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doi: 10.4013/fsu.2026.272.11

Punishment, vulnerability, and human rights

Punição, vulnerabilidade e direitos humanos

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RESUMO: O objetivo principal da presente pesquisa consiste em analisar o problema moral e político da punição com relação à vulnerabilidade e às injustiças. Argumentamos que as práticas penais recaem de modo desproporcional sobre os grupos mais vulneráveis, o que implica, de algum modo, na reprodução e perpetuação de desigualdades sociais profundas pelo sistema penal. Para tal, nos basearemos nas reflexões apresentadas por Hyman Gross e Bruce Waller sobre o aspecto injusto da punição caracterizado pela imposição intencional de sofrimento e pela violação de direitos humanos básicos. Restamos, também, algumas críticas abolicionistas para ilustrar o caráter estrutural da injustiça penal e examinamos os limites dos conceitos tradicionais de merecimento e proporcionalidade como garantias contra a arbitrariedade. Por fim, apresentamos algumas possíveis alternativas ao modelo penal centrado na retribuição, como o modelo de quarentena, o modelo terapêutico e o modelo educativo, com vistas a superar a lógica retributiva por práticas capazes de buscar a prevenção, reabilitação e reintegração social. Concluimos que reconhecer a punição como injusta, nos impele a restringir sua aplicação e a desenvolver respostas compatíveis com a dignidade e os direitos fundamentais dos agentes.

Palavras-chaves: punição; vulnerabilidade; direitos humanos; modelo de quarentena; modelo terapêutico; modelo educativo.

ABSTRACT: The main objective of this research is to analyze the moral and political problem of punishment in relation to vulnerability and injustice. We argue that penal practices disproportionately affect the most vulnerable groups, thereby reproducing and perpetuating deep social inequalities within the penal system. To this end, we draw on the reflections of Hyman Gross and

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Bruce Waller regarding the unjust nature of punishment, characterized by the intentional infliction of suffering and the violation of basic human rights. We also discuss certain abolitionist critiques to illustrate the structural dimension of penal injustice and examine the limits of traditional concepts such as desert and proportionality as safeguards against arbitrariness. Finally, we present possible alternatives to the retributive model of punishment, including the quarantine model, the therapeutic model, and the educational model, aimed at overcoming retributive logic through practices oriented toward prevention, rehabilitation, and social reintegration. We conclude that recognizing punishment as unjust compels us to restrict its application and to develop responses consistent with the dignity and fundamental rights of individuals.

Keywords: punishment; vulnerability; human rights; quarantine model; therapeutic model; educational model.

1 Introduction

The objective of this article is to reflect on an important aspect of punishment, which is that of penal injustice, in such a way that punishment generally falls on the most vulnerable citizens, such as illiterate people, the mentally ill, low-income populations, and the Black community. And depending on prison conditions, punishment implies the loss of human rights, as in the Brazilian case, where overcrowded prisons with precarious structures are common. This is characterized as an injustice, since punishment falls arbitrarily on those who are already victims of society, as a kind of effect of structural injustice, which occurs in societies with great social and economic inequality, as is the case in Brazil and the United States. Structural injustice is the systematic social inequality that marginalizes specific groups through prejudices and discrimination rooted in laws and social institutions, not due to an individual, but to the functioning of the social structure, such as the marginalization of the poor and Black people in the Brazilian case and the Black and Latino population in the American case.

Some data seem to demonstrate this statement. Let's see. The demographic profile of the American prison population reveals a striking disproportion with ethnic and racial minorities, especially Black and Hispanic people, in contrast to the white population. Despite being a minority in the general population, Black men are incarcerated at a disproportionately high rate. Data from CNN Brazil reveals that the US imprisons five times more Black people than white people in state prisons (Carrega, 2021). The Brazilian case is not very different. The Brazilian prison population is predominantly composed of Black men, reaching 70%, with low levels of education, with 54.8% of prisoners not having completed elementary school. Also, the most punished crime is drug trafficking, which falls mainly on vulnerable populations, such as residents of communities. The total population serving sentences is 941,752 people, with 705,872 imprisoned in physical cells and 235,880 serving sentences under house arrest. Given that the penal system's capacity is only 488,000, overcrowding is evidente (Senappen, 2025).

The causes of this can be explained by several reasons. One of them is certain policies such as the "war on drugs" of the 1980s, which sought to increase penalties for drug trafficking crimes, leading to greater incarceration of the Black and Hispanic population in the US and the Black population in Brazil. Other reasons are systemic bias and social inequality. Some studies indicate that the US criminal justice system has systemic biases that lead to harsher treatment and longer sentences for individuals from racial minorities, even for crimes similar to those committed by whites. Also, poverty and lack of opportunities in certain communities contribute to crime, increasing the likelihood of incarceration, this occurring both in the US and in Brazil (Braveman et al., 2022). Certainly, there are villains and monsters in our prisons. But, above all, they are full of socially vulnerable people, illiterate people, addicts, mentally disabled people, and mentally ill people, so that the unfortunate and structural conditions are intrinsically connected to the reasons why they are in prison (Gross, 2012).

As our investigation focuses on penal injustice, it is important to clarify the problem of the justification of punishment, with punishment understood as intentional, reprobative harm or suffering inflicted by the State on offenders who are held responsible and who have no appropriate excuses. The problem of the justification of punishment deals with three interconnected issues, namely: why we should punish, dealing with the justification of the institution of punishment; whom to punish, dealing with the justification of particular punitive acts; and how much to punish, dealing with the justification of the penalty itself (Coitinho, 2016, pp. 171-173; Boonin, 2008, pp. 3-25). We will not discuss here the justification for the institution of punishment, but rather the justification for the punishment falling on such a subject and the justification for penalties, especially imprisonment.

With this in mind, in the remainder of the paper we will address the problem of punitive injustice, in such a way that punishment falls more heavily on the most vulnerable, which puts human rights at risk. We begin by reflecting on punishment and moral responsibility, questioning the concepts of free will and merit. Afterward, we investigate the relationship between punishment and human rights. The following section addresses the problem of the injustice of punishment, highlighting the concepts of merit and proportionality. The final step will be to propose alternative forms of punishment that do not have harm or suffering as their focus, followed by final considerations on the subject.

2 Punishment and moral responsibility

As we saw in the definition of punishment, there is an intrinsic relationship between this institution and moral responsibility. Generally, punishment is seen as just or correct if the punished agent is morally responsible for what they did, for example, committing a crime. Thus, an agent is guilty in cases where they perform a reprehensible action, reprehensibility requiring harmful intent or, in some cases, a culpable degree of negligence. Imagine a child who accidentally fires a gun and kills their sibling, or even someone with a serious mental illness who commits a crime. In such cases, we do not say that the agents are morally responsible because they lack the capacity for deliberation of the action, in addition to bad intent. It could also be the case of someone who commits a crime while under hypnosis. In cases like these, we do not say that the agent is responsible because they did not intend to perform the action. Note that moral responsibility seems to be a necessary condition for punishment, since punishment is an intentional action on the part of the State to cause harm or suffering to the offender, considering that the person who commits the crime wanted to carry out the action and deliberated on the matter, that is, weighed reasons, and chose to commit the crime, acting freely. Without intention or deliberation, the offense is not considered liable to retribution, being more appropriate for objective liability, being a case for restitution in the form of a fine.

There is a central element in the discussion about moral responsibility, which is whether the agent needs to be free to be responsible, that is, whether he must possess free will to be responsible, considering that free will is the ability to act in another way. This discussion has a great dispute in the literature that deals with the subject, between determinists, libertarians and compatibilists, the first two being incompatibilists between determinism and free will. Determinism defends the thesis that everything is determined by laws of nature and orders of causality, and thus, there would be no freedom. In turn, libertarianism argues that free will exists and is incompatible with determinism, grounding moral responsibility in the freedom of action. Finally, compatibilism argues that determinism is compatible with free will, with moral responsibility not depending on the falsity of determinism (Garret, 2006, pp. 101-108). Regarding this last position, we can mention the conception of H. Frankfurt (1969), who argues that moral responsibility is not dependent on the principle of alternative possibilities, that is, it is not dependent on the agent being able to act differently in order to be responsible. He imagines a hypothetical scenario in which an agent, Jones, wants to perform an action and another agent, Black, wants Jones to commit the action. Fearing that this might not happen, Black places a brain device in Jones, without his knowledge, which allows him to control Jones' actions. It turns out that at the appointed time, Jones performs the action because he wanted to, meaning that Black did not have to activate the device. Jones acted based on his desires and beliefs. Thus, he is morally responsible for the action, even though he could not have acted otherwise (Frankfurt, 1969, pp. 836-839).

Note that despite the great debate about the existence or non-existence of free will and even about its necessity for accountability, when analyzing the problem of punishment in real, namely, the institutional punishment, free will is considered indisputable. That is, state punishment takes as a given that the agent is free when committing the crime, and therefore the punishment is justifiable in relation to the offender's demerit. But, is the agent really free when committing a crime? And what exactly is this freedom? Wouldn't there be relevant social and economic conditions that drive someone to commit a crime like robbery, for example, such as poverty and lack of education? Or even the case of war. Is a combatant in a war acting freely, for example, when killing an enemy or detonating a bomb that kills a group of civilians? And this is without even mentioning structural injustice, whereby agents generally participate in structural injustice without being held accountable, that is, without being personally responsible for the wrongdoing.

This is an important point made by Iris Young in *Responsibility for Justice* (2011), differentiating between guilt and responsibility. Her argument is that guilt requires blameworthiness, but agents generally participate in structural injustice without being blameworthy. She also says that guilt focuses on the past, while responsibility focuses on the future. In addition to these two conceptual arguments, she presents five pragmatic arguments, stating that: 1) Focusing on blame distracts us from future tasks; 2) We concentrate our attention on some likely culprits, while exonerating many others who should be involved in the task of improving things; 3) Focusing on blame tends to distract us from the background conditions in which injustice arises; 4) Playing the "blame game" produces a twisted defense instead of useful cooperation; 5) Guilt makes people focus on themselves, on their own character, instead of focusing on the task ahead (Young, 2011, pp. 3-93).

Bruce Waller, in *The Injustice of Punishment* (2018), argues in this direction, opposing the traditional notion that punishment can be just based on the system of moral responsibility, which is composed of just merit and free will. This means that punishment would be assuming that the punished agent has a demerit, that is, a negative merit for what he did, and this is because what he did was done freely. This is an individual notion of moral responsibility, so that agents individually act freely to commit a crime, and thus, the punishment would be just. The problem for him is that moral responsibility must be understood in its collective aspect and not only in the individual dimension, and therefore, punishment is unjust when it does not take this aspect into consideration (Waller, 2018, pp. 3-6).

He presents his argument in the form of *Modus tollens*:

- (i) For punishment to be just, it should be based on just merit;
- (ii) Since just merit requires moral responsibility, which requires free will, and no one is morally responsible because they are not free;
- (iii) Punishment is unjust (Waller, 2018, p. 8).

The way out for him is to weaken or deflate the role of moral responsibility for punishment. He argues that although no one deserves punishment, we cannot eliminate it, as it is a necessity to guarantee social order. Thus, the important thing would be to investigate more about the causes of the agents' actions, to understand what is and what is not within the agents' control, better understanding the workings of the human mind. Then the important question arises: what to do with punishment if moral responsibility and just merit are rejected? Waller's suggestion is to think about punishment from an alternative system to that of individual moral responsibility. Punishment, then, will be minimized, but not eliminated, and will still be unjust. For him: "(...) unjust punishment is a egregious wrong, it is a wrong that should be committed with great reluctance and profound sorrow in the face of cruel necessity" (Waller, 2018, p. 11).

He then proposes a no-blame system model to reduce the need for punishment, which provides better protection for human rights and allows punishment to be considered a beneficial therapy for both society and the offender (Waller, 2018, pp. 163-176). He proposes abandoning the system of moral responsibility, just as the honor system was abandoned in the past, and using a no-blame system model focused on practices and cultures that minimize belief in individual moral responsibility. He argues that the system of moral responsibility has replaced the honor system, being more civilized, taking personal responsibility and proportionality as criteria. In the honor system, for example, when someone insulted another's honor, one should kill or harm the offender or a member of their family, even disproportionately. In the moral responsibility system, revenge against the offender's family members is not right. Hence, the basis of punishment is the agent's guilt. The new system proposed by Waller, which is free from blame, is characterized as an inclusive system, since it rejects both guilt and shame, as well as rigid hierarchy. For him:

The system approach not only rejects blame and shame, but also rejects rigid hierarchy. Everyone is part of the effort to discover small errors that might become catastrophes, everyone contributes intelligence and experience and alertness to catch potential errors before they happen, and everyone participates in the effort to improve the system so that errors are reduced; or in brief, everyone is empowered to “pull the red cord.” (Waller, 2018, p. 175).

Waller's central point is to find more effective ways to minimize both the use and severity of punishment in pursuit of a deeper perspective on the causes of destructive behavior and how to change those causes to reduce the need for punishment. Now, it is important to highlight some clarifications he makes. He says that no one justly deserves punishment, which does not imply that no one acts wrongly, that is, causes harm to others. On the contrary, many people do bad things and we all do wrong things sometimes. Crime is usually committed by ordinary people who commit banal evil. He also considers that free will is not available to us, since science proves that this is an illusion. He also says that there are elements that are beyond the agent's control. Examples of this would be the racist values that are learned in a racist community, in addition to social problems and cognitive biases of all kinds, etc. (Waller, 2018, pp. 1-23). Finally, Waller highlights the advantages of recognizing punishment as unjust. This approach does not celebrate punishment as just retribution. On the contrary, it laments punishment as an inevitable but unjust necessity. Also, it fosters a deeper investigation into human behavior, seeking to understand why we act as we do. Thus, we must learn more about character, determinations, biases, social problems, etc. Finally, it states that we can recognize that we blamed and punish the victims of society much more than we modify the social structure responsible for this state of affairs (Waller, 2018, pp. 195-212).

This last point deserves emphasis, as it shows that, in societies with large social and economic inequalities, we punish disproportionately more those who are already victims of society, based on the idea that they are responsible for their actions, being free. And since they freely chose to commit a crime, which, in general, is a moral wrong, such as homicide, kidnapping, rape, which should be avoided, they must be punished in the form of suffering harm, usually with deprivation of liberty. This is a moralizing way of dealing with the institution of punishment, focusing attention on the guilt of the agent and the act that occurs in the past. But, note that punishment is a political institution, and, being an institution of this type, it should focus on preventing future crimes and correcting the attitude of agents, looking to the future, and not on causing suffering to citizens, especially the most vulnerable citizens of society. It seems that this can support regressive public policies, encouraging the idea that criminal justice is a type of corrective exercise of justice. This consideration of the problems of excessive moralization of punishment can lead us to a more civilized and efficient political morality, in the direction of social stability.

Important to note that Hyman Gross (2012) has a similar position, saying that understanding the relationship between crime and punishment from a moral point of view is a mistake and has a negative effect of supporting regressive tendencies in the public domain, encouraging the belief that criminal justice is some kind of corrective exercise of justice. Instead, we should advocate for a more civilized political morality, focusing on prevention and even correction of the agents' attitudes, rather than their suffering (Gross, 2012, pp. xi-xv).

3 Punishment and human rights

Suffering and/or harm, as we have seen, is central to the concept of punishment throughout the history of legal and political philosophy. Punishment is, by definition, the intentional imposition of harm on an agent by a legitimate authority (Walgrave, 2023, p. 662). Along the same lines, Gross (2012) emphasizes the necessarily harmful nature of punishment and admits that to punish is, inevitably, to cause harm or suffering to the agent. For the philosopher, this harm, intrinsic to the penalty, implies a violation of the basic human rights of the punished agent. These rights, for example, to life, liberty, dignity, among others, are, according to Gross (2012, pp. 18-20), of a pre-political and even pre-legal nature, since they do not depend on social consensus or even the existence of the State, although they depend on it to be ensured. Curiously, it is precisely these rights that define the content of most of the crimes that we bring to the penal system. In other words, those whom we treat as criminals for violating a series of basic human rights in their actions will, when punished, see the State arrogate to itself the prerogative of violating them as well. Here, clearly, is one of the possible presentations of the problem of punishment, namely, with what justification is the State authorized to violate the same rights that we condemn when the transgressing acts are carried out by individual agents?

Some thinkers argue that punishment cannot be considered just in any way. For Waller, "all punishment is unjust; (...) No one ever justly deserves punishment; that does not imply that no one ever acts in ways that are morally wrong" (Waller, 2018, p. 1). This, however, does not mean that punishment should cease to exist, because after all, there is an important distinction to be considered, namely, justifying punishment, that is, penal practice, is different from making it just. No one can justly deserve harm or suffering, but this does not imply the abolition of the penal system, given the social need for stability and security for the maintenance and existence of the political organization itself. The main point of this perspective is to consider punishment as unjust, even if it can be justified: "Punishment may indeed be necessary in the world in which we live; but it is a necessary wrong, an unavoidable element of injustice in a world that is not just" (Waller, 2018, p. 2). It is the awareness that punishment is a wrong that should be at the center of the debate and, for that reason, it should be minimized as much as possible and, evidently, justified.

The argumentative path taken by Waller, Gross, and other thinkers turns to the future, to conceptions of stability, social protection, self-defense, and reaffirmation of rights, for example. One possible line of argument consists of a parallel with the concept of self-defense (Tadros, 2011, p. 14). But what exactly is meant when self-defense is highlighted? When, in individual cases, are we authorized to interfere with and violate the basic human rights of other individuals? Imagine a situation where our basic human rights are under imminent threat; to illustrate, consider cases of domestic violence, kidnapping, etc. In situations like these, some degree of response seems plausible—a response that may, in fact, violate the basic human rights of the one who poses the risk or danger. This violent response is even guaranteed by Article 25 of the Brazilian Penal Code, which defines it as the action of repelling, using moderate means and with the necessary resources, an unjust, current or imminent aggression against one's own rights or those of a third party. This is what we call legitimate self-defense. This, of course, serves only as an illustration of the concept of self-defense. This concept implies an intentional cause of harm and, consequently, a violation of basic human rights, which we do not reject in the personal sphere:

As self-defense does involve intentional harming and may sometimes involve manipulative harming, it is natural to explore the reasons why self-defense is an exception to the *means principle* in order to move us towards a justification of punishment. (Tadros, 2011, p. 14).

See, as mentioned, in self-defense, it is considered morally legitimate to intentionally cause harm to another, even if this involves instrumentalizing that person in a certain sense, and Tadros seems to indicate this conception as a way to think about the justification of punishment, something that also seems to be considered by Gross (2012, p. 24).

However, to think about the relationship between self-defense and punishment, Gross admits that something similar occurs in the penal sphere, since punishing would be, in a way, a form of collective self-preservation. However, he points out that there is a crucial difference that must be considered in self-defense, namely the threat repelled by the reaction of the victim who feels threatened is immediate, but in the context of punishment, the harm that leads the agent to the penal system is past, therefore there is no imminence. The central point is that in the field of legitimate self-defense, the victim's intervention is validated, because the aggressor, by placing himself in imminent danger, has renounced the inviolability of his basic rights. In the criminal field, the situation is quite different, given that the offender does not represent an imminent threat, since the act has already been committed, so the aggressor himself is no longer in danger; therefore, it cannot be argued that he has waived the inviolability of his basic rights:

In the earlier discussion on self-defense, it was suggested that an aggressor who chose to put himself in harm's way could not claim the benefit of inviolable natural human rights when the harm that might be expected befell him. It is tempting to take the same line and say that, when a crime is committed, the perpetrator puts himself in harm's way and therefore cannot complain when harm is visited upon him in the form of punishment. (Gross, 2012, p. 23).

Therefore, the attempt to use the bases of self-defense to justify punishment as a form of collective self-preservation incurs precisely what one wishes to avoid, the instrumentalization of agents, since it implies sacrificing basic human rights in the name of a supposed greater good. For Gross:

But though the prospect of life in a world of impunity makes protective measures imperative, the prospective harm does not have the immediacy that is at the heart of justifiable self-defense. The claim that punishment in the interest of collective self-preservation demands that natural human rights be sacrificed for the higher good is for this reason a morally dubious claim. (Gross, 2012, pp. 23-24).

The idea of justifying punishment as collective self-preservation compromises the very notion of human rights as inalienable and universal, making them conditional on social utility, and this point makes this statement "morally dubious."

However, as mentioned by the philosopher, the prospect of life in a scenario of impunity requires protective measures, that is, punishment. The central argument lies in the idea that if serious crimes, such as homicide or rape, were left unpunished, the human rights of the victims and, consequently, of the community itself, would lose their normative force, becoming mere moral ornaments.

Punishment, from this perspective of collective self-preservation, can be understood as a way of guaranteeing basic human rights. Even if it incurs a violation of the basic rights of the punished agent, the penalty preserves, on a collective level, the social effectiveness of basic human rights, ensuring that they continue to be recognized and respected as fundamental to life in society. In other words, punishment can be accepted as a necessary evil, since collective self-preservation is a fragile justification.

With this understanding, punishment as a necessary evil establishes a clear limit based on the very conception of basic human rights. That is, if the violation of these rights must be rejected and, in order to communicate such rejection to society and ensure its protection, we punish serious offenders, this implies recognizing that punishment, violating the basic rights of the offender, is an evil. And being an evil of this magnitude, it should only be applied in cases of serious violation of basic human rights, and even then, reduced and avoided as much as possible.

Consequently, when dealing with crimes that do not violate this type of rights, but which primarily reflect moral conventions, dominant cultural values, or specific political interests, punishment ceases to be a guarantee. To illustrate this point, we can consider the policy of criminalizing drugs, or the prohibition of bigamy and gambling, which prevail primarily to validate a dominant cultural value. Another example is general laws that imply punishments in order to be validated and affirmed, such as the law of compulsory military service. In these cases, “[...] when the damage is not relevant to the legal sphere and does not cause harm to third parties, the suggestion is to leave criminal law aside and use other branches of law to address these issues that arise in society” (Olivier, 2020, p. 95), since punishment would only add a new violation of the convicted person's basic human rights and, therefore, incur new injustices.

It can be argued, however, that some behaviors, even if they do not imply the violation of basic human rights *per se*, can be understood as essential for the self-preservation of society. And as an example of what we mean, we can return to compulsory military service. A country without a military service would be at the mercy of its own luck and the goodwill of its neighbors not to invade it. In this sense, the principle of collective self-preservation would justify the State imposing the obligation, through punishment, of military service.

However, non-compliance with this obligation does not necessarily imply a violation of basic human rights. The agent who refuses to perform military service does not directly threaten the life, liberty, or dignity of other members of society. Therefore, punishment in these cases should be seen as a last resort, that is, if there are alternative and equally effective means to ensure the need for national defense, punishment should be discarded.

Thus, even in cases of fundamental interests for the community, punishment is only justified if there is no other equally efficient instrument. Without this limitation clearly stated, punishment ceases to be a protective mechanism and becomes an unjustified violation of the basic human rights of the perpetrators, clearly contradicting the normative limit established by the very concept of basic human rights.

4 Punishment and Injustice

Around 1970, the so-called penal abolitionist movement emerged, mainly represented by Angela Davis (2018). This movement points to injustices in the penal system with the aim of arguing in favor of the impossibility of justifying this system and, consequently, its abolition. The abolitionist critique of the penal system can be structured from the observation that its practice is permeated by multiple forms of injustice. The point is that, instead of a neutral mechanism of legal accountability, the punitive system reveals itself, in many cases, as an instrument for reproducing social, racial, and economic inequalities. Davis (2018, pp. 10-18) denounces that the advancement of the American prison system between 1852 and 1989 occurred to meet economic needs and foster commercial activities, for example, construction and the food trade. The official discourse consisted of providing greater security for society in general, but the effective practice showed the perpetuation of racial segregation in a legalized way, even after the abolition of slavery, and the provision of cheap labor. The penal system, then, produced guilty parties to keep itself alive and was a legitimized alternative to the old plantations. The author argues that the penal system became a legalized substitute for the plantation model that had been abolished, because contrary to what was intended, racial oppression did not end with the abolition of slavery, dragging on in legal codes for years, being represented by laws specific to black people (Davis, 2018, pp. 24-25).

In line with this thinking, Hulsman (1993, p. 63) also argues that the penal system produces guilty parties, given that there is no clear criterion for establishing what is a crime and what the penalty should be. According to the author, depending on where you are born, you can be incarcerated for what you did or for who you are. Furthermore, the penal system creates stigma and exclusion, since it classifies individuals into a distinct group, the criminals (Hulsman, 1993, p. 69). This classification imposes restrictions on the individual on two fronts; the first begins when the criminal process starts, even before sentencing. At that moment, the individual is already seen, in the eyes of society, as a criminal and begins to suffer moral censure. The second refers to restrictions after the penal system, that is, after serving the sentence, given the fact that they cannot fully reintegrate into society and face difficulties in finding employment, for example. The punishment extends beyond incarceration and beyond the punished individual, inflicting pain or suffering on family members and friends.

Punishment represents a major incursion into the basic human rights of individuals and requires justification, and its practice must avoid individual injustices. As an instrument of social control, punishment carries the ever-present risk of being applied to innocent people, as exemplified by the paradigmatic case of Alfred Dreyfus, convicted for anti-Semitic reasons (Gross, 2012, pp. 47-48; Begley, 2010). The fallibility of criminal judgment, however sophisticated the procedural apparatus, compromises the legitimacy of punishment, since the court is an instance of imperfect procedural justice. Even under the best procedural guarantees, judicial error remains a structural possibility and not merely an occasional one. Is it possible, then, to equalize punishment with the intention of avoiding individual injustices? Is it possible to legitimize the incursion into the basic human rights of those involved?

The institution of punishment presents itself as a tool of social control and, unlike what abolitionist theorists think, this does not make it inherently bad. Gross (2012, pp. 48-49) argues that some degree of threat is necessary to maintain social coexistence and regulate the behavior of individuals, but admits that such an institution allows injustices, especially because it does not respect the innocence of the perpetrators. In Gross's words:

Punishment in spite of innocence is always unconscionable, whether it is brought about by finding the wrong person guilty, or by treating a person as guilty when in the circumstances he is entitled to exoneration. It is deeply disturbing when punishment seeks to be monumental rather than measured, when it is selective or arbitrary rather than even-handed, or when it is simply unnecessary. (Gross, 2012, p. 48).

The criticisms of the practical scope of the penal system presented above help to illustrate these injustices. In the theoretical field, a series of precautionary mechanisms have been devised, that is, mechanisms to avoid harm to innocent agents and injustices in punishment, based mainly on the retributivist concept of merit and proportionality (Gross, 2012, pp. 50-54). This concept, that of merit, is invoked in an attempt to justify the State's exceptional right to violate basic human rights, since it is argued that the agent acted freely and, therefore, deserves punishment. Thus, merit is presented as a principle capable of protecting the innocence of individuals, ensuring that only the deserving person are punished.

The concept of merit individualizes the agent deserving of punishment and emphasizes that the penalty applied should be limited to that agent and no other, as well as guaranteeing the individualization of the crime committed, that is, the agent will be punished for a specific action and not, on the condition of being guilty of that action, be punished for another crime that may torment society.

Punishment, as an institution, is historically linked to violence, revenge, and punishment as an exemplary form. From the most archaic forms of corporal punishment, among which we list torture, mutilation, public execution, to the contemporary penalty of imprisonment, punishment seeks to inflict harm on the agent. This historical legacy has contributed to naturalizing, over the centuries, the idea that punishing should be synonymous with causing suffering. This historical perpetuation of suffering can lead us to believe that the greater the suffering of the agent, the greater the punishment and, consequently, the more effective it is. Thus, it can also lead us to accept harsher penalties masked by a discourse of deterrent efficiency or greater protection. Punishment, even with a legal and rational appearance, is based on social feelings of repulsion, fear, and even revenge, which demand increasingly severe penalties.

The concept of merit can, in some way, corroborate this idea, since if the agent is deserving of punishment, it should be applied in a way that satisfies the desires of the victim, or even social desires. This measure, however, would lead us to a certain penal arbitrariness and we could incur very severe penalties for even minor offenses. Gross states that:

The principle of just deserts imposes a limit in the severity of punishment to ensure that there is no infringement of surrounding innocence. When a particular crime is punished, it has an important part to play in restraining the wish to punish the criminal *qua* criminal. Rather than simply punishing him for the crime for which he has been convicted. (Gross, 2012, p. 51).

Excessive or greater-than-deserved punishment is a form of injustice, since the excess represents a sum of punishment applied to an innocent agent. How, then, to stipulate the appropriate measure of punishment for existing crimes? This is where the retributivist concept of proportionality comes in as a way to contain the arbitrariness of the penal system regarding the amount of punishment applied:

A sense of proportion between crime and the punishment must be maintained if injustice is not to overwhelm the proceedings. [...] This gives rise to a fourth cautionary principle, and one that goes beyond the protection of innocence. The harm or wrongfulness that a particular crime represents may be great or small in relation to any other crime. The urge to punish the crime is determined by these untoward elements, and the urge is measured by how harmful or how wrong that crime is seen to be (Gross, 2012, p. 51).

If those who hold the power to punish do so in a way that does not satisfy due proportionality, we feel that there is an injustice present.

This concept, that of proportionality, is often defended as a civilizational advance, since it stipulates a criterion for assigning punishment regarding its quantity. It is argued that the punishment should be proportional to how responsible the agent is or to the damage caused by the wrongful action (Brink, 2022, pp. 377-378). Thus, proportionality in its negative sense functions as a limit, aiming to prevent excessive, cruel, or disproportionate punishments in relation to the seriousness of the crime or the responsibility of the agent. Thus, it protects against punitive arbitrariness and provides a formal benchmark between crime and punishment. In this respect, its contribution is undeniable, especially when contrasted with the barbarity of arbitrary punishments of authoritarian regimes experienced throughout history.

However, when considering its positive application, that is, when defining the appropriate punishment for a given crime, proportionality becomes problematic. The reason for this lies in the very impossibility of accurately measuring the moral and social value of different offenses, especially in penal systems that translate such values into prison sentences. There are crimes whose gravity is undeniable, such as rape or homicide, but others whose criminalization is much more questionable, including crimes against the economic order or regulatory infractions such as drug trafficking, for example, and yet all are punished within the same quantitative logic of incarceration.

To illustrate what we want to highlight, we only need to look at some situations in the Brazilian penal code. On the one hand, the classification of crimes against property provides for a sentence of 4 to 10 years in prison, and the crime of corruption carries a sentence of imprisonment between 2 and 12 years. On the other hand, there is the crime of rape, punishable by imprisonment between 6 and 10 years, while the crime classified as homicide provides for a sentence of 6 to 20 years of imprisonment (Brazilian Penal Code, Art. 213; Art. 157; Art. 317 and Art. 121).

The crime of rape, for example, is considered extremely more serious than crimes against property, we believe there is no doubt about that. However, the penalties for crimes of the second type are quite close to the penalties for the first type. The seriousness of one crime in relation to the other seems to be disregarded. Considering the concept of proportionality, at the very least, it seems that the penalty for rape should be considerably greater than the penalty for crimes against property. If we bring the crime of corruption into this scenario, which can be penalized even more severely, it becomes more difficult to find the correspondence between the harm and the proportion of the penalty.

This scenario highlights a contradiction, that is, instead of promoting justice in the distribution of penalties, the principle of proportionality may end up legitimizing structural injustices, punishing morally incomparable conduct in a similar way. From this perspective, the criterion of proportionality reveals itself as a rhetorical artifice, whose content is often determined by political conventions, hegemonic moral values, and state interests. Inflicting intentional harm on agents presents itself as a great injustice, and the criterion of proportionality seems to corroborate this idea, since, although it represents a great advance against penal arbitrariness, it faces difficulties in establishing what the measure of suffering imposed on the offender should be and, given the current penal system, how to convert this into time of incarceration.

The concepts of merit and proportionality are sensitive and can also represent injustices when linked to cases involving shared responsibility or multi-agency systems. To illustrate, consider the trial of Adolf Eichmann, the Nazi officer responsible for the logistics of concentration camps during the Holocaust. The concept of merit assumes that it is possible to accurately assign individual guilt and, based on that, establish a punishment proportional to the damage caused or the moral gravity of the action. Cases like Eichmann's, however, where the crime does not stem from an isolated decision but from the execution of orders within a bureaucratic, legally organized, and socially accepted state apparatus that normalized mass extermination, end up representing a problem for models based on merit and proportionality.

As Arendt (1999, pp. 4-31) points out, Eichmann did not seem like a monster or an aberration, but an ordinary man who did not act out of personal cruelty, but rather out of blind, routine, and depoliticized obedience, or a lack of critical sense. His problem was that he did not think. This raises a fundamental concern, namely, if responsibility for the crime is shared, that is, institutional and collective, how do we determine who should be punished? And, even more so, what proportion of punishment would be just when the damage is immeasurable and when the punished subject is merely a cog in an unjust and, in this case, genocidal system? The concept of merit, which presupposes a correspondence between guilt and punishment, loses its effectiveness when the agent is not the mastermind of evil, but the functional executor of a systemic logic.

The principle of proportionality, in turn, is also destabilized. It requires a measurable relationship between crime and punishment, but what does it mean to proportionally punish someone who contributed to mass murder? Any attempt to measure the magnitude of the crime seems flawed. Furthermore, how can we establish a proportionality criterion for sanctions against institutions? How can we equalize or monetize lives through monetary sanctions?

Thus, proportionality, as conceived by the retributive paradigm and replicated even by mixed theories of punishment justification, is, in fact, a double-edged sword, since its normative appeal protects against abuses, that is, excessive punishments, but its concrete application can mask arbitrariness and inequalities, punishing one type of crime more than another and, consequently, one segment of society more than another.

5 Alternatives

When we clearly view punishment in terms of the injustices it can cause, both to the offender and to society, and understand it as intentional harm by the State to an offender who commits a serious violation of basic human rights, we tend to imagine the penal system as completely inefficient and as an evil to be overcome. However, there are alternatives that seek to correct the irregularities of the system, both practical and theoretical. The so-called quarantine or incapacitation proposal is one of these alternative justification proposals and is defended by authors such as Pereboom (2013; 2014; 2018) and Caruso (2018; 2021).

The authors (Pereboom and Caruso, 2018) start from a radical critique of the traditional foundation of the penal system based on retributivism, namely, moral responsibility. Similar to the critique made by Waller (2018), the authors argue that the conception of moral responsibility based on the ideal of free will is illusory and at odds with the current scientific model. Consequently, the concept of merit also becomes obsolete. Thus, if agents cannot truly be held accountable, there is no basis for applying sanctions with the classic retributive objective.

Pereboom and Caruso (2018) propose as an alternative an incapacitating model inspired, above all, by a public health model. The central point of this theory is the idea that crime should be treated analogously to a contagious disease, that is, something that needs to be controlled in order to protect the community. The field of public health involves, in some cases, coercive measures such as quarantine, as was the recent case of the Covid-19 pandemic, where numerous infected agents were forced into confinement. Note that in the forced isolation brought about by the Covid-19 pandemic, the guilt of the infected individuals was not questioned, and such measures were accepted in the name of social protection (Caruso, 2021, p. 185). This idea of forced confinement can be considered in the field of punishment, because even if the individual is not responsible for their actions, they can be quarantined as a way to protect society from future threats and harm.

In this model, measures such as quarantine, isolation, or incapacitation would be applied not to punish, that is, to cause direct harm, but rather to protect society against the repetition, effects, and threats of dangerous conduct. Note that the focus of this model is not on the suffering of the offending individual, but on the prevention of future harm. The central point is to remove the criminal from social interaction and place them in treatment, similarly to what we do with people who have serious or contagious diseases.

The comparison with the public health model does not end at this point and also extends to coercive measures, imposing important restrictions on them, such as the principle of least violation, for example (Pereboom, 2014, p. 156). The argument evoked by the principle of least violation rescues the notion that treatment for a sick agent should harm them as little as possible, and this mechanism provides an important limit to the practice of quarantine, since it ensures dignified treatment for the transgressor. A second important limitation also arises when we analyze which individuals are forced into isolation; in other words, we do not isolate citizens with a simple flu. The same should happen with cases of transgression, where only serious crimes will be subject to confinement (Pereboom, 2014, p. 156).

The main basis of this proposal, as presented by Caruso (2021, pp. 188-190), is essentially the same as the basis of the public health model, which has four unique characteristics: (i) health as a public and collective good, (ii) its promotion mainly involves prevention, (iii) it often depends on state actions, and (iv) it involves outcome-oriented policies for the future. This same structure can perfectly accommodate the penal system.

Among the advantages of the public health model, we can list the recognition of the social, economic, and psychological conditions that can favor the emergence and development of crime, in addition to a concern for the moral status of the agent and their dignity:

Its advantages include the prioritization of prevention, a focus on social justice, and a more detailed set of principles for resolving the conflict between individual liberty and public safety. This combined approach, I maintain, is sufficient for dealing with dangerous criminals, leads to a more humane and effective social policy, and is actually preferable to the harsh and often excessive forms of punishment that typically come with retributivism. (Caruso, 2021, p. 186).

Looking to the future, this model also allows for a genuine concern with the rehabilitation of the offender. It becomes clear that instead of just punishing individuals, there is room, which is central, to address the structural causes of crime, such as inequality, poverty, social injustice, mental health, and substance abuse. By recognizing a certain collective responsibility for the conditions and circumstances that produce criminal behavior, it becomes possible to broaden the scope for preventive public policies instead of mere punishment.

Another alternative that seems interesting to us is the one proposed by Waller (2018), who considers punishment no longer as a retributive, reprobative action, but as a non-punitive therapy. This is the therapeutic model of punishment, so that those who cause harm to someone and to society as a whole receive beneficial therapy instead of painful punishment. The basic idea is that this therapy will be beneficial to both the offender and society (Waller, 2018). This model provides a policy to protect society from those who cause harm to others. Offenders are not punished, but isolated from society and placed in quarantine. However, note that this isolation will not imply suffering, but rather the rehabilitation and reintegration of the offender into society. Finally, this model makes it possible to seek the deeper causes of criminal behavior, following the example of how health organizations seek the causes of diseases. In their words:

There are a number of advantages to the therapeutic model. First, it avoids inflicting retributive punishment—that cannot be justified when moral responsibility is denied—and substitutes a system of nonpunitive therapy. Second, it provides a policy for protecting society against those who harm others: we do not punish them, but we can isolate them from society (and prevent them from causing harm) by quarantining them (as we quarantine those who spread sickness to others, though those quarantined obviously are not morally responsible for the harm they cause). Third, we can seek the deeper causes of criminal behavior, just as public health organizations seek the causes of illness patterns. (Waller, 2018, p. 143).

Note that in this therapeutic model, the problem of punishment disappears, society is protected, the root causes of crimes are investigated, and those who cause harm receive beneficial therapy instead of painful punishment. For Waller, even if imprisonment is necessary for some heinous crimes, in this therapeutic model, prisons should offer good infrastructure and not be a place of suffering for offenders. They should clearly focus on the rehabilitation of the offender and their reintegration into society (Waller, 2018, pp. 143-145). The example he gives is Bastøy Prison in Norway, a prison located on an island of the same name with minimal security, even considering that some inmates have committed serious crimes such as homicide, drug trafficking, rape, etc. Known for its rehabilitation model, the prison has no walls or traditional cells, allowing inmates to live in wooden cabins and work on the island. The prison prioritizes social reintegration, offering activities such as work in agriculture, fishing, and maintenance of the ferry that connects the island to the mainland, in addition to providing sports and educational activities. It is important to note that it has the lowest recidivism rate in Europe, at only 16%. On the island, inmates can work, study, and participate in training programs. There are no cells, weapons, batons, or surveillance cameras. Inmates work on the prison farm, take care of animals, work on the ferry, or in other roles on the island, receiving a stipend for it. There is access to activities such as horseback riding, fishing, tennis, cross-country skiing, a beach, a library, and a soccer field (James, 2013).

Fundamental to the therapeutic model is the treatment proposed for those who commit crimes, under the argument that they do not deserve retributive punishment because they themselves are victims of psychological disorders or are victims of the structural injustices that mark contemporary societies. In this sense, another model that seems relevant for considering alternatives to retributivism is the educational model, which aims at educating and modifying the offender. In the educational model, punishment is justified as a means of teaching a moral lesson to those who commit crimes, and perhaps to members of the community in general, enabling the offender's repentance and correction. It conceives of punishment as a benefit to both the offender and society (Hampton, 1984, pp. 211-214). The central point is to consider that punishment can involve a process of clarifying that the crime committed is wrong, and that the person did not have the right to commit it. Retributive punishment assumes that whoever commits a crime knows that this act is wrong. Is this really so? Let's look at cases of violence against women. Do all aggressors against women know that acting violently against women is wrong? This doesn't seem to be the case, considering that we live in a society with significant remnants of structural sexism, a consequence of patriarchal societies where power has always been concentrated in the hands of men and women were not considered worthy of the same rights, even being treated as the property of their father or husband. The point to consider is whether these aggressors actually know they are acting wrongly, or if their behavior reflects the sexist culture of society? But if so, what would be the point of imprisoning the offender, causing him suffering, without reflecting with him on the causes of this gender violence, which is deeply related to the idea of owning women and having central rights, something that was a reality in the past?

On this point, it is important to mention the application of educational-restorative practices with male aggressors in cases of violence against women instead of purely punishing them with imprisonment. These practices aim to promote accountability, awareness, and reparation of damages, going beyond the traditional punitive model. In Brazil, for example, the application of restorative practices with male aggressors already takes place through the courts of justice, in accordance with the guidelines of the National Council of Justice (CNJ). The participation of NGOs and the work in specialized courts are important elements in this scenario. Referring aggressors to re-education programs is a growing strategy in some Brazilian states, since the recidivism rate is very low (CNJ, 2017).

In addition to those mentioned, there are other alternatives to retributive punishment based on imprisonment. Restorative practices, for example, aim to establish negotiated arrangements between the offender and the victim to enable the victim's satisfaction based on the idea of remorse and apologies on the part of the offender. Community service is another alternative, being a practice that makes it clear that the offender committed a crime, while at the same time spending little public money and additionally carrying out work of genuine public benefit. Furthermore, fines in a restitutive sense can be an alternative to imprisonment, as in the crime of fraud and theft, conceiving punishment as a way to restore the equality that was broken between offender and victim (Gross, 2012, pp. 174-175).

6 Conclusion

Given the above, we understand that recognizing punishment as a necessary injustice is fundamental to moving towards a more sophisticated, morally and politically honest understanding of criminal justice, understanding the criminal phenomenon not as something isolated, but as a result of larger social disturbances. This understanding also distances us from celebrating punishment as a deserved and consequently just retribution, and allows us to see it as an inevitable, but temporary, necessity in societies that have not yet achieved more civilized forms of coexistence, fairer means of income and opportunity distribution, and safer ways of dealing with structural injustices. Thus, admitting that punishing irrevocably means inflicting harm on an agent, even if legalized, implies understanding that punishment, even when justified by the social benefits that can be obtained, remains morally dubious. And this awareness of punishment as an evil provides us with some limits for penal practice itself, that is, punishment should be applied with extreme reluctance, as a last resort in the face of an inevitable social need.

From this perspective of viewing punishment as inherently unjust, it also allows us to shift the focus from the idea of retribution, of punishment, to a greater understanding of the causes of illicit human behavior. It seems to be the case that punishment ceases to be an exclusive exercise of censorship, becoming a starting point for a deeper investigation into the conditions and circumstances that lead the agent to transgression. At this point, there is room to consider issues of distributive justice, collective responsibility, and reparation policies. Questions about why we act as we do then begin to occupy space in the debate, that is, it leads us to analyze the social, economic, and psychological contexts that structure human conduct. The change of perspective that we propose also allows us to realize that, often, we punish more those who are victims of unjust social circumstances, such as poverty, exclusion, structural racism, lack of access to education and mental health, and reveals the penal system as a mechanism that perpetuates these inequalities that, we argue, should be combated.

Thus, falling primarily on the most vulnerable, punitive practices operate as an instrument for maintaining structural injustice. Overcrowded prisons, with their inhumane treatment and often lacking basic living conditions, disproportionately affects the Black, poor, and poorly educated people, revealing that punitive rationality has, perhaps unconsciously but as a result of a restricted model of retribution, a specific social target. This restricted model, based mainly on retribution, leads us to blame and punish individuals for what they are not and cannot be directly responsible for, while neglecting the structures that produce marginalization. This also leads us to recognize the urgent need for a moral and institutional transformation capable of shifting the focus of the penal response from suffering to a pursuit of reparation, rehabilitation, and prevention.

This reformulation of the focus or objective of punishment is a requirement of the very concept of moral progress, which can also be understood as the gradual overcoming of forms of violence institutionalized by the State. In the same way that we have already abandoned practices such as torture, dismemberment, branding with hot irons, and the death penalty, it seems that the time has come to rethink imprisonment as a standard form of punishment and give way to more humane and effective alternatives. It is still an embryonic debate, but among the alternatives we highlight the quarantine model, the therapeutic model, and the educational model, as they have in common the shift of punishment towards social protection, the rehabilitation of the offender, and the strengthening of conditions of social justice, criteria that are fundamental to the objectives of overcoming injustices. Note also that these models are aligned not with the elimination of moral/legal responsibility, but with the collective aspects of this responsibility, recognizing the interdependence between social conditions and individual conduct.

It is therefore important to emphasize that recognizing punishment as essentially unjust does not, in any way, imply rejecting the idea that there should be a social response to crime. Rather, it allows us to consider more effective and less harmful ways of responding to crime and violence. Thus, the challenge clearly lies in finding institutional responses capable of reducing unjustified suffering and prioritizing prevention, rehabilitation, and social reintegration. Moral progress requires us to replace the already obsolete logic of social revenge, that is, retribution. Social protection and the affirmation of social values are necessary, but with respect for basic human rights and the dignity of those involved.

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Declaração de Disponibilidade de Dados:

Todo o conjunto de dados que dá suporte aos resultados deste estudo foi publicado no próprio artigo.

Submetido: 15 de outubro de 2025.

Aceito: 24 de novembro de 2025.