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# Punishment

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## 1. Introduction

Punishment is a burden that some agent with relevant powers deliberately imposes on someone else as a purportedly justified response to conduct that she, the punishing agent, views as wrong.<sup>2</sup> The agent might view the conduct as wrong *in itself* or as wrong simply because it breaches an authoritative rule. But the burden imposed on the supposed wrongdoer is normally intended to communicate the punisher's justified condemnation of the wrong in question. The punishing agent not only has the *power* to inflict hard treatment in response to the conduct, but also, usually, claims to have the *authority* – the right – to do so. The punishee is *allegedly* responsible for the (putative) wrong, in the sense of meeting the conditions that would make it fair or fitting or otherwise appropriate to impose the punishment – though of course he in fact might not be responsible for it. These features – that punishment is justified, that the punishing agent has the relevant authority, that those punished are responsible – are the sources of the majority of the philosophical issues that arise in regard to punishment, and we examine them in more detail in this chapter.

People impose punishments on each other in various contexts and forms for various reasons. For instance, parents may use punishments as a technique in rearing their children in order to discipline them, and to teach them what behavior is acceptable. Creedal associations such as the Christian Church have sometimes used harsh punishments like excommunication or public shaming to condemn members whose behavior they could not tolerate. Employers often use punishments – such as the denial of promotions or benefits, the assignment of unpopular tasks – to control or express disapproval of uncooperative employees. And in intimate relationships with friends, family members, partners, and spouses, people often respond to the conduct they disapprove of with treatment such as blame, resentment, indignation, anger, shaming, and shunning.

The arena of punishment that will be the focus of this chapter, however, is legal punishment. The specific forms that our legal punishments tend to take can be viewed against the backdrop of the various, broadly punitive responses that we give to each other's wrongdoing in the non-legal contexts noted above. Those non-legal uses of punishment by employers, friends, associations, and families – flawed and debatable as they may be – provide us with a rough set of reference points by which to judge the credibility, defensibility, and harshness of our legal punishment institutions. Those reference points pertain to our motivations and aims in punishing each other; the chance that punishing each other in the ways we do will achieve our desired aims; and the merits or demerits of alternative responses to wrongdoing.

Punishment practices vary widely across jurisdictions in how harsh or mild they are. For instance, punishment regimes vary in the severity of the punishments provided by the criminal law of that jurisdiction (e.g. community service, fines, imprisonment, exile, solitary confinement, torture, or even execution); the harshness

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<sup>1</sup> We are very grateful to Jules Holroyd and John Tasioulas for helpful comments on a draft of this paper.

<sup>2</sup> See N. Lacey (1988), *State Punishment: Political Principles and Community Values*, Routledge, Ch. 1, for a discussion of the assumptions built into this kind of conception. See also D. Boonin (2008), *The Problem of Punishment*, Cambridge: Cambridge University Press, Ch. 1.

with which those punishments are administered by officials in that jurisdiction; and the flexibility or inflexibility of sentencing practices to attend or not to the particular features of a case.<sup>3</sup> Anglo-American systems are often said to be harsher along most measures than more progressive continental-European systems.<sup>4</sup> Further, some criminal justice systems allow people to opt for mediation, arbitration, victim restitution, and non-punitive restorative justice. Harsh punishments such as long-term imprisonment or, worse, solitary confinement tend also to generate distinctive moral problems related to slopping out, caging, sexual violence, disease, psychological trauma, and the cultivation of survival mechanisms.<sup>5</sup>

Of course, the credibility of our legal punishment institutions depends also on other factors, such as the level of collateral damage that these institutions can do to offenders' dependents as well as the gravity of any pre-existing social injustices whereby some people and communities who already disadvantaged are disproportionately affected by the punishment regime.

Given the problems of punishment regimes, we must confront some basic questions about whether we need to punish, and whether our forms of punishment are fit for purpose or should be replaced by alternatives. We will shape this Chapter around these issues, which can be captured by three questions about the general justification of legal punishment: a) Why punish?, b) Who may legitimately punish?, and c) Who may legitimately be punished, for what, and how much? We will see that the answers to these questions depend on the philosophical approach one takes to the overall justifiability of punishment.

## 2. Why punish?

In this section we look at the main routes by which theorists attempt to justify the practice of legal punishment. These are only *potential* justifications: that is to say, the conditions that theorists have put forward under which a society's intentional and authoritative infliction of hard treatment on human beings could be justified. We should be wary of accepting these considerations for two reasons. First, we should be aware of our tendency to be biased toward the *status quo*. Since we are familiar with the practice of punishment we may be inclined to conclude too quickly that it is necessary and defensible. Second, because the consequences of punishment are so drastic, we should pay particular attention to the validity of theorists' claims to have shown that practice to be morally acceptable.

We can begin by categorizing accounts of the justification of punishment as *forward-looking*, *backward-looking* or some combination of the two. Theories of punishment are either *pure*, and hence purely forward-looking or purely backward-looking, or else *hybrid*, in which case they contain some mixture of forward- and backward-looking justifications.

The forward-looking justifications comprise attempts to justify punishment by claiming that some future good is best realized (or made more likely) by punishing. The backward-looking accounts, by contrast, claim that there is something about the criminal or wrongful action itself, as we look back at it, that requires punishment as an appropriate response, regardless of whether punishment is the best available means

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<sup>3</sup> J. Q. Whitman (2005), *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*. Oxford University Press..

<sup>4</sup> N. Lacey, *The Prisoner's Dilemma: Political Economy and Punishment in Contemporary Democracies* (Cambridge: Cambridge University Press, 2008).

<sup>5</sup> R. A. Duff (2005), 'Punishment, Dignity, and Degradation', *The Oxford Journal of Legal Studies*, 25: 1, pp. 141-155.

to realize some future good. The crucial difference between the two types of accounts is that forward-looking justifications require evidence that punishment is the best available means to realize some desired end, whatever that end is, and backward-looking justifications require instead some argument that punishment is somehow inherently fitting as a response to crime or wrongdoing.

For instance, the claim that punishment is justified because it deters crime, and thereby reduces harm and makes people safer, is a forward-looking justification. To show that punishment would be justified in these terms, we would need to look at whether there are more effective and less harmful ways to increase people's safety than by punishment (such as pre-emptive measures like increasing policing, improving education, reducing social inequality, or becoming a less acquisitive society).

By contrast, the view that punishment is justified because wrongs done to one person need to be avenged on the perpetrator in like manner and extent (something like 'an eye for an eye') is a backward-looking justification since it relies on normative claims about the necessity and proper mode of avenging wrongdoing, rather than on empirical evidence about how likely it is that punishment will lead to some desired future state.

Backward-looking justifications might seem to have their own *end* in view, that is, their own forward-looking aim, which is to avenge the victim or to take revenge against the wrongdoer. The reason that such views are nonetheless well-characterized as *backward-looking* is that the wrong done is the essential reference point by which to determine what kind of punitive response is justified.

If we look more closely at forward-looking justifications, we can ask what kinds of important ends punishment could be thought to serve. We have already seen that one answer is deterrence and the contribution deterrence makes to security. This is in fact the overwhelmingly most popular answer – that punishment is necessary because of the contribution it makes to peace, security, and people's ability to plan their lives into the future without threat from those more powerful than themselves. Other related ends that are often identified are rehabilitation, education, reconciliation and forgiveness.

We can note a number of common criticisms of forward-looking theories. First of all, it is not normally thought to be legitimate to inflict suffering on people in order to further important social ends. Rather, people are thought to have stringent rights to non-interference and self-determination. If that were right, then we would need to show that, in order to be permissibly punished, someone would have to be shown to have lost or forfeited that right to non-interference or non-punishment. But, this means that forward-looking views would have to incorporate something backward-looking, showing why it is that those people who have committed certain wrongs thereby lose or forfeit their rights. This suggests that theories with a forward-looking element might have to be hybrid theories. Examples of such hybrid theories might be those that aim to model justified punishment on self- and other-defence, where there is likewise a claim that, in launching an unjustified attack on another person, one alters one's own moral immunity to an aggressive response.

Secondly, and leading on from this, it might be argued that, without a backward-looking element, forward-looking theories will be unable to explain why it is important to punish only the guilty. If, in some circumstance, the relevant valuable social end can be furthered most effectively by punishing an innocent person; and if it is the effective pursuit of that valuable social end that is sufficient to justify punishment, as the forward-looking views suggest, then the punishment of an

innocent person would be justified. However, given that we should reject this conclusion – surely the punishment of the innocent is unacceptable – the premises must be mistaken.

Thirdly, because, in the end, forward-looking justifications are hostage to empirical evidence about the effectiveness of punishment to achieve certain goals, as compared to alternative ways of bringing about those goals, there is always scope for criticism that the evidence shows otherwise. Although at some level it seems commonsensical to say that, if we threaten rational agents with a bad consequence if they decide to opt for some proscribed action, then that will reduce the likelihood of their doing that action, the evidence that punishment deters is actually very unclear.<sup>6</sup> Furthermore, as proponents of informal justice point out, a large number of criminalisable actions are never reported – perhaps far more than *are* reported – and are hence dealt with within communities and families without every formally being labelled as crimes. If this is true, it gives the lie to the view that the threat of punishment is necessary to maintain social order.

Turning now to criticisms of backward-looking justifications, as the label suggests, *backward-looking* justifications do not claim to bring about any future good, and for many people this is precisely their weakness.<sup>7</sup> These justifications seem to be suggesting that we make someone suffer – indeed, that we pour huge amounts of public money into maintaining expensive social institutions to make large numbers of often already disadvantaged people suffer – for no good end. For this reason, the backward-looking views are often portrayed as barbaric, as giving vent to a cruel or vindictive aspect of human nature that we should be looking to overcome, or as rooted in an outdated cosmology of good and evil, heaven and hell. To compound the problem, many think that these backward-looking justifications would only make sense if human beings had free will. After all, if human beings are not free to comply with moral standards for the reason that they are causally determined to act as they do, how can they be fairly punished for failing to comply?<sup>8</sup>

Nevertheless there are many who continue to see backward-looking justifications for punishment as having some resonance. The ways in which they have tried to articulate the backward-looking justification that punishment is an inherently fitting response to wrongdoing fall into three categories.

First of all, there are those who claim that there is an abstract moral principle according to which justice should be done against wrongdoers, in the name of those wronged – and specifically that doing justice requires punishment directed at the evil will of the wrongdoer in order to vindicate the victim.<sup>9</sup> While this route has the virtue of tying punishment to moral seriousness – upholding moral standards and showing concern for the rights and status of the victim as one to whom this should not have been done – the crucial thing is whether these views can really show that such moral

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<sup>6</sup> D. Nagin, 'Deterrence in the Twenty-First Century: A Review of the Evidence' at <http://repository.cmu.edu/cgi/viewcontent.cgi?article=1403&context=heinzworke>. Last accessed 2<sup>nd</sup> November 2015.

<sup>7</sup> V. Tadros (2011), *The Ends of Harm: The moral foundations of criminal law*. Oxford: Oxford University Press, ch. 1.

<sup>8</sup> N. Levy and M. McKenna (2009), 'Recent Work on Free Will and Moral Responsibility,' *Philosophy Compass* 4, pp. 96–133; B. Vilhauer (2013), 'Persons, Punishment, and Free Will Skepticism', *Philosophical Studies* 162, pp. 143–163.

<sup>9</sup> I. Kant (1991 [1797]), *The Metaphysics of Morals*, M. Gregor (trans.), New York: Cambridge University Press. Cf. R. Shafer-Landau, (1996), 'The Failure of Retributivism', *Philosophical Studies*, 82, pp. 289–316; and (2000), 'Retributivism and Desert', *Pacific Philosophical Quarterly*, 81, pp. 189–214.

seriousness requires punishment, and that an unwillingness to punish involves in some way condoning or acquiescing in the initial wrongdoing by failing to stand up for the victim.

Secondly, there are those who claim that punishment, or close analogues to punishment, are found in everyday interpersonal relations when we criticize, blame and get angry with one another, and generally hold one another to account for what we take to be important moral standards of behavior and concern.<sup>10</sup> Thus, it might be argued, we have firmly embedded intuitions that moral criticism, remorse and apologies are fitting responses to wrongs, not just when they are the most effective way to realize some future good, but, for backward-looking reasons, in order to acknowledge properly the seriousness of the wrong.<sup>11</sup> Yet these practices of accountability are rarely targeted as being cruel or barbaric. The critic might nevertheless argue that our practices of accountability *are* in fact unacceptable; or that formal types of punishment are too far removed from those practices to be justified by analogy with them.

Thirdly, there are those who take a specifically political route in attempting to make a backward-looking justification plausible. This would be the claim that punishment is necessary as part of political society: for instance, as part of the authority of the state to make law and to set boundaries to permissible actions. If there were no such thing as punishment to mark a violation of these boundaries, it might be said, the authority of the state would amount to nothing.<sup>12</sup> Therefore, the state needs a right to punish, on this type of view, not in order to vindicate the rights of the victim, but in order to vindicate its own rights as the agency that has the final say in how citizens are permitted to act.

### 3. Who Has the Right to Punish?

Some theorists argue that, in order to justify punishment, it is not enough to show that punishment either brings about some good, such as crime control, or responds appropriately to a wrong by imposing deserved censure. It is also necessary to show that the party who punishes has a right to punish the person she punishes. There are two aspects to such a right. First, something must be true of the party who is doing the punishing; it is not the case that just anyone can punish just any wrongdoer if they have the opportunity to do so. Second, something must be true of the person to be punished; as just noted, in general, people have a right against being used without their consent even if using them would bring about some good, because people have strong rights to self-determination/non-interference, and therefore the person to be punished must have lost or forfeited certain rights by their wrongdoing. We will focus on the necessary features of the punisher in the current section and on the necessary features of the punishee in Section 4.

Theorists who argue that the state and its relevantly placed officials have a right, indeed an *exclusive* right, to punish must respond to several objections. One such objection is that states are usually engaged in worse conduct than that for which they would seek to hold their citizens to account. If *tu quoque* arguments are credible,

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<sup>10</sup> See P. F. Strawson (1962), 'Freedom and Resentment', *Proceedings of the British Academy*, 48, pp. 187–211; T. M. Scanlon (2008), *Moral Dimensions: Permissibility, Meaning, Blame*, Cambridge, MA: Harvard University Press.

<sup>11</sup> C. Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge: Cambridge University Press, 2008).

<sup>12</sup> G. W. F. Hegel, *Philosophy of Right*, §101. See also H. Fingarette, 'Punishment and Suffering,' *Proceedings and Addresses of the American Philosophical Association* 50: 6 (1977), pp. 499–525.

then, on this argument, the state and its officers are not in a position to condemn people for doing some of what the state itself is doing.

A second objection is that the state and its officials lack the *standing* to punish.<sup>13</sup> The strongest version of this objection says that no human being or institution has the standing to punish another human being. In Herman Bianchi's words:

The very thought that one grown up human being should ever have a right, or duty, to punish another grown up human being is a gross moral indecency, and the phenomenon cannot stand up to any ethical test.<sup>14</sup>

In this kind of view, vengeance, retribution, and punitive threats, if they belong to anyone, properly belong to God alone, and therefore only God has the standing to condemn and punish people for their conduct. A less radical version of the objection states that vengeance can properly belong to human beings, but it belongs to victims and their affiliates, not to the state, and therefore only victims have a right to punish the people who wrong them. Victims could delegate that right to a third-party such as the state, but they need not do so. A third version of the objection challenges the victim's exclusive right to punish while still denying that the state has the exclusive right. This view holds that *everyone* has a natural executive right to punish people for wrongdoing. Here, 'everyone' includes the state, but the state is not the only party with the right to call people to account for criminal wrongdoing within its jurisdiction.<sup>15</sup>

Some responses to these objections are voluntaristic, and some are non-voluntaristic. The theorists who give a voluntaristic argument for the state's exclusive right to punish either root that right in people's explicit or implicit contractual arrangements with the state, which transfer to it the rights they would naturally have to punish each other for wrongdoing, or, less contentiously, root that right in citizens' on-going democratic endorsement of the state's punishment practices.<sup>16</sup>

Theorists who give a non-voluntaristic explanation root the state's exclusive right to punish in the public goods that are derived from the state having an exclusive right. Some argue that the state must have an exclusive right to punish because only that arrangement maintains the link between the state's judgment that some action is wrong and the appropriateness of the state inflicting a certain sanction and mode of suffering on an offender.<sup>17</sup> Others focus on the state's relative effectiveness and truth-seeking ability in criminal justice matters. They claim that formal, institutional processes and procedures are, under certain conditions, more reliable than private exercises of judgement, and, for that reason, both criminal justice officials and ordinary citizens should follow the rules of legal punishment even when, on occasion,

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<sup>13</sup> Cf. R. A. Duff (2006), *Answering for Crime*. Oxford: Hart; and J. Gardner (2003), 'The Mark of Responsibility', *Oxford Journal of Legal Studies*, 23, pp. 157-71.

<sup>14</sup> H. Bianchi (1994), 'Abolition: Assensus and Sanctuary', *A Reader on Punishment*. R. A. Duff and D. Garland (eds.), Oxford University Press, ch. 15. See also H. Bianchi (1994), *Justice as Sanctuary: Toward a New System of Crime Control*, Indiana University Press.

<sup>15</sup> For a defence of this Lockean view, see C. H. Wellman (forthcoming), *Rights Forfeiture and Punishment*. Oxford: Oxford University Press, ch 3.

<sup>16</sup> Cf. R. Dagger (2010-11), 'Social Contracts, Fair Play, and the Justifications of Punishment' in *Ohio State Journal of Criminal Law*, 8, pp. 341-368.

<sup>17</sup> A. Harel (2008), 'Why Only the State May Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions', *Legal Theory*, 14, pp. 113-133.

the institutional criminal justice process arrives at the wrong conclusion.<sup>18</sup>

A more general account of the state's exclusive right to punish is rooted in the distinctive aims of legal punishment, which include, as discussed above, 1) retributive justice, 2) general deterrence, 3) moral education, 4) the expression of certain societal values, 5) the restoration of victims, and 6) the release of socially-disruptive tensions. The most notable aim, some argue, is deterrence: circumstances would deteriorate rapidly if the state did not insert itself with these six aims and, particularly, the aim of deterring.<sup>19</sup>

Of course, even if the state were to achieve these aims *best*, that would not automatically give it an exclusive right to punish. What gives it that right, some argue, is the *importance* of the aims in question. That is, given the grave risks and high stakes for both people and society, criminal justice and punishment are from other political issues and this explains why the state's right to respond must prevail over individuals' rights to answer certain wrongs done to them.<sup>20</sup>

That said, we could make a similar claim about childrearing, that it is fundamentally important to get it right since the stakes are high and the risks are grave. Would this justify allocating childrearing rights exclusively to those people who are best placed to rear children well, which often may not be the biological parents? Surely not. A redistributive childrearing scheme is highly counterintuitive. Therefore, by analogy, we may question whether *importance* is sufficient to give the (legitimate) state an exclusive right to punish.

Moreover, even if states are best-placed, in principle, to achieve the important aims of punishment, they do not necessarily achieve those aims best or well through the kinds of punishment practices that they currently use, especially in Anglo-American systems where punishment is practised in harsh ways that include, in addition to fines and community service, public shaming, incarceration, mandatory minimum sentences, life sentences, life sentences without parole, and, in some jurisdictions, solitary confinement, severe physical strain, and execution. These are the practices that are openly acknowledged to be part of the legal punishment regime. With them comes a host of incidental, accidental, careless, and unacknowledged burdens that seem to be part of doing punitive business. First, punitive practices often deny people the freedom to pursue and maintain an ordinary family life as well as rights to care for others, to have privacy, and to exercise a meaningful degree of associative control. Second, in consequence, punitive practices harm offenders' dependents and associates by severing their social bonds. Third, practices often stigmatise, blame, shame, and dehumanise offenders; label them for life as *crooks*, *jailbirds*, and *criminals*; expose them to the risks of disease, injury, violence, and sexual abuse; use them as a means for cheap or free labour; and deny them personal control, respect, and self-respect.

Although some theorists, and politicians, view burdens such as stigmatisation and comprehensive rights-forfeiture as core aspects of legitimate punishment,<sup>21</sup> many theorists wish to see punishment practised in humane ways. The benefits that harsh measures purport to achieve could possibly be approximated, achieved, or optimised

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<sup>18</sup> D. Estlund (2007), 'On Following Orders in an Unjust War', *Journal of Political Philosophy* 15, pp. 213–34.

<sup>19</sup> Wellman, *Rights-Forfeiture*, ch. 3.

<sup>20</sup> Wellman, *Rights-Forfeiture*, ch. 3.

<sup>21</sup> C. W. Morris (1991), 'Punishment and Loss of Moral Standing', *Canadian Journal of Philosophy*, 21, pp. 53–79. See also D. Kahan (1996), 'What Do Alternative Sanctions Mean?' *University of Chicago Law Review* 63, pp. 591–653.



through more humane measures.<sup>22</sup> More modest punishment practices or non-punitive institutions, such as mediation, arbitration, education, health, housing and work, might secure these aims better than our present punishment practices. Most thinkers also recognise that, possibly, the purported benefits of any form of punitive hard treatment could be less important than other benefits that we could secure by prioritising other objectives.

Additional, more general questions about the state's standing to punish include the following: Could *any* state assert an exclusive right to punish or must it satisfy certain criteria of democratic, liberal legitimate authority and normative power to enact criminal law? Must its criminal law coincide to a reasonable degree with objectively correct moral standards? Must it serve all of its citizens equally well, giving them a genuinely good chance, at least, of avoiding breaching the law? Must it punish fairly and equitably? Theorists who wish to defend the use of punishment as it is practised in societies like ours must explain why a state need not meet all of these criteria, since few if any real states do.

#### **4. Who may legitimately be punished, for what, and how much?**

The second condition on the state's right to punish pertains to features of the person to be punished. Even if the state has an exclusive right to punish, that does not entail a right to punish all people who do criminal wrong and can be punished for it. Theorists of punishment must answer several questions, such as: Who is liable to punishment? What should the conditions of culpability be? Can we be punished for actions only, or also emotions and thought? Can we be punished for acts (*actus reus*) alone, or only with accompanying mental states (*mens rea*)?<sup>23</sup>

The answers to these questions will be different depending on what we think are the ends at which punishment properly aims. On a purely forward-looking crime control model such as the deterrence view, a punishment being an efficient way of reducing crime is a sufficient condition of justification. But this seems to mean that there is no requirement of individual culpability. Little or even no degree of culpability might be compatible with liability to punishment: it depends on what is most efficient. That is why the forward-looking view is compatible with strict liability (*actus reus* only), or even, as we saw above, with the punishment of the innocent (i.e. not even the *actus reus*). The reasons for thinking that individual culpability, with the familiar pattern of excuses, is necessary would be empirical reasons, namely, that restricting punishment to a certain construction of individual culpability best serves crime reduction aims. This might be the case, for instance, if, following Jeremy Bentham, we take it that people who commit crimes unintentionally are less likely to be dangerous, and therefore less in need of deterrence, than those who commit them intentionally.

By contrast, on a backward-looking view that sees individual wrongdoing as *ceteris paribus* sufficient to justify punishment, it is also a necessary condition of punishment being justified that the individual have done (moral) wrong. So fault of some kind is necessary and the liability cannot be strict. On this view, the action has to manifest some form of ill will or moral failing in the agent – disrespect for the law or disrespect for moral standards, or for the interests of the victims of the action – in order for it to be the case that justice requires punishment. This in turn requires some type of freedom of will – for the action must really represent the person's will and not

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<sup>22</sup> For the view that societies that have more modest punishment systems also tend to have lower levels of crime and recidivism, see Whitman, *Harsh Justice*.

<sup>23</sup> [CROSS-REF to Holton chapter?]

simply be the effect of an accident, a mental illness, or justifiable ignorance, all of which are compatible with the agent's orientation to the relevant moral standards being impeccable. There is room for a range of views here regarding what it means for the agent's action to represent their attitudes, and what kinds of impairments we should accept in overlooking some of an agent's attitudes as being products more of circumstance than their own 'deep self.'<sup>24</sup> At present, the key point is that the justification of backward-looking punishment requires some conception of moral responsibility that provide those conditions of agency that have to be met for punishment to be an inherently fitting response.

There are two types of hybrid theories that we can quickly note. The first is principally a forward-looking view, but one that acknowledges moral values other than the imperative to maximise overall social good. For instance, if there were deontological constraints of some sort that rule out treating individuals as a mere means to an end then it might be that offenders would have to be morally culpable before it can become permissible to use their punishment to deter others. This combination of moral responsibility with forward-looking aims is characteristic of 'negative retributivism' – the view that individual wrongdoing makes a person liable to punishment, but denies that such punishment is inherently fitting; if there is to be punishment, it must only be because it serves forward-looking ends to do so. The second view is based on H. L. A. Hart's position in his classic paper, 'Legal Responsibility and Excuses'.<sup>25</sup> Here the idea is that individual culpability is important, not because retributive desert is important, but rather because it allows a basically forward-looking crime control institution to make room for individual freedom by ensuring that the individual has some control over whether they are liable to punishment. Hart argues that the significance of non-strict liability conditions – which effectively require some voluntary action in order to incur liability – is that they mean that one must act voluntarily to incur liability, and hence retain freedom to avoid punishment. If liability is strict one cannot determine what might happen that will incur a risk of punishment, and Hart saw such a prospect as an unjustifiable restriction on individual freedom. Hart's model therefore supports non-strict liability without agreeing with the retributivist claim that through wrongdoing a person inherently changes their moral liability to be harmed.

To be plausible, the above models must be reconciled with various intuitions about liability to punishment. For instance, there is a commonsense intuition that young children, people with severe cognitive impairments, and people who have committed no crime are not liable to punishment. There is also a settled range of justifications and excuses such as self-defence, provocation/loss of control, duress and so on.

There is another commonsense intuition that people who repent, apologise, and seek to make amends for their wrongdoing prior to being punished should not be viewed in the same light as people who are unrepentant about their wrongdoing. If severity of a wrong can be lessened through repentance and repair, and if punishments are meant to track the general aims that purport to justify them, then oftentimes we should punish repentant offenders less than otherwise, if at all, since most of the declared aims of punishment will have been achieved prior to punishing them.

Another intuition that many have is that people who live in criminogenic conditions – such as persecution or poverty or environments where violence among

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<sup>24</sup> S. Wolf, (1993), *Freedom within Reason*. Oxford: Oxford University Press.

<sup>25</sup> H. L. A. Hart (2008 [1958]), *Punishment and Responsibility*. Oxford: Oxford University Press.

young males is the norm – due to distributive or structural injustice and who are more likely to commit crimes as a result of that, are less culpable than offenders who have committed the same crimes but did not inhabit the same conditions and, hence, the former should be deemed less liable to punishment.<sup>26</sup>

As we said at the outset of this section, views of liability dovetail with views of the overall purpose of punishment. One way to adjudicate among the various forward- and backward-looking views of punishment is to ask which gives the most plausible answer to the question of what would justify punishment. But also relevant is its corollary view on the conditions of liability. For instance, if we have the intuition that remorse or criminogenic upbringing is relevant to reducing liability, could this be because, as it happens, punishing such people is less likely to reduce crime? Or is it simply a firm intuition that such people deserve less punishment because their actions do not show such flagrant disregard of morality as they would have shown if they had been performed in the absence of remorse or criminogenic upbringing?

## 5. Alternatives to Punishment

We end this chapter by looking at alternatives to punishment. Although we have followed the contours of traditional ethical debates about punishment by looking at *how* rather than *whether* punishment can be justified, we would like to make it clear that it is very much a live question whether it can be. This is a possibility that tends to be overlooked. Even though philosophers will often say that their attempts to justify punishment build it in as a structural presupposition that such attempts may fail, far more intellectual effort is spent on justifying punishment than in coming up with realistic alternatives.

For this reason, there is nothing like the same well-versed literature on alternatives to punishment. However, we would like to set out the argumentative strategies that are open to abolitionists, and what they would need to show in order to make a success of their case. Some who reject punishment and its alternatives might do so because they think that punishment could never be justified, at least not for beings like us. Whereas for others, it might be that punishment is unjustified because of the way society and its particular forms of punishment are – though this might change. This latter, less radical, view might be compared to what is called ‘contingent pacifism’ – the view that pacifism is required, not because the use of lethal force in self-defence is always unjustified, but rather because the realities of modern warfare mean that there is no way of realistically discriminating between innocent and non-innocent, or simply repelling an unjustified attack. Related to punishment, this ‘contingent abolitionism’ might be the view that, given the prison-industrial complex and the nexus between democratic politics and law and order, there is no realistic way in which punishment could be carried out in a justifiable manner in our societies.

How would one go about arguing for the stronger conclusion that punishment is in principle unjustified? The arguments for alternatives to punishment tend to mirror the attempted justifications that we have looked at in previous sections. As we have seen, in order for a particular act of state punishment to be justified, it would have to be the case that punishment serves an important aim, and that there are no better, less harmful ways to serve that aim; that the agency carrying out the punishment has the right to do so; and that the capacities of the agent to be punished are such as to make the punishment fair or deserved or otherwise justified. These

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<sup>26</sup> V. Tadros (2009), ‘Poverty and Criminal Responsibility’, *Journal of Value Inquiry*, 43, pp. 391-413.

conditions are each necessary and jointly sufficient. This means that a proponent of alternatives to punishment need only show that the case for punishment is vulnerable on any one of these grounds in order to show that some alternative is called for.

Are the vivid measures of punishment really necessary for societies like ours to convey effectively that certain behaviours are prohibited and that the people who engage in them must undertake to repent, apologise, and restore relations? Or, are there other equally credible or more credible mechanisms for restoring and repairing wrongs, such as victim restitution? Additionally, are there less costly mechanisms by which to influence and guide people's behaviour than through the threat of punishment?

Some possibilities that theorists are currently exploring include nudging, social pressure, status, and cultural norms.<sup>27</sup> Such social influences can affect how we view the demands of the law because the demandingness of a norm, rule, or law is not a fixed quantity. It is elastic and depends greatly on our circumstances, or what psychologists call *situationism*.<sup>28</sup> We tend to want what the people around us want and have. Hence, the demandingness of following the law, or of apologising and remedying a wrong when we breach the law, can diminish for us when our surrounding infrastructure, habituation, and concerns about status all support law-abidance. In short, if we can change relevant social norms and attitudes about the law, we can make it less demanding to follow the law.

Attending to our situated position generates a response to theorists who argue that blame and resentment are natural and appropriate responses to wrongful behaviour. If these responses are natural (that is to say, typical) and appropriate, they are not the only responses that are natural and appropriate. Compassion, forgiveness, kindness, and mercy are also natural and appropriate responses to wrongdoing, especially when we remember that we are all fallible, predictably irrational human beings who are likely to respond in aggressive, acquisitive, or self-protective ways when confronted with certain kinds of stresses. To appreciate the appropriateness of compassionate responses, we would need to adjust our social norms surrounding crime and punishment.

In our present society, such an adjustment would amount to something of a moral revolution. But, moral revolutions can happen, and sometimes can happen quickly. As Kwame Anthony Appiah observes, within a generation, China gave up the practice of foot-binding and English gentlemen gave up duelling as a way to defend their honour. In both cases, the societies in question came to care about how the practices made them look. Foot-binding came to be viewed as a stain on the national honour of China. Duelling came to seem ridiculous to aristocrats as a way to defend their honour.<sup>29</sup> A similar moral revolution might be possible in our responses to criminal wrongdoing if we came to view our contemporary practices as dishonorable. Such a revolution could take various forms. One option is that we do away with everything associated with punishment. As previously noted, some communities, including some legal jurisdictions, have adopted non-punitive,

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<sup>27</sup> See, for example, R. T. Thaler, and C. R. Sunstein (2008). *Nudge: Important decisions about health, wealth and happiness*. New Haven: Yale University Press.

<sup>28</sup> Lichtenberg, Judith (2014), *Distant Strangers: Ethics, Psychology, and Global Poverty*. Cambridge: Cambridge University Press, p. 122ff.

<sup>29</sup> K. A. Appiah (2011), *Honor Code: How Moral Revolutions Happen*. Norton.

restorative responses such as healing rituals, victim-offender mediation, restorative probation, and family group conferences.<sup>30</sup>

Another option is to try to find institutional forms of punishment that better do justice to the spirit of those responses to wrongdoing that we find important in ordinary interpersonal relationships, such as educating, airing legitimate grievances, restoring relations, and improving cooperation and cohesion. Measures that might support these aims best are formal condemnation without punitive hard treatment, compulsory victim restitution, sanctuary, and community service. In moving toward such approaches, we might nonetheless have to retain a set of harsher measures with which to respond to ‘dangerous’ offenders for whom preventive detention will be necessary; whether such detention would be a punishment or not depends, in part, on our intentions. A related alternative is to do away with criminal justice altogether and replace it with a combination of private law measures and mediation, retaining a small preventive detention resource for deployment against the relatively small number of persistent offenders who cannot be expected to ‘go straight’ once they leave their early twenties.

### **Conclusion**

In this chapter, we have surveyed the main considerations that are identified as legitimate aims pursued through the criminal justice system. These include deterrence, incapacitation, reform, retribution, victim-restoration, security, moral education, the expression of certain societal values, and the release of disruptive tensions. We have noted some of the key objections against forward-looking and backward-looking accounts of the justification of punishment. We have also identified specific conditions that both the punisher and the punishee must satisfy in order for punishment to be legitimate.

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<sup>30</sup> J. Braithwaite (2002), ‘Repentance Rituals and Restorative Justice,’ *Journal of Political Philosophy*, 8, pp. 115–31.