with a sense of purpose, and, therefore, without the possibility of meaning. It is precisely not to “give our time to others.” To “do time,” then, is to live day to day without a justification, without a reason. So the ironic conundrum of time as punishment is this: How can there be a justification for the imposition of meaninglessness? Empty time as punishment is the imposition of “meaninglessness,” hence it is difficult to see how this concept of “punishment as time” could be justified by a “rational basis” or a “penological objective.” Time as punishment seems a contradiction in itself. Can the state have a purpose for eliminating purpose? Can a “sentence” be gibberish?

IV. Is meaninglessness itself a kind of justified punishment?

The legal litany of the justifications for punishment is usually recited as: deterrence, incapacitation, retribution, and rehabilitation. I’ll briefly consider each one.

Because a meaningless life is by definition not a desirable one, meaninglessness might be a candidate for a deterrent to crime. However, there is a trick here. Stilling human action does not create an “undesirable” condition, but a “desireless” condition—a condition of a lack of desire. In a condition of “lacking” desire, humans are not motivated at all, and the very human striving that is presupposed by deterrence theory is undermined. This is no mere philosophical deduction; the pervasive anomic in our prison system often leads to a listlessness in which those in prison “lose the ability to routinely initiate their own behavior or exercise sound judgment in making their own decisions…. [they] may even become extremely uncomfortable and disoriented.

33. Jonathan Goldberg-Hiller has already identified this contradiction: “In the context of punishment, we suggest, the difficulties of making coherent narrative identities and of construing a meaningful life within a remembered past and an active future are unaccounted aspects of punishment that expose more of its violence at the same time that they may frustrate some punitive goals.” Goldberg-Hiller, “Time and Punishment,” 627. In his notes, Goldberg-Hiller goes on to observe that “Ricoeur’s perspective emphasizes the aporias between cosmological and phenomenological time, implicitly disturbing the assurance of the just measurement of punishment.” He is here drawing on Ricoeur, Time and Narrative, vol. III, 19–96.
when and if previously cherished freedoms, autonomy, and choices are finally restored."\(^{34}\)

Deterrence thinking may also create anomie because it "values" crime as a desirable activity that must be counterbalanced by a painful cost. It treats us all as willing law-breakers who are only restrained by the cost—calculated as the consequences multiplied by the probability of being caught, convicted, and sentenced. From such a perspective, punishments begin to look like mere prices in a marketplace.\(^{35}\) Deterrence therefore undermines criminal law's moral legitimacy and, by some accounts, lessens the power of punishment to deter by virtue of lessening its moral authority.\(^{36}\)

While confining those who may be dangerous may make the free members of society safer, meaningless time in confinement may serve to "incapacitate"—another often-cited purpose for punishment. But meaningful confinement would actually be safer, as prison officials find restive prisoners far more dangerous and much prefer that prisoners have something to do and something to care about. Former prison warden Dora Schriro argued for her "parallel universe" model of imprisonment, in which those in prison are given quasi-workplace incentives and goals that they help to design, in part on the ground that is it safer for everyone who works or lives inside the institution.\(^{37}\)

In addition, the philosophical objections to both deterrence and incapacitation are well-rehearsed—both forms of penal justification are contrary to Kantian ideas of human dignity and autonomy that


\(^{37}\) Dora Schriro, "How Arizona has created a parallel universe for inmates," *National Institute of Justice Journal* 263 (June 2009): 2–9. After Schriro initiated her new program, she reported that from 2004 to 2008 "inmate-on-inmate violence" decreased 46%, "inmate-on-staff" violence decreased 53%, suicide decreased 67%, and sexual assault decreased 61%. The parallel universe idea is not new: See Alexander Maconochie, *Crime and Punishment: The Mark System, framed to mix persuasion with punishment, and make their effect improving, yet their operation severe* (London: J. Hatchard and Son, 1846); accessed at https://babel.hathitrust.org/cgi/pt?id=nyp.33433075963396;view=1up;seq=5
require us to respect others for their intrinsic worth as persons, rather than manipulating them to our advantage. Both deterrence and incapacitation involve complicated economic calculations that interact oddly with the public sense of moral legitimacy—which itself creates a good deal of deterrence and incapacitation in the first instance.\textsuperscript{38} The level of punishment that deters or incapacitates often does not jibe with the level of punishment that seems proportionate to the crime. Murder, to take the classic example, is often committed in situations of high emotional stress or fear, and is typically neither deterrable nor often repeated. Burglary, on the other hand, is in theory highly deterrable—yet strongly characterized by high rates of recidivism.\textsuperscript{39} Even so, few would argue that burglary should be treated

\textsuperscript{38} See Neal Katyal, “Deterrence’s Difficulty,” \textit{Michigan Law Review} 95 (1997), 2385. Katyal argues that casual references to deterrence fail to grasp the subtleties of substitution theory, and suggests that high penalties related to crack may drive drug markets to heroin—which is what seems to have happened. See also Robinson and Darley, “The Utility of Desert.”

\textsuperscript{39} For one snapshot, see Department of Justice, Bureau of Statistics, \textit{Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2011} (Washington, D.C.: Department of Justice, 2014), based on data analysis by Matthew R. Durose, Alexia D Cooper, and Howard N. Snyder. Only 0.9% of all prisoners released are rearrested on homicide charges (Table 9, p. 9). Those previously in prison for murder had the lowest rates of rearrest: 10.1% had been rearrested for any offense after six months, 47.9% had another arrest for any offense after 5 years. Those released after burglary or larceny or weapons charges had the highest rates of rearrest for any offense: 31%, 38% and 35.3% respectively after six months and 81.8%, 84.1% and 79.5% respectively after five years (Table 8, p. 8). A similar disparity is evident if return to prison, rather than rearrest, is the measure of recidivism: After five years, 61.8% of property offenders returned to prison while 50.6% of violent offenders did so (Table 16, p. 15).

These statistics are difficult to interpret, however, because those released after sentences for murder are often older and for that reason may be less likely to resume criminal behavior. See Table 2, p. 3 (rearrest by age at release: 24 or younger, 78.2%, 40 or older, 62.9%). Those incarcerated for murder may also have fewer prior arrests, and for that reason be less likely to resume criminal behavior, as a longer criminal record also correlates with recidivism (p. 12). Those released after homicide charges have also generally received much longer sentences, so one might wonder whether the length of the sentence itself deters recidivism. While there is some correlation between longer sentences and lower recidivism (at least when compared to shorter carceral sentences, though not necessarily when compared to in-community sanctions), longer sentences have steeply diminishing returns. See, e.g., David S. Abrams, “How do we decide how long to incarcerate?” in Yun-chien Chang, ed., \textit{Empirical Legal Analysis: Assessing the Performance of Legal Institutions} (New York: Routledge, 2014), 65–91.

According to the Bureau of Statistics analysis above, those previously convicted of violent crimes, while less likely to recidivate overall, are more likely to be re-arrested for violent crimes rather than property crimes in the future (33.1% of those re-arrested within
more harshly than homicide. For this reason, recent Supreme Court cases have shied away from justifying long sentences on deterrence or incapacitation grounds, and instead have required punishment to have a retributive or rehabilitative justification.\(^{40}\)

Obviously, "meaningless" time does nothing to rehabilitate, if rehabilitation is thought to require some form of action during incarceration. Hence the most serious contender for a justification of meaningless confinement is retribution. Retribution aims at narrative equivalence between crime and punishment—a kind of fitting "just deserts" that reverses the direction of an actor's unethical conduct so that, in the classic retributive narrative, the offender suffers his own crime or, less figuratively and more philosophically, the offender is brought under the law of his own crime, universalized.\(^{41}\)

Might our model of anomic sentencing be a kind of retributive equivalent to the state of "ethical loneliness" that the trauma of serious crime imposes on its victims? Jill Stauffer describes this condition of ethical loneliness, a term derived from philosopher and holocaust survivor Jean Améry, as "the phenomenological experience of having been abandoned by humanity."\(^{42}\) Améry writes:

SS-man Wajs from Antwerp, a repeated murderer and an especially adroit torturer, paid with his life. What more can my foul thirst for revenge demand? But if I have searched my mind properly, it is not a matter of re-

---

\(^{40}\) General deterrence and incapacitation alone were insufficient to justify the penalties in Panetti, Graham, and Miller. See Dan Mariel, "Executing Retributivism: The Future of the Eighth Amendment," Northwestern University Law Review 103 (2009), 1163.


venge, nor one of atonement. The experience of persecution was, at the very bottom, that of an extreme loneliness. At stake for me is the release from the abandonment that has persisted from that time until today. When SS-man Wajns stood before the firing squad, he experienced the moral truth of his crimes. At that moment, he was with me—and I was no longer alone with the shovel handle. I would like to believe that at the instant of his execution he wanted exactly as much as I to turn back time, to undo what had been done. When they led him to the place of execution, the anti-man had once again become a fellow man.43

Both “doing time” and “ethical loneliness” are defined as living with a lack of law, a lack of justification, and a lack of community. So there is a kind of equivalence here between the suffering imposed at least on victims of serious violence and that suffered by prisoners “doing time.” If Améry is correct, then the offender’s experience of ethical loneliness is what can come to dispel it for the victim—the victim and offender are joined together in being separated from the world.

The problem is that the equivalence of “merely surviving without justification or purpose or community” is an equivalence that is already created in both offender and victim as a result of the crime itself. Georg Hegel, the nineteenth-century German philosopher, thought of the offender’s deed as already having cast him or her outside of reason’s bounds, to live in a kind of moral isolation from humanity. Crime, for Hegel, was a contradiction and a failure to universalize the maxim of one’s action and to treat all reasonable creatures with consistency. Since crime makes an irrational exception of oneself, it is a repudiation of one’s being as a human with reason and a form of self-exile. The idea of retributive punishment was to reverse that condition, not to manifest it further. By visiting the offender’s own choices on herself, Hegel thought, punishment was not just the rebound of her crime, but a way to treat her, once again, as a reasonable being by including her in her own maxim and eliminating the inconsistency. Hegel conceived of retributive punishment as an offender’s re-inclusion in the circle of humanity, through a participation in the universality of reason, not as a casting of the offender outside of reason and humanity altogether.

43. Jean Améry, At the Mind’s Limits: Contemplations by a Survivor on Auschwitz and its Realities, Sidney Rosenfeld and Stella P. Rosenfeld, trans. (Bloomington, Ind.: Indiana University Press, 1980), 70.
To be cast out of the realm of reason was not punishment, but mere perishing.\(^{44}\)

Hegel is echoed by Durkheim who, writing at the end of the nineteenth century, considered anomie as the reverse of punishment: Whereas punishment enacts and reinforces the social bond, anomie is a condition of social disintegration and a precondition for suicide.\(^{45}\)

Of Durkheim's account, Patricia Ewick has written:

Durkheim offered a theory of punishment that recognized its religious quality and the degree to which the modern individual—elevated to the level of the sacred—lies at the heart of rituals of punishment. If punishment is to do its cultural work, it must express the distinction between "good" and "evil" by sacrificing the person to be punished. But in order for that to occur the creature must, paradoxically, be "worthy" of sacrifice, they must possess a self. If it is to be legitimate—that is, if it is to be meaningful—punishment must paradoxically sustain the punished as sacred, as human, even while it seeks to degrade and condemn them. To fail in this regard, that is to profane that which is not sacred, is a semiotically futile gesture.\(^{46}\)

A comprehensive study of custodial suicides produced in 2010 by the National Institute of Corrections documented a suicide rate between three and six times higher in prisons than among the general population.\(^{47}\) While it is the case that increased vigilance and improved


> Why not attempt a minimal conversion away from the self-aversion that lacerates and paralyzes us towards another possible version of ourselves? Is this not finally more courageous? Such is perhaps what Nietzsche calls the pessimism of strength as opposed to an optimism of naivety and weakness. True pessimists don’t kill themselves…. If we cannot find reasons to be, then perhaps it is better not to be. But that would be a huge mistake, a fatal misstep. The question of life’s meaning is an error and should simply be given up. The great revelation will never come…. Instead…there are little daily miracles, matches struck in the dark.


\(^{47}\) U.S. Department of Justice, National Institute of Corrections, *National Study of Jail Suicide 20 Years Later*, Lindsay M. Hayes, Project Director (Washington: U.S. Department of Justice, April 2010), NIC Accession No. 024308.
monitoring systems have reduced the number of successful suicides in custody, attempted suicides are still common.\textsuperscript{48}

The punishment of “doing time” does nothing to heal or change the condition of ethical loneliness for either the defendant or the victim; it merely imposes a second dose of ethical loneliness on the offender to be “even,” deepening the ethical loneliness rather than alleviating it.

But Améry demands more than a merely conceptual loneliness that an offender suffers by doing an act contrary to reason; he demands as well that the offender experience absolute abandonment. Only then, he believes, will the offender “revolt against reality, which [reality] is rational only as long as it is moral. The moral person demands the annulment of time...by nailing the criminal to his deed. Thereby, and through a moral turning back of the clock, the latter can join his victim as a fellow human being.”\textsuperscript{49}

The desperate demand for a return of a “moral reality,” Améry believes, can only come to the offender through the experience of moral abandonment, and perhaps only through a confrontation with death, at the moment before death. To extend Améry’s argument to “doing time” (perhaps improperly), the experience of enduring “mere time,” which creates anomie in the offender, awakens her desire and demand for what is missing (meaning, reason and community) and therefore she repudiates the crime. This desire to step out of an anomic loneliness is not just a precondition of a renewed bond with the victim, but—in Améry’s language—the shared experience of loneliness also is the bond with the victim.

Such anomic punishment is not unknown. In the early to mid-nineteenth century, hard labor often consisted of punishments like the crank and the shot-drill, precisely designed to require painful, repetitive effort in order to perform utterly useless tasks. The crank, as its name suggests, was a machine that consisted of a crank, a counter that recorded the number of revolutions, and a screw mechanism that could be adjusted by the jailer to make the turning of the crank more


\textsuperscript{49} Améry, At the Mind’s Limits, 72.
or less difficult. One would be required to perform thousands of revolutions of this crank in one’s cell each day in order to qualify for meals of more than bread and water. The shot drill consisted of the pointless moving of 32-pound cannon shot three to five steps over, and then back again. One could not bend one’s knees or make any noise during this procedure, in order “to increase the severity of the punishment.” The Sisyphean hopelessness induced by such punishments was meant to break the will of the prisoner, inducing despair, and thereafter, an abject submission and repentance.

If such anomic forms of “doing time” could necessarily evoke such an experience of ethical loneliness that called attention to “the wrong as wrong,” then perhaps time itself could be the ground of the re-unification that retribution seeks, and “doing time” would have its retributive justification. But it is a fallacy to believe, I think, that any particular form of violence can swerve a soul toward repentance rather than a new resentment. “Doing time” may be meaningless and lonely, but there is by definition also and, ironically, no meaning in “mere time” that ties such suffering to the crime or the victim. “Doing time” forgets relationships and forges emptiness; however acute the suffering, it does not necessarily call to mind the crime or remembrance of the victim.

I once asked my imprisoned students if they would be interested in having a chance to apologize to their victims. I was surprised by the response; several burst into tears of remorse. But when the conversation centers on the particular length of their sentences, they often react with resentment—they experience their treatment by the criminal justice system as disconnected from their crimes, a disconnect that is, in the Connecticut state system, perhaps exacerbated by a plea bargain system in which deals are struck by judges, defense attorneys, and prosecutors with neither the participation of, nor any explanation to, the defendants. Each sentence number emerges mysteriously from behind closed doors and, once prisoners compare their numbers with

---
