



**The Retribution-Deterrence Tension in
Punishers' Minds: from Emotional Instincts to
Clairvoyant Empathy**

***Cognitive Psychology, Behavioural Economics,
and Law & Literature in Dialogue***

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For my late grandfather, Tommaso Delicata (1945–2024), who never had the chance to attend university but walked me to school every day of my childhood. I wish someone would believe in me the way you did.

There is no Frigate like a Book (1286)¹ by Emily Dickinson

There is no Frigate like a Book
To take us Lands away
Nor any Coursers like a Page
Of prancing Poetry—
This Traverse may the poorest take
Without oppress of Toll—
How frugal is the Chariot
That bears the Human Soul—

I. INTRODUCTION. Punishment, Emotions, Empathy: a Love-Hate Triangle or a Necessary Union?

In the courtroom, voices reverberate: conviction, sentence, sexual assault. As she casts one last cold glance at her assailant, she wonders whether the punishment will be truly effective. Who to listen to, between those who say he got what he needed and those who pleaded for a heavier sentence? An uproar of emotions seems to emanate from all sides.

This paper analyzes the din of emotions arising in the face of a criminal sanction, at the heart of this choice between the two most common sanctioning logics of our criminal

¹ DICKINSON, *There is no Frigate like a Book* (1286), *The Poems of Emily Dickinson* edited by R. W. Franklin, Cambridge (MA) 1999, available at: <https://www.poetryfoundation.org/poems/52199/there-is-no-frigate-like-a-book-1286> (last consulted on 18th May 2025).

justice systems²—retribution³ and deterrence⁴: what are *punishers'* emotions, and what is the influence of these emotions on their choice of penal response, leaning towards one of those logics? What role does empathy play, and how does it influence punishers' tendency towards retribution or deterrence? With regard to the category of individuals analyzed, I chose to focus on the emotions of *punishers* when deciding between a more retributive or deterrent sanctioning logic⁵. While the criminal decision-making process of offenders is often studied in the literature⁶, the same cannot be said of punishers. This conceptual category encompasses individuals involved in criminal justice as a social body that

² NOCKUR/KESBERG/PFATTHEICHER/KELLER, *Zeitschrift für Psychologie* 2022, 104 et seq.

³ Retribution for wrongdoing means assigning a punishment to the perpetrator that is proportionate to their wrongdoing. The concept of retribution (or "just deserts") (CARLSMITH, Roles of retribution, *Journal of Experimental Social Psychology* 2006, 437 et seq.) is rooted in "moral proportionality" (CARLSMITH, Roles of retribution, *Journal of Experimental Social Psychology* 2006, 437), which implies that punishment is justified per se as a necessary consequence of wrongdoing. The perpetrator would not, however, be punished arbitrarily, but in direct proportion to the characteristics of his wrongdoing. Retribution is to be distinguished from a utilitarian point of view from punishment—of which deterrence is a part—in that it is, in the common mind, affected by and distinguished from notable factors, namely "(a) the magnitude of harm, (b) the perpetrator's intentions, and (c) extenuating circumstances that might mitigate or exacerbate the immorality of the act" (CARLSMITH, Roles of retribution, *Journal of Experimental Social Psychology* 2006, 437 et seq.). Retribution is thus part of a way of thinking that is more rooted in the moral repression of an action, in thinking in terms of "right and wrong", than in more pragmatic thinking that takes into account the long-term consequences of a sanction. See also: GOODWIN/GROMET, *WIREs Cognitive Science* 2014, 562; NOCKUR/KESBERG/PFATTHEICHER/KELLER, *Zeitschrift für Psychologie* 2022, 104 et seq.

⁴ A utilitarian view of punishment places at its heart its ability to limit future wrongdoing. This is exactly the vision behind the notion of deterrence, which is not justified per se, as is proportional punishment in retribution, but is motivated by the favorable consequences for society that it would induce (CARLSMITH, Roles of retribution, *Journal of Experimental Social Psychology* 2006, 438). Following the dogmas of utilitarian logic, deterrence is based on a conception of human beings as being more rational, thinking according to an opportunity-benefit calculation, in which deterrence would act as a disruptive element in the factors. Indeed, "Most forms of punishment designed to deter people, including incarceration, and corporal punishment, attempt to induce people to complete an a priori analysis that will inhibit them from doing future harm" (CARLSMITH, Roles of retribution, *Journal of Experimental Social Psychology* 2006, 438). In this way, deterrence seeks to tilt the cost-ratio of perpetrating a reprehensible act in favor of greater loss than gain, thereby producing a dissuasive effect on the criminal (CARLSMITH, Roles of retribution, *Journal of Experimental Social Psychology* 2006, 438).

⁵ For this analysis, I chose to focus on the category of *punishers* (which includes the general public, citizens, legislators in a broad sense, and the everyday human being confronted with social life and thus with the criminal acts it encompasses). This choice stems from the relative absence of extensive literature on their decision-making processes in criminal matters from a psychological and behavioural perspective (the literature focuses more on the opposite category, namely the *offenders*), but also from my conviction that this category plays a relevant role as a *creator* and *generator* of law—and therefore of criminal law. The following passage, in particular, influenced this choice: ROSE/ESRA KUIPER/REINDERS FOLMER/VAN ROOIJ, *Crime Science* 2024, 2: "In democratic states, public opinion plays a major role in such tough-on-crime criminal justice policies through voting in elections, public referendums and through politicians drawing on public opinion to justify punitive criminal justice policies. As such, the general public is a vital target to increase the influence of criminological evidence in public policy. Generally, studies have shown that public knowledge about criminal justice is limited (Pickett, 2019). Specifically, the general public is likely not familiar with criminological findings about deterrence". If the general public is unfamiliar with deterrence-based resources, what is its natural instinct? What is its emotional inclination, towards deterrence or retribution? These questions motivated the choice of this category for my present analysis. Although criminal law frames the actions that can be driven by public opinion through democratic processes in particular, I aim to highlight the initial intuitions of punishers in reaction to criminal phenomena.

⁶ See *inter alia*: FINE/VAN ROOIJ, *Law and Human Behavior* 2017, 335 et seq.; KAHNEMAN/FREDRICKSON/SCHREIBER/REDELMEIER, *Psychological Science* 1993, 405; MELLERS/SCHWARTZ/COOKE, *The Annual Review of Psychology* 1998, 451 et seq.; NOCKUR/KESBERG/PFATTHEICHER/KELLER, *Zeitschrift für Psychologie* 2022, 103 et seq.; POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 380 et seq.; SITREN/APPLEGATE, *Deviant Behavior* 2012, 493 et seq.

expresses itself through legislative choices or in public opinion. Judges, however, are specifically excluded from this category⁷, because their individual emotional reactions to a criminal judgment are procedurally and technically limited. This analyzed group thus abstractly considers the individuals involved in the creation and evolution of criminal law, as collective agents represented in Parliament and public opinion. While this categorization may appear to have blurred contours, it makes it possible to examine recurring emotional tendencies raised by the logics of retribution or deterrence that will underpin the choices of penal response. This thesis seeks to identify the spontaneous reactions of individuals and the role these play in their tendency to lean towards a logic of retribution or deterrence. *In concreto*, criminal law remains created within a framework limited by legislative constraints that bring back a rational logic cut off from intuitive emotions, and this thesis does not claim that legislative choices are based *solely* on these emotions but that they underlie the discussions leading to the choice of one logic over the other. Exploring punishers' emotions means questioning their intuitions facing punishment and revealing their spontaneous tendencies towards retribution or deterrence.

This analysis first draws on findings from cognitive psychology and behavioural economics to highlight the link between punishers' emotions and their choice of criminal sanction (PART I). Taken together, these theories reveal a potential gap in the literature concerning empathy. Indeed, the role of empathy in punishers' decision-making seems overlooked, even though it traces a bridge between spontaneous emotional reactions (retributive logic) and projective reflection (dissuasive logic) that leads to a different choice of penal sanction. In the interests of interdisciplinarity, this work then opts for an analysis stemming from the *Law & literature* thought to explain how to develop empathy through the flourishing of the "moral imagination"⁸ as an educational project (PART II). As a result, punishers' developed empathetic inclinations would impact their inclination towards retribution or deterrence (CONCLUSION).

II. PART I. Punishment as Mirror of Our Worst Instincts?: Insights from Cognitive Psychology and Behavioural Economics on the Emotional Foundations Behind Penal Choices on Retribution and Deterrence

⁷ Judges are expressly excluded from the present analysis for two main reasons. On the one hand, criminal law channels, to a certain extent, the emotions that may guide them in their judgments. On the other hand, in civil law jurisdictions, judges cannot express their opinions very freely, as judgments often bear little or no personal trace of those who rendered them. Moreover, several studies have already specifically addressed the influence of judges' emotions. While I consider judges to be an important category to study, they do not seem to belong to the broader category of "ordinary people" that I would like to bring to the fore in this work. See notably: KLIMIS, *Penser, délibérer, juger, Pour une philosophie de la justice en acte(s)*, Louvain-la-Neuve, 2018; BERGMAN BLIX/WETTERGREN, *A Sociological Perspective on Emotions in the Judiciary*, *Emotion Review* 2016, 32-37; MARONEY/GROSS, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, *Emotion Review* 2014, 142-151.

⁸ MCROBIE, *OpenDemocracy* 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025).

Criminal law is essentially armed with two sanctioning swords: retribution and deterrence⁹. This section exposes the emotional mechanisms underlying punishers' choices between these weapons of criminal law, in light of cognitive psychology and behavioural economics.

A. Retribution Motives > Utilitarian Goals (Carlsmith): The Illusion of Utilitarianism in Criminal Sentencing

A first insight provided by cognitive psychology is found in Carlsmith's experiments¹⁰ demonstrating that individuals make choices regarding punishment that are not based on utilitarian logic¹¹, but rather to satisfy¹² retributive concerns¹³. Although participants may endorse utilitarian justifications, their punishment decisions do not consistently reflect those preferences¹⁴. Carlsmith highlights the extent to which the notion of "deserving a greater or lesser punishment" overrides considerations of utilitarian logic such as positive consequences for the management of problem behavior and thus, deterrence¹⁵. The implications of his study are that the decision-making process of punishers is less about dealing with a perpetrator's behavior than exercising moral condemnation.¹⁶ These findings run counter to the logic of deterrence,

⁹ NOCKUR/KESBERG/PFATTHEICHER/KELLER, *Zeitschrift für Psychologie* 2022, 104 et seq. While I do not deny the existence of other sentencing objectives and sanctioning resources in criminal law, these two angles are currently the most prevalent in most criminal justice systems, which explains this focus.

¹⁰ CARLSMITH, *Roles of retribution*, *Journal of Experimental Social Psychology* 2006, 447: "My research shows that when people punish criminals, their sentencing decisions are affected primarily by retribution, rather than by incapacitation or deterrence. Although people say they value utilitarian goals, when it comes to actually seeking information and assigning sentences, their behavior reveals that they care most about retribution".

¹¹ CARLSMITH, *Roles of retribution*, *Journal of Experimental Social Psychology* 2006, 439: "I chose to study how people make punishment decisions by looking at the type of information they seek, the order in which the information is sought, and the resulting confidence that people have in the appropriateness of the assigned punishment. Although these issues arise in many contexts, I continued the tradition of studying them in legal contexts. This allowed me to use previously validated materials and methodologies, and avoided the potential confounds associated with changing multiple variables simultaneously".

¹² CARLSMITH, *On Justifying Punishment*, *Social Justice Research* 2008, 120 et seq. Thus, if we look at the first intuition of punishers when they have to sanction, they are more inclined towards retribution since it is not-unlike deterrence-part of a utility logic, but a logic of analysis of the consequences over a longer period of time of the effects of punishment.

¹³ Indeed, CARLSMITH, *Roles of retribution*, *Journal of Experimental Social Psychology* 2006, 437: "Although people endorse utilitarian goals, they prefer punishments that satisfy retributive concerns". Note also, regarding the "Just World Hypothesis", CARLSMITH, *Roles of retribution*, *Journal of Experimental Social Psychology* 2006, 449: "There is also evidence that people differ meaningfully in their support for different punishment justifications. Moreover, ordinary people and legislative bodies have justified punishments in radically different ways throughout history. This suggests that justifications for punishment are a learned response, rather than an innate human characteristic. This contradicts the strong claim that there is a universal belief in a just world".

¹⁴ CARLSMITH, *On Justifying Punishment*, *Social Justice Research* 2008, 120 et seq.

¹⁵ CARLSMITH, *Roles of retribution*, *Journal of Experimental Social Psychology* 2006, 441 et seqq.

¹⁶ DARLEY/PITTMAN, *Personality and Social Psychology Review* 2003, 329; CARLSMITH, *On Justifying Punishment*, *Social Justice Research* 2008, 133: "In particular, it shows that people have favorable attitudes towards zero tolerance and other utilitarian policies in general (albeit lower than for retribution), and that they cite deterrence as an important reason for punishment. However, they largely ignore those factors that are critical to deterrence, but are highly sensitive to factors that are critical to retribution when it comes to assigning

which is based on the post-act consequences, the practical benefits of punishment—since punishment doesn't have to be useful to be preferred by punishers¹⁷. Individuals may therefore give comparatively little weight to the consequences of punishment for recidivism or crime rates. It also shows that the more morally wrong an action appears, the more willing individuals will be to punish it severely, even if the utility derived from the punishment is negligible¹⁸. The consequences of a punishment in terms of recidivism or crime rate is a factor that individuals¹⁹ thus overlook²⁰. It can be deduced from punishers' spontaneous will to retributively punish the perpetrator that the desire for revenge²¹ and emotions such as fear or anger are predominant²² at least in their initial intuition²³.

punishments to perpetrators. For scenarios in which retributive and deterrence theories diverge and logically lead to different punishments, people uniformly choose the retributive outcome and describe it as more fair. Thus, although people say that deterrence is important to them, and although they frequently support laws designed for deterrence, in actual practice they select retributive sentences and reject deterrence based sentences". See also CARLSMITH, *On Justifying Punishment*, Social Justice Research 2008, 127 et seqq.

¹⁷ CARLSMITH/DARLEY, 204: "This study reveals that when people are placed in the position of assigning punishment, they seek out information relevant to a retributive perspective and not to one of the utilitarian perspectives. Moreover, when they are forced to use utilitarian information, they feel less confident in the accuracy of their assignments than when they receive information pertaining to the perpetrator's deservingness of punishment".

¹⁸ CARLSMITH/DARLEY, 204: "The results were quite clear. When it came to sentencing, people were highly sensitive to the severity of the offense, and largely ignored the likelihood that the person would offend again. Manipulation checks revealed that people clearly understood whether the perpetrators would be likely to reoffend, but that knowledge did not translate into sentence severity. Even for the most serious crimes that involved physical injury, the threat of future harm did not evoke incapacitative responses. Rather, people punished exclusively in proportion to the harm done and not for the harm that might be done in the future"; CARLSMITH/DARLEY, 205: "This finding, in conjunction with the earlier results, led to the conclusion that people spontaneously punish in a manner that is highly consistent with a theory of retributive justice and not in a manner consistent with the utilitarian goals of incapacitation".

¹⁹ CARLSMITH, *Roles of retribution*, Journal of Experimental Social Psychology 2006, 447: "Finally, comparisons among the participants' responses revealed that their natural (default) approach to sentencing probably involved retribution".

²⁰ CARLSMITH/DARLEY, 213: "Provisionally, let us accept that it is often, perhaps always, the case that a person's first reactions to a moral violation are intuitive in nature, and largely driven by just deserts concerns".

²¹ For a more detailed analysis of retributive motives and the effects of revenge on punishers, see CARLSMITH/WILSON/GILBERT, *Journal of Personality and Social Psychology* 2008, 1316 et seqq.: "People expect to reap hedonic rewards when they punish an offender, but in at least some instances, revenge has hedonic consequences that are precisely the opposite of what people expect. Three studies showed that (a) one reason for this is that people who punish continue to ruminate about the offender, whereas those who do not punish "move on" and think less about the offender, and (b) people fail to appreciate the different affective consequences of witnessing and instigating punishment".

²² See for example CARLSMITH, *On Justifying Punishment*, Social Justice Research 2008, 134 regarding the impact of his findings on law creation: "Second, these findings can inform policy-makers on the process of creating just laws. Although this recommendation may sound paternalistic, it may be best to obey public opinion cautiously when crafting new laws. For example, California was at the forefront of states that passed 3-strikes laws. These laws, which had overwhelming public support, mandated life sentences for repeat offenders. Surprisingly, though, support for the laws dropped sharply in the decade following its passage, and a recent statewide referendum very nearly repealed them. One explanation for this dramatic shift in opinion stems from the fact that people did not envision a law that would violate the retributive element of proportionality. For example, when Californians encountered the case of Leandro Andrade (Lockyer v. Andrade, 2003), who was sentenced to 50 years for stealing a pair of children's videos for Christmas presents, they found the outcome to be deeply unjust. Their response was to seek a repeal of that law".

²³ CARLSMITH/DARLEY, 212: "When respondents receive a scenario in which some person commits a known morally wrong action, respondents experience a reaction of moral outrage that is a substantial predictor of the

B. System 1 = retribution > System 2 = deterrence²⁴ (Kahneman): Retribution is Fast and Furious

Carlsmith's psychological experiments exposed the spontaneous nature of human reactions in favor of retribution. This characteristic can be linked to the dual process theory as presented by Kahneman in the field of behavioural economics, which is a tool to visualize the cognitive processes at work in decision-making²⁵. In this theory, the reasoning process is divided into "System 1" and "System 2". System 1 is "intuitive, automatic and fast²⁶ "and "provides constant and near instantaneous answers to the questions in daily life²⁷". System 1's reasoning is based on "cognitive heuristics²⁸", or mental shortcuts. By contrast, System 2 would then provide more systematic, analytical reasoning to counteract, if need be, the very on-the-spot conclusions of System 1²⁹. System 1 would relate to retribution, which is a predominant intuition among the punishers, while deterrence and the more detached, rational analysis it requires being future looking and focused on the consequences of punishment on future behavior relates to System 2. However, it has been shown³⁰ that System 1 processing often operates as the default, while System 2 may endorse rather than override an intuitive response³¹. With regard to punishers' mental processes, Carlsmith has underlined that individuals rely primarily and intuitively on their instincts rather than on logical or utilitarian reasoning³². Hence, it can be said that punishers reflect on their penal response in System 1, which favors retribution, rather than in System 2, which favors analysis and distancing from cognitive heuristics³³.

relative punishments that will be assigned to the perpetrator of the immoral action. We would suggest that this 'feeling' of moral outrage is the conscious registration of the intuitive reaction to instances of moral wrong doing".

²⁴ POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 388.

²⁵ See POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 388 for an application of this concept regarding the decision-making process of offenders. In this paper, we reverse this application in order to use the same concept but regarding punishers.

²⁶ POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 388.

²⁷ POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 388.

²⁸ POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 388.

²⁹ POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 388.

³⁰ POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 388: "However, the behavioural economics literature suggests that System 2 deliberation governs less human decision-making than one might initially think. For various reasons (e.g., preoccupation, depletion, individual differences in reasoning styles, or simple ambiguity), System 2 often accepts the heuristic answer, which then becomes the basis for a person's judgment or belief (Kahneman 2011)".

³¹ However, a contra doctrine can be found in SLOVIC/FINUCANE/PETERS/MACGREGOR, *The Affect Heuristic*, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 398: "Affect also plays a central role in what have come to be known as dual-process theories of thinking, knowing, and information processing (Chaiken and Trope, 1999; Sloman, 1996). As Epstein (1994) observed, 'There is no dearth of evidence in every day life that people apprehend reality in two fundamentally different ways, one variously labeled intuitive, automatic, natural, non-verbal, narrative, and experiential, and the other analytical, deliberative, verbal, and rational' (p. 710)".

³² See the references made in the section above.

³³ This is shown inter alia by the type of information that people will seek when having to take a decision regarding a punishment, see CARLSMITH, *Roles of retribution*, *Journal of Experimental Social Psychology* 2006, 447: "Study 1 demonstrated that people generally view retribution information to be more relevant to sentencing than utilitarian information. It also demonstrated that people could link different information items with the philosophies from which they were derived. When asked to adopt each perspective, participants could do so appropriately, albeit with some error. Finally, comparisons among the participants' responses

C. Heuristics, Biases, and their Influence on Punishment Decisions (Pogarsky, Kahneman, Tversky): “My Mind is Playing Tricks on Me³⁴”

In their research on heuristics, Kahneman and Tversky³⁵ sought to identify the various cognitive biases and mental shortcuts at work in the decision-making process³⁶. Among the heuristics most commonly identified, "Kahneman and Tversky described three general-purpose heuristics—availability, representativeness, and anchoring and adjustment—that underlie many intuitive judgments under uncertainty³⁷". In addition to

revealed that their natural (default) approach to sentencing probably involved retribution. Study 2 showed that when participants sought information about crimes in order to sentence perpetrators, they searched most often for retribution information"; see also the TDRM and how it is applied to offenders in POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 388. Additionally, this type of reasoning could be linked to the “hot vs. cool” modes of processing highlighted by Gelder and De Vries quoted in POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 389 et seq. but here applied to punishers: "The hot mode of processing is largely affective, intuitive, and nonvolitional. Hot choices are based on emotions, such as fear and anger, rather than probabilistic inferences. Information processing occurs automatically and thus involves little agency. By contrast, the cool mode of processing involves the agency and cognitive reasoning typically assumed by rational choice theories of crime. It entails thoughtful reflection and logic, is under conscious control, is responsive to probabilistic information, and is well-suited for weighing the costs and benefits of behaviors. Theoretically, the hot and cool modes of processing may help to account for the influence of both situational factors and traits on offender decision-making".

³⁴ GETO BOYS, *Mind Playing Tricks on Me*, album: *We Can't be Stopped*, 1991.

³⁵ KAHNEMAN/SLOVIC/TVERSKY, 3.

³⁶ Indeed, GILOVICH/GRIFFIN, Introduction – Heuristics and Biases: Then and Now, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 6: "Wherever the rational choice model shall go, in other words, the heuristics and biases program- or something much like it- must follow. And follow it did, as the heuristics and biases program has reshaped both explicit and implicit assumptions about human thought in all of these areas and a few more" and KAHNEMAN/SLOVIC/TVERSKY, 3: Many decisions are based on beliefs concerning the likelihood of uncertain events such as the outcome of an election, the guilt of a defendant, or the future value of the dollar. These beliefs are usually expressed in statements such as "I think that...", "chances are...", "it is unlikely that...", and so forth. Occasionally, beliefs concerning uncertain events are expressed in numerical form as odds or subjective probabilities. What determines such beliefs? How do people assess the probability of an uncertain event or the value of an uncertain quantity? This article shows that people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors".

³⁷ GILOVICH/GRIFFIN, Introduction – Heuristics and Biases: Then and Now, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 3.

these three heuristics, this analysis will also develop the affect heuristic, which came in a later wave of work³⁸ to extend this theoretical framework³⁹.

1. Availability Heuristic: "We didn't start the fire, it was always burning"⁴⁰

Firstly, the availability heuristic describes that "the psychological salience of an event influences assessments of its probability"⁴¹. This would imply that the most vivid or strong memories of the individual will influence their perception of the likelihood of certain consequences occurring⁴². Punishers may be influenced by this availability heuristic in that they might want to punish more severely because of their perception that the likelihood of a crime is on the rise, influenced by extensive media coverage, for example, even if statistically there is no real evidence that the crime is on the rise⁴³. In this case, the emotion at work would be the fear that the crime will be repeated more often, and this fear could lead to a harsher penal response, even more retributive, since emotions such as fear and the desire for revenge are part of System 1 and motivate a penal response that is more retributive than deterrent⁴⁴.

³⁸ SLOVIC/FINUCANE/PETERS/MACGREGOR, *The Affect Heuristic*, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 397: "Although affect has long played a key role in many behavioural theories, it has rarely been recognized as an important component of human judgment and decision-making. Perhaps befitting its rationalistic origins, the main focus of descriptive decision research has been cognitive, rather than affective. When principles of utility maximization appeared to be descriptively inadequate, Simon (1956) oriented the field toward problem-solving and information-processing models based on bounded rationality. The work of Tversky and Kahneman (1974) and Kahneman, Slovic, and Tversky (1982) demonstrated how boundedly rational individuals use such heuristics as availability, representativeness, and anchoring and adjustment to make judgments, and how they use simplified strategies such as "elimination by aspects" to make choices (Tversky, 1972). Other investigators elaborated the cognitive strategies underlying judgment and choice through models of constructed preferences (Slovic, 1995; Payne, Bettman, & Johnson, 1993), dominance structuring (Montgomery, 1983), and comparative advantages (Shafir, Osherson, & Smith, 1989). [...] Similarly, a state-of-the-art review by Busemeyer, Hastie, and Medin (1995) was titled "Decision Making from a Cognitive Perspective." In keeping with its title, it contained almost no references to the influence of affect on decisions".

³⁹ GILOVICH/GRIFFIN, *Introduction – Heuristics and Biases: Then and Now*, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 15.

⁴⁰ BILLY JOEL, *We didn't start the fire*, single released on September 18, 1989.

⁴¹ POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 391.

⁴² Obviously, as highlighted by POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 391: "The problem is that availability to memory is a highly error prone proxy for statistical likelihood". See also KAHNEMAN/SLOVIC/TVERSKY, 163 et seq.: "[...] the estimation of the frequency of a class or the probability of an event is mediated by an assessment of availability. A person is said to employ the availability heuristic whenever he estimates frequency or probability by the ease with which instances or associations could be brought to mind. To assess availability it is not necessary to perform the actual operations of retrieval or construction. It suffices to assess the ease with which these operations could be performed, much as the difficulty of a puzzle or mathematical problem can be assessed without considering specific solutions. That associative bonds are strengthened by repetition is perhaps the oldest law of memory known to man. The availability heuristic exploits the inverse form of this law, that is, it uses strength of association as a basis for the judgment of frequency".

⁴³ KAHNEMAN/SLOVIC/TVERSKY, 163 et seqq.

⁴⁴ The application of this concept is inspired by POGARSKY/ROCHE/PICKETT, *The Annual Review of Criminology* 2018, 391 et seqq. but applied here to punishers and not to offenders: "We discuss below how availability bias may be exploitable for policy interventions to curb crime and transgression. This involves enhancing the salience to memory of adverse consequences (e.g., perp walking a white-collar criminal from his or her office during business hours) to inflate perceptions of the certainty of punishment and enhance deterrence".

2. Representativeness Heuristic: "They judge me like a picture book by the colors, like they forgot to read"⁴⁵

Secondly, the representativeness heuristic⁴⁶ refers to the tendency of individuals to use prototypes⁴⁷ or stereotypes⁴⁸ as data in their decision-making process, rather than factual information⁴⁹. Hypothetically then, this bias can impact punishers' judgments both in terms of "who" would be considered a category to be punished and for the determination of the contours of this category—which notably opens the door to racial profiling abuses—but also in terms of the severity of sentences⁵⁰. Also, the same crime could be perceived differently depending on the perpetrator's profile, which could be taken more or less into account and more or less favorably depending on the stereotypes of the representativeness bias⁵¹. As a result, punishers' emotions will be influenced by these stereotypes, and will motivate different decisions depending on what they perceive as more or less dangerous. Indeed, if the white-collar criminal seems less dangerous than another, the emotion that his crime will provoke in punishers will be less, and thus it may give rise to reasoning more in line with System 2 than System 1, as it will be less emotional than reflective–utilitarian—and therefore deterrence may be favored.

⁴⁵ LANA DEL REY, *Brooklyn Baby*, album: Ultraviolence, 2014.

⁴⁶ LIU/YE/YANG/XIANG/LIU, *Journal of Construction Engineering and Management* 2022, 1 : "[...] the subjective probability of an event, or a sample, is determined by the degree to which it: (1) is similar in essential characteristics to its parent population; and (2) reflects the salient features of the process by which it is generated".

⁴⁷ KAHNEMAN/SLOVIC/TVERSKY, 86.

⁴⁸ KAHNEMAN/SLOVIC/TVERSKY, 95.

⁴⁹ KAHNEMAN/SLOVIC/TVERSKY, 54 et seqq.

⁵⁰ See, as an illustration, the example of the stereotyped cocaine user in GILOVICH/GRIFFIN, *Introduction – Heuristics and Biases: Then and Now*, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 3: "When evaluating the likelihood that a given comic actor is a cocaine user, one may assess the similarity between that actor and the prototypical cocaine user (the representativeness heuristic piggy backs on automatic pattern-matching processes)".

⁵¹ A recent case in the Belgian justice system illustrates the public's questioning of a judgment in a case that could be considered to have used (or abused) representativeness bias. In this case, a gynecology student was found guilty of rape, but the judge did not impose any penalty so as not to "disturb him socially" because he is a brilliant student with no previous criminal record. In this particular case, the general public was outraged by the judge's leniency - which could be seen as the potential effect of a representativeness bias whereby the judge, relying on the stereotype of a brilliant medical student, considers that rape is therefore a less serious crime and therefore decides not to apply any punishment, forsaking other objective and crucial data such as the demonstration of the rape that took place through evidence (including the student's confession). Of course, this example aims at providing an illustration of potential representativeness bias and does not establish that the judge for sure acted based on this bias; it is solely an analytical illustration. See the reactions of the citizens interviewed: RTBF, *Débat: pas de condamnation pour un violeur... le talent c'est une immunité pour la prison?* - RTBF Actus, 4th April 2025, available at: <https://www.rtbf.be/article/debat-pas-de-condamnation-pour-un-violeur-le-talent-c-est-une-immunite-pour-la-prison-11528455> (last consulted on 14 May 2025). For a description of the case and the following protests: STROOBANTS, *En Belgique, une mobilisation contre la "culture du viol" après le jugement contesté d'un tribunal*, 4th April 2025, available at: https://www.lemonde.fr/international/article/2025/04/04/en-belgique-une-mobilisation-contre-la-culture-du-viol-apres-le-jugement-conteste-d-un-tribunal_6591148_3210.html (last consulted on 14 May 2025).

3. Anchoring-and-Adjustment Heuristic: "The first cut is the deepest"⁵²

The third heuristic mobilized is the anchoring-and-adjustment heuristic, which states that "people make estimates by starting from an initial value that is adjusted to yield a final answer [and]...adjustments are typically insufficient⁵³". In other words, the information initially received and "adjusted until a plausible estimate is reached⁵⁴"—even if erroneous or not adapted to the particular case—will influence the decision the individual makes⁵⁵. If we apply this bias to punishers, it is possible to detect the influence that the defense presented in a trial for example would have on their decision. This finding could even be used as a subtle manipulation to steer their decisions⁵⁶. Studies also show that "the sentencing decisions of experienced legal professionals are influenced by irrelevant sentencing demands even if they are blatantly determined at random. Participating legal experts anchored their sentencing decisions on a given sentencing demand and assimilated toward it even if this demand came from an irrelevant source, they were informed that this demand was randomly determined, or they randomly determined this demand themselves by throwing dice⁵⁷". Thus, this bias can lead to a more or less accentuated penal response, potentially disconnected from the factual seriousness of the facts. In short, this bias influences punitive judgments

⁵² YUSUF / CAT STEVENS, *The First Cut Is the Deepest*, album: New Masters, 1967.

⁵³ KAHNEMAN/SLOVIC/TVERSKY, 14.

⁵⁴ See, regarding the insufficiency of the adjustment process EPLEY/GILOVICH, *Psychological Science* 2006, 311; EPLEY/GILOVICH, *Psychological Science* 2006, 316: "This research was first and foremost designed to explain why the use of the anchoring-and-adjustment heuristic yields reliable anchoring effects—that is, why adjustments tend to be insufficient. Testing an idea first advanced by Quattrone et al. (1981), we obtained evidence that people adjust insufficiently from an initial anchor value because they stop adjusting once their adjustments fall within an implicit range of plausible values (see also Epley, Keysar, Van Boven, & Gilovich, 2004). People's estimates therefore tend to lie near the anchor side of this implicit range, but, on average, the true value is likely to lie closer to the middle of the range. We also obtained evidence that adjustment is effortful, and so anything that increases a person's willingness or ability to seek more accurate estimates tends to reduce the magnitude of adjustment-based anchoring biases".

⁵⁵ XIANG/GUOLI, *Anchoring Heuristics*, in: KAN, Z. (ed.), *The ECPH Encyclopedia of Psychology*, Singapore 2025, 62: "It is a problem-solving strategy in which individuals refer to the initial value or starting point to make appropriate adjustments to subsequent judgments when they estimate uncertain values. It is one of the heuristic problem-solving strategies. When individuals make decisions in a lack of evidence, they often use a reference point or an anchor to reduce ambiguity. Even if such anchor is clearly unrelated to the decision, individuals still tend to use the earliest anchors to make quick decisions, and then revise their decisions gradually, using the first decision as a reference point in subsequent decisions. For example, in group sports events that require refereeing, the performance of the early athletes usually serves as an anchor for the later athletes' scores".

⁵⁶ GILOVICH/GRIFFIN, *Introduction – Heuristics and Biases: Then and Now*, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 5: "Often people's estimates are automatically contaminated by previously mentioned values. Sometimes, however, the anchoring and adjustment heuristic is deliberately employed. If asked when George Washington was first elected president, most people do not know the answer; but they do know it was after 1776 and they adjust from that year (Epley & Gilovich, Chapter 7). Anchoring and adjustment is thus sometimes used as an explicit strategy of judgment".

⁵⁷ ENGLISH/MUSSWEILER/STRACK, *Personality and Social Psychology Bulletin* 2006, 188.

and can also be used to manipulate punishers' opinions to one side or the other of the penal response by playing on the emotions that will create this subjective anchor⁵⁸.

4. Affect Heuristic: "When I see red, I just can't help myself..."⁵⁹

Finally, the affect heuristic has long been underestimated because studies of decision-making had for long adopted a cognitive rather than affective focus⁶⁰. A perceptible advance in research into the influence of affect on decisions was the work of Zajonc in 1980⁶¹, who stated that "all perceptions contain some affect". By "affect", he means "the specific quality of 'goodness' or 'badness' (1) experienced as a feeling state (with or without consciousness) and (2) demarcating a positive or negative quality of a stimulus⁶²". A response that is not rational and cognitive, but affective, hence appears to be "rapid" and "automatic", based on feelings associated with the stimulus, such as a word to which feelings of fear or rejection are associated⁶³. Since it is a mental shortcut, it affects the rapid decision-making of individuals in the face of uncertainty⁶⁴. Concretely, the affect heuristic mechanism has been described as operating on the basis of an internal "affect pool", which would be a mental locus where all the "positive and negative tags consciously or unconsciously associated with the representations⁶⁵" are gathered. So, when faced with emotionally-charged stimuli, under time pressure or when the information available to the individual is too vague, the emotional experience of the individual's past will serve as a decision compass⁶⁶. This heuristic once again underlines that people's choices are based on subjective preferences that will make them place more or less weight on certain

⁵⁸ See for complementary information and comparison JETTER/WALKER, *Journal of Economic Behavior and Organization* 2020, 755-766.

⁵⁹ EVERYBODY LOVES AN OUTLAW, *I See Red*, album: Dance Moms: A New Era (Official Television Soundtrack), 2024.

⁶⁰ SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 397: "[...] the main focus of descriptive decision research has been cognitive, rather than affective".

⁶¹ SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 398.

⁶² SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 397.

⁶³ SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 400.

⁶⁴ SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 398: "Although analysis is certainly important in some decision-making circumstances, reliance on affect and emotion is a quicker, easier, and more efficient way to navigate in a complex, uncertain, and sometimes dangerous world". See also SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 399: "In short, affect heuristic means that "images, marked by positive and negative affective feelings, guide judgment and decision-making".

⁶⁵ SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 400.

⁶⁶ SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 400: "Representations of objects and events in people's minds are tagged to varying degrees with affect".

information according to their affective association, and not on the basis of the objective value of this information⁶⁷.

With regard to retribution, the affect heuristic could exert an influence in that if the fault committed by the offender arouses a strong emotional reaction, punishers could base their punitive reasoning and thus the penal response not on objective data but on the emotions they consciously or unconsciously associate with this type of fault. Hence, the punishers' response could appear to be proportional to the negative emotion aroused by the criminal act, but disproportionate from a rational point of view. As the emotions aroused by a criminal act are often linked to fear, indignation or even the desire for revenge, they would encourage punishers to seek greater retribution⁶⁸. In this respect, these findings are in line with what Carlsmith underlined. Taking a Belgian judicial example, the provisional release of Michelle Martin in 2012 caused a public outcry: although she met all the conditions for parole, demonstrations and citizens' groups mobilized against it⁶⁹. Intellectuals expressed their indignation in the press or, on the contrary, defended her⁷⁰. This example illustrates how despite the precise framework laid down by criminal law, affect plays a role in assessing its application. Depending on what punishers associate as an "emotional label" with the offence committed, their response will be more or less based

⁶⁷ SLOVIC/FINUCANE/PETERS/MACGREGOR, *The Affect Heuristic*, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 409: "When consequences carry sharp and strong affective meaning, as is the case with a lottery jackpot or a cancer, the opposite phenomenon occurs - variation in probability often carries too little weight. As Loewenstein, Weber, Hsee, and Welch (2001) observe, one's images and feelings toward winning the lottery are likely to be similar whether the probability of winning is 1 in 10 million or 1 in 10,000. They further note that responses to uncertain situations appear to have an all or none characteristic that is sensitive to the possibility rather than the probability of strong positive or negative consequences, causing very small probabilities to carry great weight. This they argue, helps explain many paradoxical findings such as the simultaneous prevalence of gambling and the purchasing of insurance".

⁶⁸ SLOVIC/FINUCANE/PETERS/MACGREGOR, *The Affect Heuristic*, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 401: "These various studies demonstrate that affect is a strong conditioner of preference, regardless of whether the cause of that affect is consciously perceived. They also demonstrate the independence of affect from cognition, indicating that there may be conditions of affective or emotional arousal that do not necessarily require cognitive appraisal. This affective mode of response, unburdened by cognition and therefore much faster, has considerable adaptive value".

⁶⁹ TRIBUNE DE GENÈVE, *Manifestation contre la libération de l'ex-femme de Dutroux*, 3rd August 2012, available at: <https://www.tdg.ch/manifestation-contre-la-liberation-de-l-ex-femme-de-dutroux-364210588425>, (last consulted on 14 May 2025); RTBF, *Libération de Michelle Martin: pour le MR, c'est la faute du PS*, 28th August 2012, available at: <https://www.rtbf.be/article/liberation-de-michelle-martin-pour-le-mr-c-est-la-faute-du-ps-7828463> (last consulted on 14 May 2025); LE NOUVELLISTE, *La libération de Michelle Martin secoue toute la Belgique*, 30th August 2012, available at: <https://www.lenouvelliste.ch/monde/la-liberation-de-michelle-martin-secoue-toute-la-belgique-233423> (last consulted on 14 May 2025); FRANCE INTER, *La Belgique accepte encore difficilement la liberté conditionnelle de l'ex-femme de Marc Dutroux*, 13th August 2016, available at: <https://www.radiofrance.fr/franceinter/la-belgique-accepte-encore-difficilement-la-liberte-conditionnelle-de-l-ex-femme-de-marc-dutroux-4428540> (last consulted on 14 May 2025).

⁷⁰ RTBF, *Des citoyens soutiennent Michelle Martin: "Nous sommes à vos côtés"*, 29th August 2012, available at: <https://www.rtbf.be/article/des-citoyens-soutiennent-michelle-martin-nous-sommes-a-vos-cotes-7829341> (last consulted on 14 May 2025); DENOËL, *Libération de Michelle Martin: sortir du cycle de la vengeance*, 26th August 2022, available at: <https://www.levif.be/opinions/liberation-de-michelle-martin-sortir-du-cycle-de-la-vengeance/> (last consulted on 14 May 2025). See for a complete overview of the question and the use of the Dutroux trial as an example of a case that divides public opinion DAYEZ, *Pourquoi libérer Dutroux? Pour un humanisme pénal*, Bruxelles 2018.

on rational reasoning or not, particularly when the consequence of the punishment is so emotionally charged.

Regarding deterrence, the affect heuristic will also charge the penal response with an emotional perception that influences the way punishers conceive its effectiveness⁷¹. For example, a severe sentence may appear as effective and desirable, not because it is based on objective data but because individuals attach a strong emotional reaction to it—such as fear. If the punishment is emotionally charged in this "affect pool", it will be perceived as necessary or useful⁷². For example, death penalty remains defended because it arouses strong emotions of fear and dread in society⁷³, even though its limited deterrent effect on criminals has been proven⁷⁴. Thus, the emotional mechanisms of punishers, influenced by affect, influence the perception of the deterrent effectiveness of the penal response. The

⁷¹ ROSE/ESRA KUIPER/REINDERS FOLMER/VAN ROOIJ, *Crime Science* 2024, 4: "Negative emotional reactions to crime, such as anger and fear, have been linked to increased support for punishment (Hartnagel & Templeton, 2012; Johnson, 2009). The intensity of these emotions also tends to vary based on the type of crime committed (Armborst, 2017). Stronger negative emotional reactions to crime, both fear and anger, are related to higher punitive attitudes and higher levels of support for punishment and punitive policies (Drakulich & Baranauskas, 2021; Kury & Kuhlmann, 2014) and may even be a key factor in why exposure to evidence fails to change attitudes towards punishment (Loader, 2005). It is possible that people who have stronger negative emotional responses (anger/fear) about crime will be less receptive to scientific evidence when making punishment decisions. Additionally, more serious types of crime may elicit stronger negative responses which may further impact receptiveness to such science".

⁷² See however in ROSE/ESRA KUIPER/REINDERS FOLMER/VAN ROOIJ, *Crime Science* 2024, 12 et seq.: "[...] that even though more serious crimes, particularly homicide, are viewed as less redeemable and generate more negative emotional responses—exposure to scientific evidence remains effective in reducing preferences for stronger punishments. This result replicates, and extends on, the findings of Kuiper et al. (2023) and underlines how providing the public with criminological evidence can reduce preferences for stronger punishment, and bring public punishment preferences more in line with scientific evidence. [...] However, this would not alter the main conclusion of the present research, namely that scientific information reduces preferences for stronger punishment regardless of crime type". See also about the importance of information provided to punishers, which can of course then influence their level of empathy ROSE/ESRA KUIPER/REINDERS FOLMER/VAN ROOIJ, *Crime Science* 2024, 15: "This study provides compelling findings that further clarify the circumstances required for criminological evidence to be successfully utilized to shape the punishment preferences of the general public. This study demonstrated that presenting people with timely and accessible scientific evidence can lead to more evidence aligned punishment preferences—which are robust to contextual factors such as the seriousness of crime and related impact on individual emotional and cognitive response. This highlights a number of valuable insights for criminology as it seeks to translate its empirical evidence into real-world practical contributions. It suggests that public opinion about punishment may be brought more into line with scientific evidence by improving access to consumable, reliable evidence. By enabling more scientifically-informed punishment preferences in the general public, criminology may also come to impact real world criminal justice policy, and counter the continuing reliance on punitive approaches existing there. It is our hope that future research will build upon these findings to help further unlock the potential of criminological science for these purposes".

⁷³ See NAGIN, *The Annual Review of Economics* 2013, 83-105 for a broader analysis of literature around capital punishment and deterrent effect.

⁷⁴ Indeed, as pointed out by RADELET/LACOCK, *Journal of Criminal Law and Criminology* 2009, 489: "The findings demonstrate an overwhelming consensus among these criminologists that the empirical research conducted on the deterrence question strongly supports the conclusion that the death penalty does not add deterrent effects to those already achieved by long imprisonment". See also in that sense: THE DEATH PENALTY PROJECT, *The Death Penalty Project Annual Report 2022*, available at: <https://deathpenaltyproject.org/knowledge/the-death-penalty-project-annual-report-2022/> (last consulted on 14 May 2025). However, the argument that the death penalty has a deterrent effect is central to those who support it as shown in CASSELL, *In Defense of the Death Penalty*, *IACJ Journal* 2008, 17: "More significant benefits come from the death penalty's restraining effect on the much larger pool of people who are potential murderers, what criminologists refer to as general deterrence. Evidence for capital punishment's general deterrent effect comes from three sources: logic, first-hand reports, and social science research".

emotional imprint of punishments will impact their choice of sanction, potentially to the detriment of a choice based on objective data such as the limitation of the recidivism rate induced or not by certain types of punishment.

D. The Emotional Dog and the Rational Tail (Haidt): I punish, Therefore I Think?

In his research, Haidt demonstrates that people's moral judgments are based almost exclusively on "moral intuitions"⁷⁵. Indeed, Haidt exposes that "moral intuitions precede moral reasoning, and secondly that moral reasoning largely serves a post hoc role of justifying intuitively made judgements"⁷⁶. While it had already been established that moral judgments were biased and that rational justifications did not underpin them⁷⁷, Haidt helped to highlight that individuals become "morally dumbfounded"⁷⁸, i.e. they "maintain a moral judgment for which they could find no reasons"⁷⁹, even after experts have shown them that their reasoning is flawed⁸⁰. In short, individuals base their choices on subjective preferences and then justify them with socially acceptable concepts such as fairness⁸¹. Haidt's metaphor for moral reasoning is "an emotional dog" with a "rational tail", because if the judgment is based on automatic, biased intuitions, it is then, in a second stage, rationalized by the individual, who finds a moral basis for it⁸². Moral judgment is therefore social in nature, and not purely internal and processual⁸³. Haidt's thesis that moral

⁷⁵ HAIDT, *Psychological Review* 2001, 814: "[...] moral judgement arises more or less instantaneously and almost entirely on the basis of 'moral intuitions'". See also ABBOTT, 265: "Haidt, however, devised an ingenious method for illuminating firstly that moral intuitions precede moral reasoning, and secondly that moral reasoning largely serves a post hoc role of justifying intuitively made judgements"; HAIDT, xx et seq.: "Moral intuitions arise automatically and almost instantaneously, long before moral reasoning has a chance to get started, and those first intuitions tend to drive our later reasoning', with people's moral reasoning being 'mostly post hoc constructions made up on the fly, crafted to advance one or more strategic objectives'".

⁷⁶ ABBOTT, 265.

⁷⁷ See CARLSMITH, *On Justifying Punishment*, *Social Justice Research* 2008, 120 et seqq.

⁷⁸ HAIDT, *Psychological Review* 2001, 817.

⁷⁹ ABBOTT, 266.

⁸⁰ ABBOTT, 266 et seq.

⁸¹ Although Haidt considers that a judgment based on reason alone is possible "but rare in practice" (ABBOTT, 266), he emphasizes that deliberative reasoning is possible, but that it is not primarily initiated by rational analysis, but "the genesis of our moral evaluations, [is] often initiated by social requirements to explain, defend, and justify our intuitive moral reactions to others'. This yields the crucial social element that led Haidt to refer to his account of moral judgement as the 'social intuitionist model'" (ABBOTT, 266).

⁸² In this model, Haidt posits that our "moral action is non-reflexive and driven by intuition and emotion" (ABBOTT, 267). Then, to flesh out his theory that our moral judgments are based on these two components rather than on a rational analysis of objective information, he developed the "moral foundations theory" (ABBOTT, 268), which demonstrates how these judgments take place in practice and function universally in a similar way on the basis of at least "five irreducible basic elements" (ABBOTT, 269) that "reflect the five basic moral foundations that MFT argues we are all born with" (ABBOTT, 268 et seq.). These moral foundations may differ despite a similar mechanism, and this would explain, in his view, why moral disagreements may arise, particularly between different political or religious groups.

⁸³ Of course, Haidt's work has received criticism in particular for its "substantive limitations" (ABBOTT, 291 et seq.), for example the fact that his conclusions about moral judgments are based on artificial experiments and scenarios and that his model leaves little room for social phenomena such as "the influence of social histories, institutions, discourses, events (...), personal experiences" (ABBOTT, 292) or the very Westernized character of his work having a "liberal-biased focus on justice and care as the only properly moral intuitions" (ABBOTT, 293). I leave to the reader to dig deeper into these criticisms, noting however that "MFT has been extensively tested and while some of the claims have been argued to be slightly inflated in meta-analysis

judgments—and therefore penal response judgments—are based on affective intuitions rather than on purely rational reasoning can be applied to the analysis of punishers' retributive or deterrent tendencies. Indeed, Haidt's thesis is very much in line with Carlsmith's, as well as with the affect heuristic: they all expose the primordial importance of the emotions in the decision-making process, including criminal⁸⁴.

Firstly, according to this theory, punishers would choose a penal response based on their emotions before justifying it *a posteriori*. The stronger the emotions aroused by the crime, the more intense the punishers' emotional response—and so, they might respond to the height of these strong emotions, for example with a severity of punishment disproportionate to the actual seriousness of the criminal act, since emotions would be the primary guides to the penal response. Punishment would then become a way of "purging" these extreme emotions aroused by the crime, to the detriment of a more reflective or "analytical" reasoning of System 2. The shock provoked by the act committed will of course be influenced by moral, cultural, and societal factors, and will therefore vary from one society to another⁸⁵. This "post-hoc" justification highlighted by Haidt implies that punishers will "cover up" the emotional origin of their penal response by justifying their choice with explanations that will then seem to form a logical line of reasoning that led to their penal response. This thesis is important with regard to retribution, as we know from Carlsmith in particular that individuals' first emotional intuitions are more concerned with retribution than deterrence, and it reveals the fact that punishers' *façade* justifications must be approached with an even sharper critical eye, as they could be no more than shells concealing the emotions that motivated their decision.

Secondly, Haidt's thesis presents the different intuitions that could lead punishers to make a choice in favor of deterrence. Indeed, the universal moral intuitions underlined by Haidt will motivate punishers' penal responses, some of which may favor a choice in favor of deterrence. For example, among the "five irreducible elements of his model⁸⁶", the element of "loyalty/betrayal⁸⁷" could be mobilized in that punishers would choose to punish as a deterrent, to show that betrayal of a group member has consequences. Also, the element of "authority/subversion⁸⁸" could also push punishers in favor of deterrence in that

(Kivikangas et al. 2021), it seems clear that there is something of empirical significance to the overall claims of MFT" (ABBOTT, 293).

⁸⁴ ABBOTT, 266.

⁸⁵ ABBOTT, 269.

⁸⁶ ABBOTT, 269: "Building on Shweder, Haidt and others developed the argument that at least five "irreducible basic elements" are needed to represent, understand, and explain the breadth of the moral domain' across the globe, although they argue that the number is likely to be higher (Graham et al. 2013; Haidt and Graham 2009; Haidt and Joseph 2004). The five elements of the moral domain reflect the five basic moral foundations that MFT argues we are all born with: 1. Harm/care (e.g. the registering of the effects of causing harm and caring for others) 2. Fairness/reciprocity (the registering of what is equitable and just) 3. Ingroup/loyalty (e.g. the moral priority given to kin and other ingroups as well as loyalty to those groups) 4. Authority/respect (e.g. respect for social hierarchy and the authority of tradition, cultural heritage) 5. Purity/sanctity (e.g. the avoidance of behaviours that are socially and personally distasteful or disruptive and the prioritising of sanctified social and bodily practices)".

⁸⁷ ABBOTT, 269.

⁸⁸ ABBOTT, 269.

it aims to preserve the social order. However, Haidt's model shows that punishers choose according to how they feel, and that, similar to the effect of affect heuristic on punishers' choice of penal response, punishment will be evaluated not on the basis of empirical data such as its actual ability to deter, but on the basis of the emotional impact it produces. As a result, a very severe sentence may appear to be effective because it is frightening—particularly in the collective imagination of punishers—even though it does not produce the expected deterrent effects among offenders. By linking the emotional response provoked by a sentence to a decision in favor of it, he demonstrates that our emotions can override more objective factors—which would explain why punishers may persevere with an inappropriate type of penal response. The punishers' decision and evaluation of a penal response are thus based on an emotional valence rather than a real analysis of the sentence.

E. CONCLUSION. Retribution as Emotion's Fruit: Could Empathy Reclaim the Tree?

The contributions of cognitive psychology and behavioural economics developed above highlight the extent to which individuals are guided—or biased—by their emotions, and this also in their tendency towards retribution or deterrence⁸⁹. Together, these findings reveal that punishers' judgments arise from emotional reactions rather than from rational analysis. Emotions such as fear, indignation, and the desire for revenge tend to influence their choice towards a more retributive punishment. It is therefore possible to conclude from these studies that punishers have a natural—emotional—tendency in favor of retribution.

Additional studies expose the role of emotions in decision-making more precisely⁹⁰. However, none of them really study the impact of empathy on emotions or its ability

⁸⁹ Indeed, Carlsmith points out that individuals base their criminal decisions on their emotions rather than on rational analysis, and the dual system theory shows that System 1 at work in criminal decision-making is based on rapid, reactive reasoning rather than on an analytical system of thought. Additionally, heuristics show the mental shortcuts that individuals' cognition uses to solve problems quickly, and finally, Haidt's theory of moral intuitionism highlights that moral justification comes after the individual's immediate reaction, which is not based on objective reflection but on emotion, thus artificially masking the spontaneous origin of the punishers' decision.

⁹⁰ Indeed, in the literature of psychology and behavioural economics, an "emotion-imbued choice model" (LERNER/LI/VALDESOLO/KASSAM, *The Annual Review of Psychology* 2015, 799) has been developed, which challenges the traditional rational choice model while integrating research into the precise impact of emotions in decision-making processes that was lacking in the findings developed above. In those, the researchers question the "valence-based approach" (LERNER/LI/VALDESOLO/KASSAM, *The Annual Review of Psychology* 2015, 803) developed *inter alia* in the theories above, for example in the "affect pool" of Haidt. Also, the importance of emotion in the decision-making process is not limited to the "content of thought" but "also influences the depth of information processing related to decision making", *inter alia* (LERNER/LI/VALDESOLO/KASSAM, *The Annual Review of Psychology* 2015, 806 et seq.). Researchers also stress the importance of the social nature of emotions (LERNER/LI/VALDESOLO/KASSAM, *The Annual Review of Psychology* 2015, 806). Experiments have been carried out to try and minimize the negative effects of emotions in decision-making processes, notably in cognitive biases—which has proved very difficult in practice (HESS/BACIGALUPO, *Management Decision* 2011, 710-721). In short, "Emotions constitute potent, pervasive, predictable, sometimes harmful and sometimes beneficial drivers of decision making. Across different types of decisions, important regularities appear in the underlying mechanisms through which emotions influence judgment and choice. Thus, emotion effects are neither random nor epiphenomenal"

to "regulate" emotions and thus impact the penal response of punishers in particular. If emotions underpin punishers' penal responses, it seems essential to look at their potential shaping, with empathy as sculptor. While the theories developed above accentuate punishers' emotional reactions, empathy, by contrast, is a social capacity that doesn't seem to be linked to the immediacy of moral intuitions—but rather to a deep understanding of the Other, including the criminal.

III. PART II. Moral Imagination in Punishment⁹¹: "What is essential is invisible to the eye. One sees clearly only at the Heart of Empathy"⁹²

If empathy is essential to decision-making, is it possible to train it organically in every individual? Studies show that children develop representativeness heuristics between the ages of 4 and 6⁹³. Other studies underline that children's use of screens worryingly diminishes their capacity for empathy⁹⁴. Empathy skills thus can and need to be

(LERNER/LI/VALDESOLO/KASSAM, *The Annual Review of Psychology* 2015, 816). Finally, studies have been carried out to determine how to enhance decisions and decision-making processes through the development of emotional intelligence skills. In their research in particular, Hess and Bacigalupo emphasized that empathy in the decision-making process plays a central role but did not, however, develop it extensively HESS/BACIGALUPO, *Enhancing decisions and decision-making processes through the application of emotional intelligence skills*, *Management Decision* 2011, 717). Another study in this field also showed the impact of emotions in decision-making regarding sexual risk behavior, from a cognitive neuroeconomic perspective (GUTNIK/FOROGH HAKIMZADA/YOSKOWITZ/PATEL, *Journal of Biomedical Informatics* 2006, 722 et seq.). The researchers also highlight how the *information* received by the subject is important in the process of decision-making, which can be linked to the methodology used by Carlsmith above (GUTNIK/FOROGH HAKIMZADA/YOSKOWITZ/PATEL, *Journal of Biomedical Informatics* 2006, 727 et seq.).

⁹¹ This part of the thesis has been published on 18th May 2025, in an adapted Spanish version that retains some of the original sentences, on the blog "Constitucionalismo Comparado – Universidad Nacional de Colombia" in the "Opiniones" section. This publication marked my official affiliation with the Grupo de Investigación - Constitucionalismo Comparado (Comparative Constitutional Law - Research Group) at the Universidad Nacional de Colombia (Director: Prof. Bernd Marquardt), see GERVASONI, *Cuando la justicia encuentra su alma: arte y empatía en el corazón del derecho penal y los derechos humanos*, Grupo de Investigación Constitucionalismo Comparado (Universidad Nacional de Colombia), available at: <https://constitucionalismocomparadocc.org/aurelia-gervasoni-cuando-la-justicia-encuentra-su-alma-el-arte-y-la-empatia-en-el-corazon-del-derecho-penal-y-de-los-derechos-humanos-constitucionales/>, (last consulted on 18th May 2025).

⁹² Title inspired by the famous quote "On ne voit bien qu'avec le cœur. L'essentiel est invisible pour les yeux" by DE SAINT-EXUPÉRY, *Le Petit Prince*, New York 1943.

⁹³ See GUALTIERI/DENISON, *Journal of Experimental Child Psychology* 2018, 74 et seq. Let's also highlight the interesting fact that: "Together with the current findings, these results suggest that children's reliance on personal characteristics in their decisions increases as they gain experience in making social inferences in their own culture from 4 to 6 years of age. As their intuitive theory strengthens, children weight personal characteristics more highly; thus, other information (such as base-rates and covariation data) is downgraded or overshadowed, resulting in younger children— somewhat surprisingly—providing less biased and more rational judgments and decisions".

⁹⁴ See ADOSEN, *L'empathie chez les plus jeunes, victime collatérale de la surexposition aux écrans*, 25th June 2018, available at: <https://adosen-sante.com/lempathie-chez-les-plus-jeunes-victime-collaterale-de-la-surexposition-aux-ecrans-2/> (last consulted on 14 May 2025): "Serge Tisseron: L'étude phare de Linda Paganì sur les effets de la consommation télévisuelle précoce a montré que les enfants en âge de débiter la marche et passant plus de deux heures par jour devant le petit écran avaient plus de difficultés à repérer les émotions d'autrui et à gérer les relations aux autres. Cette angoisse de la relation avec l'autre provoque un repli sur soi et résulte d'un défaut d'empathie chez l'enfant. Dans les cas les plus extrêmes, cela peut donner lieu à ce qu'on appelle "l'agression proactive", lorsque les enfants s'en prennent aux autres sans raison".

developed from an early age. Criminal punishment is a context in which intense emotional reactions must coexist with legal, institutional and evidentiary constraints⁹⁵.

From an interdisciplinary perspective, this paper draws on the *Law & Literature*⁹⁶ scholarship to develop the role of empathy in punishers' criminal decision-making –namely Nussbaum's work on the moral imagination developed through fiction⁹⁷. Indeed, she makes empathy a public education project⁹⁸, particularly in higher education⁹⁹. In that vein, she argues that empathy is a resource faculty that can be mobilized and developed in tangible ways¹⁰⁰. Its *clairvoyant* character¹⁰¹ makes its mental deployment among punishers necessary as a modulator of their spontaneous emotional reactions, providing a more "rationalizing" counterweight to penal responses. In this section, we show that empathy would therefore enable punishers to go beyond their spontaneous intuitions to engage in a more nuanced response to punishment—less trapped by initial emotional reactions. By facilitating a deeper projection of the decision, particularly with regard to its long-term consequences, empathy would thus inspire punishers to consider deterrence more frequently.

1. Martha Nussbaum and the Infinite Lives of Fiction: Cultivating Moral Imagination through Education

Critiquing the economic model of growth that shapes education systems¹⁰² by pressuring them to professionalize rather than "philosophize" students¹⁰³, Nussbaum argues that to avoid the erosion of the humanities, it is necessary to rethink their curricula on the basis of a more diversified and multidisciplinary paradigm as to not reduce them to instruments that would be directly useful and applicable in terms of "production". Beyond the economic reading of education systems she proposes, this present thesis wants to mobilize Nussbaum's argument more specifically related to the shaping of empathetic dispositions in citizens—and therefore, in punishers—through reading¹⁰⁴. This idea, highly topical in

⁹⁵ This is also the argument put forward by Bruno Dayez in his book cited above, which takes Dutroux as the supreme example of a being for whom no empathy would be possible. In so doing, Bruno Dayez positions the need to exercise empathy even for the worst criminals, in order to apply criminal law. He shows that if we can project ourselves into a justice system that is not too permissive but humane, even for the worst criminals, then the whole application of criminal law will be inspired and changed.

⁹⁶ For a more complete overview of this movement, as well as detailed explanations of its developments, including regarding Nussbaum, see: TALAVERA, 112 et seqq.

⁹⁷ KOENIS/DE RODER, Educating for Democracy, Empathy, Reading, and Making Better Citizens in Martha Nussbaum's Public Education Project, in: SWINNEN/KLUVELD/DE WAAL (eds.), *Engaged Humanities, Rethinking Art, Culture, and Public Life*, Amsterdam 2022, 326.

⁹⁸ For a more comprehensive overview of Nussbaum's mission to "humanize the law" through literature, see: TALAVERA, 101 et seqq.

⁹⁹ NUSSBAUM, *Not for profit*, 95 et seqq.

¹⁰⁰ One could also think about methods to research and measure the impact of this "resource".

¹⁰¹ The "*clairvoyant*" expression developed is a term I coined but that is not used by Martha Nussbaum.

¹⁰² MCROBIE, Martha Nussbaum, empathy, and the moral imagination, OpenDemocracy 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025).

¹⁰³ NUSSBAUM, *Not for profit*, 14 et seqq.

¹⁰⁴ MCROBIE, Martha Nussbaum, empathy, and the moral imagination, OpenDemocracy 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025).

view of recent developments in the draining of the humanities¹⁰⁵, has been empirically supported by psychological studies which have demonstrated that "the vicarious experiences afforded by fiction enhance our skill at reading other people's minds (i.e., ToM) in much the same way as the time spent in flight simulators enhances a pilot's command of the skills needed to fly an airplane¹⁰⁶".

For Nussbaum, the moral development of every citizen requires reading, reading and more reading¹⁰⁷. According to her, literature plays a crucial role in fostering citizens' sensitivity, particularly with regard to inequality issues¹⁰⁸. To flesh out her argument, Nussbaum relies on the ability of fiction to bring the individual to experience "more than one life¹⁰⁹". Like Adam Smith's impartial spectator¹¹⁰, Nussbaum emphasizes that reading, and our "literary moral imagination¹¹¹" through it, acts as a portal that allows us to experience other people's existences. Hence, as McRobie points out, "And after we have 'lived' people through literature, it is harder to find them alien or disgusting, however much our governments or media may try to make 'other' groups seem so¹¹²". Through the use of our moral imagination, we project ourselves into the life of the Other—and this experience then influences our decisions. Indeed, reading enables us to think and reflect in polyphonic echoes with all the existences it allows us to intimately encounter. I will now criticize this thesis and expose how clairvoyant empathy can modulate punishers' emotions and thus influence their penal response.

First of all, a school and university system in which certain readings would be geared to developing students' empathy for those who fall under the application of criminal law is

¹⁰⁵ See among others KNOTT, What Trump's Proposed Budget Cuts Mean for Education, Research, 2^d May 2025, available at <https://www.insidehighered.com/news/government/student-aid-policy/2025/05/02/trump-proposes-deep-cuts-education-and-research> (last consulted on 14 May 2025).

¹⁰⁶ DUNCAN/OSINUBI, Interdisciplinary Literary Studies 2017, 248.

¹⁰⁷ NUSSBAUM, Not for profit, 141 et seqq.: "So we need to cultivate students' "inner eyes," and this means carefully crafted instruction in the arts and humanities—appropriate to the child's age and developmental level—that will bring students in contact with issues of gender, race, ethnicity, and cross-cultural experience and understanding. This artistic instruction can and should be linked to the citizen-of-the-world instruction, since works of art are frequently an invaluable way of beginning to understand the achievements and sufferings of a culture different from one's own. In other words, the role of the arts in schools and colleges is two-fold. They cultivate capacities for play and empathy in a general way, and they address particular cultural blind spots. The first role can be played by works remote from the student's own time and place, although not just any randomly selected work. The second requires a more pointed focus on areas of social unease. The two roles are in some ways continuous, since the general capacity, once developed, makes it far easier to address a stubborn blind spot".

¹⁰⁸ SIERRA-CAMARGO, Derecho del Estado 2014, 70. This vision of the individual—who becomes a citizen *sensu largo*—as someone to be shaped to assume a role in society is reminiscent of the philosophical theories of antiquity.

¹⁰⁹ MCROBIE, Martha Nussbaum, empathy, and the moral imagination, OpenDemocracy 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025).

¹¹⁰ CARRASCO/FRICKE, Econ Journal Watch 2016, 249-263.

¹¹¹ SIERRA-CAMARGO, Derecho del Estado 2014, 72.

¹¹² MCROBIE, Martha Nussbaum, empathy, and the moral imagination, OpenDemocracy 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025).

hardly realistic as things stand. On the contrary, a promising approach would be to start with teachers, those who, one by one—and not organized as a system, since a system is harder to change radically all at once than it is to incite individual behavioural change¹¹³—teach at both high school and university, and include (more) works of fiction in their courses. In this way, every student will at least have had the opportunity to grasp that inspiring breath towards deeper empathy¹¹⁴.

In addition to teachers' action, the development of empathy could be carried out through more accessible fictional works than books. I argue that we need to mobilize all forms of creative expression to cultivate this empathy, without being limited to what is considered "literary"¹¹⁵ in the Western tradition¹¹⁶—an idea that Nussbaum has touched upon but not developed in her works¹¹⁷. I am referring here for instance to Gustav Möller's movie

¹¹³ This idea is inspired by the works of Prof. Mariela Inés Sánchez Cardona, who has written extensively on how teachers and higher education can play a role, particularly with regard to school violence, but also in transmitting a "culture of peace", see: SANCHEZ CARDONA, *La paz pedagógica: una ruta para mejorar el aprendizaje del manejo de los conflictos*, Pensamiento Jurídico 2019, 51-74; SANCHEZ CARDONA, *Empowerment and Responsibility of the Culture of Peace Through Education*, Ra Ximhai 2012, 127-158.

¹¹⁴ Briefly, almost surreptitiously, to instill the hope that the works that build our common humanity can contribute to making each and every one of us citizens—and punishers—more than *merely* human. This sentence is loosely inspired by MAHLMANN, 463 et seqq.

¹¹⁵ MCROBIE, Martha Nussbaum, empathy, and the moral imagination, OpenDemocracy 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025): "A related criticism to the concern that literature should be 'moral' is the concern that Nussbaum is elevating 'literature' in terms of the western canon of literature and the western tradition of the novel, a position necessarily at odds with the priorities of social justice if it implies that the voices of the western canon of literature are more valuable than the majority of humanity, or uniquely positioned to 'teach' everyone else how to feel and how to live. The canon of western literature (the Dead White Men Books, as much might be re-named), variously silences, ignores, sidelines or essentialises most of the world. How could looking at the world through its eyes expand our empathy? The reply to this criticism is not only the point that much literature, from Joyce to Atwood to Rushdie, works as a reply to the silencing of various peripheries by the 'western canon' - literature, in other words, self-corrects in its multiplicity when it is allowed to thrive; in modernity and post-modernity the canon has been turned on itself, rewritten and responded to by voices that have been historically absent. It is true that the elevation of 'literature' in Nussbaum's argument is problematic, seeming to privilege written cultures and traditions over other forms of expression, and may lead us down the road of attempting to create hierarchies amongst which arts or forms of expression are most 'noble' in their task of expanding our capability, akin to the Frankfurt School's nervous preoccupation with discerning the qualitative difference between popular culture and 'high art'. Perhaps a better way to think of Nussbaum's argument about the moral imagination to think not of literature in terms of what constitutes the 'literary' but of story-telling as a central facet of our humanity".

¹¹⁶ MCROBIE, Martha Nussbaum, empathy, and the moral imagination, OpenDemocracy 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025).

¹¹⁷ NUSSBAUM, *Poetic Justice*, 6 et seqq.: "The question, Why literary works and not works in other media—music, say, or dance, or film?—is a deep and fascinating one. Indeed, works in other media frequently have narrative properties and forms of emotional expressiveness that bring them close to the properties of the literary that I shall discuss. Most serious musical works have an expressive emotional content; in some cases (for example, the symphonies of Mahler), it is natural to think of that content as unfolding in narrative form, even if one also knows that any verbal representation of that narrative is at best a halting translation.⁶ There are similar analyses to be given in jazz. (All this is relevant to Dickens, since music is, in *Hard Times*, a primary source of the images of sensuousness and play that map the world of the circus.) On the other hand, music's contribution is in its very nature dreamlike and indeterminate in a way that limits its role in public deliberation. Turning to film, recent criticism has shown convincingly that some films have the potential to make contributions similar to those I imagine novels making. And one might plausibly argue that film in our culture has to some extent supplanted the novel as the central morally serious yet popularly engaging narrative medium. I think that this sells short the continuing power of the novel, and I am going to continue

"Sons"¹¹⁸, or other cinematic or documentary works such as Ava DuVernay's "The 13th"¹¹⁹. In this respect, it also seems important to multiply the creative origins of those fictional works, so as to avoid sinking into a Eurocentrism that would be detrimental to develop each individual's capacity for projection¹²⁰. In that vein, some authors are already beginning to write stories and tales specifically designed to be discussed and debated, on themes relating to criminal law¹²¹. Additionally, one must remain aware of the potential dangers of Nussbaum's argument. Indeed, the selection of these works must never descend into a kind of propaganda¹²² and if the use of "literary imagination" is necessary, it is not a pretext for a drift towards a moralization of fictional works¹²³.

2. *Clairvoyant* Empathy as a Modulator of Punishment Preferences – Neither Tyranny of Emotional Impulse, Nor Blindfolded Leniency

Suggesting that empathy should be further developed among individuals is not to claim that punishers lack it, or that criminal law is incapable, to some extent, of adapting its

in an unapologetic way to discuss the novel as a living form. But I am not reluctant to admit that films may also make contributions to public life in related ways".

¹¹⁸ MÖLLER, *Sons* (Vogter), 2024 (movie).

¹¹⁹ DUVERNAY, *13th*, 2016 (documentary movie).

¹²⁰ See notably the critical article KOENIS/DE RODER, *Educating for Democracy, Empathy, Reading, and Making Better Citizens in Martha Nussbaum's Public Education Project*, in: SWINNEN/KLUVELD/DE WAAL (eds.), *Engaged Humanities, Rethinking Art, Culture, and Public Life*, Amsterdam 2022, 351: "Although literature is surely about more than moral questions, we would like to refer to Robert Musil's view of art and literature as a "moral laboratory," which is not about providing "clothes for the soul," but instead about searching, analyzing, and scrutinizing moral issues (1978, p. 1351), which was practiced by Musil himself in his seminal novel *The Man Without Qualities* (*Der Mann ohne Eigenschaften*, 1930–1942). To understand twentieth-century black experience as expressed in *Native Son*, we need to take into account James Baldwin criticizing this novel as literature, and Toni Morrison on the white perspective in *Invisible Man*. The question is not whether they are right or not, or, in Nussbaum's terms, whether they encourage us to make "the good choice." In contrast to liberal humanism's view that literature gives meaning to us and our lives or even guides us, we believe that it is rather about us giving meaning to literature".

¹²¹ See all the works of François Ost, a pioneering thinker in *Law & literature* who has published several books of "Contes Juridiques": OST, *Le congrès, et autres contes juridiques*, Paris 2024; OST, *Nouveaux contes juridiques*, Paris 2021; OST, *Si le droit m'était conté*, Paris 2019; OST, *Raconter la loi – aux sources de l'imaginaire juridique*, Paris 2004.

¹²² NUSSBAUM, *Poetic Justice*, 1995, 5: "Another way of putting this point is that good literature is disturbing in a way that history and social science writing frequently are not. Because it summons powerful emotions, it disconcerts and puzzles. It inspires distrust of conventional pieties and exacts a frequently painful confrontation with one's own thoughts and intentions. One may be told many things about people in one's own society and yet keep that knowledge at a distance. Literary works that promote identification and emotional reaction cut through those self-protective stratagems, requiring us to see and to respond to many things that may be difficult to confront and they make this process palatable by giving us pleasure in the very act of confrontation".

¹²³ MCROBIE, *Martha Nussbaum, empathy, and the moral imagination*, OpenDemocracy 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025): "Perhaps it is helpful to differentiate between the author (dead in the post-Barthes conception) and the writer, whose conscience as a moral agent is real. Writer Susan Swan has spoken of the role of the writer's conscience as a kind of 'literary imagination' whose responsibility is to the stories being told, and preserving the humanity contained within them through their transmission. Similarly, Susan Sontag used the post-war 'rehabilitation' of Nazi filmmaker Leni Riefenstahl amongst aesthetes who sought to position her as a morally-neutral 'high-priestess of the beautiful' to demonstrate that morality applies to artists and writers as people just as it applies to anyone - 'artist' as a title is not a get-out card from complicity in systems of oppression, even or especially if it is through art that the system of oppression is presented as just. Such a position on the duties of role of the artist or writer do not entail that artists make moralistic art but that if their works dehumanise, this dehumanisation is real. In Nussbaum's reading of the role of literature as a device for developing our empathy, the duty of the writer is to write with humanity". For another critique of Nussbaum's work, see TALAVERA, 112 et seqq.

application to the circumstances of convicted offenders. However, whatever level of empathic capacity individuals already possess could be deepened by early exposure to fictional works, as advocated by Nussbaum. An education project of this kind would reduce some inequalities among individuals in terms of exposure to cultural experiences. While lawyers might generally have a certain capacity of projection into the lives of criminals that is induced by their practice, this might not be the case for punishers in the broader sense, notably those who make up non-specialized public opinion as a powerful—and sometimes deafening?—*vox* carrying the strongest emotions of a society¹²⁴.

Drawing from Nussbaum's contributions, I propose that empathy is a necessary complementary dimension to punishers' penal reasoning. Cultivated empathic perspective-taking may become integrated into the individual's decision-making process. While the psychological and behavioural findings expose the emotional nature of individual's decision-making, the study of empathy highlights how it can instill a certain level of rationality in penal decisions, without falling into the classical rational system or erasing the influence of emotions. Hence, empathy seems to be *clairvoyant*—providing a modulation, a counterweight to the intuitions of punishers—while remaining lucid about the need for an adequate penal response. More empathetic inclinations would enable punishers to deeper anticipate the long-term consequences of the penal response, shifting their tendency away from retribution and toward deterrence. So, developing this essential emotional capacity through fictional works—in a multiplicity of both media and origins thereof—seems a valuable idea on which to rethink education. *Clairvoyant* empathy shows that deep relationships are inscribed in Otherness, which then circumscribe an appropriate penal response—it is both an observer of the inner world and a direct eye of external reality.

IV. GENERAL CONCLUSION: Empathy as the (Trained) Art of the Mind

Part I examined evidence suggesting that intuitive, affective and heuristic processes can shape punishment preferences and may, in some contexts, contribute to retributive responses. To address the overlooked role of empathy in punishers' decision-making, I engaged with Nussbaum's argument on the development of empathy through fictional works. In that vein, I developed more specifically how *clairvoyant* empathy could play a role as rationalizing agent of punishers' penal decision. Punishing then becomes not simply a reactive act, but one of vision, of deeper projection and consideration of the consequences of punishment on the individual, leaning the punishers towards a more deterrent logic. Criminal law could be the artwork of empathy, as empathy is the (trained) art of the mind.

¹²⁴ See also GARCIN-MARROU, *Emotion dans les médias* 2004, 89-99.

V. Bibliography

ABBOTT, *Social Theorists of Morality, Essays on Moral Agency*, London 2024.

APEL, Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence, *Journal of Quantitative Criminology* 2013, 67-101.

ARINI/MAHMOOD/BOCAJERO ALJURE/INGRAM/WIGGS/KENWARD, Children endorse deterrence motivations for third-party punishment but derive higher enjoyment from compensating victims, *Journal of Experimental Child Psychology* 2023, 1-22.

BECKER, Crime and Punishment: An Economic Approach, *Journal of Political Economy* 1968, 169-217.

BERGMAN BLIX/WETTERGREN, A Sociological Perspective on Emotions in the Judiciary, *Emotion Review* 2016, 32-37.

CARLSMITH, On Justifying Punishment: The Discrepancy Between Words and Actions, *Social Justice Research* 2008, 119-137 (referenced as: CARLSMITH, On Justifying Punishment, *Social Justice Research* 2008).

CARLSMITH, The roles of retribution and utility in determining punishment, *Journal of Experimental Social Psychology* 2006, 437-451 (referenced as: CARLSMITH, Roles of retribution, *Journal of Experimental Social Psychology* 2006).

CARLSMITH/DARLEY, Psychological Aspects of Retributive Justice, in: Zanna (ed.), *Advances in Experimental Social Psychology*, San Diego 2008, 193-236.

CARLSMITH/WILSON/GILBERT, The paradoxical consequences of revenge, *Journal of Personality and Social Psychology* 2008, 1316-1324.

CARRASCO/FRICKE, Adam Smith's Impartial Spectator, *Econ Journal Watch* 2016, 249-263. CASSELL, In Defense of the Death Penalty, *IACJ Journal* 2008, 14-28.

CASTRO LESMES/SANCHEZ CARDONA/SANCHEZ RODRIGUEZ, The role of teachers in the management of school violence, *Via Inveniendi et Iudicandi* 2015, 51-73.

CRANK/BREZINA, "Prison Will Either Make Ya or Break Ya": Punishment, Deterrence, and the Criminal Lifestyle Offender, *Deviant Behavior* 2013, 782-802.

DARLEY/PITTMAN, The Psychology of Compensatory and Retributive Justice, *Personality and Social Psychology Review* 2003, 324-336.

DAYEZ, *Pourquoi libérer Dutroux? Pour un humanisme pénal*, Bruxelles 2018.

DRIPPS, Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame, *Vanderbilt Law Review* 2003, 1382-1438.

DUNCAN/OSINUBI, Why Martha Nussbaum is Right: The Empirical Case for the Value of Reading and Teaching Fiction, *Interdisciplinary Literary Studies* 2017, 242-259.

ENGLISH/MUSSWEILER/STRACK, Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making, *Personality and Social Psychology Bulletin* 2006, 188-200.

EPLEY/GILOVICH, The Anchoring-and-Adjustment Heuristic, *Psychological Science* 2006, 311-318.

FINE/VAN ROOIJ, For Whom Does Deterrence Affect Behavior? Identifying Key Individual Differences, *Law and Human Behavior* 2017, 354-360.

GARCIN-MARROU, L'affaire Dutroux: de l'émotion à la mobilisation, *Emotion dans les médias* 2004, 89-99.

GERBER/JACKSON, Retribution as Revenge and Retribution as Just Deserts, *Social Justice Research* 2013, 61-80.

GERVASONI, Cuando la justicia encuentra su alma: arte y empatía en el corazón del derecho penal y los derechos humanos, Grupo de Investigación Constitucionalismo Comparado (Universidad Nacional de Colombia), 18 May 2025, available at:

<https://constitucionalismocomparadocc.org/aurelia-gervasoni-cuando-la-justicia-encuentra-su-alma-el-arte-y-la-empatia-en-el-corazon-del-derecho-penal-y-de-los-derechos-humanos-constitucionales/>, (last consulted on 18 May 2025).

GILOVICH/GRIFFIN, Introduction – Heuristics and Biases: Then and Now, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 1-18.

GNEEZY/RUSTICHINI, A Fine is a Price, *The Journal of Legal Studies* 2000, 1-17.

GOODWIN/GROMET, Punishment, *WIREs Cognitive Science* 2014, 561-572.

GUALTIERI/DENISON, The Development of the Representativeness Heuristic in Young Children, *Journal of Experimental Child Psychology* 2018, 60-76.

GUTNIK/FOROGH HAKIMZADA/YOSKOWITZ/PATEL, The role of emotion in decision-making: A cognitive neuroeconomic approach towards understanding sexual risk behavior, *Journal of Biomedical Informatics* 2006, 720-736.

HAIDT, The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment, *Psychological Review* 2001, 814-834.

HAIDT, *The Righteous Mind: Why Good People are Divided by Politics and Religion*, United States 2012.

HESS/BACIGALUPO, Enhancing decisions and decision-making processes through the application of emotional intelligence skills, *Management Decision* 2011, 710-721.

JETTER/WALKER, At what age does the anchoring heuristic emerge? Evidence from *Jeopardy!*, *Journal of Economic Behavior and Organization* 2020, 755-766.

KAHNEMAN/FREDRICKSON/SCHREIBER/REDELMEIER, When More Pain Is Preferred to Less: Adding a Better End, *Psychological Science* 1993, 401-405.

KAHNEMAN/SLOVIC/TVERSKY, *Judgment Under Uncertainty: Heuristics and Biases*, Cambridge 1982.

KHADJAVI, Deterrence Works for Criminals, *European Journal of Law and Economics* 2018, 165-178.

KLIMIS, *Penser, délibérer, juger, Pour une philosophie de la justice en acte(s)*, Louvain-la-Neuve, 2018.

KOENIS/DE RODER, Educating for Democracy, Empathy, Reading, and Making Better Citizens in Martha Nussbaum's Public Education Project, in: SWINNEN/KLUVELD/DE WAAL (eds.), *Engaged Humanities, Rethinking Art, Culture, and Public Life*, Amsterdam 2022, 325-356.

LANE/NOSENZO/SONDEREGGER, Law and Norms: Empirical Evidence, *American Economic Review* 2023, 1255-1293.

LERNER/LI/VALDESOLO/KASSAM, Emotion and Decision Making, *The Annual Review of Psychology* 2015, 799-823.

LIU/YE/YANG/XIANG/LIU, Construction Workers' Representativeness Heuristic in Decision Making: The Impact of Demographic Factors, *Journal of Construction Engineering and Management* 2022, 1-10.

MAHLMANN, *Mind and Rights, The History, Ethics, Law and Psychology of Human Rights*, Cambridge 2023, 462-468.

MARONEY/GROSS, The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective, *Emotion Review* 2014, 142-151.

MAZAR/AMIR/ARIELY, The Dishonesty of Honest People: A Theory of Self-Concept Maintenance, *Journal of Marketing Research* 2008, 633-644.

MCRIBIE, Martha Nussbaum, empathy, and the moral imagination, *OpenDemocracy* 2014, available at: <https://www.opendemocracy.net/en/5050/martha-nussbaum-empathy-and-moral-imagination/> (last consulted on 14 May 2025).

MELLERS/SCHWARTZ/COOKE, Judgment and Decision-Making, *The Annual Review of Psychology* 1998, 447-477.

MOOIJMAN/VAN DIJK (W.)/VAN DIJK (E.)/ELLEMERS, On Sanction-Goal Justifications: How and Why Deterrence Justifications Undermine Rule Compliance, *Journal of Personality and Social Psychology* 2017, 577-588.

MURPHY/BRADFORD/JACKSON, Motivating Compliance Behavior Among Offenders, Procedural Justice or Deterrence?, *Criminal Justice and Behavior* 2015, 102-118.

NAGIN, Deterrence: A Review of the Evidence by a Criminologist for Economists, *The Annual Review of Economics* 2013, 83-105.

NOCKUR/KESBERG/PFATTHEICHER/KELLER, Why Do We Punish? On Retribution, Deterrence, and the Moderating Role of Punishment System, *Zeitschrift für Psychologie* 2022, 104-113.

NUSSBAUM, Not for profit: Why democracy needs the humanities, Princeton 2010 (referenced as NUSSBAUM, Not for profit).

NUSSBAUM, Poetic Justice - The Literary Imagination and Public Life, Boston 1995 (referenced as NUSSBAUM, Poetic Justice).

OST, Le congrès, et autres contes juridiques, Paris 2024. OST, Nouveaux contes juridiques, Paris 2021.

OST, Si le droit m'était conté, Paris 2019.

OST, Raconter la loi – aux sources de l'imaginaire juridique, Paris 2004.

PLANTZ/NEAL/CLEMENTS/PERELMAN/MILLER, Assessing Motivations for Punishment, The Sentencing Goals Inventory, *Criminal Justice and Behavior* 2023, 139-162.

POGARSKY/ROCHE/PICKETT, Offender Decision-Making in Criminology: Contributions from Behavioural Economics, *The Annual Review of Criminology* 2018, 379-400.

RADELET/LACOCK, Do Executions Lower Homicide Rates? The Views of Leading Criminologists, *Journal of Criminal Law and Criminology* 2009, 489-508.

ROSE/ESRA KUIPER/REINDERS FOLMER/VAN ROOIJ, Can Criminology Sway the Public? How Empirical Findings About Deterrence Affect Public Punishment Preferences, *Crime Science* 2024, 1-17.

SANCHEZ CARDONA, La paz pedagógica: una ruta para mejorar el aprendizaje del manejo de los conflictos, *Pensamiento Jurídico* 2019, 51-74.

SANCHEZ CARDONA, Empowerment and Responsibility of the Culture of Peace Through Education, *Ra Ximhai* 2012, 127-158.

SIERRA-CAMARGO, ¿Qué son las estéticas legales? una aproximación a la noción de ‘arte y derecho’, *Derecho del Estado* 2014, 57-77.

SITREN/APPLEGATE, Testing Deterrence Theory with Offenders: The Empirical Validity of Stafford and Warr's Model, *Deviant Behavior* 2012, 492-506.

SLOVIC/FINUCANE/PETERS/MACGREGOR, The Affect Heuristic, in: GILOVICH/GRIFFIN/KAHNEMAN (eds.), *Heuristics and Biases, The Psychology of Intuitive Judgment*, Cambridge 2012, 397-420.

SVINGEN, *Evolutionary Criminology and Cooperation Retribution, Reciprocity, and Crime*, London 2023.

TALAVERA, *Law and Literature: A Still-Thriving Relationship*, Leiden 2025.

TAN/XIAO, Third-party punishment: Retribution or deterrence?, *Journal of Economic Psychology* 2018, 34-46.

THE DEATH PENALTY PROJECT, The Death Penalty Project Annual Report 2022, available at: <https://deathpenaltyproject.org/knowledge/the-death-penalty-project-annual-report-2022/> (last consulted on 14 May 2025).

TWARDAWSKI/HILBIG, Retribution and Utilitarianism as Motives for Children's Third-Party Punishment: An Information-Seeking Approach, *Motivation Science* 2024, 387-391.

TWARDAWSKI/TANG/HILBIG, Is It All About Retribution? The Flexibility of Punishment Goals, *Social Justice Research* 2020, 195-218.

VIALE, *Methodological Cognitivism*, Vol. 1: Mind, Rationality and Society, Heidelberg/Dordrecht/London/New York 2012.

WESTBROOK/BRAVER, Cognitive Effort: A Neuroeconomic Approach, *Cognitive, Affective, & Behavioural Neuroscience* 2015, 395-415.

XIANG/GUOLI, Anchoring Heuristics, in: KAN, Z. (ed.), *The ECPH Encyclopedia of Psychology*, Singapore 2025.

A. Journalistic sources

ADOSEN, L'empathie chez les plus jeunes, victime collatérale de la surexposition aux écrans, 25 June 2018, available at: <https://adosen-sante.com/lempathie-chez-les-plus-jeunes-victime-collaterale-de-la-surexposition-aux-ecrans-2/> (last consulted on 14 May 2025).

DENOËL, Libération de Michelle Martin: sortir du cycle de la vengeance, 26 August 2022, available at: <https://www.levif.be/opinions/liberation-de-michelle-martin-sortir-du-cycle-de-la-vengeance/> (last consulted on 14 May 2025).

FRANCE INTER, La Belgique accepte encore difficilement la liberté conditionnelle de l'ex-femme de Marc Dutroux, 13 August 2016, available at : <https://www.radiofrance.fr/franceinter/la-belgique-accepte-encore-difficilement-la-liberte-conditionnelle-de-l-ex-femme-de-marc-dutroux-4428540> (last consulted on 14 May 2025).

KNOTT, What Trump's Proposed Budget Cuts Mean for Education, Research, 2 May 2025, available at <https://www.insidehighered.com/news/government/student-aid-policy/2025/05/02/trump-proposes-deep-cuts-education-and-research> (last consulted on 14 May 2025).

RTBF, Débat: pas de condamnation pour un violeur... le talent c'est une immunité pour la prison? - RTBF Actus, 4th April 2025, available at: <https://www.rtbf.be/article/debat-pas-de-condamnation-pour-un-violeur-le-talent-c-est-une-immunite-pour-la-prison-11528455> (last consulted on 14 May 2025).

RTBF, Des citoyens soutiennent Michelle Martin: "Nous sommes à vos côtés", 29 August 2012, available at: <https://www.rtbf.be/article/des-citoyens-soutiennent-michelle-martin-nous-sommes-a-vos-cotes-7829341> (last consulted on 14 May 2025).

RTBF, Libération de Michelle Martin: pour le MR, c'est la faute du PS, 28 August 2012, available at: <https://www.rtbf.be/article/liberation-de-michelle-martin-pour-le-mr-c-est-la-faute-du-ps-7828463> (last consulted on 14 May 2025).

LE NOUVELLISTE, La libération de Michelle Martin secoue toute la Belgique, 30 August 2012, available at: <https://www.lenouvelliste.ch/monde/la-liberation-de-michelle-martin-secoue-toute-la-belgique-233423> (last consulted on 14 May 2025).

STROOBANTS, En Belgique, une mobilisation contre la « culture du viol » après le jugement contesté d'un tribunal, 4 April 2025, available at: https://www.lemonde.fr/international/article/2025/04/04/en-belgique-une-mobilisation-contre-la-culture-du-viol-apres-le-jugement-conteste-d-un-tribunal_6591148_3210.html (last consulted on 14 May 2025).

TRIBUNE DE GENÈVE, Manifestation contre la libération de l'ex-femme de Dutroux, 3 August 2012, available at: <https://www.tdg.ch/manifestation-contre-la-liberation-de-l-ex-femme-de-dutroux-364210588425>, (last consulted on 14 May 2025).

B. Artistic sources

BILLY JOEL, We didn't start the fire, single released on 18th September 1989.

DE SAINT-EXUPÉRY, Le Petit Prince, New York 1943.

DICKINSON, There is no Frigate like a Book (1286), The Poems of Emily Dickinson edited by R. W. Franklin, Cambridge (MA) 1999, available at : <https://www.poetryfoundation.org/poems/52199/there-is-no-frigate-like-a-book-1286> (last consulted on 18 May 2025).

DUVERNAY, 13th, 2016 (documentary).

EVERYBODY LOVES AN OUTLAW, I See Red, album: Dance Moms: A New Era (Official Television Soundtrack), 2024.

LANADEL REY, Brooklyn Baby, album: Ultraviolence, 2014.

MÖLLER, Sons (Vogter), 2024 (movie).

YUSUF / CAT STEVENS, The First Cut Is the Deepest, album: New Masters, 1967.