

Imprisonment and Criminal Discourse

Leonardo Filippini¹

Introduction

In this work, I would like to question the canonical view of prison, which underlies the daily practice of law, and criminal law courses at law schools. Our criminal discourse excessively limits, or even forbids, the possibility of discussing imprisonment. In this way, imprisonment, a rudimentary and brutal tool, is criminal law's ordinary means of punishment, and there is no evidence that legal operators will critically question it in these days.

Criminal law tolerates overcrowding, death, violence and corruption as if they were natural. Any person—specially lawyers, criminal judges, legislators or criminal law professors—knows that prison is selective and violent, and that the value of constitutional guarantees inside prisons is less than their value outside. We all know that the possibility of judicial control over prisons is minimal and that prisons have their own rules, as in a sinister experiment of legal pluralism.

I do not mean to question prisons here, but the insipid way in which legal operators refer to it. The way in which we shape the discourse of legal operators and the academic speech through which we train those operators is disappointing. Only very few paragraphs of criminal law handbooks, a very small part of legal education, and almost no part of the

¹ Lawyer, UBA '98. LLM, UP '04. LLM Yale Law School '06. Law Professor in Palermo and San Andrés Universities and Guest Professor in Universidad Nacional de Lanús' LLM on human rights and Universidad Nacional de Río Negro's LLM on global administrative law.

language of judges, lawyers and prison guards reflect imprisonment's problems in a useful way, or offer tools to criticize it.

Criminal law's speech seems to have abandoned the question on punishment. We discuss when and for how long imprisonment should be imposed, but almost never whether imprisonment is justified in a particular case, as a the appropriate punishment or retribution, nor have the enormous flow of ideas and thought over the issue in other areas of knowledge seeped through legal speech. In the end, law is considered to be a speech used to limit imprisonment, but it has not yet claimed its authority to scrutinize imprisonment's own existence as the prevailing criminal practice.

In the following section, I will give more details about the matter that motivates this work. Later, I will try to show how law's speech has progressively retracted when facing the imprisonment phenomenon and I will suggest some lines of thought to make the question on the different ways to punish recover its paramount place in education and in legal practice. The statement underlying these words is simple. I believe that, if criminal law's speech hopes to be relevant and actually limit state's power, it should recover its interest in the different ways to punish.

1. Criminal law's prevailing understanding of imprisonment

Imprisonment is still the prevailing legal answer to certain forbidden behaviors, especially when they directly jeopardize life, private property or sexual integrity. The core idea behind the practice of imprisonment is that, all things considered, it is still an acceptable compromise between social interest, victim's interests and the offender's dignity, to condemn a conduct and to minimize violence or to order social life.

Basically, imprisonment is the intense restriction of a person's right to freedom of movement that is imposed on those who have committed a crime, and is put into practice by locking her up for a period established by law or judicially. When imprisonment is established as a punishment, its duration is set according to the seriousness of the crime that is being punished and the circumstances in which it was committed; while when it is imposed before trial, it must be proportional to the possibility to neutralize the offender's capacity to hinder the due course of the investigation and trial. In addition, we accept that imprisonment contributes to reestablishing confidence on the authority of law, and that preventive imprisonment is able to reduce the offender's chances to hamper legal procedures.

Imprisonment, however, only poorly reflects these limits or fulfills these functions. Preventive imprisonment is used as anticipated punishment, before trial has been held, and is not really related to the need to assure legal procedures. Punishment through imprisonment does not always reflect the seriousness of the crime and there is no evidence of its ability to express or reinforce law's authority. In both cases, moreover, the rule is that the people who are imprisoned are those with less economic and social resources.

To all these, it must be added that, notwithstanding the principle that states that punishment must be humane, most imprisonment situations allow that the right to body's integrity of the imprisoned be violated and that he/she be excluded from his/her life's social and political spheres. Exclusion and ill treatments are the natural consequences of imprisonment and describe this practice much better than the still prevailing paradigm that

stresses that it is a proportional punishment to a crime or that it is a way to prevent that justice's ends from being frustrated. ²

In the legal description, however, exclusion and ill treatments are not distinctive elements of imprisonment. To the contrary, we consider them exceptional and they are forbidden. We tend to think that torture or isolation are not part of the imprisonment's essence. They are extraordinary consequences that may be foreseeable and usual but are never necessary.

Criminal law, resorts to imprisonment as its' preferred tool to face the most serious conflicts, and trusts the possibility to impose it in a way that respects convicts' dignity. This is the way in which we refer to imprisonment in law school and this is the understanding that underlies the practice of lawyers and judges. We discuss the forms of punishment, or one particular aspect or a particular form of punishment only exceptionally. And when we do it, the institution of imprisonment is never jeopardized.

According to criminal law, imprisonment can always be justified. Law controls when, for how long, and how it must be imposed—for example, the separation of minors from adults, or those who are preventively imprisoned from those who are serving a sentence—but the justice of imprisonment is never put into question. Criminal law writings and justice operators assume that imprisonment, if imposed correctly, can be justified and that it is not law's task to question that justification.

Criminal practice continues to be based on an idea of equality that is essentially formal. The rationale behind the criminal law system is that those who are in prison are the people who breached a criminal duty and that they were imprisoned through an

² Video about the conditions of the prisons of the province of Buenos Aires, <http://www.vimeo.com/11015270>

independent judicial decision and according to a precise, certain, written and previous law.³ Reality reminds us that not all of us run the same risks. Not all crimes are judged; conducts that are judged are not necessarily the most serious ones and not everyone is treated with the same harshness.⁴

Despite its judicial validity, formal equality, rationality and proportionality ideals do not stand before the evidence that shows that the criminal system creates and holds second class citizens. Given the lack of a substantive idea of equality⁵ —that at least examines the uneven impact of our criminal laws—we can only hope for some organization of the use of imprisonment and, at best, a reduction of abuses, but not the scrutiny of imprisonment in the light of the Constitution’s ideals.

2. Law and punishment

The birth of prison was associated to a discussion on the forms of punishment. Prison has been, and still may be thought of as, a modern development that functioned as an intellectual and practical option to replace the prevalence of the idea and practice of corporal punishment, as Michel Foucault explained when analyzing the process that took

³ Enrique Bacigalupo shows that “Generally the equality guarantee is not referred to, because it is implicit in the idea of law, which, in a State of Law, must be applied equally and, in consequence, the fulfillment of the legality principle requires that the criminal system guarantees that laws will be applied equally”, HACIA EL NUEVO DERECHO PENAL, cit., p. 105.

⁴ According to Eugenio Zaffaroni, “people are not criminalized for the seriousness of the crimes they commit but for their personal characteristics which make them vulnerable to the exercise of power of criminal systems”, see “La filosofía del sistema penitenciario en el mundo contemporáneo”, CUADERNOS DE LA CÁRCEL, special edition of NO HAY DERECHO, Beloff M., Bovino A. y Courtis C., comps. (1991) p. 61. In a similar line of thought, Roberto Gargarella holds that “in our mistake, we have not even kept prison for the worse criminals [...] Prison is still today the destination that we reserve for the least favored members of society, when the time comes to exercise social reproach”, DE LA INJUSTICIA PENAL A LA JUSTICIA SOCIAL, cit., p. 246.

⁵ The idea of a humane treatment aimed at reducing the vulnerability of the detainee, for example, is not reflected in the decisions of the Court, even if the vulnerability of minors and the mentally ill has been mentioned. See, for example, Eugenio Zaffaroni, “La filosofía del sistema penitenciario en el mundo contemporáneo”, cit.

place between the execution of regicide *Damiens* in 1757 and the establishment of the imprisonment system we know today.⁶

Local contexts adherent to modern ideas about punishment experimented a similar substitution process, as the one explained by Lila Caimari regarding the Argentine case. In those contexts, legal discussion has been able to question and model the shape of punishment:

“The reflection about the characteristics of State punishment in Argentine society begun with the first attempts to built the institutions of that same State. [...] the first thinkers on the subject [...] set a starting point that was specified until the real possibilities started to match, at least partially, the ideal projects. Given its adaptation to racionalist ideas of proportionality, its distance from the body, and its social invisibility, prison became gradually the reference punishment. Between 1870 and 1890 its ideal characteristics were defined, following closely the utilitarian disciplinary models of the English and American penitentiary movement. The *Penitenciaría Nacional* [National Prison], opened in 1877, became the strongest symbol of punishment’s update in Argentina [...] it represented to the eyes of society the triumph of disciplinary modernity and it constituted a strong symbol of the State’s power in formation.”⁷

Juan Bautista Alberdi —one of the main influences in Argentina’s Constitution proposed that “torment and horrible punishments” were “abolished forever and in all circumstances”. He also advised to prohibit “whipping and executions made with knives, spears and fire” and to establish that “dark, humid and deadly prisons” should be “destroyed”.⁸

⁶ Michel Foucault, *VIGILAR Y CASTIGAR, Siglo XXI*, Buenos Aires (2008).

⁷ Lila Caimari; “Castigar civilizadamente. Rasgos de la modernización punitiva en la Argentina (1827-1930)”, in *VIOLENCIAS, DELITOS Y JUSTICIAS EN LA ARGENTINA*, Sandra Gayol and Gabriel Kessler, comps., Manantial, UNGS, Buenos Aires, 2002, p. 163. Zaffaroni, Alagia and Slokar also mention the discussion on the need of maintaining whipping as punishment when referring to the 1860 constitutional reform, *DERECHO PENAL - PARTE GENERAL*, Ediar, 2000, p. 881.

⁸ Article 19 of his draft of the Constitution, in *BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACIÓN POLÍTICA DE LA REPÚBLICA ARGENTINA*, Plus Ultra, 1991.

The National Constitution finally established, with a more general language, that “Prisons will be healthy and clean, for the security and not the punishment of the detainee, and all measure that injures them more than is needed for precaution will make the authorizing judge responsible.”

3. The abandonment of the discussion about prison

Successive reinterpretations of the goal and function of prison were also integrated to legal speech, and were either accepted or discussed by legal operators.⁹ The social rehabilitation ideal of the sixties, for example, was recognized by international human rights treaties such as the *International Covenant on Civil and Political Rights*¹⁰ that states that “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation” (Art. 10.3).

Today nobody truly believes that imprisonment can comply with this function, nor states that it really does. Neither are there many supporters of the idea of a factory-prison that imposes discipline to mold detainee’s bodies to make them match economic needs, nor people convinced of the need of pure retribution. However, there is not much in the immediate horizon that anticipates the end of imprisonment in the way we know it.

The speech that supports imprisonment still repeats modern ideas regarding punishment, but without the original conviction. We impose a punishment but we seriously suspect that it does not perform any verifiable function. However, in practice we support, at least temporarily, one of these possible theories when giving reasons for a conviction. Or

⁹ For a general description, David Garland, *CASTIGO Y SOCIEDAD MODERNA*, Siglo XXI (2006).

¹⁰ Adopted and opened for signature, ratification and adherence by the General Assembly in its resolution 2200 A (XXI), dated December 16th, 1966. Entry into force: March 23rd, 1976 according to article 49.

we shelter under the options made by legislators not because of deference to his criterion, but to avoid the discussion.

In criminal practice, live unenthusiastically pieces of justifications that, notwithstanding the contentions, have not been replaced by others. Criminal law as a whole, as Bacigalupo said, is understood today as a system aimed at reestablishing the communicational value of law and backs with punishment the authority of the breached rule.¹¹ We doubt that the reproach to an infraction, expressed in the punishment of imprisonment, can effectively communicate the validity of a legal rule and contribute to the reestablishment of the authority of the right that was breached.

The justification of the reproach to which Bacigalupo refers is not convincing enough regarding the justification of punishment as a privileged means, and least regarding imprisonment as the preferred form of punishment. When the time comes to define the way to reproach, criminal practice abandons any justificatory enterprise and gives privilege to the option given by the modern legislator, more out of custom and inheritance than of conviction. Therefore, criminal practice relies on the idea that imprisonment reflects properly the idea of punishment as a consequence of the decision made by the legislator.

When there are enough proofs to believe that a crime has been committed, the main variable that legal operators can regulate is the duration of incarceration, and this is determined considering the seriousness of the offence. The idea behind the practice—which we do not discuss either—is that the greater seriousness of an offence can be properly reflected in the longer duration of imprisonment. Criminal practice does not discuss if incarceration should be the punishment, nor if its longer or shorter duration reflects the greater or lesser relevance of any element, or the extent of the reproach, or if one day in

¹¹ See, Enrique Bacigalupo, *HACIA EL NUEVO DERECHO PENAL*, Hammurabi (2006), p. 67.

prison means the same in all cases. It neither questions that very diverse offences can be put in the same level by using as a common denominator the days, months and years of imprisonment. Whatever it is the element that justifies the possibility to reproach and, in that case, to do it through punishment, we still believe that it should be measured in periods of time.

Finally, we also expect that the serving of the sentence that imposed imprisonment will lead to the social rehabilitation of the convict. This is impossible. Not only because overcrowding and exclusion do not collaborate at all to rehabilitate a person, but also because the measure that subjected a person to overcrowding and exclusion is the result of a first decision related to the reestablishment the authority of law and of a second decision to limit a fundamental right according to the seriousness of the crime. We built imprisonment considering aims different to rehabilitation of the offender, but we expect that it fulfils that aim magically.¹²

As Alcira Daroqui pointed out, the inconsistency in criminal speech shows that “it has abandoned any moral justification of punishment, it has not been possible to support retribution as a just punishment since the moment that it has been recognized that the contract that was breached had never been entered by equals, when that just punishment turned useless, the failure of rehabilitation and re-education meant not only the failure in its manifest ends but it also revealed the true meaning of an institution born to produce pain and suffering, and nothing more, and of course, nothing less”.¹³

¹² Una muestra de esto es que la prisión preventiva y la pena de prisión, a pesar de responder a fines formalmente diversos, se cumplen en condiciones prácticamente idénticas. Es muy llamativo que esperemos, sin embargo, que la pena de prisión colabore a un resultado que en modo alguno esperaríamos ocurra en el contexto de la prisión preventiva.

¹³ Alcira Daroqui, “La cárcel del presente”, en *VIOLENCIAS, DELITOS Y JUSTICIAS EN LA ARGENTINA*, cit., pp. 201-202.

The discussions reflected in the reversion of a court's sentence by another, or in the comments made by law professors and lawyers on certain judicial decisions focus on if and how much time of incarceration should be imposed in each case, but do not question the use of imprisonment as a preventive measure, if punishment is the correct way of expressing reproach, or imprisonment as the prevailing form of punishment. Legal literature describes the legal rules in a jurisdiction and spreads its concrete application by courts, through the systematized description of legal practices, but it does not discuss imprisonment either. And very few look in that literature for a critical thought, but for a guide, as the one given by a map to those who look for short and effective directions.¹⁴

In the end, imprisonment is still supported as a natural institution that is part of criminal practice. The overcrowding, the terrible conditions and a certain degree of violence are seen as necessary evils which, even if they are not desired, are tolerated as almost inevitable collateral damage of imprisonment. Efforts to minimize abuses never reach to the point of discrediting the idea of imprisonment. In some way, we all trust in the theoretical and practical possibility of imposing imprisonment without violence.

The problem, as already was stated, is that prison has never existed without that extra unjustified violence, even if our regular view makes us believe violence is natural, and puts distance between juridical sciences and the imprisonment problem. There is a very deep separation between penitentiary technique and justice that, as Josefina Martínez states, underlies a definition of legality that has abandoned reflection over punishment "more worried for the fulfilment of formal requisites than for particular practices."¹⁵

¹⁴ Para una discusión más amplia, OBSERVAR LA LEY – ENSAYOS SOBRE METODOLOGÍA DE LA INVESTIGACIÓN JURÍDICA, Christian Courtis (ed.), Trotta, Madrid (2006).

¹⁵ Josefina Martínez, "Las burocracias penales y su violencia naturalizada", in VIOLENCIAS, DELITOS Y JUSTICIAS EN LA ARGENTINA, cit., p. 269.

According to this vision, the use of force is a police and penitentiary competence “that can be exercised only inside the legal frame [...] in that field, Justice does not care about the way in which violence is used, in which ways, to what degree [...] The use of violence in the context of criminal bureaucracies bases its legitimacy in the legality of the means and focuses on the formal control of procedures. Specific bureaucratic practices easily escape the separated bars of this ‘iron cage.’”¹⁶

4. The place of legal speech

One possible way of explaining the retraction of law is that it is not possible to expect much more from it. Eugenio Zaffaroni suggests that justice’s possibility to challenge the characteristics of imprisonment and imprisonment itself is minimal:

“Punitive power is not something we have in our hands that judges or criminal lawyers exercise, against everything we relieve in. The only thing we exercise and that we can exercise is juridical power. The only thing that judges can decide is that those clients that are previously selected by other agencies and taken to the, are going to be subject to a secondary criminalization process. But those clients are selected by others, are taken by others and others are the ones who carry the procedure of secondary criminalization. Judges are not in charge of carrying it out, it is in charge of police agencies, execution agencies and penitentiary agencies. The law that we apply is made by others, in other words, politicians. The power that we have as criminal lawyers is the power to influence the judicial agency and nothing more, since the power of the agency we can influence is a reduced power to say yes or no, in this small number of cases that other agencies have previously selected and have taken to them for them to decide [...] juridical agencies do not have in their hands the power to create or to eliminate crimes (called primary criminalization), not to select

¹⁶ Josefina Martínez, cit., p. 270.

the clients of the criminal system or to carry the procedure of secondary criminalization against certain persons.”¹⁷.

However, it is still possible that criminal law can—and in consequence, should—have a more important role, and defy some structural conditions of imprisonment.

Judges, for example, could hold constitutional values that are contrary to the situations that endorse abuse practices. As Wacquant suggests, they can contribute to “stop the semantic adrift that, on one side, compress the space for debate (when, for example, the notion of insecurity is limited to physical insecurity, excluding social and economic insecurity) and, on the other hand, to make more trivial the criminal treatment of those tensions linked to the deepening of social inequalities”¹⁸.

It may occur that nothing is possible if other cultural and social conditions are missing, but there is room to imagine a different performance of criminal knowledge. Law can also defy prevailing social views in both its speech as in its concrete practice.¹⁹

There are many examples of the constitutional invalidation of laws that criminalize certain acts, of management initiatives inside the judiciary, or of disagreement on spaces and resources with other powers and for the most diverse topics. Why should not we be able to expect that lawyers and judges take a more active role facing generalized abuses in prison? Are there really insurmountable limitations that prevent us from larger control or from thinking on a deeper alternative?

¹⁷ Eugenio Raúl Zaffaroni, APUNTES SOBRE EL PENSAMIENTO PENAL EN EL TIEMPO, Hammurabi, 2007, Primera Conferencia, pp. 18-19. In the same line, en DERECHO PENAL – PARTE GENERAL, cit., p. 20.

¹⁸ Loïc Wacquant, LAS CÁRCELES DE LA MISERIA, Manantial, 2000, p. 170. Of course, it is not self evident and requires its own assumptions. Zaffaroni, for example, holds that “We are usually cheated making us believe that according to our speech punitive power is exercised. And our narcissism makes us believe such a fallacy, when actually punitive power works alone and we accompany it with a speech that [...] sometimes legitimizes it and other times criticizes it”, APUNTES SOBRE EL PENSAMIENTO PENAL EN EL TIEMPO, cit., Segunda Conferencia, p. 58.

¹⁹ Rita Segato, El derecho a nombrar el sufrimiento en el derecho, in Voces y Silencios de la Discriminación, Conferencia 2009, APDH, Buenos Aires, p. 132 yss.

5. Discussing prison

As I advanced, I believe that our discussion about punishment is disappointing. I do not yet see proper tools for the discussion, nor even a consolidated worry regarding that lack. Alternatives to imprisonment do not come out simply because we are not looking for any alternative. At least, we do not do it in law schools or in legal practice.

In this work I intend to say that it is possible, and that it would be possible, to reinstate the discussion about punishment. Let's think, for example, how should we talk to our students about imprisonment? Can we trust that the usual way in which criminal and constitutional law courses refer to the topic give an accurate image of the phenomenon of prison to whom is interested in law and that it offers solid theoretical tools for its discussion? Are we offering a broad and defying education or our textbooks and views improperly limit the object of study? Does legal practice offer any alternative? Or it only reproduces and feeds from the limitations of the usual way of thinking about prison? Definitively, are we offering an adequate theoretical framework?

We should start trusting less on the possibility to continue talking about imprisonment as state's reaction to crime limited to the restriction of the right to freedom of movement, based on the causes and for the time specified in criminal laws. As David Garland pointed out, "The shapes taken by punishment reveal the need to reflect on punishment itself and, when we try to do it- even if it is superficially—we follow certain pre-established and pre-delimited patterns [...] we are induced to think criminal policies in the current institutional framework, instead of questioning them- as we do when we examine how to manage prisons better, under which conditions conditional liberty can be

established or when we determine the penalties, instead of asking ourselves which is the reason to use those measures.”²⁰

Why could not we start talking about imprisonment in some other way? And teach for example that the most widely accepted legal reaction to crime is the State’s interference with bodily integrity and the social bonds of those who have committed a crime, through incarceration that is only regulated by criminal law in what respects to its duration and minimal execution content, but left unregulated in all other aspects.

We should openly show to those who are interested in criminal law that law only limits the duration of incarceration without even trying to limit the consequences on detainees’ bodily integrity and social bonds. Imprisonments’ consequences go far beyond the time of effective incarceration, and the law says very little about this. And we say even less in class and in court.

Argentina’s Supreme Court’s case *Villarreal*²¹ shows the validity of this approach. A detainee had requested a remedy as a consequence of the beatings she had been subjected to. The case was never properly investigated and the detainee finally recovered her liberty. The Court declared that since the moment the detainee was set free there was no longer a case that could be decided by a court. The Court confirmed that law does not tell us anything about the conditions that make it possible to be beaten up in prison nor about the fate of a person after being legally punished. These issues are “abstract” for the law. What is concrete, and what judges can decide on, are actual and direct injuries, clearly stated by law and while the incarceration lasts. There is no discussion about imprisonment and the

²⁰ David Garland, *CASTIGO Y SOCIEDAD MODERNA*, siglo XXI, México, buenos aires, Madrid, 2da ed., (2006), pp. 17-18.

²¹ CSJN, V. 1287. XL. RECURSO DE HECHO, “Villareal, Blanca Estela s/hábeas corpus”, file N° 45.996, May 23rd, 2006. In the decision the detainee is called “Villarreal”.

ideas of prevention or post-punishment care are not considered as part of the punishment of imprisonment.²²

Given this situation, I propose to start any discussion about imprisonment based on a more real description of it. Such a reflection would show the limitations of the current view in a much better way and would clarify that imprisonment as the prevailing idea to confront insecurity only implies political and social exclusion and the mistreatment of a group of people who have committed or are related to a crime.

6. Three ways of discussing punishment

As a finishing remark, I would like to suggest three proposals on how to state the discussion of imprisonment in criminal law today. Or, let's say, to state three guidelines that I myself would adopt to design the curricula of criminal law today. I do not say that these are the most adequate, but they try to frame themselves in the line of thought I have established so far and they would suppose an academic agenda very different from the one we have today.

Firstly, I believe that we should recover the role of sensitive experience in the process of education of lawyers and in legal practice. Today, lawyers or law students do not have to visit prisons or to talk to detainees. Lawyers do not know how many prisons there are, where they are situated or how crowded are they or what kind of services they provide. It would not be an exaggeration to say that this is law only incidentally. It simply is not a relevant issue in procedural criminal law to be exposed to first hand information about what

²² As far as I know, the process that led the United States to sanction the PRLA, which limits the possibility to discuss imprisonment conditions in courts, shows an analogous situation, as also is all jurisprudence that assumes that overcrowding is an anomalous situation that requires gradual solutions, like in California.

punishment really is. Of course, a doctor does not know how many beds are there in a hospital, but he touches his patients and we expect them to know and analyze the concrete consequences of his actions. To the contrary, lawyers tend to naturalize the idea of imprisonment as a necessary evil and put an end to the discussion about the effects of imprisonment and the exploration of alternative ways to reproach.

Despite our essentially formal method, we expect any lawyer to have certain capacity to empathize with those groups who are the main focus of the criminal system and suffer its consequences. In other juridical areas, however, we believe that it would be almost impossible to do without knowing the specific qualities of a person, his/her testimony, voice, history and his/her direct contact with lawyers and judges. Oral procedures, the claim to establish jury trials, voting, public hearings are all ways of showing the importance that we give to direct contact with the person who is expressing or representing an interest. Prison, its´ means, its´ players, remain distant from the world of law.

Secondly, we should recover the practice of discussing punishment argumentatively. We could try the exercise without any trouble at least in law schools and legal academy. How should a prosecutor that is requesting the imprisonment of a person state his case if there was not a compulsory legislative decision regarding that issue? Again, we are not trained nor discuss in those terms. The scene is the one described by Garland, and the prevailing legislative option minimizes our possibilities and criticisms, moving the focus from the legal academic debate to areas of larger foreseeability and cohesion. How could a jurist like Alberdi state in Argentina the constitutional abandonment of whipping and, today, to the contrary, most discussions only refer to the question on whether imprisonment

should be imposed and for how long? Criminal and constitutional law should recover their argumentative capacity over a space that was progressively given to penitentiary technique.

Thirdly, we should recover the interdisciplinary approach, given that imprisonment clearly exceeds the argumentative field and implies restrictions and interventions over the body and social and political life of a person. There was a time when legal medicine emerged as a prevailing science. In fact, it still defines the contours of criminal responsibility in key aspects such as the capacity to understand, mistakes in knowledge, states of violent emotions and the extent of the offence in those cases where the sexual or personal integrity of a person have been breached. Why has not this relationship been introduced in our understanding of imprisonment and its high rate of suicide, HIV and tuberculosis infections, beatings and many other proofs about the cruelty of state's punishment?

I propose, in sum, to revise critically our usual way of presenting imprisonment in our discussions on criminal law. We must restore the discussion of punishment, in the way that we impose it today, in the central place it once had, if we truly think that that kind of punishment is a relevant problem for criminal law.