

**Happiness and Abolitionism: Decentering Crime, Punishment and Time**

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The same goes for the duration of the punishment; it makes it possible to quantify the penalties exactly, to graduate them according to circumstances and to give to legal punishment the more or less explicit form of wages; but it also runs the risk of having no corrective value, if it is fixed once and for all in the sentence. The length of the penalty must not be a measurement of the 'exchange value' of the offence; it must be adjusted to the 'useful' transformation of the inmate during the term of his imprisonment. It is not a time measure, but a time finalized (Foucault 1977: 244).

A central aspect of the abolitionist enterprise involves decentering the ideological prominence of the crime-punishment dyad. Such a project, it is sometimes argued, requires a conceptual shift wherein the master category of 'crime', might be replaced or supplemented with notions of 'tort' or 'debt' and its corollary of 'punishment' with frameworks of 'reparation' or 'compensation' drawn from customary, traditional and civil law sources (e.g., Davis 2003, Hilyard et al. 2004, Hulsman 1986). This essay is very much in line with the above normative project and shares many of its core assumptions but in the discussion that follows, I approach these concerns from a slightly different starting point. I explore whether it might be conceptually fruitful to reconceive the crime-punishment nexus as a debt relation.

More specifically, this chapter proceeds in three steps. First, I begin by arguing that much of the way we treat imprisonment, and punishment more generally, is as a transaction. This transaction takes the shape of an exchange relationship between a

debtor (the offender) and a creditor (the state); criminal debt is settled or repaid by the debtor in blocs or units of his or her time. I will also argue that together, these individual debt settlements form part of a larger punitive economy within which time is the primary unit of exchange.

As such, it has a wide circulation and is generally assumed to be a stable medium that can be proportionately calibrated. Second I will discuss some of the recent interdisciplinary debates about punishment and its justification precipitated by research on happiness. I will argue that these pose significant challenges to how we currently think of imprisonment and temporality (and particularly the link between temporality and proportionality). Third, by way of conclusion, I will sketch an abolitionist position that incorporates the critiques developed in sections 1 and 2 and which argues for an abolition (decentering) of time as the core medium, signifier and currency for punishment. I argue that the way we make use of and think of time in criminal justice greatly distorts our capacity to think of alternatives.

### **I. Imprisonment, Time and Debt**

In a passage describing the seeming ease with which 19<sup>th</sup> century societies embraced the prison, Foucault (1977) noted the enduring self-evident and 'natural' character of imprisonment: despite our knowledge of its limited or even negligible utility and its loathsome and dangerous capacities, we are seemingly incapable of contemplating how to replace it or even do without it. According to Foucault, the roots

of this self-evidence flow from the central functions and rationales attributed to imprisonment: the deprivation of liberty and the promise of rehabilitation (1977: 232-233). In modern Western societies that prize liberty and the capacity for self-determination above all other public goods, the prison appears as an intuitive corollary. Liberty, so our political myths tell us, is available to all and in the same proportions. Because of its universal diffusion, the curtailment and restriction of liberty impacts all in the same way and carries the same 'value', thereby leveling the differences between individuals and producing a form of punishment that is (at least normatively) 'egalitarian'.

Yet upon closer inspection, imprisonment's intuitive reasonableness lies in the fact that deprivation is measured and meted out in quotients of time. And in some respects our thinking about time parallels our thinking about liberty: time is a universal possession, something that (in theory) everyone has in equal amounts, can make use of as they see fit and which carries the same 'value' to everyone (Matthews 1999:39). But unlike liberty, time is readily quantifiable and supports a series of economic rationales with respect to punishment that mimic the wage-structure of labor in capitalist society.

'By levying on the time of the prisoner, the prison seems to express in concrete terms the idea that the offence has injured, beyond the victim, society as a whole. There is an economico-moral self-evidence of a penalty that metes out punishments in days, months and years and draws up quantitative equivalences between offences and durations. Hence the expression...that one is in prison in order to 'pay one's debt' (1977: 232-233).<sup>1</sup>

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<sup>1</sup> These economic-transactional assumptions are also evident in expressions like: 'don't do the crime if you can't do the time' or 'crime doesn't pay'.

From this brief sketch of imprisonment as a form of debt one can draw at least three inferences: (a) each form of criminal injury has its rough equivalent in a punishment; (b) payment of this equivalent can actually constitute a discharge of the debt and; (c) time is the most common currency used to pay this debt.<sup>2</sup>

This exchange character of punishment is certainly older than the prison. For example, Aristotle in the *Ethics* described crime as an 'involuntary transaction'(1131a 4-10) and the judge's meting out of justice as the restoration of equality: 'when one party is struck, and the other strikes, or one kills and the other is killed, the suffering and the action are divided unequally. The judge tries to equalize them with the penalty, decreasing the gain that has been made (1132a 8-11).' And with a slightly different inflection, Nietzsche in his *Genealogy of Morals*, argued that the oldest and most enduring element in punishment was the contractual form and the '...idea that every injury has its equivalent and can actually be paid back, even if only through the pain of the culprit (1967:63).' In different historical periods criminal debt was paid in different currencies including money (e.g. the Wergild in the Middle Ages), labor (indentured servitude or workhouses), mutilation and death.

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<sup>2</sup> An important question in this regard revolves around who does the criminal owe? There are at least three parties to the transaction which, arranged in order of proximity to the injury, are: a) the victim, b) the community and c) the state. In order of priority the state would be the least important of the interested party to the transaction, yet in the modern administration of criminal law it becomes the central proxy or creditor for this debt. As many sociologists of the state argue, the transfer of this creditor function originates in those very processes of monopolization and pacification involved in a state's own formation. In this view the state is the grand creditor (as in the metaphor of the social compact) and all of society's members are debtors to the state in some sense (e.g., for the security it provides).

Thus although the notion of debt has figured centrally within the history and culture of punishment, it is only when measurement and payment of that debt took the form of time segments that the transaction took on an objective, universally valid and (hence) non-arbitrary character. In *Marxism and the Law*, Evgeny Pashukanis (1978) develops this theme into a commodity theory of law. He argues that legal categories and forms represent direct corollaries of the groupings and relationships generated in the economic system's mode of exchange and production. For Pashukanis, the liberal democratic subject—conceived as an autonomous, rights-bearing and property-owning individual who relates to his fellow citizens through relationships of contract, ownership and exchange—is a universalization or abstraction of the patterns of life privileged and sustained by the capitalist system. By reframing unequal relations as a formal bundle of universal rights, law reifies capitalist categories and relations while veiling and obscuring their class-based origin (1978-181-188). The commodity form also serves as a template for the structure and rationalization of criminal law and he emphasizes law's role in class discipline as well as its capacity to veil the very power differentials it works to sustain.

Within the above account the principle of proportionality (equivalence) occupies a central position: for a given crime to be proportionate to a given quantity of punishment, that punishment must be reduced to a sufficient level of abstraction (i.e., deprivation of liberty measured in units of time) so that it can be responsively calibrated in line with variations in criminal forms. This operation makes possible the use of time and liberty as stable mediums of exchange and is modeled on how the economic system measures human value:

‘For it to be possible for the idea to emerge that one could make recompense for an offence with a piece of abstract freedom determined in advance it was necessary for all concrete forms of social wealth to be reduced to the most abstract and simple form, to human labor measured in time...Industrial capitalism, the declaration of human rights, the political economy of Ricardo, and the system of imprisonment for a stipulated term are phenomena peculiar to one and the same historical epoch (1977: 181).’

Yet according to Pashukanis, the abstraction of punishment—that is the process of simplification so necessary to make the same punitive form sensitive to differences in gradations of harm—also generates distortions in how that punishment is represented and understood. Though for the sake of equivalence, punishment *X* for a crime *A* is determined through a series of numerical additions and adjustments based upon the culpability of an offender, his or her criminal profile, the seriousness of the crime and the damage caused, the bulk of conceptual effort is made in the direction of generating equivalence, not in ensuring fidelity to the content of punishment.

Yet the idea of the criminal as a debtor and of society (and the victim) as a creditor is only one part of the equation and if imprisonment were solely based upon this relationship perhaps greater attention would be paid to the Pashukanis’ point about the content of punishment. The second component to imprisonment’s self-evidence, returning to Foucault (1977), is the idea that it can also qualitatively transform individuals. Rehabilitation and reform, whether through hard labor, penitence or more recently through cognitive-behavioral therapy, have long been central ideological supports for the practice of imprisonment. Importantly, rehabilitation supplements the notion that a criminal debt can be discharged by formalizing a community’s expectation (and pledge) that a criminal can return within its folds after reparation.

The combination of this dual logic is most evident in practices of early release: the idea of 'time-served' or of 'good credit'. One receives a 'credit' against one's unpaid debt for showing evidence of reform or rehabilitation—now operationalized as good discipline or successful and enthusiastic participation in a prison's rehabilitation and vocational programs. Similarly, when one is on remand or has been denied bail, the period of time one is incarcerated before conviction and sentencing is then deducted from the sentence that will have to be served. And, of course, negative behavior in prison similarly incurs new time-debts that are added onto the sentence itself. Finally one could argue that having served any time in prison functions as the criminal justice system's equivalent of 'bad credit' in the sense that it often makes one unlikely to negotiate more favorable terms for the repayment of the debt or of future debts incurred.

Thus the functional correspondence between a crime and a punishment draws coherence from the successful conversion of different degrees of criminalized harm and individual levels of culpability into different segments of time. These equivalences (between different crimes and their punishments) are arranged in a proportionate grid or ladder where the quantum of severity in a punishment shifts in step with the seriousness of a crime and the blameworthiness of the individual. Throughout, these proportionate movements up and down the 'pyramid of social harm' (Hulsman 1991:685) are largely effected through temporal means (I will bracket the institutional/spatial dimensions of imprisonment for this argument). Finally, the above also implies that the differences between these equivalences are (at least objectively)



meaningful, that they can be finely calibrated and, in this sense, are capable of speaking to both the harms a criminal has caused and the differences between different kinds of harms.

## **II. Hedonics, Proportionality and Temporality**

In their classical study of lottery winners and paraplegics researchers Brickman, Coates and Jonoff-Bulman (1978) developed the notion of ‘hedonic adaptation’ and the ‘hedonic treadmill’. Put simply, positive and negative life events impact on our levels of happiness but their overall effect is short-term; individuals adapt to these changes well and in a relatively brief period of time. Thus counter-intuitively, the researchers found that lottery winners, after the initial novelty of their winnings receded, were not any happier than those that had never won a prize. Similarly paraplegics, after the initial shock of their injury was normalized, were less happy than people that retained the full use of their legs but not appreciably so. Though there have been significant qualifications to Brickman’s original study in subsequent research (see for example, Diener and Diener 1996; Diener, Lucas and Scollon 2006), their findings have generally confirmed the existence of an adaptation effect.<sup>3</sup>

This leads to a second point in the hedonics literature that helps explain adaptation and why it may seem counterintuitive. When we evaluate the possible effect

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<sup>3</sup> Most of this data is based upon self-report studies (some longitudinal and some cross-sectional), but there have also been correlations between this data and other sources such as observer reports, facial measures, emotion sensitive tasks and neurological data (Diener and Ryan 2009: 391).

of an event (either as bystanders or individuals experiencing it) we make poor estimations about the impact that this will have on our future happiness. In the example of paraplegia, we might 'focus' on the effects of the disability and give it disproportionate weight in evaluating how it will change our lives. But we might also fail to consider the many aspects of our lives that paraplegia will not change (e.g., enjoying dinner with friends, a great movie, or pleasant conversation) (Ubel, Jepson and Lowenstein 2005). 'Focusing illusions' explain the gap between our appraisals of the emotional impact of an event (which exaggerates its impact) and our normalization of this impact in practice.<sup>4</sup> Three kinds of focusing illusions are particularly important. *Intensity biases* refer to individual's overestimation of the immediate emotional impact of an event and *durability biases* center on people's misrepresentations of the length and strength of what their emotional reactions will be. Finally, *immune neglect* refers to the fact that the level of misrepresentation tends to be greater for negative events than positive ones (Ubel, Jepson, and Lowenstein 2005:113).

Despite the homeostatic effect of adaptation, our ability to cope with certain kinds of life events is limited and defies adaptation. Three areas, connected with intimate relationships, work, and health, are cited in the literature for their lasting negative impact. Divorce, for example, has a significant and lasting toll on our wellbeing (Lucas 2005) but and although we do adapt to the death of a spouse, it may take as long

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<sup>4</sup> Yet this is not to say that life events do not have long-term consequences. Indeed there is significant debate in the psychological literature about what exactly is being measured when one measures for happiness. Although I might be armed with knowledge of the 'focusing illusion' in my everyday life and know that should I have a stroke or sustain a fine for failing to file taxes, the overall effect on my happiness will be minimal, my preference is still to avoid the discomfort.

as seven years to return to our previous baselines (Lucas et al. 2003, Lucas 2007).

Unemployment in particular has a lasting effect on levels of satisfaction (even after re-employment and where the duration has been relatively short). This is clearly the case for men (who have potentially internalized patriarchal social constructions of 'masculinity' as breadwinners) for whom the third year of unemployment is just as difficult as the first (Clark 2009, Lucas et al. 2004). Finally ongoing illness (e.g., chronic migraines, even high levels of noise) and degenerative diseases (e.g., multiple sclerosis, HIV/AIDS and Hepatitis C) also notoriously defy adaptation.

In recent years, hedonic insights have been applied in the fields of economics, legal theory and political philosophy. In the legal field they have been applied to tort law and civil compensation schemes as well as reinvigorating the debates in moral philosophy over the justification of punishment. For the purposes of this chapter, I want to 'cut across' this interdisciplinary literature without fully engaging its main concerns (an overall defense of either retributivist or utilitarian approaches to punishment) to develop some critical points about proportionality. The findings in the hedonics literature potentially open a Pandora's box with respect to imprisonment. Is prison one of those life events that resist adaptation and if so, why?

In 'Happiness and Punishment' (2009) and *Happiness and the Law* (2014) Professors Bronsteen, Buccafusco and Masur (2009) bring the hedonic insights discussed above to bear on the question of imprisonment and the effect of adaptation on how we think about and justify punishment. They argue that much like in the case of lottery winners and paraplegics, many prisoners seem to adapt to imprisonment relatively

quickly. Although the initial shock of incarceration is sharp (and accompanied by anxiety, psychological distress and very low levels of wellbeing), prisoners rebound significantly and over time this adaptation effect becomes more prominent. Prisoners develop coping strategies and use them to adapt to their situations and improve their own wellbeing (Bronsteen, Buccafusco and Masur 2009:1048). According to this view, much of the pain of imprisonment is 'front-loaded' in the sense that it is experienced and particularly prominent in the early stages of incarceration and yields diminishing returns (in terms of affective impact) over the course of a sentence (2009:1054).

Because much of the affective impact of imprisonment is front-loaded, the authors argue that the difference between 1 and 2 years of incarceration is not as great as is generally supposed and that the addition of large blocs of time beyond that does not appreciably decrease the level of an offender's happiness or their capacity for adaptation. On the other hand, imprisonment for any length of time does significantly impact an offender's levels of wellbeing post-incarceration. This is because imprisonment is associated with and promotes those noxious factors that defy adaptation. It impacts an offender's capacity to maintain family ties and significant relationships, places tremendous hurdles on employment chances, future career prospects and earning potential (2009: 1064).<sup>5</sup> Finally, imprisonment increases one's exposure to communicable diseases and poor health conditions. In other words, the collateral sanctions that come bundled with criminal conviction (and are not a formal

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<sup>5</sup> The impact of substantially diminished earning potential sits very close to the exception to Easterlin's famous paradox. Money doesn't buy happiness except where it impacts extreme deprivation and levels of basic subsistence.

part of the sentence) come to play a central role in the severity and experience of the punishment that is meted out (Bronsteen, Buccafusco and Masur 2009: 1051-1052).

Paradoxically then, the post-conviction effects of prison impose a relatively uniform amount of suffering that persists well after the time debt has been paid. At the same time, differences between short-term, medium-term and long-term sentences are not as great as one would assume since a significant share of the 'pain' of incarceration is experienced in the first two years of imprisonment. What we have then, or at least what this implies, is an inversion of the traditional ladder of proportionate severity. We punish less serious offenses heavily since they are exposed to both the most deleterious aspects of imprisonment and the exclusions of post-incarceration life. In proportionate terms we probably punish them much more severely than offenders who have committed more serious crimes and who receive longer sentences. Secondly, we are probably not adding much in terms of punishment between a mid-term and a long-term sentence, since adaptation and coping strategies minimize the hedonic differences between the two (Bronsteen, Buccafusco and Masur 2009: 1065-1066). The above claims, not surprisingly, have been the subject of sustained critique (e.g., Kolber 2009a, 2009b, 2013 Markel and Flanders 2010, Gray 2010, Markel et al. 2011, Wildeman et. al 2013). In the next section I briefly summarize these points because they help draw out some of the key implications of time as a currency of punishment and criminal justice more generally.

### **III. Time and the Pyramid of Social Harm**

One key thrust of the hedonics argument is that its insights problematize the linear logic that undergirds how consequentialist and retributivist theorists conceive of proportionate punishment. This claim has been the subject of significant challenge, particularly from retributivists who attach a high premium on the need for proportionality in justifying punishment. A central strategy in these exchanges has focused on the distinction between subjectivist and objectivist interpretations of punishment. According to Kolber (2009a, 2009b), a subjectivist, this difference is framed: a) in terms of how the currency of punishment is conceived and b) in terms of how the underlying ideas of proportionality that help structure and legitimate a person's criminal sentence are understood. Objective accounts prioritize the deprivation of liberty as punishment and are committed to absolute proportionality while subjectivists are attentive to the physical or emotional distress generated by punishment and seek comparative proportionality (2009a: 1584). Kolber is critical of Bronsteen, Buccafusco and Masur not because their emphasis on psychological and mental states is too subjective but rather because it is not subjective enough. His argument hinges on the point that subjective experiences of punishment matter greatly, are individually variable and should be taken into account (e.g., through the use of available and soon to be available technologies such as brain imaging and scanning) in meting out punishment (2009 b: 222-223). To give one evocative example, he asks us to imagine two individuals, guilty of the same crime, sentenced to the same prison term except that one is severely claustrophobic and the other is not. Clearly the pains of

imprisonment experienced by the former are completely different from the sort experienced by the latter (2013: 1161-1162). Yet it is precisely these sorts of differences (much like the variation in institutional conditions of confinement or the emotional and psychological sensitivity of offenders) that the machinery of justice is poorly equipped and conceptually unwilling to consider of relevance.

Ultimately Kolber, much like Bronsteen, Buccafusco and Masur, targets the comparative proportionality of punishment. Comparative proportionality can be distinguished from absolute (or objective) proportionality in the following way. Champions of the latter will stress that a punishment is justified to the extent that it is proportionate to the crime for which it is inflicted and the culpability or blameworthiness of the offender (Gray 2010: 1631). A secondary consequence of such an approach is the notion that these instances of individual proportionality should hold good across a series of similar cases, since one would expect that like cases be treated in the same way. For comparativists on the other hand (and here we should note that Bronsteen, Buccafusco and Masur (2010) explicitly do not take this position) whether the 'currency' of punishment is suffering or the deprivation of liberty, the only way one can achieve a proportionate level of punishment is to take individual offenders and compare their baseline 'affective' or experiential state prior to punishment with the same measure as a result of punishment (Kolber 2009a:1584-1585). This position would take into account the tremendous variation in the way individuals experience imprisonment and seeks to give this difference some impact on the calibration of

individual sentences so that similarly positioned individuals would actually receive the same 'amount' of punishment.

Before continuing it should be noted that I am not interested in developing an account of punishment that takes either an objectivist or subjectivist line of interpretation, nor am I interested in taking sides in the perennial debate between consequentialists and retributivists over the appropriate justification of punishment. Rather, I would like to use these debates as a departure point for some critical points about the structure of criminal proportionality and the underlying logic that lends it a veneer of legitimacy.

A good starting point might be the chasm between objectivists and subjectivists over how best to describe what punishment is. Put simply, the former maintain that the purpose and function of punishment is not to impose harm (and whatever deliberate harm is inflicted on those punished should not be defined as 'punishment' proper) while the latter maintain that punishment is first and foremost the singling out of an individual for the infliction of suffering. Empirically and historically one could certainly find ample cases supporting the subjectivist line of interpretation even if, as institutionally framed and formally justified in law, modern punishment tends to eschew expressive and sanguinary forms of justice. Yet, as I have argued, the currency of modern punishment is neither the deprivation of liberty nor the imposition of suffering *per se* but one (or both of these things simultaneously) in addition to time. The state punishes in units of time and it is this time that is traded, credited and imposed upon criminals because punishment is largely operationalized and quantified in temporal terms.



The recognition of time as the proper currency for criminal justice does not resolve the above divide but further problematizes it since within prison the temporal is experienced in both objective and subjective terms. Criminal sentences involve extensive periods of 'waiting' and time appears in prison ethnographies as both an enforced, durable dimension of institutional structure as well as a powerful source of deprivation, anxiety and, potentially, madness. Between the formal and objective timetabled flow of prison life and the determinate years of one's prison sentence stretches an interpretive abyss (Cohen and Taylor 1992, Brown 1997, Scarce 2002, Martel 2006, Wahidin 2006). Indeed numerous studies chart the precarious terrain between "doing time" and madness by considering how prisoners develop strategies to contend with and manipulate the flow of time (e.g., Scarce 2002; Wahidin and Tate 2005; Wahidin 2006, Moran 2012).

Prisoners attempt to master the monotony of time as a means of sustaining a personally suitable identity (Martel, 2006:598) and of psychological survival (Medlicott 1999). According to Cohen and Taylor (1972:103), it is a way of reckoning with a future that is paradoxically too remote, because it evokes the enormity of the gap between it and the present, and a necessary source of sustenance that marks the end of exile. Ironically though, echoing some of the insights of hedonics, scholars have found that the reclamation of time-autonomy through such routines also tends to reinforce the sense in which the present becomes an "extended and undifferentiated space," unmoored from the past and un-tethered to a future that one would rather not think about (Brown 1997: 97-98, Meisenhelder, 1985).

The above is merely to emphasize the point that subjectivist accounts matter even when approaching punishment through the phenomenology of time. Imprisonment produces significant material and psychological consequences that are poorly conceptualized as such within the moral philosophical literature on punishment. Further, even if one puts aside the subjective critique of time-as-punishment and probes specifically at time as an objective medium of penal exchange, one cannot help but note the instability at the core of this currency.

Some core assumptions of criminal law sentencing stretching from Beccaria and Bentham to the present day are the following: (a) the more time an individual receives the greater the amount of punishment they endure and (b) the difference between different time sanctions is meaningful, proportionate and can be finely calibrated. Even with a strong dose of skepticism with respect to the notion of 'adaptation' informed by the above prison ethnography, hedonics throws into question the idea that we can finely calibrate time sanctions through imprisonment. It also destabilizes the notion that the differences between temporal sentences of divergent severity (say between a sentence of 2 ½ years and 5 years) bear a meaningful relationship to the severity of harm they are respectively meant to address.

As we have seen, the objectivist critique of comparativists would argue that the proportionality of punishment depends on the relationship between a sanction, the harm caused by an offender and his or her blameworthiness. From this point of view, whether similarly positioned offenders experience similar subjective punishment is incidental. Yet on closer inspection, where does this objective equivalence between

culpability, crime and punishment come from? Absolute (or objective) proportionality gains meaning only in terms of the position a particular time sentence occupies in the larger grid of proportionate sentences. It is not subjective comparability that is most problematic for punishment in units of time but the objective comparability of criminal sentences.

If 3 years in prison is the objectively appropriate sentence for assault, it only gains this objectivity within a larger economy of time sanctions for particular crimes that can speak to the objective differences between different levels of criminal harm (e.g., a system in which 1 year is an appropriate sentence for shoplifting and 15 years is an appropriate sentence for manslaughter). That is, absolute proportionality is dependent on the 'pyramid of social harm' within which the possible sentences handed out to an individual offender for a particular crime are nested. On this point Hulsman's (1986, 1991) insights are particularly salient: he argued that the scale of social harm constructed within criminal justice which forms the basis for the proportionate equivalences between crimes and punishments suffers from selection bias. The Criminal Justice system takes into account only those social harms that have been designated as 'crimes' in drawing up its proportionate grid, it does not seek to compare or draw its equivalences from broader cultural or moral scales of social harm. Thus rather than a tidy and objective ladder of equivalences corresponding to differing levels of harm, temporality at its best appears to be a crude and widely fluctuating modality of exchange. Further, returning to the notion of debt (and the collateral sanctions that flow from criminal conviction) it is clear that all prisoners pay back much more than they

have been formally determined to owe in the transaction. Indeed there is a strong skepticism over whether, given how things are configured, the debt can ever be paid back.

From a formal point of view offenders are sentenced to imprisonment as punishment not for punishment. This view privileges an instrumental and monolithic understanding of the prison sentence; it is a metric or measurement and nothing more. Yet as Messuti (2008:90-91) and others (e.g., Hulsman 1986, 1991; Hilyard et. al. 2004) convincingly argue, this view obscures the processes of detemporalization and retemporalization through which penal logic is sustained. For a harmful act committed by a suspect to be considered a legally defined crime, it must first undergo a process of abstraction where it is pulled from its time (the past) and made 'present' so that it can be 'cancelled'. A similar process occurs to the author of the act: he is detemporalized (pulled from the specificity of his own biological time and life's chronology) and abstracted, only to be retemporalized as a legal subject that exists in the time of law. The legally sanctioned subject that emerges from this transformation does not even reflect the most basic temporal characteristic of the prisoner: his biological finitude (Messuti 2008: 91).

This abstraction process makes possible sentencing criminals to terms that will greatly exceed the human life span but it also supports a variety of more quotidian applications; including the use of credits and debits in determining how much time a prisoner will serve or the seemingly arbitrary bargaining process through which blocs of time are used as leverage to induce criminal suspects to plead guilty for a lesser charge

and shorter time sentence. As the literature on prisoners and time illustrates quite powerfully, this is a legal fiction. If this “quantitative and abstract temporal determination” (Messuti 2008, 32) is the punishment, the problem of how a numerical value (2, 3, 4 years) can be harnessed to transmit a particular punitive intensity must necessarily be resolved in the subjective experience of the prisoner himself and his internalization of this duration. The formal view systematically furthers this internalization and sanctions it as “the punishment” but it also walls it off in the prison where its content and character will take concrete form. In the process the calculus of sentencing and the finalization of justice through temporal means are insulated from the “inner time of incarceration” (Goldberg-Hiller and Johnson 2013: 643). Above all this works to shore up and cordon the time of sentencing, which anchors the whole process of criminal justice, from the tenuous logic upon which the operationalization of time in related contexts (e.g., parole review, death row, plea-bargaining) depends.

In other words, it should be emphasized that although this chapter focuses specifically on the punitive end of the time-imprisonment relationship, the prison occupies a premier position in a larger time-economy or market. There is a continuum of temporal orders running from the moment of arrest all the way through to the moment of incarceration and release. In these varying contexts time serves and comes to assume multiple functions. For example, in the context of interrogation and detention during a criminal investigation or in the period between arrest and arraignment, time also functions as an index of justice. Timeliness is an important principle of due process and time spent in detention without accruing credit against a debt is potentially

illegitimate and an abuse of state power. Time is also haggled over and negotiated in plea-bargain agreements. Finally in parole board reviews, time is anchored to yet another series of considerations involving one's proof of reform, one's behavior in prison, the credit or debits one has accrued and one's level of dangerousness.

In each of the above examples the operationalization of time changes in light of the exigencies of context and the role it is supposed to perform. And yet, all of this remains dependent on how the sentencing process fixes a particular abstract and impersonal value on time; a value that can then be imported in other domains or "markets" not as an equivalent currency that has everywhere the same value, and is determined through the same process, but as a more fundamental baseline for a variety of crude economico-rational assumptions and strategies. Further it is clear that all other penalties with a time component (conditional release, supervision orders, parole, life supervision sentences) continue to gain meaning in relation to the time sentence of imprisonment and draw their force from the implied or explicit threat of its imposition. So in this sense imprisonment really is a 'time-machine' (Medlicott 1999) and its existence helps anchor the temporal as a more general currency for criminal justice<sup>6</sup>.

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<sup>6</sup> Indeed one might cite the example of the recently abolished Indeterminate Sentences for Public Protection (IPP), which were indeterminate penal sanctions designed primarily for the purposes of preventative public protection, as a case in point. These sentences were steeped in an elaborate chronology of the time offenders would serve in prison (e.g., the punitive tariff vs. the public protection portion, the timing of sentencing plan reviews and assessments, parole board hearings etc.) and on the outside (the life sentence). More generally, the broad use of the term 'tariff' as descriptor of an incarceration sentence in the UK illustrates both the economic, debt-based assumptions upon which imprisonment relies and occludes their grounding in temporal considerations. On IPP sentences see generally: Jacobson and Hough 2010.

In conclusion, it should be noted that the relevance and prominence of abstract time in criminal justice has accelerated since the late 1970s in connection with the decline of expressive (capital punishment) and individualized (rehabilitation) forms of punishment, as well as the increasing importance of human rights legislation (in Europe at least). To give just one example: in the UK since 1992 and the Conservative party's about-face from the Criminal Justice Act of 1991, temporality has become central to punishment.<sup>7</sup> Further, recent rulings by ECHR (e.g., *Hirst v. UK*) have seemingly reemphasized the importance of time in stressing the principle of normalcy: 'Prison life should be arranged so as to approximate as closely as possible the realities of life in the community,' and rule 64 of the European Prison Rules (Recommendation No. R (87) 3 of the Committee of Ministers of the Council of Europe):

'64. Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this.' (Murdoch 2006: 200)

In other words, divorced from notions of retribution and suffering. What is the core of imprisonment as a penalty? What is the principle of normalcy and rule 64 really saying? Above all: time is the punishment. But if, as I have argued, time is poorly equipped to serve as the medium of punishment then a necessary step in thinking beyond the pitfalls of the crime/punishment nexus of equivalence—and thus a central component in imagining alternative ways of thinking about crimes as harms and

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<sup>7</sup> The 1991 Criminal Justice act had 3 main features: 1) the seriousness of crime should be the prime determinant of punishment, 2) less weight should be given to previous convictions in sentencing and 3) offenders should be punished with a community penalty when possible and through the introduction of the unit fine.

punishment as the reparation of debt—requires thinking beyond ‘time’ as the central currency through which this debt is paid. It involves decentering the hegemony of time as the primary lens through which punishment is measured and conceptualized. The apparent objective and calculable character of time leads us into thinking that the equivalences that are generated through it are stable, calibrated and meaningful.

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