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Pain Matters? The New Life of *Poena Naturalis*

Alberto di Martino[1]

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Abstract
What purpose does legal punishment serve when the offender is already enduring profound suffering as a consequence of the offence itself? This paper addresses that question through the concept of poena naturalis: the severe suffering that may result from a grave misfortune affecting the offender or those closely related to her, typically as an unintended consequence of her negligent, reckless, or even intentional criminal conduct. I argue that poena naturalis needs not to be conceptually contrasted with legal punishment. Rather, it is best understood as grounding a legal power to mitigate or even waive punishment. On this account, poena naturalis does not place forgiveness in opposition to justice; instead, it reveals their complementarity. The paper therefore defends a compatibilist account of natural punishment that provides a coherent normative framework for addressing the practical and doctrinal questions that must be confronted if the relevance of natural punishment is to be recognised in positive law.

Keywords Natural punishment · Forgiveness · Punishment and mercy

1 Scenes of Suffering

This paper examines how to address the severe suffering that may result from a grave misfortune occurring to the offender or to persons closely related to her, typically (though not necessarily) as an unintended consequence of her negligent, reckless or even intentional criminal act.[1] At the outset, it is necessary to delimit the scope of the

[1] With Antony Duff I believe, as concrete cases show, that the problem might also arise in the case of self-punishment of the individual, e.g. in attempted suicide cases (see also below, fn 9): Duff 'Justice, Mercy, and Forgiveness', *Criminal Justice Ethics* 51 (1990). More recently see Id. 'Mercy', in John Deigh, David Dolinko (eds), *The Oxford Handbook of Philosophy of Punishment* (OUP 2011), 467.

✉ Alberto di Martino
alberto.dimartino@santannapisa.it

[1] Scuola Superiore Sant'Anna, Pisa, Italy

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inquiry to punishment that is causally attributable to the commission of the offence, as opposed to misfortunes arising independently of it. This restriction is warranted for several reasons, four of which will be briefly indicated. First, in the absence of a causal nexus, the notion of punishment within criminal law would be employed merely in a figurative sense. Second, cases of direct causal derivation offer a particularly clear analytical setting, allowing the fundamental elements of the argument to be identified and, if necessary, providing a point of departure for addressing more problematic or marginal cases. Third, there is an empirical consideration: the doctrinal debates concerning so-called natural punishment overwhelmingly focus on situations in which the harm suffered by the offender follows directly from the criminal act. It is therefore methodologically appropriate to ground the philosophical analysis in these paradigmatic instances. Finally, it must be asked whether a misfortune that befalls the offender after the commission of the offence would presuppose, in order to qualify as punishment, a religious or metaphysical framework. The longstanding association between guilt and punishment by fate, often illustrated through references to Greek mythology, may appear to support such a view. Yet this question is useful only insofar as it helps to dispel conceptual confusion. While it may be conceded that, in certain historical contexts, such as ancient Greece, the sanctioning of wrongdoing was attributed to fate or divine agency,[2] such sanctions would not, strictly speaking, constitute 'natural' punishment. Rather, within those belief systems, they would amount to a form of institutional punishment, albeit grounded in a different normative order.[3]

Pain, or suffering that arises from the commission of a crime, as described above, is traditionally referred to as natural punishment, as opposed to legal punishment (*poena forensis* or *civilis*). The term *poena naturalis* is famously used by Kant who defines it as a situation in which 'the vice punishes itself'; importantly, Kant specifies that it *is* in no way taken into consideration by the legislator.[4] Some one hundred and forty years earlier, Hobbes had already addressed natural punishment explicitly in

[2] See only Aeschylus, *Agamemnon*, vv. 1578–1581 ('now will I grant that gods above as man's right-vindicators scan the crimes of earth; now that I see there, grateful sight to me, that man lie in the Furies' own-spun robes, atoning for his father's hand's device' – https://dn790001.ca.archive.org/0/items/agamemnonaeschyl00aesciala/agamemnonaeschyl00aesciala.pdf). Larry May, *Ancient Legal Thought. Equity, Justice and Humaneness from Hammurabi and the Pharaos to Justinian and the Talmud*, especially Ch. 22 'Hybris and Impiety' (CUP 2019). On supernatural punishment see Christopher Harding and Richard W. Ireland, *Punishment. Rhetoric, Rule, and Practice* 153–155 (Routledge 1989).

[3] See especially Renaud Gagné, *Ancestral Fault in Ancient Greece*, *passim* and esp. Chapters 6, 7, and 470–472 (CUP 2013). I am indebted to Corinne Bonnet for drawing my attention to this work, which offers extremely valuable insights into a complex aspect of the ancient Greek culture and 'theology'

[4] Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (1797), § 331 I [new edition by Bernd Ludwig, (Meiner 1986), 155]: through the 'natürliche Strafe', as contrasted to the punishment inflicted by a judge ('richterliche Strafe (poena forensis)'), 'das Laster sich selbst bestraft' and '(auf sie) der Gestzgeber gar nicht Rücksicht nimmt'. From an exegetical point of view, this clarification leaves one in doubt as to whether it is purely descriptive or normative, in the sense that it is unclear whether Kant is referring to the fact that legislation does not provide for the possibility of taking the natural penalty into account (an interpretation legitimised by the use of the indicative verb) or to the fact that legislation could not or should not provide for this consequence to be taken into account.

Chap. 28 of Leviathan (*On Punishments*, *and Rewards*).[5] According to Hobbes, natural punishment must be excluded a priori from the concept of punishment, much in the same way that inflicting an evil for an action performed before any law prohibited it does not constitute a punishment. Indeed, by definition, such evil would qualify not as punishment but rather as an act of hostility.

However, the delineation of conceptual boundaries does not, by itself, resolve the problems arising from the relationships between *poena naturalis* and *poena forensis* (the latter being punishment in a conventionally juridical sense of this word). The events of life with which legal systems deal compel us to confront those relationships directly. Indeed, situations labelled as natural punishment occur frequently in judicial practice across different countries. The cases share common structural features despite their diversity. The brief survey I provide below is limited to a few countries in continental Europe and the United Kingdom,[6] noting that each case has sparked significant theoretical debate and that criticisms have been levelled as to the conspicuous diversity in the outcomes.

Examples include negligent conduct by a parent resulting in the death of a child or the death of other relatives – or close friends – in different contexts, such as car

[5] Hobbes argues, in the proposition entitled to 'Naturall evill Consequences, No Punishments', that 'whereas to certain actions, there be annexed by Nature, divers hurtfull consequences; as when a man in assaulting another, is himselfe slain, or wounded; or when he falleth into sicknesse by the doing of some unlawfull act; such hurt, though in respect of God, who is the author of Nature, it may be said to be inflicted, and therefore a Punishment divine; yet it is not contained in the name of Punishment in respect of men, because it is not inflicted by the Authority of man' (https://www.gutenberg.org/files/3207/3207-h/3207-h.htm#link2H_4_0373). On Hobbes's theory of punishment see, generally, Arthur Schuster, *Punishment and the History of Political Philosophy. From Classical Republicanism to the Crisis of Modern Criminal Justice* 51–74 (Univ. of Toronto Press 2016).

[6] The experience of Latin America is often considered in comparative surveys: see recently e.g. Grace Elizabeth Moreno Yanes, 'La pena natural como criterio de oportunidad: un freno al expansionismo penal', 17/2 *IURIS* 105 (2018) at 115–117; further references to (western) legal orders in: Marco Edgardo Florio, *La pena naturale* 217–224 (Jovene 2025).

accidents or workplace incidents (UK, Germany, Italy);[7] failed suicides of mother and child (so-called extended suicide), where only the child dies, as well as mercy killing followed by attempted suicide (Germany, UK);[8] severe injuries suffered by

[7] For a car accident case, where Sec. 60 of the German penal code has been applied, see Oberlandesgericht Karlsruhe NJW 1994, in Sabina Sprotte, *Die* poena naturalis *im Straf- und Strafzumessungsrecht* (Peter Lang 2013) at 72 fn 305. In another car accident case, a judge ruled out the application of § 60 StGB (as the legal requirement of '*offensichtlich Verfehltsein*' [being obviously misguided] of the penalty, necessary for the judge to refrain from punishment, was not met). Although the judge considered the consequences of the car accident, entailing the death of the defendant's wife, as a mitigating factor, she acknowledged that the defendant was a recidivist in driving under the influence of alcohol and had therefore shown himself to be irredeemable. By virtue of Sec. 60 (Dispensing with penalty) 'The court dispenses with imposing a penalty if the consequences of the offence suffered by the offender are so serious that the imposition of penalties would clearly be inappropriate. This does not apply if the offender has incurred a penalty of imprisonment for a term of more than one year for the offence'. This provision is much criticised, and its repeal is sometimes called for: see Sprotte, with further references. But see the positive stance taken e.g. by the internationally renowned German scholar Claus Roxin, *Strafrecht. Allgemeiner Teil* I 120 marginal no. 30 (4th edition, Duncker&Humblot 2006). As for Italian cases in the context of workplace incidents: (*i*) the legal representative of a company carries out a repair job jointly with his nephew on the roof of a house, which collapses causing the death of the nephew due to the uncle's negligent violation of safety regulations; (*ii*) nephew causes the death of his uncle during the felling of a tree, which was carried out in violation of accident prevention regulations; (*iii*) an employer causes the death of his brother, his employee, who had not been properly trained and did not have the appropriate equipment. See, respectively, Court of Cassation, sec. IV, 26 March 2014, no. 16,067; Id., 22 June 2021, no. 24,417; Id., 3 April 2008, no. 13,939; Id., 13 November 2014, no. 49,735; Id., 19 April 2018, no. 29,505; Id., 11 February 2020, no. 11,536. In case (*i*), the Court of Florence raised a question of constitutional legitimacy regarding the absence of a provision empowering the judge to refrain from punishment where the suffering is so serious as to constitute 'natural punishment'. The Constitutional Court – while declaring the question of constitutional legitimacy unfounded on technical grounds, essentially linked to the need for a legislative determination – does not appear to exclude the potential relevance of natural punishment (judgment 25 March 2024, no. 48).

[8] In the UK, cases include (1) a clinically depressed woman who jumps off a bridge with her small child in her arms, intending to end both their lives: she survives but the child does not – here, the court stated that 'there are occasions when the court may set aside guidelines and authorities, and apply mercy'; (2) a man injures his adopted, very much loved son in an effort to resolve a desperate situation in which his son threatened him and continually challenged and provoked him. As for the first case: [2007] 2 Cr App R (S) 399, in Andrew Ashworth, *Sentencing and Criminal Justice* 201 nt. 198 (6th edition, CUP 2015). The second case is quoted *ibidem*, fn 201. Ashworth emphasises, however, that the court must give a full justification as to why the so-called interests of justice suggest deviating downwards or towards a suspended sentence from the guidelines: the use of the term leniency should not be allowed to exempt courts from properly justifying their actions.

the perpetrator due to an intentional crime such a trafficking in narcotics,[9] or terrorism[10] (Spain).[11]

Some codes expressly provide that, in situations of this sort, the judges can (or shall) refrain from punishment (this is the case in Sweden, Argentina, Bolivia, Colombia, Ecuador, Finland, Germany, Peru).[12] In other jurisdictions (e.g. Italy), the relevance of natural punishment has been considered in some reform proposals, and recent cases have triggered a renewed discussion on the topic.[13]

The practical questions that must be answered if the relevance of natural punishment is to be recognised in positive law are essentially the following:

- How to determine whether the perpetrator suffered, and how much?[14]
- Who decides whether and how much the defendant has suffered? Is mercy compatible with legal certainty and equal treatment in the application of criminal law, and how?
- Only negligent offences or also intentional ones?
- Only misdemeanours, or also (less serious?) felonies?
- Only consequences of a personal nature, be they physical or psychological, or also consequences of a broader economic nature, such as huge financial losses,

[9] A mother, in a situation of extreme poverty, with three children, one of whom is seriously ill, agrees to transport a few (eight) packets of cocaine inside her body from Bogotá to Milan with a stopover in Spain, where she is arrested and detained. In the hospital where she is admitted, she expels some of the drugs, but some of the packets rupture in her intestine, causing a risk of death, which is averted by two surgical operations. She later suffers major consequences due to the removal of part of her intestine. The judgment on the merits convicts her of drug trafficking but mitigates the penalty through the application of Article 21(7) of the Penal Code (which provides for the analogical application of mitigating situations: 'Any other circumstance carrying a meaning similar to the previously enumerated ones', especially the incomplete state of necessity) based on the so-called natural punishment: 'Cualquier otra circunstancia de análoga significación que las anteriores'. The judges held the situation similar to those instances in which 'not all the necessary requirements for exemption from liability in their respective cases are met' (art. 21(1) Penal Code). The state of poverty amounts to the incomplete state of necessity. Supreme Tribunal, ruling 806 of 30 April 2002. See specifically on this ruling José Antonio Choclán Montalvo, 'La pena natural y sus efectos sobre la culpabilidad del autor. Reflexiones acerca de la Sentencia del Tribunal Supremo de 30 abril de 2002', 46 *Actualidad penal* 1221–1238 (2002). For further references to Spanish case-law, see Álvaro Redondo Hermida, 'La "pena natural" en la jurisprudencia penal española', 61 *La Ley penal* 1–7 (2009).

[10] A terrorist attempts to plant a bomb, which detonates and causes the amputation of his legs and testicles, leaving him permanently confined to a wheelchair and dependent on assistance for the performance of ordinary daily activities for the remainder of his life. See Tribunal Supremo 31 January 1994, quoted in Miguel Bustos Rubio, 'El reflejo de la *poena naturalis* en la *poena forensis*. Posibilidades en derecho penal español', *Teoría&Derecho* 119–144 (2016) at 121.

[11] See generally Cristian Sánchez Benítez, 'La pena natural o poena naturalis en el derecho penal español', 46 *Estudios Penales y Criminológicos* 1–39 (2025); moreover, Bustos Rubio (fn 10); Hermida (fn 9); José Antonio Choclán Montalvo, 'La pena natural', *La ley* 1910–1916 (1999); Enrique Bacigalupo, 'Principio de culpabilidad, carácter del autor y *poena naturalis* en el Derecho Penal actual', *Cuadernos del Departamento de Derecho Penal y Criminología* – Nueva Serie 2, 141–164 (1998).

[12] See for references: Mario Caterini, 'La pena naturale *de lege lata*', 1 *Archivio penale* 1–61, 40–47 (2025).

[13] See only Florio (fn 6) with references.

[14] The severity of the suffering is necessary both to consider it as 'punishment' and to establish, for practical purposes, whether it can justify abstaining from punishment or only mitigating it.

loss of employment, as long as they are not already foreseen and voluntarily caused?
- In the case of complicity, in which only one of the participants suffers the natural penalty, how do we regulate the punishment of the others for the same act?
- What is to be expected in the case of several victims where only some suffer in the way relevant to *poena naturalis*?
- What consequence should be envisaged: abstention from punishment, or mere reduction?
- Should mercy/forgiveness (either in the form of abstention from punishment or of mitigation)[15] be mandatory or optional?

It is clear, however, that the resolution of practically contentious issues is contingent upon the answer given to a fundamental philosophical question: why should the criminal law consider the suffering endured by agents as a direct consequence of their crimes? Why should or could this suffering call into question the meaning, justification or extent of legal punishment? Hence, the problem of natural punishment calls into question the fundamental problem of punishment from a very specific point of view: its relationship with suffering.

In what follows, I do not seek to address all the practical issues mentioned above. Rather, I focus on the fundamental philosophical question of the role that so-called 'natural' suffering plays within the criminal justice process. The argument proceeds as follows. After outlining the basic homogeneity between suffering resulting from legal punishment and that resulting from natural punishment (Sect. 2), I critically examine the dominant methodological approach in the literature. This approach typically asks whether natural punishment can properly be regarded as punishment and, if so, whether it can fulfil the purposes traditionally ascribed to punishment. Accordingly, natural punishment is assessed through the lens of the competing theories that purport to justify punishment.

The conclusions reached by scholars diverge sharply. On the one hand, some deny that natural punishment qualifies as punishment at all, on the ground that it fails to satisfy the constitutive elements or purposes of punishment. On the other hand, others maintain that natural punishment can indeed be understood as genuine punishment (Sect. 3). I contend, however, that this debate is of limited interest. The fact that opposing conclusions are reached within the same methodological framework suggests that the question itself may be misleading. Hence, rather than asking whether natural suffering can be subsumed under the concept of punishment, this paper proposes to reverse the perspective and to examine the legal relevance of natural suffering in relation to the decision *not* to punish (Sect. 4). The focus thus shifts from the justificatory logic of punishment to the conditions under which the legal order may legitimately abstain from imposing it, on the basis of a legal recognition of suffering

[15] The words mercy and forgiveness are used here as philosophical concepts within the punishment theory and not as terms of art referring to legal 'pardons' and (royal, or presidential) prerogatives of mercy: see e.g. Arie Freiberg and Julian V. Roberts, *Advanced Introduction to Sentencing* 143 f. (Edward Elgar 2025). Besides, I use them as synonymous, following Leo Zaibert, *Rethinking Punishment* 4 (CUP 2018): both of them mean 'the deliberate sparing of a suffering that is deserved as a result of a wrongdoing […] based on a special moral reason'.

and of its concrete effects within the criminal law system. In my view, linking suffering and so-called natural punishment to the theme of forgiveness offers a clearer and more productive interpretation of the issue under consideration. On this account, not only does suffering express the negative consequence that accidentally affected the perpetrator herself due to its very wrongdoing (as the examples referred to above show), but it may acquire a positive moral *and* legal value that is capable of grounding a *justified* response by the legal order in terms of non-punishment. To develop this claim, the analysis draws on certain communicative theories, treating them as more apt for explaining abstention from punishment – and thus the choice to forgive – than for grounding punishment itself. In this respect, I employ these theories beyond the intentions of their proponents.

I argue that there is no contradiction between forgiveness and justice; rather, the two stand in a complementary relationship. In other words, I defend a compatibilist thesis, which provides a conceptual framework capable of addressing the range of practical questions sketched at the outset. Although these questions will not be examined analytically in what follows, they nonetheless benefit from the clarification offered by this approach (Sect. 5).

2 Suffering Homogeneity, Beyond Any Accounting Ledger

Natural punishment forces the legal theorist to take a position on the intrinsic, fundamental homogeneity of the suffering arising from circumstances causally related to the crime committed with the true content (the suffering) of criminal punishment. The very question of whether the suffering endured can or should be considered in inflicting (but also in executing) the legal punishment only makes sense insofar as it can be assumed that they are qualitatively homogeneous entities, even if they are not imme-

diately comparable from a purely quantitative point of view.[16] Indeed, legal punishment is the deliberate infliction of a (physical and moral) burden, hardship, loss.[17] And at least empirically, whenever the legal punishment is inflicted through deprivation of liberty – especially in prisons – one cannot think away the very experience of suffering even if one is not ready to admit that (deserved) punishment involves deliberately making someone suffer.[18]

It is not difficult to understand that the suffering arising from the mere commission of a crime due to accidental circumstances, on one side, and the pain conveyed by the legal punishment through the burden imposed, on the other, could be deemed

[16] The quantitative dimension is not decisive from a conceptual standpoint. In general, actually, no relationship of homogeneity – whether qualitative or quantitative – exists between crime and punishment, yet this does not preclude the establishment of a meaningful relation between them. Such a relation is not ontological in nature but legal, and it is instituted through the penalty prescribed by law as a consequence of the offence. It therefore cannot be maintained that, in cases of so-called natural punishment, any form of balancing would be conceptually incoherent – for instance, balancing a custodial sentence against the loss of a child resulting from a culpable offence committed by the perpetrator. Even in such cases, a relationship can be articulated. The relevant criterion, however, cannot be determined in the abstract; it must depend on the circumstances of the particular case, with the assessment ultimately entrusted to judicial discretion. At most, this discretion may be directed through guidelines. See for instance the Israeli State Attorney Guideline No. 2.22 'Policy on Prosecution and Sentencing of Parents and Family Members for Negligent Causing of Death or Serious Injury to Their Family members'. These Guidelines acknowledge, generally, that: 'On the one hand, the loss of human life due to negligent behavior and the need to instill proper behavioral norms create a public interest in prosecution. On the other hand, these are severe personal tragedies accompanied by feelings of loss, guilt, and sometimes even shame, which accompany the parent for life. In many cases, the death of a child also leads to personal, familial, occupational, and psychological breakdowns. All of these factors may influence the prosecution authority's policy on prosecution and sentencing, as will be detailed in this directive'. In particular, two concrete instances are considered. First, 'Leaving a child alone in a vehicle – In accordance with the general considerations outlined above, in the event of the child's death, the parent will generally not be prosecuted, except in cases of high-level negligence – for example, leaving the child in the vehicle with the intention of leaving them there for a significant period of time and subsequently forgetting them. In such cases, prosecution will be considered based on the overall circumstances.' Second, 'Drowning: As a rule, if the prosecutor finds that the negligence does not reach a high level, significant weight will be given to the severe consequences of the child's death on the suspected parent, and prosecution will be avoided. This rule differs from the rule established for traffic accidents, due to the differences in the frequency and degree of negligence typical of these cases compared to traffic accidents, as well as the common need to revoke the driver's license of those whose negligence caused death. On the other hand, if the prosecutor finds that the parent's behavior amounts to high-level negligence, they will consider prosecution based on the overall circumstances' [I am extremely grateful to Miri Gur-Arye who alongside her comments on an early version of the paper has made me aware of aspects of the Israeli legal order, and provided me with relevant materials translated from Hebrew].

[17] It is impossible to even begin to discuss what constitutes punishment, but we can certainly repeat with Thom Brooks that '[t]he loss in terms of punishment may be understood in a variety of ways, including a loss of liberty, a loss of money through a fine, or some degree of suffering […] as a response to criminal activity': Thom Brooks, *Punishment*, 5 (Routledge 2012).

[18] See on this point Zaibert (fn 15) 57, who refers to punishment as the 'paradigmatic example of a moral conflict'. See also Id., 'Rethinking Mixed Justifications', in Matthew C. Altman (ed.), *Palgrave Handbook on the Philosophy of Punishment* (Palgrave 2023). The reference to 'suffering' or 'affliction' is largely familiar, for instance, in Italian scholarship (*sofferenza*, *afflittività*): among leading scholars see only Ferrando Mantovani, *Diritto penale* at 714 (10th edition, Wolters Kluwer 2017); Giovanni Fiandaca, *Prima lezione di diritto penale* at 5 (Laterza 2017). The meaning is not subjective but objective: suffering is usually explained as the deprivation or diminution of an individual right or interest (mainly, personal liberty or some essential part of it).

comparable. Accordingly, the former could be taken into account while determining the amount of punishment to be meted out.

This similarity questions the value of suffering in the context of punishment. The possibility to contrast with each other and to axiologically balance, as it were, different instances of suffering suggests – I maintain *ex hypothesi* – that the *value* of suffering is not univocal, that is, it is neither univocally negative nor univocally positive; and that the amount of suffering enshrined in the criminal process is to be seen not as a fixed quantity, however individualized, but as a scalar one, which can be modulated in the individualization of the wrongdoer's punishment to take the vicissitudes of her life into account. The nature of the suffering at issue depends on the circumstances of the individual case, which shape the impact of events originating in the offender's own conduct on the person concerned. Likewise, the meaning attributed to such suffering – by the individual, the community, and by judicial institutions – varies according to the concrete circumstances in which it arises. It may readily be conceded that suffering is not univocal, nor amenable to measurement along a single scale or to being recorded, as it were, in a double-entry ledger.[19] Suffering cannot be defined in the abstract or determined in an unequivocal manner, precisely because it is rooted in the lived experience of the individual, as situated within relationships with other persons involved in the offence and, more broadly, within a given social, historical, and cultural context.

That said, the close connection between suffering and the particularities of the individual case does not render it legally indeterminate. Suffering can still be assessed by reference to recognisable standards that are objectifiable and intelligible in terms of shared social understandings. The difficulty, therefore, is not conceptual but operational. It concerns the manner in which such experiential diversity can be accommodated within the criminal process – specifically, how the occurrence of suffering is to be established and how its causal relation to the offender's conduct is to be demonstrated. This, however, is not a problem unique to the present context but a familiar one within criminal law theory, arising in the general treatment of the proof of psychological facts, beginning with intent. As such, it does not in itself constitute an insurmountable obstacle. This issue will be taken up again at a later stage.

3 Two Tracks and a Fork. Natural Punishment as Punishment?

Methodologically, the question can be approached in two fundamental ways.

A first line of reasoning questions the relationship between suffering and the concept and aims of punishment. That is, one wonders whether the suffering resulting from the crime, the *poena naturalis*, is genuine punishment from a philosophical point of view.

To answer this question, for example, a recent book asks whether natural punishment meets any of the grounds and purposes that are conventionally attributed to

[19] See Leo Zaibert, 'The Instruments of Abolition, or Why Retributivism Is the Only Real Justification of Punishment' 32 *Law and Philosophy* 33–58 at 39 (2013) discussing Tadros' account. I draw the imagine of the ledger and the 'moral mathematics' from Zaibert (fn 15), 147 ff.

punishment.[20] It is noted at the outset that the consequences labelled as natural punishment usually consist of injury to the physical integrity of the subject: here, it is the act that punishes the agent and not an authority legitimised by the legal system. It is therefore a completely random and arbitrary act, devoid of a formalised procedure that would result in the violation of human dignity.[21]

Moreover, it is argued that, if one adopts the consequentialist account (still the majoritarian view in continental Europe),[22] natural punishment is not suitable for the function of general prevention because a permanent and reliable threat would be required. It might instead serve the purpose of special prevention, but even from this point of view it cannot be said to be a punishment, since even special prevention can only be achieved if the threat and infliction of punishment meet criteria of 'continuity' and 'reliability'. Furthermore, for the suffering to amount to punishment, a causal or at least a dependency relationship must exist and be perceived between the offence and the severe consequences, which is not the case of purely casual events.[23] Not even the widely known and authoritatively countenanced theory, according to which the purpose of punishment is (only) to validate, i.e. to 'confirm' and 'maintain' the validity (*Geltungskraft*) of the rule of conduct,[24] is able to provide reliable guidance regarding natural punishment.

It may be argued that the question of whether natural punishment can restore confidence in the validity of the norm is itself misconceived. Confidence in the norm's validity depends not on natural punishment *as such* but rather on the judge's recognition of it – that is, on the legal acknowledgment of the suffering endured. Such recognition must, in accordance with ordinary procedural requirements, be articulated in the publicly reasoned judgment, which is addressed not only to the parties but to the public at large.[25] For this very reason, it cannot be determined in abstract terms whether natural punishment is capable of restoring citizens' confidence in the validity

[20] Sprotte (fn 7).

[21] *Ead*., 23. To the contrary, see e.g. Bustos Rubio (fn 10) 122: *Failing* to take natural punishment into account would be inconsistent with respect for human dignity. Similarly, also with reference to the case law of the European Court of Human Rights, Florio (fn 6) 145–148.

[22] On the influential German legal 'doctrine' on this topic see from the Anglo-Saxon perspective especially Markus D. Dubber, 'Theories of Crime and Punishment in German Criminal Law', 53 *American J Comp. Law* 679 (2006).

[23] This observation bears on the notion of *poena naturalis* only insofar as purely accidental events are brought within its conceptual scope. By contrast, no comparable difficulty arises where the natural punishment constitutes the sole harm directly caused by the offence. See a taxonomy of such incidental hardships or 'extra-curial punishment' Mirko Bagaric, Lidia Xynas, and Victoria Landropoulos, 'The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders' 39 *U.N.S.W.L.J.* 47 and esp. at 74 ff. (2016).

[24] Confidence in the validity of the norm despite the offence is a key concept of this idea.

[25] In accordance with the general principle of the right to a fair trial, as recognised in international law, judgments in criminal proceedings must be public and reasoned. See Giovanni Chiarini, *The Evolution of International Criminal Procedure. From Nuremberg and Tokyo to the International Criminal Court* (Routledge 2025). On the conceptual dimension of fairness, see generally Mjrian Damaška, 'Reflections on Fairness in International Criminal Justice' 10 *Journal of International Criminal Justice* 611–620 (2012).

of the law.[26] The answer, on this basis, can only depend on the concrete case. And, more importantly, it is doubtful whether the subjective processing of the personal fate (*Schicksalverarbeitung*) would be sufficient for the resocialisation process.

Finally, natural punishment is not even a form of retribution. In fact, although it may appear as a sort of immediate retributive act performed by nature, this act is not governable and cannot therefore be commensurate, in terms of type and gravity, with the act committed.

The same negative answer to the question of whether natural punishment constitutes punishment could be more simply inferred from the premise that the concept of legal punishment only refers to suffering inflicted by a human authority endowed with punitive power. This is a widely accepted premise in contemporary philosophy. For example, Kwame Appiah defines punishment as 'the infliction of penalties on offenders, by people in authority over them, for offenses they have committed… [There] is a class of people who are entitled to punish…[I]nflicting a penalty involves doing something to someone that they have a right not to have done to them for no reason'.[27]

To sum up, we see that *poena naturalis* cannot serve any of the standard aims of punishment, whatever theory of punishment we adopt. Therefore, it cannot justify reducing legal punishment on the grounds that it makes some amount of that punishment unnecessary.

Conversely, stating that natural punishment is not 'punishment' apparently simplifies the problem but does not solve it. First, an inference that, if natural punishment is not punishment, then legal punishment is automatically justified – and as such necessary in principle – seems a *non sequitur*, if not tautological. But even if one does not admit that inference, denying that natural punishment amounts to punishment merely circumvents the substance of the original question: whether the severe suffering is capable of affecting the justification of the evil inflicted through legal punishment, even if it does not amount to it.

Were the answer in the positive, i.e. natural punishment is a form of punishment, one would have to further ask, specifically, what the latter's 'differential' purpose is.[28] Legal punishment would appear as an additional and supplementary evil to be justified, but with the added complication of having to reflect not only on a general justification but also on the legitimacy of the additional quantity of punishment.

I maintain that this would be a particularly convoluted way in which to discuss the criminal relevance of natural punishment. Instead, I believe that the question to be posed to the theory of punishment is first and foremost a meta-question, that is, it must be placed at an even earlier stage than the questioning of the legal nature of natural punishment. Why does this very question arise? Why does bare suffering raise questions for criminal law and the theory of punishment?

[26] In such a case, the general trust in the existing criminal justice system – which, according to Alejandro Chehtman, grounds the legitimacy of the territorial principle in jurisdictional law – becomes irrelevant. From this perspective, the basis of the punitive claim in cases of natural punishment cannot be articulated in abstract terms.

[27] Kwame Antony Appiah, *Thinking it Through: An Introduction to Contemporary Philosophy* at 286 (OUP 2003). Such an understanding reaches back to Hobbes (fn 5).

[28] This is the account extensively made by Florio (fn 6), especially Chaps. 1 and 2.

So framed, this question helps, I believe, to see clearly the reason for the troubling character of the suffering arising from the crime independently of its punishment and completely disconnected from it. What requires autonomous justification *vis-à-vis* this suffering is the decision *not* to punish or to punish less (whether the refusal to punish is partial or total is not relevant for now, because what matters is the decision not to impose the punishment that would otherwise be justly inflicted).

Poena naturalis, therefore, calls for a different methodological approach. I suggest reconsidering not the justification of punishment but a different and indeed opposite matter, namely the refraining from punishment: the institutional decision not to punish.

4 Off the Beaten Track(s). Refraining from Punishment, Censure and the Positive Value of Suffering

Placing natural punishment within the framework of abstention from punishment is a more direct way of addressing this topic. I include in the concept of abstention any form of refraining, whether in whole or in part, from exacting the punishment that the judge (the punishing authority)[29] would be otherwise justified in imposing on the wrongdoer.[30] From this perspective, I argue that communicative theories are particularly helpful in providing a justification for empowering judges to refrain from punishing, as well as in explaining the operational aspects of the procedure discussed below.

As justificatory theories, communicative theories have met considerable scepticism (for example, in Italian scholarship) for several reasons, the detailed analysis of which would fall beyond the scope of this paper.[31] Suffice it to point out a few general criticisms aimed at the very influential version developed by Antony Duff. In general terms, a basic ambiguity has been emphasised: the concept of *censure* would be 'suspended between retrospective (retribution) and prospective (purpose of communication)'[32] with the consequence that a twofold problem arises: what is the relationship between censorship and retribution, and what is the communicative structure of censure. More specifically, a first doubt concerns punishment's 'hard treatment' requirement: the communicative view does not explain why it is necessary to suffer. In addition, critics doubt that the infliction of punishment can really be framed as a form of communication in which the offender is an active participant, as the coercive nature of punishment fundamentally compromises this possibility. More deeply, it has been observed that person-oriented communicative theories offer a plausible description of how punishment works but do not answer the question

[29] Rachel E. Barkow, 'Mercy's Decline and Administrative Law's Ascendance', in Paul H. Robinson et al. (eds), *Criminal Law Conversations* 663 at 671 (OUP 2009); on the 'centrality of judges' see *Ead.*, 'The Ascent of the Administrative State and the Demise of Mercy' 121 *Harvard LR* 1333, especially at 1355–1358.

[30] Duff (fn 1) 57 f.

[31] See e.g. Brooks (fn 17) especially Chap. 6 on 'Expressivism'. See critically Zaibert (fn 15) especially Chap. 5 (on Duff's and Tasioulas's accounts with special regard to mercy).

[32] Attilio Nisco, *Teorie espressive della pena: un'introduzione critica* at 148 (Giappichelli 2024).

of why communication must entail hard treatment and thereby fail to move from the descriptive to the normative level of justification of punishment. Furthermore, it has been observed that accounts such as Duff's claim to reconstruct the communicative relationship between the political community and the offender in terms of an equal dialogue with a moral agent, instead of as an imbalanced power relationship. This normative claim, however, does not take into account the reality of such power asymmetries, thus incurring that kind of failure that Kant notoriously pointed at in his essay 'On the common saying "This might be true in theory but does not work in practice"'.

Besides, it has been contended that hard treatment, though conceived as a way of attesting to the seriousness of the offender's commitment to the community, fulfils the function of reassuring society: hence, it basically shares the same perspective as general prevention. Finally, critics complain about a lack of adequate interdisciplinary theorization of the concept of communication, described in an overly simplistic manner, that is, limited to the generic reference to communication as a form of respect shown to moral agency.

I am not interested in examining whether these criticisms are justified, or whether communicative theories are useful as a general explanation of the concept of punishment. Instead, I intend to argue that communicative theories are particularly suited to justifying the decision *not* to punish, with a few clarifications that I will mention below.

Communicative theory applied to non-punishment avoids the criticism that can be levelled at communicative theory as a theory of punishment. Indeed, the theory would not be required to explain the suffering inherent in legal punishment because in this case it is *not* inflicted. The objection as to the asymmetrical relationship that would *ab origine* vitiate the communication is moot, as it does not bear on the decision not to punish: rather, the judging authority empathetically looks at suffering agents. In the case of abstention from punishment, the communication does not expose itself to the reproach of inlaying punishment with any undue moralistic component: retribution, or the consequentialist intent to pursue repentance. Rather, the communication takes note of an element, that of suffering, which signals the fact that the justification for punishment no longer obtains – nor is the aim of punishment to be pursued – because of the events of life that have affected the individual. In other terms, leniency is to be justified not because it serves the aims of punishment but because the judge should no longer pursue or attend to (only) those aims.

How then does the communication between the legal order and the offender take shape, to the point of legitimising the decision not to punish? To answer this question, it is apposite to outline the mechanism through which the form of communication between the legal system and the individual can operate. I assume that the judge who ascertains the facts declares that they amount to an offence in all the relevant respects (possibly also indicating the punishment that would be proportionate to the offence). However, the judge formally declares that she abstains from imposing the penalty. In fact, this is a procedure entirely congruent with the 'two-steps structure' of the mercy judgment according to Tasioulas. First, a case of retributive justice is established to inflict a certain level of sentence as a deserved punishment, proportionate to the objective and subjective gravity of the crime; the second stage records grounds for

refraining from punishment.[33] I therefore consider a dual mechanism within which the moral significance of the two components – the declaration of liability possibly flanked by the indication of the penalty to be imposed, on the one hand, and the declaration of abstention from punishment, on the other hand – must be considered separately. The setting out of the facts and the declaration that they constitute an offence expresses, in my opinion, the censure of its author as it is understood by communicative theories. Indeed, the declaration of responsibility for the act states that the subject has violated the norm, that he is responsible for this violation and has acted without either justification or excuse. In this sense, it can be recognised with Tasioulas that 'grounds for mercy […] imply no denial, nor downgrading the level of criminal liability: no question of lack of responsibility or wrongdoing, no element of justification or excuse'.[34]

Moreover, alongside acknowledging Tasioulas' remark that 'it is excessive to convey that censure' through 'the sentence set by retributive justice alone' if there are grounds for mercy,[35] I hold that the censure embedded in the declaration of liability in the abstract is entirely 'fitting' (irrespective of what purpose the punishment would have in the specific case).[36] On this understanding, the declaration of liability and, through it, the imposition of a judgment of wrongfulness with respect to the behaviour cannot be regarded as 'excessive hardship'. Precisely because censure is accompanied by the deliberate absence of punishment, the censure itself avoids the objection that 'to insist on communicating the full measure of punishment proportionate to the gravity of her offence without taking these extenuating circumstances into account is unduly harsh'.[37] In this way, the content of the communicative act (*Schuldspruch*)[38] is appropriately complex: it conveys both the reasons for reproach which make censure appropriate (or deserved, or fitting), and the recognition of extenuating circumstances. This communication is made precisely at the second stage of the decision process,[39] where the decision not to punish is met and explicitly motivated.

One could argue, however, that one key component of the communicative theory would be incompatible with a justification of non-punishment, as the suffering enshrined in punishment is – at least in Duff's account – the only way the offender has

[33] John Tasioulas, 'Mercy' 103 *Proceedings of the Aristotelian Society* 101 at 123 (2003). This differs from K.D. Moore's process: Moore, *Pardons: Justice*, *Mercy*, *and the Public Interest* (OUP 1989) at 123, on which see Duff (fn 1) 60–61. Her 'two-step process of deciding who deserves to be punished' asks first whether the person is liable to punishment; it then asks whether the agent is morally deserving of punishment. It follows, for what matters here, that one who is liable to punishment, but not morally deserving of it, may be pardoned (it is permissible, although not mandatory, to pardon). I argue that even the agent who is deserving punishment can be pardoned whenever there are reasons for refraining from punishment.

[34] Tasioulas (fn 33) 115.

[35] Tasioulas (fn 33) 120 and 119 respectively.

[36] Leo Zaibert 'The Fitting, the Deserving, and the Beautiful', 3 *Journal of Moral Philosophy* 331 (2006) at 335, 349 f.

[37] Tasioulas (fn 33) 123. See also Id., 'Where is the Love? The Topography of Mercy', in Rowan Cruft et al. (eds), *Crime*, *Punishment and Responsibility. The Jurisprudence of Antony Duff* 37 ff. (OUP 2011).

[38] Hans Heinrich Jescheck, *Lehrbuch des Strafrechts* – AT 771 (4th edition, Duncker&Humblot 1988); this is the latter edition authored by Jescheck as a sole author. Nothing in this respect has changed in the subsequent editions updated by Thomas Weigend.

[39] The stage is only conceptually different, because the decision is a unitary act.

of seriously manifesting her commitment to the infringed values of the polity. Yet, the decisive point of the communicative dimension of punishment lies in the meaning that we generally attach to suffering, that is, in its social significance. The reading of the communicative account suggested here urges us to recognise the complex social meaning of the natural suffering endured by the agent. While the legal significance of the wrongdoing is declared to the agent and the political community by the verdict that still establishes individual responsibility, the overall meaning of the complex situation of life at hand (*Lebenssachverhalt*) carries an evaluatively laden emotional component, which is acknowledged by the decision to refrain from punishment – i.e. the acknowledgment that the person is *not* liable for punishment.[40]

(1) This aspect represents a value characteristic of communicative theories of punishment and therefore merits closer examination. There seem to be three possible ways of connecting a communicative theory to the remission of punishment in such cases:[41]To punish (or to punish in full) would hinder or distort the communicative aims of the criminal process: it would say to the offender (and to others) that he must still focus his attention on his past crime – when he should really be allowed to attend to the tragedy he has suffered.
(2) A communicative theory leaves room for leniency/mercy, in a way that other theories do not, because the essential communication is made at conviction, so that remitting punishment does not negate the (whole) point of the criminal process.
(3) A communicative theory can mandate the remission of punishment, because that remission itself communicates the right message to the offender (and to others): the conviction censures him for his crime; the remission tells him that nonetheless it is appropriate for him, and for us, to attend to the tragedy he has suffered.

Neither the first nor the second interpretation of the communicative process is convincing. The first is flawed because it rests on a paternalistic stance – one that the legal system should not adopt, however intelligible it may be from the perspective of legal moralism. The second interpretation of punishment within a communicative framework is equally unpersuasive. It artificially fragments the communicative process, mainly focussing communication upon the first 'stage', i.e. on the public declaration of the wrong – and guilt. Instead, the criminal process has an intrinsically unitary character from a communicative point of view. It therefore appears possible to endorse communicative theory in the third sense identified above, subject to the further clarification that the communicative content inherent in the remission of punishment must include an explanation of the reasons for which the legal system grants forgiveness. Andrew Ashworth underlines that:

[40] I underline the distinction between being 'responsible' for a wrong, and 'liable' for punishment. See the similar concepts of *Strafwürdigkeit* or *Strabedürftigkeit/Strafbedürfnis* (largely known in the German-influenced continental penal theory): in the context of natural punishment see Jescheck (fn 38) 772 generally, Claus Roxin, *Strafrecht* AT-I 1046–1050 (4th edition, Beck 2006). Recently, Ambrose Y.K. Lee and Alexander F. Sarch, *The Moral Prerequisites of the Criminal Law* 15, 17 (CUP 2023).

[41] I am grateful to Antony Duff who prompted me to deeper reflection on this point.

> If the circumstances indicate a strong case for showing mercy, the court should give full reasons why 'the interests of justice' indicate a downward departure from the guideline, and should comment on the strength of the mitigating factor and the quantum of reduction.[42]

Although the author frames the obligation incumbent upon the judges to give reasons primarily as a safeguard against arbitrariness in the exercise of mercy, the principle he affirms has a broader scope: courts are required to justify their decisions in an appropriate and transparent manner. In this context, the purpose is to make intelligible the grounds for an empathetic response, thereby reinforcing the legitimacy of judicial decision-making and the morality of the criminal process as a whole.

This recognition has a philosophical significance regarding the meaning of suffering that deserves closer attention. To explain this point, I draw on the account developed by Leo Zaibert on the axiological division between retributivists and consequentialists. While the latter hold that suffering is always an evil, for retributive theories (including the communicative ones discussed here) it is not necessarily an evil. This is not the place to engage in a full discussion of Zaibert's account. I am only relying on it because it seems to me particularly useful in explaining the question just mentioned. Natural suffering is certainly an evil and can be considered as such, irrespective of whatever moral parameter is used to evaluate the situations that bring it about. And yet, since that suffering is acknowledged by the decision not to punish – which follows the moral and legal assessment on the act that was committed – it takes on a positive value. In other words, in the transition from the declaration of responsibility to the decision to abstain from punishment, the legal and moral value of suffering changes, and is placed at the opposite extreme of its natural value: it becomes, in this limited sense, intrinsically positive, precisely because it is positively valued through the decision to refrain from punishment.

It could be objected that an evil remains an evil even if when the court remits D's punishment in recognition of the evil D has suffered. To say that D's suffering now has positive value seems to imply that we and he should now welcome it or at least see it as beneficial in securing him this remission of punishment: 'You lost your child, but at least this saved you from punishment'; a quite bizarre conclusion indeed.

Nevertheless, I am not persuaded by such an objection. There is no denying that, from a naturalistic perspective (emotionally, for both the perpetrator and the observer), what has occurred constitutes a tragedy. Nonetheless, I would argue that such an evil acquires a positive significance from a legal standpoint, for two reasons.

First, from the perspective of the perpetrator, the evil is not beneficial in itself, as though its positive value lay in the transformation of suffering into happiness (as might be the case, for instance, with mercy). Rather, what is positive is that the legal

[42] Andrew Ashworth, *Sentencing and Criminal Justice* 201 f. (6th edition, CUP 2015).

order demonstrates that it remains aligned with the perpetrator despite the wrongdoing. It is precisely the perpetrator's suffering that grounds this stance.[43]

Second, the legal order takes the individual's suffering into account while simultaneously censuring the wrongful nature of the conduct. In doing so, it preserves the coherence of its communicative enterprise.

The whole mechanism of abstention of punishment due to *poena naturalis* is therefore perfectly justifiable. On the one hand, it is formally declared that pain matters; on the other hand, the decision-making process ensures that the wrongdoer and the community properly understand the reasons to blame and simultaneously to lift punishment.[44]

I submit that this justification has a further profound philosophical import. It underpins the view that no conflict arises between justice and forgiveness (mercy). Against a common understanding,[45] they are not irreducible values. Rather, their interaction varies depending on the context. To put it otherwise, their relationship is expressed by a scalar measure contingent upon the variety of life's cases. As noted above, it is worth pointing out that the notion of a scalar measure should not be understood as in an accounting ledger, where quantities can simply offset one another. When comparing the deserved punishment with the suffering caused by circumstances – suffering understood in the specific sense I have outlined – the evaluator (whether theorist, community, or judge) does not perform a quantitative balancing exercise. The assessment consists not in measuring commensurable units of harm but rather in a qualitative and context-sensitive appraisal of the significance that such suffering acquires within the concrete case. Any mathematical calculation would be impossible and senseless, given the incommensurability of these entities.[46] Rather, the evaluator makes a qualitative value judgment, as is true of all axiological assessments.

Accordingly, non-punitive decisions based on forgiveness are not an exception to justice, they are an integral part of it. Through censure, the legal system continues to respond to the guilty as guilty.[47] The essence of culpable wrongdoing is preserved as a necessary condition of abstaining from punishment or, if one so prefers, of pardoning/forgiving in the legal sense of the word.

On this understanding, the response to D's crime should be understood as a unitary process that includes attention both to the crime and to what D has suffered – a just

[43] Wojciech Sadurski, 'Distributive Justice and the Theory of Punishment', 5 *Oxf J LS* 47 (1985) has interestingly pointed out that 'judges and juries, as the case may be, *do* tend to take the wrongdoer's suffering into account in sentencing […] This is confirmed also by the empirical studies of social psychologists who have examined the effect of the criminal's suffering upon the community's views about just punishment […] The results clearly confirm the view that the suffering of the criminal is regarded as relevant to the severity of punishment: the more the defendant was said to have suffered after the crime, the smaller the prison sentence mock judges gave him (at 57 f.; italics in original).

[44] I don't find necessary to take a stance on whether this solution resembles the traditional (catholic) moral distinction between the sin and the sinner.

[45] Although within distinct accounts, see for instance the influential book by Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* at 159 (CUP 1988); Kathleen D. Moore, *Pardons. Justice*, *Mercy*, *and the Public Interest* (OUP 1989) 190 ff.; Duff (fn 1) 62, 475.

[46] On 'moral mathematics' see critically Zaibert (fn 15) 149 ff., 152.

[47] Leo Zaibert, 'The Paradox of Forgiveness', 6 *Journal of Moral Philosophy* 365 at 368 (2009).

response is one that 'does justice' to the whole situation and thus includes leniency when that is appropriate.

These reflections lead us to critically consider the thesis of the synchronic incompatibility between punishment and forgiveness.[48] This incompatibility would arise only if the crime was punished or if the decision not to punish was taken in the absence of grounds for pardon. Instead, the mechanism highlighted above shows that 'not only is it possible to forgive and continue to blame, but this is the most natural form of forgiveness'.[49] Indeed, from the point of view of the legal evaluation of the moral situation and the dynamic with which this evaluation is expressed – declaration of responsibility and subsequent abstention from punishment – we can reverse the way the proposition is usually expressed and argue that it is possible to blame but continue to abstain from punishment. This happens because blame is embodied in and expressed by censure through the judgment of responsibility.

This claim presupposes a clarification of the concept of forgiveness. At least in the context of natural punishment, forgiveness should be understood as an attitude of the legal system – exercised through its institutional, moral, and communicative authority – that takes into account the suffering endured by the offender independently of any request by her or any form of conditional behaviour on her part. From this perspective, forgiveness, understood objectively as an attitude of the legal system, consists in the unconditional remission of punishment.[50]

This conception appears to be the most appropriate in this framework. It highlights the liberal character of a criminal law that recognises suffering as a reason to refrain from punishment. In this sense, abstention from punishment is genuinely unconditional. At the same time, the waiver of punishment does not preclude the relevance of personal change on the part of the offender. Such changes may still affect certain aspects of the execution of punishment, where punishment is imposed or has already been imposed, albeit to a lesser degree – a mitigation that could be itself a result of natural punishment. Thus, for example, changes of the wrongdoer's personality or attitudes – such as repentance – may justify a reduction in sentence length or in the severity of its modalities:[51] for instance, a transition from custodial to non-custodial enforcement, the imposition of community sanctions, or other modifications depending on the options and institutional frameworks available within each diverse domestic legal system.

The compatibilism proposed here respects the agent as a moral subject, recognising its dignity. It may be metaphorically illustrated by the 'oblique' reading of Hegel's 'infamous' proposition that punishment is a right of the condemned.[52] I do

[48] Zaibert (fn 47) 387.

[49] Zaibert (fn 47) 388.

[50] The problem of conditional versus unconditional forgiveness has been debated by Leo Zaibert in relation to Derrida: Zaibert (fn 47); Id. (fn 18) esp. 201 ff. An analysis of Derrida's interpretation of *poena naturalis* beyond the aspect debated by Zaibert is provided by Michael Naas, 'Kant with Freud: Derrida's Analysis of the Ancient Dream of Self-Punishment', 27 *Law Critique* 151–169, esp. at 160 ff. (2016).

[51] See generally Freiberg and Roberts (fn 15) 51.

[52] The label 'infamous' is used by Tasioulas (fn 33) 128. I draw the idea of the 'oblique' reading of Hegel from Angela Nuzzo *Approaching Hegel's Logic*, *Obliquely* (SUNY 2018).

not mean that there is a right to be censured because censure guarantees a full-fledged moral agent, but rather that *the presence of censure safeguards a justifiable right of the moral agent not to be punished*, *or a right 'to present a case for mercy'*.[53]

One could generalize these reflections by breaking down the very concept of punishment into the various phases in which it manifests itself. In other words, punishment is not a unitary and static category but an institutionalised vital process that accompanies the subject and is modified by his transformations. It unravels at least along the three phases of threat, sentencing procedure(s), and execution; each of these phases has its own foundation and purposes, which may in part coincide with those of the other phases, but must be identified as discrete from a conceptual point of view. To give just one example, while the threat contained in the abstract penalty provided for the offence may serve, at least if one adopts a consequentialist or mixed point of view, a general prevention function, such a function can never enter as an element of the punishment meted out against an individual offender.[54] In parallel, it can be maintained that the dialectic between punishment and non-punishment is also a constitutive dialectic of the legal reaction to the crime.[55] It is not exceptional in nature but is an expression of the fact that punishment is not composed of automatisms but must be consciously managed by the actors of the legal system. Nietzsche's paradox according to which mercy is not a tempering of justice but shall be seen as its self-sublimation can be resolved in this sense.[56]

5 From Philosophy to *Phrónesis*

Legislative drafting can be conducted in a manner consistent with these reflections.[57] Among the issues I mentioned at the outset of this article, it is helpful to provide three examples. The first concerns the alternative between mandatory or optional waiver of punishment: it may be argued that it stands to reason that the legislature should provide a mechanism to take account of situations in which we speak of natural punishment. From this point of view, on the one hand, enacting a provision on *poena naturalis* is morally mandatory on the part of the legislature, without prejudice to any further consideration of the general principles of domestic systems, especially where Constitutions lay out provisions on punishment and criminal justice (this is the case

[53] See Tasioulas (fn 33) 129.

[54] For different views in the Anglo-Saxon context see Julian V. Roberts, *Criminal Justice. A Very Short Introduction* 59–62 (OUP 2015). A broad comparative endeavour on this issue is to be recommended. Very important but largely insufficient the endeavour of the Anglo-German Dialogue project that led to the series of books (three, for now) *Core Concepts in Criminal Law and Criminal Justice* published by Cambridge University Press: see especially Chaps. 7 and 8 of Volume I (CUP 2020).

[55] I considered this structure from (what now appears to me as a limited, old-fashioned) theoretical and doctrinal viewpoint in *La sequenza infranta* [The Shattered Sequence] (Giuffrè 1998).

[56] 'Justice, which began by saying "Everything can be paid off, everything must be paid off", ends by turning a blind eye and letting off those unable to pay, – it ends, like every good thing on earth, by sublimating itself' (*Genealogy of Morals* [1887], edition by K. Ansell-Pearson, CUP 2006, at 48).

[57] 'Drafting is phronetic': Helen Xanthaki, *Thornton's Legislative Drafting* at vii (6th edition, Bloomsbury 2022).

in Italy, and, to varying degrees, in Spain and Germany). If, on the other hand, one considers the phase of infliction of punishment (the sentencing procedure), one must admit that the judge has the power to decide in relation to the characteristics of the concrete case: it is a matter for discretion.

One might ask whether the legislative provision should merely empower the judge to remit the sentence where appropriate, or whether it should instead require the judge to consider remission and thereby oblige the judge to remit the sentence whenever such remission is warranted. Framed in more general terms, this issue constitutes a specific instance of the broader question of whether mercy can be the object of a legal or moral obligation. John Tasioulas, for example, argues that only a duty of mercy can effectively exclude the competing obligation to comply with justice.[58] To the contrary, Leo Zaibert considers that 'this seems to be nothing less than (an instantiation of) the illusory view whereby only a duty can defeat a duty, even if it is perhaps supposed to hold only in the case of punishment or in the case of state punishment'. Tasioulas' claim would lead to a 'deeply counterintuitive idea of mercy' which 'seems to force us to recognize not only a duty of mercy but the no less counterintuitive idea of a "right" to mercy, features that, Tasioulas also admits, "stretch credulity"'.[59]

From a practical standpoint, this apparent problem can be avoided by recognising that the judicial evaluative process may be analytically divided into two distinct stages. The first consists in an obligation to give due consideration to the issue of remission. At this level, the legislator might impose a genuine legal duty on the judge. This, however, does not imply that the legislator is itself subject to a corresponding moral obligation: the decision to impose such a duty remains a political choice, discretionary in its aims and not binding in any stronger normative sense. The legislature cannot reasonably be said to be under an obligation to confer such discretion in the first place.

Nevertheless, where the legislature does grant the judge discretion of this kind, it thereby acknowledges the irreducible plurality of values implicated in punishment and recognises the possibility of genuine value conflict. The resolution of such conflict is then entrusted to judicial judgment in a manner consistent with the impossibility of resolving the issue *in abstracto* through general rules alone. The second stage of the decision-making process therefore lies with the judge, who must determine whether the sentence should be remitted in full, merely reduced, or left unaltered – in the latter case, for instance, on the ground that the suffering endured does not justify a derogation from punishment.

What is decisive at this stage is not the outcome as such but the justification offered for it: the transparency of the reasoning, its narrative coherence, and the 'universalisability' of the criteria relied upon. As Neil MacCormick famously argued in the debate between universalists and particularists,[60] it is precisely through reasoned jus-

[58] Tasioulas (fn 33) 129.

[59] Zaibert (fn 15) 141–142.

[60] Neil MacCormick, 'Particulars and Universals', in Zenon Bańkowski and Jean MacLean, *The Universal and the Particular in Legal reasoning* 3 ff., 13–16 (Ashgate 2006).

tification that individual decisions can claim normative legitimacy without collapsing into either mechanical rule-application or unstructured particularism.

The second example relates to the question of whether abstention from punishment should apply only to negligent acts – and, perhaps, only a part of them – or also to intentional acts. In principle, always bearing in mind the need to consider the concrete circumstances, there is no moral reason to distinguish between the two cases.

The third question concerns whether suffering should be regarded as a mitigating factor or rather justify the waiver of punishment altogether. Again, this can only be determined on a case-by-case basis.[61]

6 Conclusions

To sum up, I argue that the choice not to punish is an integral part of a secular, morally grounded, and legally principled management of punishment. It is a mechanism that reflects the prismatic dimension of human affairs, transparently recognised by the legal system that 'has to do with the complexity of our whole life'.[62] The values in play may be in conflict but they are not conceptually incommensurable, nor practically incompatible. It is therefore incorrect to state that criminal law must simply seek to do (retributive) justice, so that the granting of pardon is justified only when punishment is unjustified – e.g., because the agent has already suffered enough. I advocate a compatibilist account: when appropriate reasons obtain, abstention from punishment can be justified even when punishment would also itself be justified. From both a theoretical and a moral point of view the 'justice' of punishment should be understood as a dynamic process of adjudicating on the facts and the person – a 'drama', Nietzsche writes[63] – and not as a moment that stops only at the stage of inflicting punishment on the offender. The assessment of *whether to* punish is also part of this drama. The relationship between crime and punishment is not a logical one, i.e. it cannot be formalised through the categories of 'cause' – the crime – and 'effect' or legal consequence – the punishment – as scholars who countenanced the technical-juridical method between the nineteenth and the first decades of the twentieth century claimed instead.[64] From a practical point of view, I have tried to show, through the example of the discussion on natural punishment, that it is possible – even if difficult – to perform the task of constructing and administering such a process of criminal justice.

[61] See for instance Tasioulas (fn 33) 122: 'such doubts can only be allayed by deliberation on actual cases'.

[62] Leo Zaibert, 'On the Matter of Suffering. Derek Parfit and the Possibility of Deserved Punishment', 11 *Crim. Law and Phil.* 17 (2017).

[63] Nietzsche (fn 56) § 13.

[64] On the technical-juridical method see e.g. Luigi Lacchè, 'Criminal Justice in Italy between the End of the Liberal State and Fascism: Transnational Perspectives between the USA and Italy (1919–1945)', 28 *Clio@Themis. Revue électronique d'histoire du droit* (2025) (available online: journals.openedition.org/cliothemis/5821), at 16.

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