

Political Theory and Criminal Punishment

Introduction

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The scholarly literature on punishment—its general justification and allocation, its forms and processes—is vast indeed. The discourse ranges from the seemingly intractable philosophical debate between retributive and utilitarian accounts of punishment’s legitimate purpose to more practical considerations involving trials, sentencing, and implementation. We are, in short, preoccupied with punishment. This is as it should be, for criminal punishment involves what is perhaps the most profound and awesome exercise of the state’s formidable power. Absent a compelling justification, the sort of hard treatment that constitutes punishment—the deprivation of life, liberty, or property—would itself represent a grave injustice, especially in a liberal democratic polity. But for all of the thoughtful discussion of punishment’s many facets, the relationship between punishment and political theory has received relatively little sustained attention, especially in legal scholarship.¹ In some cases this omission reflects an affirmative rejection of the relevance of political theory to questions of criminal punishment;² more generally it may reflect a determination to take the Anglo-American political context as given in order to explore specific legal controversies on their own terms. While these judgments represent valid scholarly choices, the result is that many of the most difficult questions about punishment remain under-examined. And as Claire Finkelstein observes in this volume: “It is the job of legal philosophers to help import clarity about the structure of our moral values and their degree of inviolability, with the hope that it will help policy makers face up to their underlying normative commitments squarely.”³

This symposium takes up that challenge, offering fresh perspectives on a range of familiar issues, with special attention to the interplay between political theory and criminal punishment. Each contribution takes the question of political legitimacy as central to the justification of our punitive institutions and practices.

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¹ There are a number of notable exceptions, including R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001); H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 1 (2d ed. 2008); George P. Fletcher, *Political Theory and Criminal Law*, 25 *CRIM. JUST. ETHICS* 18 (2006); Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475 (1968); Jeffrie G. Murphy, *Legal Moralism and Retribution Revisited*, 1 *CRIM. L. & PHIL.* 5 (2007).

² See, e.g., Michael Davis, *The Relative Independence of Punishment Theory*, in *TO MAKE THE PUNISHMENT FIT THE CRIME* 18 (1992); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 *ARIZ. ST. L.J.* 1089 (2011).

³ Claire Finkelstein, *Punishment as Contract*, 8 *OHIO ST. J. CRIM. L.* 319, 324 (2011).

And although in each case the political context is recognizably liberal, contested conceptions of core liberal values inform a variety of punitive accounts. Thus, in his contribution, *Expressive Punishment and Political Authority*,⁴ Christopher Bennett, a proponent of an expressive account of punishment's purpose,⁵ confronts the question of state authority that lies behind the expressive rationale. Specifically, he explores the possibility that a commitment to the expressive justification depends upon an objectionable, possibly illiberal, conception of the state. Although he concludes that the expressive rationale is compatible with "at least one attractive form of political community"⁶—a democratic polity—he also highlights the difficulty of specifying the grounds of democratic authority on which his appealing conception of expressive punishment depends.

Claire Finkelstein, in *Punishment as Contract*,⁷ and Richard Dagger, in *Social Contracts, Fair Play, and the Justification of Punishment*,⁸ take up where Bennett leaves off. Although both, following John Rawls, conceive of political society as a "cooperative venture for mutual advantage,"⁹ Finkelstein defends a version of classic contract theory as the basis for justified punishment. On this view, punishment is justified because—and to the extent that—individuals have effectively consented to it and have derived benefits from the scheme of cooperation that the institution of punishment makes possible. According to Dagger, however, the initial appeal of various contract-based accounts of punishment does not withstand scrutiny because none provides an adequate basis for the high degree of mutual cooperation essential to the liberal state. Having elsewhere developed a version of fair-play theory as the foundation of justified punishment,¹⁰ Dagger here argues that it is the implicit appeal to fairness, rather than consent or benefit, that lends contract approaches whatever plausibility they have.

Zachary Hoskins, in *Deterrent Punishment and Respect for Persons*,¹¹ and Youngjae Lee, in *Deontology, Political Morality, and the State*,¹² address the

⁴ Christopher Bennett, *Expressive Punishment and Political Authority*, 8 OHIO ST. J. CRIM. L. 285 (2011).

⁵ CHRISTOPHER BENNETT, *THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT* (2008).

⁶ Bennett, *supra* note 4, at 316.

⁷ Finkelstein, *supra* note 3.

⁸ Richard Dagger, *Social Contracts, Fair Play, and the Justification of Punishment*, 8 OHIO ST. J. CRIM. L. 341 (2011).

⁹ JOHN RAWLS, *A THEORY OF JUSTICE* 4 (rev. ed. 1999).

¹⁰ See Richard Dagger, *Playing Fair with Punishment*, 103 ETHICS 473 (1993); Richard Dagger, *Punishment as Fair Play*, 14 RES PUBLICA 259 (2008).

¹¹ Zachary Hoskins, *Deterrent Punishment and Respect for Persons*, 8 OHIO ST. J. CRIM. L. 369 (2011).

¹² Youngjae Lee, *Deontology, Political Morality, and the State*, 8 OHIO ST. J. CRIM. L. 385 (2011).

viability of deterrence as a justification for punishment, responding to some familiar deontological objections to an instrumentalist account of punishment in a liberal state. Hoskins maintains that a commitment to deterrence, duly constrained to avoid certain obvious injustices, can be compatible with the liberal commitment to respect for persons as autonomous moral agents. In particular, he argues that pursuing deterrence need not involve treating wrongdoers as outsiders to the political community or securing compliance through threats rather than the moral appeal befitting “autonomous members of a liberal political community.”¹³ For his part, Lee considers the argument that the state has a moral obligation to pursue crime prevention more assiduously by, for example, inflicting the death penalty on a larger number of convicted murderers or relaxing the standards of proof for criminal liability. After analyzing some standard distinctions in deontological ethics—and rejecting them as insufficient to meet the challenge—Lee identifies specific features of the political morality of the liberal state that constrain its pursuit of crime control. For the “fundamental legal protections that are promised to individuals . . . spell out the proper relationship between the government and the governed, and they are among the many conditions that attach to the government’s exclusive possession and use of the power to criminalize and punish.”¹⁴

Finally, in my own contribution, *The Political Morality of the Eighth Amendment*,¹⁵ I develop a critique of the Supreme Court’s Eighth Amendment jurisprudence that faults the Court for adopting a form of moral skepticism that is at odds with our constitutional values. In place of the majoritarianism that dominates its current approach to determining what counts as cruel and unusual punishment, I argue that the Court should develop a conception of decent treatment grounded in our political morality. In this way, the essay reflects the shared premise of all of the contributions—that the best account of punishment, whatever it turns out to be, should engage rather than obscure the political commitments and values that structure the institution of criminal punishment.

¹³ Hoskins, *supra* note 11, at 382.

¹⁴ Lee, *supra* note 12, at 399.

¹⁵ Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403 (2011).

