of "poor relief", and towards the presumed "dishonest felon", and that that resentment rests upon an apprehension of the resented class as free riders. The principle of less eligibility is founded upon the utility of deterrence, but it is also founded upon discrimination of the deserving and undeserving in welfare provision (Sparks, 1996). For the believer in less eligibility's deterrent properties a robust retributivism existed alongside moral compulsion since anything else would constitute an affront to the 'honest labourer'. As such, less eligibility serves a role in dividing the sufferers from society's ills into 'me' deserving, and 'you' undeserving. Even in the realm of penal transportation, concerns over less eligibility arose when reports of ex-convicts having 'made good' were received by poorer relations left at home (Mannheim, 1939). Of course, this is a two way street in that whilst the state creates (in part) the segmentation, and the concerns of the divided poor, it simultaneously reflects them back, to its political advantage.

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<sup>36</sup> For example Rule VI of the rules of the house at Aylesbury state "That none absent themselves from the House without leave" (Gibbs, 1835) or the rules of Doncaster workhouse "[those poor] who are desirous of going out [do so] only at the same time of year at which they came in" (Sheardown, 1867), or Hackney, "that no person be permitted to go out from the house without leave from the committee" (Higginbotham, 2016).

<sup>37</sup> Until 1971: 12 'old' pennies = 1 shilling = 5 'new' pence = 5% of 1 pound sterling (current).

The sentiments that drive the doctrine of less eligibility are clearly not constantly in the forefront of the populace's nor the lawmakers' minds. Following the Gladstone committee's 1895 replacement of the deterrent ideal with the rehabilitative 'good and useful life', less eligibility receded from the vanguard of penal aims (Sparks, 1996). Even so, the doctrine continues to bubble under the surface, resurfacing in times of political and economic upheaval (Mannheim, 1939; Melossi, 1993). Similarly Sparks (1996) observes that during 1993 and 1994, during the tenure of Michael Howard as UK Home Secretary, there was a significant revival in the doctrine of less eligibility, following upon an academic revival of classical theories of crime, notably from criminologists like James Q Wilson (1985) who describes a class of rational parasitic criminals whom he refers to as 'the calculators'. The implication here is that there exists a 'class' of criminals, and that such a class is predatory on 'your' class, and that they are benefiting at 'your' expense. In other words, Michael Howard's rhetoric and that of Wilson has the effect of sensitizing the population to the supposed presence of 'free riders'. The relationship of such rhetoric to less eligibility is to be observed in the headlines of the UK tabloid newspapers that persistently speak of prisons as 'Holiday Camps' and of prison cells awash with play stations and the like<sup>38</sup>. The object, again, is to appeal to a sense of 'them' as free riders enjoying a life of greater 'eligibility' than 'you', the honest hard working, law abiding citizen can afford, and to inculcate feelings of resentment<sup>39</sup>. Such politicking is startlingly in evidence throughout Europe and the US currently with the rise of regimes such as that of Viktor Orbán in Hungary or the Law and Justice (*Prawo i Sprawiedliwość*) party in Poland, the myth of job-stealing Eastern European immigrants in the UK and the resentment and hatred harboured by Evangelical Christians and neglected white male voters in the US. These resentments, falling as they do, some way away from the very poorest in society were, of course observed by Runciman (1966) and by Stauffer (1949) whose analyses form the basis of the concept of relative deprivation to be found in perspectives like 'Left Realism'. Their observations pointed to the greatest resentment being present among those in the middle of society.

We might point out that Durkheim thought that although punishment is enforced upon those categorized as criminals it "is above all intended to have its effect upon honest people" (2014 [1893], p. 83). This is very much in line with Habermas' (1976) 'legitimation crisis', that is, loosely, the notion that governments respond to the boundaries of possibility by *generating* concerns that it is *capable* of addressing, and hence diverting, through mystification and misdirection, attention from those it is not. Whilst I have mentioned some relatively commonplace adjudications of circumstances or of the behaviour of others that give rise to resentful attitudes, such as erosion of traditional cultural practices, economic inequality, erosion of traditionally held (assumed) entitlement, perceived slight or insult, for example. What we are interested in in this paper is adjudications of behaviour associated with punitiveness. Clearly, we may make negative adjudications concerning our own individual victimisation such as oneself having been burgled or assaulted, for example, and we may feel resentful, particularly if the individual offender is perceived to have been leniently dealt with. This kind of reaction, like Murphy's (1998 [1982]) kind of resentment, occurs at an individual level and has very much to do with individual circumstances and individual histories which personal affects are not really what this paper is about. We are interested particularly in the collective phenomenon of popular punitiveness, and the punitive resentment of whole classes.

The development of the public notion of a criminal 'class' such as Wilson's 'calculators', as opposed to a criminal individual, is not new. The study of criminological topics is at its core the study of difference and similarity between this group and that, between this culture and the other

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<sup>38</sup> Those readers unfamiliar with the British Tabloid Press, should know that they are notorious for dissembling, economy with the '*actualité*', or downright lying.

<sup>39</sup> My wife likes to tell a story of two people sat opposite one another on a train. One is sat behind a huge pile of doughnuts so high they have to stretch to see round them. Opposite is someone with a single doughnut. The person with the huge pile speaks to the person with one donut, and, pointing to a person passing, says "watch out, he's trying to steal your doughnut!"

(Crewe, 2015). We may also say with some confidence that systems of punishment are devised by some for imposition upon others. We have seen, above, that Nietzsche was of the opinion that punishment has its roots in the offering and failure of promises, and the consequent private obligations, and progressed therefrom to systems of retribution that represented resentment of whole classes, of people of other classes. Foucault indicates in his lectures at the College de France (2018 [1973]) on the 17<sup>th</sup> and 24<sup>th</sup> of January 1973, that the mid-18<sup>th</sup> century analyses of Le Trosne<sup>40</sup> (similar to those of E. P. Thomson, and Douglas Hay above) suggested a shift in the 'systematicity' of punishment as a result of vagabondism. Le Trosne advances the enlightenment sentiment that an offence against one member of society constitutes an offence against society as a whole and that the unemployed vagabond (and groups thereof) are parasitical on society as a whole, leading Foucault to suggest that this constitutes the beginning of the notion of the criminal (class) as an enemy of society. Concomitantly, as the affect of punitiveness manifests itself both at the individual and the collective level and in consequence any concept we choose or design to make sense of this phenomenon must similarly function as a shared as well as a personal phenomenon. For successful collective and shared social recognition to take place the putative other must be defined in a way that is as inclusive as possible and that frequently means as loosely as possible. Where the inculcated resentment of immigrants is concerned for example, recently in the UK over the so called 'Brexit' debate and its adjuvant migrant debates, such immigrants were variously labelled as both coming from the EU or not coming from the EU. The important thing to realize was that 'someone' was trying to steal your work and it was right to conceive of 'them' as being a parasitic class. It is also noteworthy that the putative victims of such a parasitic class are also treated as a class, in this case, 'the public', in the White Paper 'Justice for All',

[1] The public are sick and tired of a sentencing system that does not make sense. [2] They read about ... serious offenders who get off lightly, or are not in prison long enough or for the length of their sentence<sup>41</sup> ... [3] The system is so muddled that the public do not always understand it (Home Office, 2002, p. 86).

This is a kind of polemical language usually considered inappropriate in a serious policy document (Tonry, 2004). Nowhere does the White Paper give evidence of a public confused by sentencing outcomes. Sentencing procedures and outcomes are similar across many Western jurisdictions and if the UK's doesn't make sense then neither do theirs. Second, it is a matter of legal or governmental power, or of democratically expressed solidarity, whether or not a sentence is appropriate. It is not a self-positing standard that somehow manifests itself out of the ether. What is happening here is that the writer of the White Paper (the government of the day, loosely) is attempting to speak to a putative class, "The Public", whose collective interests it believes it is *capable* of addressing and mobilizing through a fabricated resentment of a notional free-riding criminal class, which resentment it is culpable in generating by such rhetoric.

Where resentment is based on a perceived economic slight, we might suggest that Weber's (1978 [1905]) 'Protestant Ethic' has some traction in making sense of the situation. Albeit that rather than the protestant nature of the work ethic translating economic slight into a religious one, the economic slight also translates into a slight against a collective belief in hard work, or, again, a resentment against pecuniary free riders on a system of supposed reciprocative benefit and subscription. As Jeffrie Murphy puts it " ...resented wrongs can be of two sorts: resentment of direct violations of one's rights (as in assault) or resentment that another has taken unfair advantage of one's sacrifices by free riding" (1998 [1982], p. 16). Where *punitiveness* as resentment is concerned, we might profitably look at Elias' (2012 [1939]) civilizing process. I do not mean by this that I subscribe to Freud's account of the development of the super-ego (I do

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<sup>40</sup> G. F. Le Trosne *Mémoire Sur les Vagabonds et sur les Mendiants*. Paris 1764.

<sup>41</sup> That is, they are allowed out on parole too soon.

not) but I do mean to appeal to collective sensibilities concerning ‘civilized’ behaviour. Elias’ account reveals to us that what we might call ‘civilizing work’ is done by the collective. In this view, then, those who behave in an ‘uncivilized’ way may be seen as free-riders on a culturally advanced, beneficial society in which we may all be expected to take an active part equally to secure. An important issue here is that ‘uncivilized’ behaviour must not be confused with criminal behaviour. For example, young men parading around town, drunk, and without their shirts, promote negative reactive attitudes like resentment but such resentment is not a reaction to behaviour that is against the law, nor against one as an individual, but it is perceived as ‘uncivilized’. It is seen as free-riding because, it is perceived that such young men should be at work, (Weber), and that they should contribute to the decorous nature of social living by keeping their shirts on, (Elias). In other words, sharing in the ‘civilizing work’ expected of everybody. The view often expressed is that these lads should be locked up – ‘given a short sharp shock with a night in the cells’: in other words, punished. Similarly, we hear, benefit recipients who don’t dispose properly of rubbish from their front gardens should have their benefits stopped. English politicians have recently stated that benefit claimants should not be given money to feed their children during school holidays because they will simply spend the money in crack dens (Murphy, 2020). These attitudes are not driven by law breaking, but they do call for the infliction of pain for this behaviour or that, and they are not targeted against the acts of individuals, but of one class or another. That is, they represent a desire to punish, regardless of the content of the law. This is very similar to the desire to inflict pain upon those on remand despite the remandee not having been convicted of any crime<sup>42</sup>. Punitiveness is not directed against criminals necessarily, it is not directed necessarily against a *criminal* class, but it is directed against a *xenos* (ξένος), a class of others, generated jointly by those who make the law (and hence, who make criminals), and the general public.

A significant point in our discussion of punitiveness is that the reader may say that my discussion of resentment – should I persist in separating punitiveness, and the kind of resentment engendered by cultural and economic slight – is not a discussion of punitiveness. The point is this, that punitiveness is not always about crime, and it is not always about punishment as conventionally conceived. But it is always about a desire for punishment reduced to the delivery of pain, whether for criminal activity or not, and much of that kind of desire we call resentment, and it is as we have seen, manipulable and in addition it is contagious.

#### *Contagion: Penalty and culture*

We have seen above, how resentment can be manipulated. Considering what I have just said, it is apposite that we now address the phenomenon of contagion. Towards the end of his book ‘*Punishment and Modern Society*’, Garland (1990) moves to an examination of the relationship between punishment and culture. This is surely a necessary move. He is keen to point out, correctly, I think, that the relationship between punishment and culture is a two-way street, as I maintained above. Punitive attitudes are not only a reflection of cultural values, but also an inculcator of them. However, he is wrong, I believe, on two counts. He appears to take culture or cultures to be entities: that is, he reifies them, and imbues them with a stability, ipseity, and hæcceity they do not possess. Moreover, he takes punishment to be communicative in a way that I have suggested it probably is not. Let us unpack this a little; Garland’s language is instructive here. His aim, he says, is to “indicate just how penal *practices* contribute to the *making of the larger culture ...*” (p. 250 my emphases). This is of interest because it appears to me to evince a degree of functionalist thought, where functionalism is the doctrine that what makes something what it is dependent upon its function, or the *role* it plays, in the system of which it is a part. These ‘somethings’ in Garland’s language are “larger culture” and “penal practices”, and they are characterised by their properties<sup>43</sup> rather than by their capacities: that is, their supposed actual function in shaping one, criminal justice institutions, and two, cultural manifestations. The

<sup>42</sup> See the discussion of Garland’s (2018) above.

<sup>43</sup> See DeLanda (2006) and (Crewe, 2013).

word “making” indicates a kind of mechanical image of causation, in which, paradoxically, elsewhere in the chapter, he pejoratively accuses social sciences of persisting. In yet more mechanistically functionalist language, he says that he is keen to show that “culture [is] a *determinant* of punishment” (p. 249 my emphasis again). This reveals to my mind, a somewhat impoverished view, on Garland’s part, of the interrelationship of capacities and processes in the social world: that is, a world which is characterized by relations of exteriority, not relations of interiority. In a world characterized by relations of exteriority, culture is a set of processes leading to, or an emergent property manifested from, the interplay of the capacities of those processes. These processes (which are really *cultural* processes) are the processes by which we negotiate the (merely) *pragmatic* meaning to be attached to symbols, so that that meaning can be more or less shared and used to communicate about something or other in its absence. When we do this, we belong to a collective that shares that particular *pragmatically* ‘agreed’ meaning. This collective, to my mind, is what we call a culture, and it is highly fluid: indeed, it is never stable. Counterintuitively, in reality, it may have an infinitesimal degree of durability (Crewe, 2010). What is durable, though, is the nature of the *processes* of generating the feelings of belonging involved; its *manifestations* are not. Moreover, reification of ‘culture’ gives rise to locutions like ‘gang culture’, ‘knife culture’, or ‘grooming culture’<sup>44</sup>, for example, which so often contain connotations of ‘race’<sup>45</sup>, the upshot of which is to mystify and misdirect with regard to the real problems of racism, for example. It is worthy of note that we rarely see reference to ‘greed culture’ or ‘drunk culture’ or ‘libertarian culture’ or ‘misogynistic culture’ or ‘homophobic culture’ or ‘racist culture’ since these might be *our* guiding values. Where the term culture is used as a tool of misdirection and mystification, it has become a term that merely means different: but it means it in a pejorative way, and that means that it can be used to inculcate resentment and fear.

Garland’s second error, I believe, lies in his notion of what he takes to be the communicative nature of punitive action. As I have mentioned above, this idea has a long history<sup>46</sup>. “Punishment among other things, is a communicative and didactic institution” Garland (1990) says “Through the media of its practices and declarations it puts into effect – and into cultural circulation – some of the categories and distinctions through which we give meaning to the world” (p. 251). This, I think is a very bold claim. As I have already made clear, it seems to me that the evidence suggests that punishment does not communicate. People do not seem to be communicated to by instances of specific acts of punishment which must be what Garland means by the “practices” of punishment, not least because people in general are not interested in them, or at least, not until their sensibilities are stirred by media coverage, let’s say, of a particular crime, or of a particularly newsworthy sentence. What they are stirred by is the perception of a threat to their membership of a group, or to the persistence or the identity of the group, or to their ‘entitlements’, not so much the particulars of any individual sentence. The evidence, concerning deterrence mentioned above indicates that people are not used to thinking ‘I would probably only get X months inside for a first-time burglary’, or ‘I might get X years since I’ve been done one already’, that is, Wilson’s ‘calculators’ (1985). Yet Garland now suggests that the communicative and didactic nature of punishment is affected by punishment’s “declarations”. To support this claim, he makes an appeal to Searle’s (1969 *inter alia*) and Austin’s (1975 [1969]) speech act theories (although he credits neither Searle nor Austin with the notion of illocutionary acts). Judges, he supposes, are in the business of ‘teaching a lesson’ to offenders by their “terse, plain-speaking words of condemnation”. In other words, by

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<sup>44</sup> See Crewe (2016)

<sup>45</sup> ‘Race’ is, of course, in part, also a reified concept. That is, I take it that there is no real biological phenomenon, ‘race’. However, I recognize that the *perception of race* is a phenomenon with real social force, a Durkheimian ‘social fact’, perhaps.

<sup>46</sup> See Duff (2003).

performing excoertives<sup>47</sup>, in Austin's terminology. But the real question is 'what do these speech acts actually do?' A common example given of a speech act is the phrase 'I now pronounce you husband and wife'. It is often said that this speech act 'marries' two people, never the less, that is not the case. This speech act *pronounces* that the marrying has taken place *by virtue of the witnessed exchange of vows*, the making of promises. This is what does the marrying. The supervisor of the ceremony is that witness, he declares that he has witnessed it. What then does the judge's "terse" language do? If it communicates at all, it communicates to an audience, an audience that consists, according to Garland, of the offender, and following that the population of inmates to whom the offender later communicates. Also witness to this performance are court reporters and other interested parties, eventually reaching what Garland calls 'the general public'. *What* it communicates is the sentence. This is, however, not the punishment itself, nor does it actually involve itself in the pragmatic *negotiations* that are involved with establishing cultural meanings, it is a declaration that is not open to negotiation; it merely *announces* the line taken by the law-making class on the offence committed. As Garland (1990) puts it "[t]hese institutions tacitly hold out their own practices as models or exemplars, showing how conduct and persons are to be held to account, by whom and on which terms" (p. 265). The actual audience envisioned here by Garland is not the "larger culture" that he refers to earlier in the chapter, and, if that "larger culture" has not been communicated to, they cannot use the communication as part of their meaning-negotiating processes. This 'top down' model, to my mind at least, is just not the way cultural communication works; we do not take our cultural 'instructions' from our 'betters' in the manner of a schoolchild from a patrician master. We negotiate them.

There is, however, a way that punitiveness *is* involved in cultural formation, and it has to do with belonging, as I have already suggested above. The origin of the suggestion I wish to advance here is the understanding that our symbols are elastic. This elasticity is necessarily so because of (the doctrine known as) privileged access: that is, (the conviction) that the only states of mind about which we can have any certainty are our own. In this circumstance, in order to communicate, we have to agree to agree that our grasp of another's states of mind, is, pragmatically, close enough. This is what I mean when I say that we share meanings. When we share meanings, we feel that we belong to the group, class, culture, that shares these meanings. One of the things that is of importance to this paper is that amongst other things, we share our resentments. We may imagine, for example, two people in the country club, or golf club; one says to the other 'doesn't it just rile you when ...?' The answer may be perfectly straight forward 'Oh yeah - dreadful'. 'Yeah' they chime, 'We should lock them up.' They both drink from their scotch and Club Soda. What has just happened here is that the second speaker has given what is called the 'preferred answer'<sup>48</sup>: they have agreed to agree. Imagine, however, that the resentment harboured by the first speaker was of people of colour, and the second speaker was you. You have three options; to give the preferred answer because you agree with the first speaker, to give the preferred answer despite disagreeing with the first speaker, which will make you feel uncomfortable, or you can give the 'dispreferred' answer which will mean a degree of discomfiture from the challenge to your self-confidence, and that the first speaker will not consider you a member of 'their' club. You take your drink elsewhere. A question then arises. If you take your drink elsewhere to share with someone else, will you find the same resentments expressed? If you do, you will not join the club. You may, however, suppress your own concern about the dominant culture of racism in the club because you are desperate to ingratiate yourself with your neighbours, for example; you are desperate to become a member of your local country club (or working men's club). This is an indication of how resentments, attitudes etc., intensify in

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<sup>47</sup> in which speakers exercise powers, rights or influence, e.g. excommunicating and resigning etc.

<sup>48</sup> See for example Harvey Sacks' (1987 [1973]) *On the Preferences for Agreement and Contiguity in Sequences in Conversation*, or his (1974) *A Simplest Systematics for the Organization of Turn-Taking for Conversation*, with Shegloff and Jefferson, in their work on conversation analysis and in particular, adjacency pairs.

social (cultural) situations. The desire to inflict harm on those whom one resents becomes amplified through the mechanisms of sharing meanings and attitudes in the social (cultural) setting. However, should you decline membership of the club on these grounds, your sensibilities will not become the defining cultural feature of that club, or whatever meaning-sharing group we care to think of. Please forgive me for this highly crude example. Nonetheless, these memberships (of any kind of meaning-sharing group, even as small as two people, and stretching to what we might call a national culture) are the vehicle for the intensification and reinforcement of cultural attitudes like resentment and the concomitant desires to inflict harm. Similar processes of negotiating preferred and dispreferred speech, behaviour, or meanings are at work in far more subtle ways across all modes and scales of interaction (Sacks, 1987 [1973] et passim; Sacks et al., 1974).

A major problem with this kind of communication has become considerably more significant recently. In part one of this paper, I suggested that the retreat of penal sanction from public view has served to reduce our sympathies with the victims of penal practices. It has been suggested that we have moved into a 'post truth era'. For example, in the US you may watch Fox News and consequently believe that your country is being over-run by people from Mexico who are all murderers, rapists, and economic free-riders. Our resentments appear to be more and more open to suggestion, and the inculcation of division by those with the power to control the media. Our resentments, in consequence lose their connection to any real slight or harm and become more and more attached to groups of Others whose othering serves as a tool of governance. Our response is then, fuelled by our resentment, to wish those others harm.

### **Conclusion: Punitiveness, responsibility, resentment, and liberty.**

I am always interested when an idea seems to suggest of itself that its meaning is obvious, and this has been true for me for a very long time where the notion of popular punitiveness is concerned. How and why is this phenomenon so established (if indeed it is) and so widespread. One might assume that the commonplace view of what punitiveness is, is the desire to inflict punishment on offenders. The question begged by this notion is 'what is punishment?' If we knew the answer to this question, the question 'what is punitiveness?' would be a relatively straightforward one. I have suggested that, in reality, this is a long way from the truth. It appears that only one of the conventionally accepted definitions, or conditions for something to be considered punishment is without serious problems and that one, following Christie (1981) is that it is the infliction of pain, or harm. Hence, punitiveness would be the desire to inflict harm. We discover a further problem however when we assume that the harm should be inflicted on offenders; what do we mean by offenders? I suggested that the evidence indicates that offenders legally defined are not the only group upon which we wish to exact punitive harm.

An examination of the emotional foundations of popular punitiveness appears to show that it is a cultural affect: it is *emergent* from cultural processes. It operates via shared resentments or supposed shared resentments that serve to, establish, secure, and identify belonging to a particular group or class. It is also a part of the hegemonic processes of the governing classes, particularly evident at the moment where 'woke' ideas, for example appear to threaten the 'entitlement' of those classes, and hence, inculcate in them a resentment of so called 'liberal elites'. As I have pointed out above, resentment is conventionally taken to be an individual phenomenon. This is readily visible when one has been assaulted or burgled for example, or when one has been snubbed by one's boss, but resentment may manifest itself as a combination of individual and collective phenomena. For example, we have seen that I (as an individual) can resent a *class* of people that I perceive to be free riders. In the UK a perennial example of this kind of effect is the resentment of benefit recipients, or particularly currently, asylum seekers. The United States, at the moment, for example, appears to display a four-tier structure of resentment. Coastal liberals resent the chauvinism represented by the 'republican' upper classes and the extreme inequality that their economic behaviour brings about. These 'republicans' resent the liberals' attempts to hamper their perceived entitlement to continue in this vein: their

liberty so to do. Through acts of misdirection, a class of neglected blue collar and working-class people, is caused to resent a putative, parasitic underclass whom they are encouraged to believe are free riding on their hard work, in addition to the liberal coastal class who are said to encourage this free riding, killing two political birds with one stone.

When one, or one's relationships, are parasitized upon by the free rider, the effect is to send a message that the victim is of diminished worth, or in Kantian terms, not fully a person who is an end in their own right: one of diminished rank. In Levinasian terms, the parasite fails to respect the true 'height' (Levinas, 1998) of the Other who precedes him. This is, in part, the nature of the slight given by the free rider. However, there is, of course, in Levinas, a concomitant failure on my part as the free-ridden-upon: the resenter. My resentment of the free rider represents a failure on my part to accord to the free rider the 'height' due to them as a subject in their own right, who is given over to my responsibility (Levinas, 1981): a subject whose own subjectivity precedes my apprehension of him. In plain terms, I, as the resenter, fail to understand the circumstance of my victimizer, to place myself in their shoes, as it were. I have failed to exercise my responsibility towards my victimizer<sup>49</sup>. Were this to be brought to many people's attention they would probably say that the claimant of benefits or seeker of asylum should take responsibility for themselves. In this response, surely, is revealed an antinomy between responsibility and liberty when liberty is thought of as freedom from constraint: that is, Berlin's (1969) negative freedom. My desire for liberty, then, foments resentment of those who would restrict it, and resentment foments the desire to inflict harm: that is, punitiveness. Our view of our own liberty is always skewed, we almost always perceive it to be under attack, that there is someone 'taking liberties' as we say. There should, in Levinasian terms, exist an inequality that means *all responsibility* is mine. In reality, it is a more common belief that all *liberty* is mine. And we appear to have a great propensity to resent anyone who looks like impeding those liberties.

Our liberties can be constituted of all manner of things, after all, complete liberty in Berlin's negative liberty terms means being free to do whatever we might want. Hence, if I wish to work at fruit picking and wish to be paid a certain wage for that work, I will resent the person who is prepared to do that work for less. I can be sensitized to feeling this way for political purposes, particularly if those workers can be perceived as a distinct group. This kind of resentment is a pernicious durable experience, not a brief disturbance or moment which one readily gets over (as in the standard account of resentment to be found in Murphy and others). On the other side of the coin, the patrician who is used to having many such people work for them on these poverty wages will be resentful should a minimum wage be established, which would serve to restrict their freedom to exploit their workers, and hence their freedom to live the wealthy lifestyle to which they have become accustomed, that is, to threaten their feeling of entitlement to these things. The point is that the real exploiters here are not the poor seeking work, but the wealthy libertarians paying dirt wages. I noted at the very beginning of my introduction that the target of resentment does not have to be real. This makes the task of the manipulation of resentments more readily achievable. The target of the poor's resentment of those in greater need than them has been manipulated by rhetorical misdirection and mystification, and this is a highly commonplace political tactic of the patrician class.

As a result of this mystification however, rather than bottom up as in Nietzsche, punitive resentment appears to work top down, particularly at the lower levels of society (for want of a better term). Those policing the BLM protests with 'less lethal' weapons, surely resent the protestors. They appear to resent the resentment of the status quo that the protestors represent, and which status quo serves their lifestyle and family life, not just through the provision of a wage but through membership of well documented police culture. Their response to the protest is punitive. We should note, however, that my freedom is *always* at the cost of the freedom of someone else. My choice of action *always* serves to restrict the choice of another. This is true at an extremely banal level. I buy the last pack of cheap bacon in the store; someone less well off

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<sup>49</sup> See Crewe, (2019).

than I has to pay more for their bacon. However, the notion that 'my' freedom over-rides my responsibility to Others is one of the most pervasive, and indeed pernicious, views in the West, and indeed it should be noted that almost universally it persists, politically, at higher levels, along with heightened levels of inequality, in those states with the most pronounced levels of punitiveness. As Downes and Hansen (2006) put it:

simply, we find that countries that spend a greater proportion of GDP on welfare have lower imprisonment rates and that this relationship has become stronger over the last 15 years. The consistency in these findings across the United States and the other 17 countries studied makes it difficult to believe that this relationship is simply accidental or coincidental (p. 1).

Punitiveness, then is a pernicious kind of resentment, or even resentment, that is not necessarily related to legal wrongs or law-breaking. It appears that the frustrated, future-oriented nature of desire or will to correct a perceived slight, permits the resentment to fester, such that it evolves into a desire that the precipitators of that resentment are caused to or permitted to suffer harm: these harms constitute punishment and the desire to inflict is what we call punitiveness. I claimed, however in part one of this paper that punishment merely reduces to the infliction of pain. In this circumstance it becomes reasonable to speak of punitive resentment that is not bound by juridic considerations. Freed from this illegitimate constraint, the desire to inflict punitive harm in response to many kinds of slight becomes evident. A large number of these perceived slights involve the supposed apprehension of free riders and these, often, are free riders on my liberty. My liberty to pay low taxes is curtailed by the imperative for me to be responsible for the other in need. For example, I may resent refugees coming to the country and causing my taxes to rise to pay for their health care. Expressly in the United States, many resent those reliant on Obamacare because they feel it raises their insurance costs. They wish harm on those people because they effectively say 'let them suffer, they should take responsibility for themselves'. My liberty to be paid a reasonable wage for my work is curtailed by those prepared to work for less than I. My reaction towards them is punitive, I wish them harm when I desire to send them back to their country of origin where they may well experience abject poverty. 'Well', I may say, 'they should look after themselves'. These attitudes are punitive. This is popular punitiveness at work. It is not a *necessary*, not completely natural, nor an inevitable part of the solution of social problems, and accordingly we must conclude that it is eradicable. Hence, let me return (almost) to the Golfing translation of Nietzsche (1956, p. 204 my emphasis). "It is *possible* to imagine a society flushed with such a sense of [mercy, and responsibility for others DJC] that it could afford to let its offenders go unpunished. What greater luxury is there for a society to indulge in". We would also like to be able to say, where criminals conventionally conceived are concerned, 'come back into the house where it is warm, and we can care for you'. Unfortunately, currently the house is not warm, all the heat has been purloined by the people living in the penthouse apartment, and those downstairs are left fighting over which of the people living in the basement they most resent for leaving the door to the apartment open.

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