

LEGAL PUNISHMENT: THEORETICAL JUSTIFICATIONS, CONSTITUTIONAL BOUNDARIES, AND MODERN REFORMS

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Abstract: This article examines the conceptual foundations and moral justifications of legal punishment as a fundamental mechanism of state coercion. The study systematically analyzes major theoretical paradigms—Retributivism (deontological desert and proportionality), Utilitarianism (general/specific deterrence, incapacitation, and rehabilitation), and Expressive Communication theories. Furthermore, it scrutinizes the constitutional and human rights limits placed upon state punitive power (the principle of legality, prohibition of cruel and unusual punishment) and evaluates contemporary legal movements, including restorative justice models and penal reform strategies.

Keywords: Legal punishment, retributivism, utilitarianism, deterrence, proportionality principle, restorative justice, penal reform, human rights.

Annotatsiya: Ushbu maqolada huquqiy jazo institutining mohiyati, uning davlat majburlov mexanizmi sifatidagi o'рни va axloqiy-huquqiy asoslari tahlil qilinadi. Tadqiqotda jazoni asoslovchi klassik va zamonaviy nazariyalar — retributivizm (retseptiv adolat va Kant deontologiyasi), utilitarizm (ogohlantirish, qayta tarbiyalash va jamiyatdan ajratish) hamda ekspressiv kommunikativ nazariyalar atrofida ilmiy mulohazalar yuritilgan. Shuningdek, jazoni tayinlashdagi konstitutsiyaviy cheklovlar, inson huquqlari standartlari (*nulla poena sine lege*, shafqatsiz jazoni taqiqlash) va zamonaviy penitensiar tizimdagi tiklovchi adolat (*restorative justice*) hamda dekarseratsiya muammolari yoritilgan.

Kalit so'zlar: Huquqiy jazo, retributivizm, utilitarizm, ogohlantirish (deterrence), mutanosiblik tamoyili, tiklovchi adolat, penitensiar islohotlar, inson huquqlari.

Аннотация: В данной статье исследуются концептуальные основы, сущность и морально-правовые основания юридического наказания как института государственного принуждения. В работе проведен системный анализ ключевых теоретических парадигм — ретрибутивизма (карательное правосудие и деонтология Канта), утилитаризма (общая и частная превенция, ресоциализация) и коммуникативно-экспрессивных теорий. Особое внимание уделено конституционным и международным

границам карательной власти государства (принцип законности, запрет жестоких наказаний), а также современным тенденциям восстановления справедливости (*restorative justice*) и реформирования пенитенциарной системы.

Ключевые слова: Юридическое наказание, ретрибутивизм, утилитаризм, превенция (предупреждение), принцип пропорциональности, восстановительное правосудие, пенитенциарная реформа, права человека.

The question of whether, and how, legal punishment can be justified has long been a central concern of legal, moral, and political philosophy: what could justify a state in using the apparatus of the law to inflict intentionally burdensome treatment on its citizens? Radically different answers to this question are offered by consequentialist and by retributivist theorists — and by those who seek to incorporate consequentialist and retributivist considerations in ‘mixed’ theories of punishment. Meanwhile, abolitionist theorists argue that we should aim to replace legal punishment rather than to justify it. Among the significant developments in recent work on punishment theory are the characterisation of punishment as a communicative enterprise, greater recognition that punishment’s justification depends on the justification of the criminal law more generally, growing interest in the normative challenges raised by punishment in the international context, and increased concern for the relationship of punishment to the so-called ‘collateral’ consequences of a conviction.

1. Legal Punishment and Its Justification: The central question asked by philosophers of punishment is: What, if anything, can justify punishment? More precisely, since they do not usually talk much about punishment in such contexts as the family or the workplace (but see Zaibert 2006; Bennett 2008: Part II), their question is this: What can justify formal, legal punishment imposed by the state on those convicted of committing criminal offences? We will also focus on legal punishment here: not because the other species of punishment do not raise important normative questions (they do), nor because such questions can be answered in terms of an initial justification of legal punishment as being the paradigm case (since it’s not clear that they can be), but because legal punishment, apart from being more dramatically coercive and burdensome than other species of punishment usually are, raises distinctive issues about the role of the state and its relationship to its citizens, and about the role of the criminal law. Future references to ‘punishment’ should therefore be read, unless otherwise specified, as references to legal or criminal punishment.



What then are we to justify in justifying punishment? The search for a precise definition of punishment that exercised some philosophers (for discussion and references, see Scheid 1980; Boonin 2008: 3–28; Zimmerman 2011: ch. 1) is likely to prove futile; but we can say that legal punishment involves the imposition of something that is intended to be both burdensome and reprobative, on a supposed offender for a supposed crime, by a person or body who claims the authority to do so. Two points are worth particular notice here.

First, punishment involves material impositions or exactions that are in themselves typically unwelcome: they deprive people of things that they value (liberty, money, time); they require people to do things that they would not normally want to do or do voluntarily (to spend time on unpaid community labour, to report to a probation officer regularly, to undertake demanding programmes of various kinds). What distinguishes punishment from other kinds of coercive imposition, such as taxation, is that punishment is precisely *intended* to ...: but to what? Some would say that punishment is intended to inflict pain or suffering: but that suggests that what matters is pain or suffering as such (and invites the familiar criticism that we and the state should not be in the business of trying to inflict pain or suffering on people; see Christie 1981 on ‘pain-delivery’), which some penal theorists would reject as a distortion. Others would say that punishment is intended to cause harm to the offender — adding, if they are careful (see Hanna 2014: s. 2) that what is intended is ‘prima facie harm’ rather than ‘all-things-considered harm’, to allow for the possibility that punishment might be, or might be intended to be, on balance beneficial to the offender. But some theorists would deny even this, since they would deny that punishment must be intended to be ‘intrinsically bad’ for the person punished. It is safer to say that punishment must be intended to be burdensome, and that is how we will understand punishment in what follows. (For running debate about this intentionality feature, see Wringer 2013; Hanna 2017; Wringer 2019; Hanna 2020; see also Lee 2019; Hoskins 2023.)

Second, it is widely accepted that what distinguishes punishment from mere ‘penalties’ (see Feinberg 1970) is their reprobative or condemnatory character. Penalties, such as parking tickets, might be imposed to deter the penalised conduct (or to recoup some of the costs that it causes) without being intended to express societal condemnation. But even if a primary purpose of punishment is deterrence (see ss. 3–4 below), its imposition (the conviction and formal sentence that the offender receives in court, the administration of the punishment itself)



also expresses the censure or condemnation that the offender's crime is taken to warrant.

These two features, that punishment is intentionally burdensome and condemnatory, make the practice especially normatively challenging. How can a practice that not only burdens those subjected to it but aims to burden them, and which conveys society's condemnation, be justified?

We should not assume, however, that there is only one question of justification, which can receive just one answer. As Hart famously pointed out (Hart 1968: 1–27), we must distinguish at least three justificatory issues. First, what compelling reason is there to create and maintain a system of punishment: what good can it achieve, what duty can it fulfil, what moral demand can it satisfy? (Hart termed this the question of punishment's 'general justifying aim', although the term may be misleading in that talk of 'aims' may seem to privilege a consequentialist answer to the question, whereas the compelling reason could be a nonconsequentialist one.) Second, who may properly be punished: what principles or aims should determine the allocations of punishments to individuals? Third, how should the appropriate amount of punishment be determined: how should sentencers go about deciding what sentence to impose? (One dimension of this third question concerns the amount or severity of punishment; another, which is insufficiently discussed by philosophers, concerns the concrete modes of punishment that should be available, in general or for particular crimes.) It might of course turn out that answers to all these questions will flow from a single theoretical foundation — for instance, from a unitary consequentialist principle specifying the good that punishment should achieve, or from some version of the retributivist principle that the sole proper rationale of punishment is to impose on the guilty the punitive burdens they deserve. But things might not be as simple as that: we might find that different and conflicting values are relevant to different issues about punishment, and that any complete normative account of punishment will have to find a place for these values and offer guidance in how to resolve tensions among them when they conflict (see s. 6).

Even this way of putting the matter oversimplifies it, by implying that we can hope to find a 'complete normative account of punishment': an account, that is, of how punishment can be justified. It is an implicit assumption of much philosophical and legal discussion that punishment can be justified, and that the theorists' task is to establish and explicate that justification. But it is an illegitimate assumption: normative theorists must be open to the possibility,



startling and disturbing as it might be, that this pervasive human practice cannot be justified. Indeed, there is a significant strand of 'abolitionist' penal theorising, the subject of increasing philosophical attention in recent years, that argues precisely that legal punishment cannot be justified and should be abolished. We will attend to some abolitionist arguments in section 7. Even if those arguments can be met, even if legal punishment can be justified, at least in principle, the abolitionist challenge is one that must be met, rather than ignored; and it will help to remind us of the ways in which any practice of legal punishment is bound to be morally problematic.

2. Punishment, Crime, and the State: Legal punishment presupposes crime as that for which punishment is imposed, and a criminal law as that which defines crimes as crimes; a system of criminal law presupposes a state, which has the political authority to make and enforce the law and to impose punishments. A normative account of legal punishment and its justification must thus at least presuppose, and should perhaps make explicit, a normative account of the criminal law (why should we have a criminal law at all?) and of the legitimate powers and functions of the state (by what authority or right does the state make and declare law, and impose punishments on those who break it?). (See generally Duff 2018: ch. 1.)

Recent scholarship has thus seen a growing interest in grounding analysis of the justification of punishment in a political theory of the state. Many of these accounts are based on Rawls's political theory or on other versions of constructivism (see Matravers 2000 and 2011b; Dolovich 2004; Brettschneider 2007; Flanders 2017; for critiques of such accounts, see Garvey 2004; Dagger 2011b; Hoskins 2022). Several others are based on versions of republicanism (see Pettit 1997; Duff 2001; Dagger 2007 and 2011a; Yankah 2015; for other recent contributions showing the importance of political theory, see Brudner 2009; Brooks 2011; Sigler 2011; Markel 2012; Chiao 2016 and 2018). How far it matters, in this context, to make explicit a political theory of the state depends on how far different plausible political theories will generate different accounts of how punishment can be justified and should be used. We cannot pursue this question here (for two sharply contrasting views on it, see Philips 1986; M. Davis 1989), save to note one central point. For any political theory that takes seriously the idea of citizenship as full membership of the polity, the problem of punishment takes a particularly acute form, since we have to ask how punishment can be consistent with citizenship (how citizens can legitimately punish each other): if we are not to say that those who commit crimes thereby forfeit their



status as citizens (see s. 6 below), we must — if we are to justify punishment at all — show how the imposition of punishment can be consistent with, or even expressive of, the respect that citizens owe to each other. (Punishment is also, of course, imposed on non-citizens who commit crimes within a state's territory: on the primacy of citizenship in understanding criminal law and its authority, and on the status of non-citizens, see Duff 2013 and 2018: ch. 3; Wringer 2021.)

Before we tackle such theories of punishment, however, we should look briefly at the concept of crime, since that is one focus of the abolitionist critique of punishment.

On a simple positivist view of law, crimes are kinds of conduct that are prohibited, on pain of threatened sanctions, by the law; and for positivists such as Bentham, who combine positivism with a normative consequentialism, the questions of whether we should maintain a criminal law at all, and of what kinds of conduct should be criminalised, are to be answered by trying to determine whether and when this method of controlling human conduct is likely to produce a net increase in good. Such a perspective seems inadequate, however: inadequate both to the claims of the criminal law, which presents its demands as something other or more than those of a gunman writ large — as something other or more than 'Behave thus, or else!' — and to the normative issues at stake when we ask what kinds of conduct should be criminalised. For the criminal law portrays crime not merely as conduct which has been prohibited, but as a species of wrongdoing: whether our inquiry is analytical (into the concept of crime) or normative (as to what kinds of conduct, if any, should be criminal), we must therefore focus on that notion of wrongdoing.

Crimes are, at least, socially proscribed wrongs — kinds of conduct that are condemned as wrong by some purportedly authoritative social norm. That is to say that they are wrongs which are not merely 'private' affairs, which properly concern only those directly involved in them: the community as a whole — in this case, the political community speaking through the law — claims the right to declare them to be wrongs. But crimes are 'public' wrongs in a sense that goes beyond this. Tort law, for instance, deals in part with wrongs that are non-private in that they are legally and socially declared as wrongs — with the wrong constituted by libel, for instance. But they are still treated as 'private' wrongs in the sense that it is up to the person who was wronged to seek legal redress. She must decide to bring, or not to bring, a civil case against the person who wronged her; and although she can appeal to the law to protect her rights, the case is still between her and the defendant. By contrast, a criminal case is between the whole



political community — the state or the people — and the defendant: the wrong is ‘public’ in the sense that it is one for which the wrongdoer must answer not just to the individual victim, but to the whole polity through its criminal courts.

It is notoriously difficult to give a clear and plausible account of the distinction between civil and criminal law, between ‘private’ and ‘public’ legal wrongs, whether our interest is in the analytical question of what the distinction amounts to, or in the normative question of which kinds of wrong should fall into which category (see Murphy and Coleman 1984: ch. 3; a symposium in *Boston University Law Review* vol. 76 (1996): 1–373; Lamond 2007). It might be tempting to say that crimes are ‘public’ wrongs in the sense that they injure the whole community: they threaten social order, for instance, or cause ‘social volatility’ (Becker 1974); or they involve taking unfair advantage over those who obey the law (H. Morris 1968: 477–80; Murphy 1973; Dagger 1993 and 2008); or they undermine the trust on which social life depends (Dimock 1997). But such accounts distract our attention from the wrongs done to the individual victims that most crimes have, when it is those wrongs that should be our central concern: we should condemn the rapist or murderer, we should see the wrong he has done as our concern, because of what he has done to his victim. Another suggestion is that ‘public’ wrongs are those that flout the community’s essential or most basic values, in which all members of the community should see themselves as sharing: the wrong is done to ‘us’, not merely to its individual victim, in the sense that we identify ourselves with the victim as a fellow citizen (see Marshall and Duff 1998; Duff 2007: ch. 6; and see further section 6 of the entry on [theories of criminal law](#)).

Some abolitionists, however, argue that we should seek to eliminate the concept of crime from our social vocabulary: we should talk and think not of ‘crimes’, but of ‘conflicts’ or ‘troubles’ (Christie 1977; Hulsman 1986). One motivation for this might be the thought that ‘crime’ entails punishment as the appropriate response: but that is not so, since we could imagine a system of criminal law without punishment. To define something as a ‘crime’ does indeed imply that some kind of public response is appropriate, since it is to define it as a kind of wrong that properly concerns the whole community; and it implies that that response should be a condemnatory one, since to identify wrongs as wrongs is to mark them out as apt for condemnation: but that public, condemnatory response could consist in nothing more than, for instance, some version of a criminal trial which calls the alleged wrongdoer to answer for her alleged wrongdoing, and condemns her for it, through a criminal conviction, if she is proved guilty. One can of course count a criminal conviction as a kind of



punishment: but it does not entail the kind of materially burdensome punishment, imposed after conviction, with which penal theorists are primarily concerned.

Another possible motivation for the abolitionist objection to the concept of crime is a kind of moral relativism that objects to the ‘imposition’ of values on those who might not share them (Bianchi 1994: 71–97): but since abolitionists are very ready to tell us, insistently, how we ought to respond to conflicts or troubles, and how a state ought or ought not to treat its citizens, such an appeal to relativism reflects serious confusion (see Williams 1976: 34–39). More plausibly, the abolitionist claim could be that rather than take wrongdoing as our focus, we should focus on the harm that has been done, and on how it can be repaired; we will return to this suggestion in section 7 below.

Another abolitionist concern is that by defining and treating conduct as ‘criminal’, the law ‘steals’ the conflicts which crime involves from those to whom they properly belong (Christie 1977): instead of allowing, and helping, those who find themselves in conflict to resolve their trouble, the law takes the matter over and translates it into the professionalised context of the criminal justice system, in which neither ‘victim’ nor ‘offender’ is allowed any appropriate or productive role. Now it is a familiar and disturbing truth that our existing criminal processes — both in their structure and in their actual operations — tend to preclude any effective participation by either victims or offenders, although an adequate response to the criminal wrong that was done should surely involve them both. One response is to argue, as some abolitionists do, that our response to crime should consist not in punishment, but in a process of mediation or ‘restoration’ between victim and offender (see s. 7 below); but another is to insist that we should retain a distinctive criminal process of trials, and punishment, in which the polity as a whole, acting on behalf of the victim as well as on its own behalf, calls the criminal wrongdoer to account — but that victims and offenders should be given a more active role in that process (see further Duff et al 2007, esp. chs. 3–5, 7). Such an insistence on the need for a public criminal process reflects two aspects of the concept of crime: first, it is sometimes important to recognise that a situation involves not just people in ‘conflict’, but a victim who has been wronged and an offender who has done the wrong; second, some such wrongs are ‘public’ wrongs in the sense sketched above — wrongs that properly concern not just those directly affected, but all members of the political community. Faced, for instance, by feuding neighbours who persistently accuse each other of more or less trivial wrongs, it might indeed be appropriate to suggest that they should forget about condemning each other and look for a way of resolving their conflict.



But faced by a rapist and the person he raped, or by a violent husband and the wife he has been beating up, it would a betrayal both of the victim and of the values to which we are supposedly committed to portray the situation merely as a 'conflict' which the parties should seek to resolve: whatever else or more we can do, we must recognise and declare that here is a victim who has been seriously wronged; and we must be collectively ready to censure the offender's action as a wrong (for a useful discussion of the significance of criminal law in the context of domestic violence, see Dempsey 2009).

However, to argue that we should retain the concept of crime, that we should maintain a criminal law which defines and condemns a category of 'public' wrongs, is not yet to say that we should maintain a penal system that punishes those who commit such wrongs; while a system of criminal law might require something like a system of criminal trials that will authoritatively identify and condemn criminal wrongdoers, it does not of its nature require the imposition of further sanctions on such wrongdoers. So, we must turn now to the question of what could justify such a system of punishment.

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