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# RECENT WORK

## *Punishment*

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Philosophical writing about the legal practice of punishment has traditionally focused on two central questions: what (if anything) justifies the practice of treating certain individuals in ways that typically would be unjustified, and what considerations should govern how severely legal authorities may punish in particular cases? Most philosophers of punishment have tended to fall into one of two broad camps. On one hand, consequentialists have contended that punishment is justified instrumentally, as a means to some valuable end – typically crime reduction, and commonly through deterrence, incapacitation or rehabilitation – and that the severity of punishment should be tailored to serve this aim. On the other hand, retributivists have regarded the hard treatment characteristic of punishment as an intrinsically appropriate, because deserved, response to wrongdoing; as such, retributivists have argued that punishment must be no more severe than is deserved.

In recent years, however, theorists of punishment have attempted to move beyond the traditional consequentialist-retributivist arguments, developing new answers to the 'why' and 'how much' questions that aim to break the familiar logjam. In addition, they have broadened the scope of inquiry into punishment's justification in various ways. To take just two examples, theorists have suggested that whether punishment is justified depends on whether the legal practices associated with punishment – criminalization, policing, prosecutions – are themselves justified. Second, the continuing growth of institutions of international criminal law has spurred new thinking about the distinctive normative challenges related to punishment in the international context.

In this essay, I discuss each of these developments in philosophical writing about punishment. In doing so, I recognize that due to space limitations, the discussion unavoidably will fail to address much interesting work that has been done in recent years and will be unable to give many of the accounts that are considered the sustained attention they deserve. I hope, however, that this essay provides readers a useful sense of some of the noteworthy developments in theorizing about punishment in recent years.

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## 1. *Why and how much?*

To begin, we should take stock of the state of philosophical debate regarding the central questions of punishment's justification – the 'why' and 'how much' questions. As I indicated, punishment theory has traditionally consisted primarily of a debate between consequentialists and retributivists. To oversimplify a bit, consequentialists have tended to view punishment, because it involves the infliction of burdensome treatment, as an evil, one which can only be justified if it promotes benefits sufficient to outweigh the suffering it produces. Retributivists, by contrast, have tended to view punishment as justified not by forward-looking considerations but by backward-looking ones: namely, punishment is justified insofar as it is a deserved response to an offender's prior wrongdoing. Criminal wrongdoers deserve to suffer, and punishment is justified insofar as it metes out this deserved suffering.

For consequentialists, retributivism seems barbaric insofar as it would justify the imposition of punitive hard treatment without reference to any future beneficial consequences that punishment is likely to promote. Also, opponents have charged that the retributivist notion of 'desert' is inadequate to provide genuine guidance in sentencing. Retributivists, for their part, have tended to regard consequentialism as pernicious in part because it is unable to ground more than contingent constraints against punishment of the innocent or disproportionate punishment of the guilty. Punishing the innocent, or punishing the guilty more harshly than they deserve, may be unjustified on consequentialist terms if such punishment tends, on balance, to produce worse consequences than only punishing the guilty and only as harshly as they deserve. But these merely contingent constraints have seemed unsatisfying to many theorists. Also, retributivists have objected that consequentialist punishment would, in Kantian terms, use an offender as a mere means to some valuable end, rather than respecting her as an end in herself.

In recent years, punishment theorists have attempted to move beyond the traditional consequentialist-retributivist impasse by appealing to different sorts of considerations or by reframing the dilemma in various respects. The most influential such recent account, in my view, is Antony Duff's account of punishment as 'secular penance' (Duff 2001). Duff characterizes the criminal law generally as a communicative enterprise, one in which the state declares certain sorts of wrongs to be public wrongs – that is, wrongs that properly concern the polity – and calls on those who commit such wrongs to answer for their wrongdoing. The institution of punishment, on Duff's view, communicates to those found culpably guilty of wrongdoing the censure, or blame, that is the appropriate response to such wrongdoing.

Duff's account resembles traditional retributivist accounts in that it regards punishment as a deserved response to criminal wrongdoing. His view differs from such accounts, however, in some respects. For one, Duff contends that

what is deserved in response to wrongdoing is not suffering, or hard treatment, but censure. The notion that blame, or censure, is an intrinsically appropriate response to wrongdoing is more intuitively appealing, he believes, than the idea that the infliction of suffering is an intrinsically appropriate response to such behaviour (Duff, 2001: 27). Still, on Duff's view, the burdensomeness characteristic of punishment plays an important role of bringing home to the offender (and to victims and members of the polity generally) how seriously the polity takes the wrongdoing. Thus punishment should be proportionate in severity to the seriousness of the crime so that the message of censure is properly communicated (Duff, 2001: 132–39).

Duff's view also differs from traditional retributivist accounts in that it explicitly contains central forward-looking elements. Part of communicating censure, he contends, is calling on the person censured to repent of her wrongdoing (thus 'secular penance'), to commit to self-reform, and to reconcile with her community (Duff, 2001: 107–11). Thus on his account, as on consequentialist accounts, punishment is forward-looking in the sense that it aims to bring about certain valuable ends. Unlike on consequentialist accounts, however, punishment for Duff is not simply a contingently effective means of achieving these ends; rather, he believes punishment is an intrinsically appropriate way for the state to communicate censure, and thus an intrinsically appropriate way to urge offenders to repent, reform and reconcile, because such urging just is part of what it is properly to convey deserved censure (Duff, 2001: 30).

Duff's account has been influential in the development of normative thinking about punishment among both those sympathetic to his general account and those critical of it. Among accounts that draw on and develop themes found in Duff's view of punishment (see, e.g. Brownlee 2007; Garvey 2003; Hsu 2015; Markel 2012; Tasioulas 2006; Wringe 2010) perhaps the most prominent is Christopher Bennett's account of punishment as an apology ritual (2008). Punishment can be justified, on Bennett's view, as a means of making offenders engage in the sort of apologetic behaviour they would choose to undertake if they were genuinely sorry for what they did. Thus punishment's justification, on Bennett's view as on Duff's, is grounded at least in part in the deeper social meanings of the practices of blaming, offering apology and making amends. But Bennett emphasizes that offenders need not apologize sincerely (thus apology *ritual*); rather, it is sufficient if the state requires them to do what they would do if they were genuinely sorry and motivated to make amends (Bennett 2008: 154, 172–73). Requiring this behaviour is the appropriate way for the state to express its condemnation of the wrongdoing, Bennett contends, and the state is justified in such expressions of condemnation by its legitimate interest in setting limits on how citizens treat each other. Thus although Bennett, like Duff, characterizes his view as retributivist, it does not fit neatly with traditional retributivist accounts of punishment as simply meting out the suffering offenders deserve.

Critics of expressive retributivist views such as Duff's and Bennett's have objected to such accounts on various grounds. In particular, some have challenged the notion that punishment is essential to conveying societal condemnation (see Boonin 2008: 176–79; Hanna 2008; Königs 2013; Tadros 2011: 103). It may be, as a contingent matter, a more effective means of doing so than other options (non-punitive denunciation, e.g.), but an account that relies on its contingent effectiveness begins to look more like the sort of consequentialist account of which both Duff and Bennett are critical (but see Glasgow 2015: 611–20).

Others have charged that Duff's version, at least, by making penance a central aim of punishment, suggests an overly intrusive picture of the state. A liberal democratic state should not be in the business, say critics, of coercing offenders with the aim of inducing moral repentance, of bringing them to share the community's attitudes or values (see Bennett 2006; Ciocchetti 2004; von Hirsch and Ashworth 2005: Ch. 7). On this last point, Bennett contends that his view fares better than Duff's, in that on his view the state does not seek to elicit genuine remorse or repentance through punishment (Bennett 2008: 150–51, 2016: 223–24). Rather, through punishment the state expresses its condemnation of the crime by forcing the offender to undertake what he would voluntarily undertake if he were genuinely sorry for his crime and concerned to make amends. But this 'apology' is merely a ritual; it need not be sincere for the punishment properly to serve the state's aim of condemnation of and dissociation from the crime. This point, however, has generated criticism of its own: don't apologies lose much of their value if they are given merely as rituals, rather than sincerely (see Martí 2012; Smith 2014: 64)?

Expressivist views, while prominent in recent years, have not been the only theories on offer: a number of philosophers have developed accounts that appeal to other considerations. Each of these, in its own way, has attempted to avoid the pitfalls associated with traditional consequentialist or retributivist accounts. One such strategy grounds the justification of punishment in the logic of self-defence. The justification of self-defence seems to involve forward- and backward-looking elements: in the paradigmatic case, a person uses force to avert an attack, but the attacker makes himself liable to such defensive force by attacking the person. In this simple case, it is fairly uncontroversial that a person is justified in using force to avert the attack. Punishment, however, inflicts harsh treatment on those who have been found guilty of committing past offences. How then, would considerations of self-defence help to illuminate the justification of punishment? Here, self-defence theorists tend to draw on the notion of general deterrence: the threat of punishment serves to deter potential offenders; thus a system of deterrent punishment is a way for society to defend itself and its members against criminal wrongdoing.

Insofar as self-defence views have relied on the notion of deterrence, they have faced the same sort of objection traditionally levelled against general deterrence views: society may be justified in threatening punishment to help deter potential offenders and reduce crime, but what justifies it in carrying out the threatened punishment on those who offend anyway (see Boonin 2008: 195–200)? If the punishment is intended to maintain the credibility of the threat for future cases, then again it seems that the person punished is used as a mere means to help modify the behaviour of other potential offenders.

Anthony Ellis (2012) offers a recent articulation and defence of the self-defence view. His answer to the 'mere means' objection is that we should think of the institution of punishment as issuing a deterrent threat but a threat that *automatically* will be carried out if the potential offender ignores the threat and commits the violation anyway. On such a system of automatic retaliation, an offender isn't used as a means to maintain a credible threat against others; rather, the punishment is simply an automatic result of her failure to heed the threat (2012: 165–67). One question, on such an account, is what justifies creating the system so that retaliation automatically follows from one's failure to heed the threat. But Ellis maintains that this automaticity might be motivated by various reasons; as long as the motivating reason is not to maintain the credibility of the threat against others, then he believes the self-defence account need not run afoul of the objection that it would use offenders as mere means (Ellis 2012: 167).

Victor Tadros (2011) also draws on the notion of self-defence, albeit in a different way. Through a series of increasingly elaborate thought experiments, he examines the logic of self-defence and what implications this may have when an offence has already been committed. On Tadros's 'Duty View', just as a potential victim is entitled to defend herself against an attacker, she is also entitled, if the offence is completed, to use the offender to help defend herself against future threats. This is because the offender incurs a duty to her victim to remedy the harm she caused, but if she cannot remedy the harm, then her duty to the victim is to help defend against future threats the victim may face from others (Tadros 2011: 268–91). And one way for the offender to help avert future threats is to suffer punishment, thus helping to deter other potential offenders. Victims also have a duty, however, to transfer the duty offenders incur to them to the state instead (Tadros 2011: 293–311). Therefore, the offender's duty in such cases is to suffer punishment to help the state maintain a credible deterrent threat, thus helping defend society against threats to its members' safety and security (for a critique of Tadros's account, see Alexander 2013).

Other notable recent accounts of punishment include Thom Brooks's attempt to develop a broadly 'unified theory' on which punishment's function is to restore and protect individuals' rights (2012), and Christopher Heath Wellman's defence of the rights-forfeiture view (2012). Brooks

incorporates a variety of considerations – deterrence, retribution, proportion, etc. – as aims of punishment in his pluralistic account, which he contends is more theoretically coherent than previous hybrid views (most famously, H. L. A. Hart's). Wellman's rights-based account would circumvent the traditional consequentialist-retributivist debates by focusing on what he takes to be the normatively prior question of whether punishment violates the rights of those punished (for an attempt to combine rights-forfeiture and self-defence accounts, see Alm 2013).

By contrast, some recent works have concluded that the institution of punishment is not justified. David Boonin (2008) and Deidre Golash (2005) review the range of proposed justifications of the practice and offer detailed objections to each. Such strategies do not, of course, demonstrate that punishment cannot be justified; at best, they may demonstrate that the practice is not justified by accounts currently on offer. Nevertheless, they thus challenge defenders of punishment to answer their objections or to find more plausible alternative justifications. Michael Zimmerman (2011) goes further, attacking notions of desert and culpability on which criminal punishment rests by contending that many acts of moral wrongdoing are committed in ignorance that the acts are wrong, and that it is often (typically?) only moral luck that distinguishes wrongdoers from others. These lines of argument are not new, but Zimmerman develops them more thoroughly than others have done; to the extent that they are compelling, they threaten not only traditional ideas about criminal punishment but also about blaming and holding responsible more generally.

## 2. *Punishment theory as political rather than (solely) moral philosophy*

Several of the recent accounts of punishment – for example, Duff's view of punishment as a communicative enterprise between a polity and its members, or Ellis's or Tadros's accounts of punishment as a justified measure societies impose to protect themselves and their members from crime – encourage us to understand punishment's justification as a question of political rather than (solely) moral philosophy. Many scholars have picked up on this point, contending that the traditional casting of the problem of punishment as centrally a moral rather than a political problem has had a detrimental effect on theorizing on the topic. Punishment is, on this view, arguably the paramount example of a state's exercise of power over its citizens; thus what's needed is an account of when (if ever) punishment constitutes a legitimate exercise of state power. Theorists have therefore attempted to move scholarly discussion of the criminal law and punishment forward by shifting the focus from moral philosophical debates about the permissibility of punishment to deter or mete out retribution to political philosophical debates about the circumstances in which state coercion is legitimate (see Brudner

2009; Chiao 2016; Dagger 2011a, b; Matravers 2011; Sigler 2011; Thorburn 2011).

A number of attempts to push the debate towards political theory have been Rawlsian in flavour, which is interesting given that Rawls's major writings, *A Theory of Justice* and *Political Liberalism*, contain very little consideration of punishment's justification.[1] Nevertheless, scholars attracted to Rawls's contractualist political philosophy – according to which, basically, just political institutions are those which all citizens as free and equal could reasonably be expected to endorse – have sought to glean insights from Rawls's approach for what a justifiable institution of punishment would look like. One advantage of such an approach, contend its advocates, is that it is sensitive to what Rawls called the fact of *reasonable pluralism*. In a liberal democracy, citizens will disagree about moral questions such as whether punishment is a deserved response to wrongdoing, what constitutes proportionate punishment, or whether it is permissible to punish offenders to deter others from committing similar crimes. As Vincent Chiao writes:

> 'Taking the problem of reasonable pluralism seriously . . . is taking seriously the thought that the appropriate scope and use of the criminal law is a *political* rather than a *moral* problem. It is a question for a theory of politics, not a quasi-religious debate among adherents of different comprehensive doctrines'
>
> (Chiao 2016: 28; see also Thorburn 2011).

Sharon Dolovich (2004) offers an extensive Rawlsian account of punishment, in which we begin by asking what position regarding punishment deliberators in a Rawlsian 'original position' would choose. We should expect, Dolovich contends, that they would select as if they might be either victim or offender when the 'veil of ignorance' is lifted and they enter into society as citizens. She argues that deliberators in such a position would endorse an institution of punishment, but one with strong constraints: in particular, a parsimony principle, according to which 'in all cases punishment must be no more severe than necessary to achieve the relevant deterrent effect' (Dolovich 2004: 401).

Broadly Rawlsian approaches to punishment have also been developed by Corey Brettschneider (2007) and Matt Matravers (2011). Other theorists, by contrast, have grounded their accounts of punishment in broadly republican political theories (see, e.g. Dagger 2011a; Duff 2001: 35–73; Yankah 2015).

1 Rawls did address the question of punishment in an earlier article: 'Two Concepts of Rules', *The Philosophical Review* 64:1 (1955): 3–32. The rule-utilitarian account he develops in this article, however, seems inconsistent with the central themes of his later works.

### 3. *Punishment, criminal law and the state*

Another notable development in punishment theory in recent years, related to the conception of punishment's justification as a question of legitimate state coercion, is the growing recognition that punishment cannot ultimately be justified in isolation from the rest of the criminal law or from the state itself. Punishment is meted out by the state against those apprehended, charged and convicted of violating some criminal law(s). Thus, if the broader institutions of criminal law and justice are unjustified, or if the state itself is illegitimate, then inflictions of punishment will be unjustifiable.

For example, if a polity passes laws criminalizing behaviours that are not justifiably prohibited, then the punishment it metes out for violations of these laws will be unjustified. Thus as Douglas Husak (2008) has persuasively argued, questions of criminalization are directly relevant to the justification of punishment. To assess whether punishment is justified, we need an account of the principles or considerations relevant to determining what behaviours may be criminalized. It is perhaps surprising, then, to realize that the question of criminalization has traditionally received comparatively little scrutiny from theorists concerned with the justification of punishment. Husak himself offers a thoughtful and compelling account of criminalization: on his view, justified criminalization requires that the conduct proscribed be non-trivially harmful or evil; that it be wrongful; that violations deserve state punishment; that the burden of justification fall on those who endorse the criminalization; that the criminalization aim at a substantial state interest; that it directly advance that interest and that it be no more extensive than necessary to advance the interest. Critics have taken issue with whether these conditions would, in practice, serve to limit criminalization as Husak intends (Gardner 2008; Ramsay 2010; Tadros 2009). Arguably, however, Husak's most valuable contribution is in helping to reinvigorate an important line of inquiry that has for too long been largely dormant (see, e.g. Duff et al. 2014; Green 2011; Hörnle 2012; Sumner 2011; Tomlin 2014; Yaffe 2012; Yankah 2011; see also Duff and Green 2005).

Punishment's justification depends not only on the justification of the laws whose violations the state punishes but also on the legitimacy of the procedures by which the state apprehends, charges and prosecutes individuals. Thus Alice Ristroph (2015, 2016) has contended that if we are interested in establishing whether punishment is justified, we should spend time considering the criminal processes surrounding punishment as well as possible defences of punishment itself (for notable recent accounts, see, e.g. Loader 2014 on policing; Lippke 2011 on plea bargaining; Duff et al. 2004, 2006, 2007 on criminal trials; Flanders 2013 on pardons). More generally, we should ask whether the state itself has standing to punish; the existence of severe social injustices may undermine a state's standing to punish offenders who are victims of such injustices (see, e.g. Chau 2012; Duff 2007; Holroyd

2010; Howard 2013; Matravers 2006). What's more, the justification of punishment may depend on how we think about the host of so-called 'collateral' burdens, both legal and extra-legal, faced by those with criminal convictions: do these burdens ever themselves count, as some have suggested, as forms of 'invisible punishment;' and should these burdens factor into assessments of what constitutes a proportionate response to a criminal offence (see Hoskins 2016; LaFollette 2005; Travis 2003)?

### 4. *Punishment in the international context*

Theorizing about punishment has expanded its scope in other respects, as well. With the gradual development since the Nuremberg Trials of institutions of international criminal law, theorists have begun to see that prosecuting and punishing wrongdoing at the international level raises distinctive conceptual and normative puzzles. Perpetrators of international crimes such as genocide may be subject to prosecution and punishment in the International Criminal Court or in one or another international tribunal. But what is it about certain crimes that makes their prosecution and punishment a matter for international legal authorities whereas other crimes are thought to be properly addressed at the domestic level? This question is especially difficult with respect to crimes that do not cross boundaries, crimes that occur in a state of which the perpetrators and victims are both members. Are such crimes ever properly tried and punished by international legal authorities? If so, why?

One prominent answer is offered by Larry May (2005). May contends, first, that when a state fails to provide its citizens with security and subsistence, the state has 'no right to prevent international legal bodies from justifiably infringing that state's sovereignty' (May 2005: 68). He terms this the 'security principle'. This principle alone, however, only says that in such circumstances a state has no right against international intervention; it does not yet say that international prosecutions and punishment are justified in such cases. Thus he offers a second principle, the 'international harm principle', which states that international prosecutions and punishment are justified only in cases of 'serious harm to the international community' (May 2005: 83), where such harm is group-based either in the sense of being based on group characteristics of the victims or in the sense that it is perpetrated by a state or another type of group. Critics have challenged, variously, May's reliance on a harm-based account of crime (Renzo 2010) and his claim that such crimes harm the international community or humanity as a whole (Altman 2006).

More recently, David Luban (2010) has argued that crimes that are sufficiently heinous may be prosecuted and punished by international authorities if there are adequate procedures in place to ensure that trials and punishment are fair. Antony Duff (2010), however, has suggested that the heinousness of

the crimes and the existence of fair procedures are not enough. What we also need, in Duff's view, is some account of why a particular legal entity (in this case, the institutions of international criminal law) has standing to call particular offenders (in this case, perpetrators of atrocities such as genocide) to account. What is it, then, that in some cases makes perpetrators answerable to the international community rather than to one or another state? (On this question of jurisdiction to prosecute and punish international crimes, see also Altman and Wellman 2004; Davidovic 2016; Giudice and Schaeffer 2012; Lee 2010; Wellman 2011.)

Furthermore, given that crimes such as genocide are perpetrated by groups of people rather than by individuals acting alone, questions arise regarding how international legal institutions should assign responsibility for such crimes. Such questions are not unique to the international context: corporations or other groups have perpetrated crimes at the domestic level, and thus have raised questions about how to assign responsibility for the wrongdoing (see, e.g. Hartogh 2009; Pettit 2007). But the magnitude of group-perpetrated international atrocities – such as the 1994 Rwandan genocide, in which roughly 800,000 people were murdered in a span of about 100 days – makes concerns about assigning responsibility for crimes perpetrated by groups of individuals especially poignant. The Nuremberg Tribunal expressed what has since been the governing view in international criminal law itself:

> 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[2]

But some scholars have recently begun to suggest that for some mass crimes, states themselves are the appropriate objects of punishment – either instead of or in addition to the individual perpetrators (see Erskine 2011; Lang 2007; Tanguay-Renaud 2013).

Justifications of state punishment quickly run into a crucial challenge, however: in any ostensibly state-perpetrated crime, there will as a practical reality always be many members of the state who did not participate in the atrocity, or perhaps who actively spoke out against it, or even who were among its victims. Thus punishing states *qua* states risks inflicting punitive burdens on individuals who were innocent of the crime – or worse, victims of it. Defenders of the idea of state punishment have suggested that the punishment need not distribute among the members of the state (see Erskine 2011; Pasternak 2011; Tanguay-Renaud 2013; but see Hoskins 2014), or that the ends of such punishment may be sufficiently valuable to override concerns about harm to innocents (see Lang 2007: 255).

2 International Military Tribunal for the Trial of the Major War Criminals, judgement of 1 October 1946; reprinted in 41 *American Journal of International Law* (1947) 221.

There have been other interesting recent developments in theorizing about punishment – perhaps most notably the challenges generated by advances in neuroscience (see, e.g. Greene and Cohen 2004; Vincent 2010) – but space prohibits my discussing these here. I have tried, however, to highlight some of the notable ways recent work on punishment has aimed to shed new light on traditional questions or to expand to address new ones.

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