Theories of Crime and Punishment

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Abstract and Keywords

This chapter examines the central issues for the justification of criminalization and punishment in the context of criminal law. Specifically, it considers whether there is a class of acts (or omissions) that warrants the use of the label of crime as appropriate. It initially discusses what kind of theory is suitable for grasping and grounding criminalization and punishment, focusing on three types of theory: ideal, situated, and political constructivist. Attention then turns to the central questions to be answered by theories of crime and punishment: what a crime is, what it means to be responsible for a crime, why it is necessary to respond to crime, who may respond to crime, how to respond to crime. Ideas such as retributivism, *lex talionis*, utilitarianism, and consequentialism are highlighted. The chapter also looks at some influential ways in which the justification of criminalization and punishment has been addressed in post-Enlightenment, occidental thought.

Keywords: criminalization, punishment, criminal law, crime, ideal theory, situated theory, political constructivist theory, retributivism, lex talionis, utilitarianism

I. Introduction to Theories of Crime and Punishment

*THE aim of this chapter is to separate as clearly as possible the central issues pertaining to the justification of criminalization and punishment and to indicate some influential ways in which the question has been addressed in post-Enlightenment, occidental thought. Its scope is therefore quite broad in that it tries to organize a vast terrain of ideas and yet narrow in that it does not examine the history of punitive practices or the deep genealogy of ideas on criminalization and punishment.

The chapter will begin with the methodological question of what kind of theory is suitable for grasping and grounding criminalization and punishment. It will then go on to single out the central questions that theories of crime and punishment must answer: What is a crime? What does it mean to be responsible for a crime? Why respond to crime? Who may

respond to crime? How should one respond to crime? The chapter will not defend any substantive theory of crime and punishment. However, it will, at the very least, suggest that the answer to all these questions cannot be piecemeal as if the criminal law were a special case and somehow (p. 356) isolated from the rest of the legal system. A theory of crime and punishment must form part of a comprehensive theory of the state and its institutional structure in a way that is sensitive to actual practices in a political community.

II. What Kind of "Theory"?

The debate regarding the appropriate vantage point, from which to think about the justification of criminalization and punishment, has recently intensified.[1] This methodological meta-question is of some significance so I will begin by considering three types of theory, the differences between which revolve mainly around the relationship between context-independent reasons for action and empirically identifiable facts.

1. Ideal theory

Many take a top-down approach. They think that it is possible to work out some principles on the basis of values, which apply to all and at all times irrespective of the historical context with all its empirical complications. Let us call this type of theory *ideal* for the sake of brevity and to highlight the priority of context-independent principles over fact or belief.[2]

To start from the abstract and move down to the empirical is not to say that such principles are not sensitive to facts in the world—they will of course have to be applied to such facts and application will inevitably generate a number of problems on a number of levels. For instance, say we accept it as a matter of true general principle that causing harm to others is wrongful (and therefore at least prima facie eligible for criminalization). Still, the harm principle cannot determine by itself (p. 357) whether a particular act counts as harmful. There is no ideal theorist, who would deny such difficulties of interpretation and application. The question is framed differently, namely as pertaining to the priority between theoretical standpoints. According to ideal theory, the locus of application of ideal principles has no bearing on the latter's justification or content. We can make normative sense of facts, that is, we can know what the right thing to do in the real world is, only if we already have some normative standards, which are true independently of experience.

Ideal theories are more often than not moral. This has at least three central implications. First, they hold these higher level principles to pertain to our relations to each other, to how we ought to treat each other as persons, that is, in our manifestation as moral agents, with the respect that each of us deserves as members of humanity. Secondly, ideal theories hold the community to be morally constituted. Some ideal theories of crime and punishment form part of comprehensive moral theories of the community. Others simply extrapolate from interpersonal norms, which, writ large, are held to be capable of governing the relationships of communities of people. Thirdly, ideal theories consider the real setting of the people, whose lives they purport to govern, their beliefs, and the actual

ways in which they interact with each other, to be of secondary significance. They regard moral principles as universally binding and true either as a matter of fact-independent truth or as a matter of the correct exercise of our reason and, in any case, independently of our beliefs and experience. So, ideal theory's way of dealing with disagreement about value is to idealize the normative perspective of the moral agent and separate it from the real circumstances and beliefs of the criminal law's addressees. An implication of this is that theories of this sort do not have an in-built way of resolving actual controversy about their foundational assumptions. They stand and fall on the success of these assumptions. Absent any compelling reason for accepting the theory's foundations, one has no reason to accept its conclusions either.

There is one last but very important point about ideal theory. As already mentioned, some versions of it are parts of comprehensive theories, which place the criminal law within a general framework of justification of legal institutions. Very often, however, ideal theory tends to treat the criminal law as an autonomous domain and its justification as dissociated from the justification of the rest of the institutional structure. The conditions of legitimacy of the criminal law are treated as purely moral and not as a part of a wider scheme of relations between people. This strategy of regarding the criminal law as autonomous has at least two upshots. First, many non-comprehensive ideal theorists will think that there are good reasons for holding an act to be wrong, and therefore at least prima facie eligible for punishment, even if social relations are not politically organized and constituted. Or, to put it differently, reasons for criminalizing and punishing are constitutive of the reasons for having a relevant legal framework rather than the other way around. Secondly, reasons for criminalization, the conditions of criminal responsibility, and reasons for punishing are assumed not to be affected in a direct and necessary way (p. 358) by the justice or injustice of the rest of a legal system. For example, an ideal theorist might think that there are strong reasons for which to hold violations of property rights as wrongful and for punishing such violations even if the pattern of distribution of property rights is grossly unjust. In this sense, the criminal law is held to be the paradigmatic domain of application of general rational principles to situated agents, it is the ideal type of law.[3]

2. Situated theory

The world is not as tidy as ideal theories would wish it to be. Institutional arrangements cannot be rationalized so as to cohere with one meta-principle or with a set of consistent and coherent principles. To mention but one typical example, most (including most ideal theorists) would agree that one may be held criminally responsible for a wrongful act only if one displays a certain mindset, for example one must have intended to bring about a result or have been reckless about the result coming about. However, most jurisdictions are fraught with offenses, which have no such requirement (the so-called "strict liability" offenses).[4]

Such inconsistencies prompt many theorists to think about the criminal law in an alternative way, which does not accentuate unity and coherence of ideal principle but rather the reality of institutional set-up. Let us call this kind of theory "situated theory" to empha-

size that it is anchored to actual practices and that it moves from that level to the higher level of generalized statements about the criminal law.

Situated theorists take issue with the fact that ideal theory fails to account for the way that institutions have in fact developed and readily jettisons as irrelevant or unjustifiable sizeable chunks of the criminal law, because they do not neatly fit into ideal schemes of principle. Situated theorists also consider this inability as symptomatic of a deeper problem with ideal theory, namely its failure to appreciate the salience of real practices to the grounding of the criminal law. Situated theory therefore urges us to pay closer attention to such practices and use them as a guideline to make sense of the criminal law.[5]

But what kind of sense of the criminal law will empirical knowledge help us to make? And which data of experience are salient? One possibility is that a clearer understanding of institutional facts will allow us to make the most of the critical potential of ideal theory. Whereas the latter singles out the universal standards, which our criminal law practices must meet, situated theory elucidates the meaning (p. 359) of our actual, complex, and interdependent practices and the reasons animating them. Both these tasks are necessary but neither is sufficient in itself. Now, if this is the case, the dispute seems to focus mainly on the diagnostic ability of ideal theory and its ability to interpret facts in light of values. And this also entails a critique of ideal theory on the question of the autonomy of the criminal law in relation to the rest of the institutional structure of which it forms part.

It is true that a great deal of ideal theory neglects or often altogether disregards the complexity of facts, especially institutional facts, which help to shape the relations, which the criminal law aspires to govern. It often regards criminal law doctrine as nothing but perfect reflections of the moral relations between idealized agents independently of their real setting. Situated theory, on the other hand, views the person-bearer of criminal responsibility not as an abstraction but as a participant in a complex scheme of institutional relations, which immanently constitute her personhood. These institutional facts have a direct and necessary impact on the reasons determining the way in which the criminal law ought to treat people. In other words, whereas for ideal theory agents in criminal law are stripped of any characteristic other than some universal and immutable ones, for situated theory they are institutionally—and, for some, in other ways too—shaped in a relevant way.

To this extent, situated theory's objection seems plausible. It seems incomplete to assume, like many ideal theorists do, that the conception of persons and their relations relevant to the justification of criminal law practices is an ideal one with institutional conditions being simple add-ons. It is also incorrect to assume that the meaning of our practices, and especially institutional ones, somehow hits us in the face and therefore that the reasons backing institutional practices are immediately visible without the need for inquiry of the type that situated theory engages in. Situated theory is right to point out that this is not so, that institutional normative meaning is much more complex than ideal theory would assume.

Important as this critique may be, however, it seems not to target the central claim of ideal theory. Adapting the context of application of ideal theory in a way that is more attuned to the complexities of institutional structures is useful and indeed necessary but it does not cancel out the distinctive part that ideal theory aspires to play. In light of the knowledge provided by situated theory, we can go on to ask whether our practices satisfy general principles, which we have worked out independently of experience, and adapt them accordingly.

Many proponents of situated theory might be unhappy with this division of theoretical labor. Their objection with ideal normative theory might reach much further. The claim is possibly that the institutional set-up in all its historical particularity is more deeply and directly salient to the very question of the *grounds* of our practices of criminalization and punishment.[6] **(p. 360)**

One possible reading of it might be that, contrary to the hopes of ideal theorists, justification of complex institutions is simply never possible from the perspective of agents employing a priori reasons. At best, a theorist may be able to record the intrasystemic development of institutions as the outcome of power relations, available technologies, historically contingent choices, and so forth. This can only be achieved, situated theorists might emphasize, by taking account of a wider range of relevant facts so as to place the criminal law in a wider nexus of social relations, both institutional and extra-institutional, and by enlisting to that end the help of speculative social sciences such as history, political economy, sociology, etc. We may thus be in a position to form a framework to help us to understand the causes of our practices of criminalization and punishment. Within this framework we may factor in agents' beliefs and choices but these can only form a small and contingent part of a complex scheme of determining factors, over which agents do not exercise any control.

So the claim may be that not only does ideal normative theory not tell us everything there is to know about crime and punishment but in fact it can tell us nothing meaningful, let alone useful, about our practices of holding people responsible in a certain way and at a given time and space. Theory is then nothing but the admission and recording of the radical limitations of our ability to control our normative practices with the use of reasons. In other words, the argument altogether rejects as an illusion the normative perspective of reason-giving participants in the system of criminal law, in a way that runs counter to our self-understanding and our intuitions about how we exercise our judgment in relation to the world.

This is clearly an extremely ambitious argument and much can be said about it but we will focus on one point. To argue consistently that what we generally perceive as practical decisions pertaining to the *ought* are in reality nothing but the outcome of systemic causal reactions—of which our psychological attitudes to certain facts in the world are only a part—one must be able to show that the selection of the relevant facts purportedly explaining legal practices is itself normatively inert, that is, independent of any prior normative framework of reasons determining the direction of inquiry. This begs the question

why some facts are singled out over others as determining the development of our normative practices. For example, an increasing number of scholars think about criminalization and punishment in political economic terms trying to trace the parallel development of punitive practices and modern capitalism in their interconnectedness.[7] Why, then, is it that the political economic standpoint enjoys priority over the vast range of available such (p. 361) perspectives? Why should we hold economic facts as pertaining so directly and centrally to our practices of holding people criminally responsible and punishing them as a response?

The answer might be that our theories are always tentative because we lack the epistemic resources to construct a perfect, fully comprehensive explanatory scheme of our practices as determined by various facts over which we exercise no control. But until such a perfect theory is devised—and it is highly questionable whether it is even possible but this cannot be discussed here—the criteria of selection seem inescapably normative in nature. Situated theory takes the participant, normative, reason-giving perspective—even if we are deluded that such a perspective is genuine—very much in the way of ideal theory but with two differences: first, situated theory expands the relevant context so as to encompass reasons from elsewhere in the institutional (and social) structure. It is on this basis that it is able to criticize ideal theory, and rightly so, as misreading our normative practices by focusing exclusively on one normative domain. Secondly, and precisely because of its aversion to ideal theory, it is very often reluctant to spell out the standards, which support its critical project. To return to the previous example, what political economic theories of criminalization and punishment really do is to place these practices into a wider matrix not of facts but reasons, which are determined by a specific conception of the good, the relative worth of people, and so on. This is already valuable as a critique of certain types of ideal theory, which disregard the deeper and wider normative structure supporting the criminal law. But there is also an implicit argument there that elucidating the true nature of institutional reasons for criminalizing and punishing can be valuable as a critique of these practices as animated by these reasons. For this project to be completed one would have to turn to ideal theory, that is, one would have to work out reasons, which enjoy priority over facts, or at least *most* facts. I say most facts, because there may be a way of reconciling the two positions of ideal and situated theory. To this I turn in the next section.

3. Political constructivist theory

This is the bind in which we find ourselves after the previous two sections: either we work out a priori reasons regarding criminalization and punishment, which we then go on to apply to facts in the world, or we concentrate on facts and dismiss the possibility of assuming the participant, normative perspective altogether.

But there may still be a way of reconciling the two positions. There may be a way of thinking of some facts in the world as having normative significance and as capable of forming at least the first stage of construction of normative theory. This time, however, theory is not premised on context-independent truth but on the reflective grasp and unraveling of

the normative perspective of real, situated agents who share certain normative attitudes. This is the initial premise of *constructivism* (p. 362) in meta-ethics generally[8] but what we have in mind here is a specific kind of constructivism, which is particularly pertinent to the grounding of criminalization and punishment, namely *political constructivism*.[9]

Political constructivism regards as arbitrary the selection of a certain conception of the abstract reasoning agent independently of, and often despite, the self-understanding of the *actual* people, whose behavior the law claims to be governing. Now, an ideal theorist might object that, if we are confident that our overarching principles are true, there is no reason why actual beliefs in the community should be taken into account at all. The answer to this objection lies in the characteristics of large, complex, differentiated, modern societies, which display a distinct mode of integration. Such societies are marked by a pluralism of beliefs regarding the good life—beliefs which are often irreconcilable with each other and the conflicts between which cannot be settled from within any one of the belief systems. In other words, no moral system of beliefs can claim objectivity and immunity from reasonable contestation and we can never have the epistemic confidence that one model of morality is superior to its reasonable competitors. Accordingly, members of modern societies do not recognize each other on the basis of a shared set of conceptions of the good, as was—or still is—the case in pre-modern societies. Social relations are mediated by political institutions, in which people participate in a distinct capacity of theirs, their capacity as citizens, as members of a political, rather than a moral, community. So, enforcing one such conception of the good would be unjustified to those whose actions it is meant to guide but also unstable in the long run. Therefore, political constructivism is concerned with the justification of political institutions *as* political institutions, that is as a free-standing domain of social relations.

Political constructivism uses as the first step in the construction of the grounds of the law the basic terms on which citizens in modern societies regard themselves and others in their *public* manifestations as citizens, as members of the political community. Some thinkers in this post-metaphysical tradition start from the specifically political conception of the person embedded in current political institutions in democratic societies.[10] Others build the normative constitution of the political community on the basis of the character of social relations in the modern public sphere.[11] Either way, what is distinctive is that political constructivist theory (p. 363) proceeds from a certain conception of personhood that draws on the actual experience of the political community.

Political constructivism therefore occupies the middle ground between ideal and situated theory and arguably resolves the central tension between them. It takes into account certain facts about our societies, facts which are not morally thick but are not normatively inert either. They are not thick in that they do not enforce any specific conception of the good and they do not have action-guiding force without further ado. And they are not normatively inert, because they have certain upshots for the normative terms of social cooperation.

This points to political constructivism's related claim that these foundational assumptions about a certain state of affairs serving as the first step in the process of the construction of an institutional order are uncontroversial. The members of the political community *already* participate in a certain form of social cooperation. Therefore, to the extent that they accept this (and they could not reasonably deny it, because it is a presupposition of their actual practices) they also already necessarily accept its presupposed premises. Therefore, all principles that follow from that empirically observable foundation are already acceptable—though not necessarily actually accepted—and one can only reject them at the risk of self-contradiction.

But not everything is justified counterfactually and in the absence of those whose lives are governed by the law. This would be inconsistent on the part of political constructivism, the purpose of which is to reconcile actual ethical pluralism within the constitution of the political community. It is only the outer framework of the institutional structure that will be determined philosophically (i.e. independently of the empirical context) while its greatest part will have to be justified against the backdrop of this plurality of beliefs. Different theorists think about this in different ways and we cannot go into the details here but the important point for our purposes is that the justification of the law and, of course, the criminal law in particular, must be anchored to a consensus in the political community. Consensus does not mean some sort of majoritarian rule over the minority but rather a general agreement on reasons that all can accept on the basis of fair democratic representation of all beliefs.

This type of thinking about the justification of the state and its institutional structure has important ramifications for the criminal law. Crucially, criminalization and punishment cease to be distinct, self-standing practices dissociated from the rest of the legal system. They form an integral part of their institutional setting. Therefore, their justification depends necessarily on the justification of the rest of the institutional structure. There are two aspects to this. First, should the institutional structure not be adequately justified on the basis outlined previously, then the state is not authorized to mete out punishment because no genuine duties on the part of citizens are established. Secondly, particular criminal law-based duties are shaped in complete interdependence with the overall way in which social relations are legally regulated. Whereas much of ideal theory necessarily compartmentalizes (p. 364) various contexts of social interaction and holds different areas of law as mirroring these contexts, political constructivism treats such compartmentalization as wholly contingent on the way that relations *actually* develop and in light of the most effective ways of governing them in light of the framework requirements of justice. For example, if, say, property relations are adequately governed though different means, contract or tort and so forth, there may be nothing that necessitates the criminalization of violations of property rights. Thus, the requirement of coherence between institutional practices (and not only rules within the doctrine of criminal law) is established.

Through this strategy of bracketing the criminal law as political in that very specific sense and as concerning a particular manifestation of the personhood of citizens, political constructivism arguably deals with a number of problems that no one, single ideal theory

is able to. To list a few such points: it accounts for the exclusive authority of the state to punish as the expression of the collective; it can justify the selective, albeit consistent, criminalization of certain acts but not others, whereas ideal theory which regards the criminal law as necessary cannot do so consistently; the flip-side of this is that it can also justify the criminalization of acts which are not intuitively morally wrong, that is, it can justify what is often called the regulatory function of the criminal law; it takes seriously empirical facts about our societies while still providing philosophical normative guidelines, which can help us practically to organize this knowledge. And, of course, it addresses the shortcomings of situated theory by reconciling the perspective of the reason-giving agent with the perspective of the observer of facts in a community.

Naturally, there is a range of objections that could be raised against a political constructivist justification of the criminal law. One such forceful objection is that it runs counter to most people's intuitions regarding wrongdoing. There is something awkward, the objection goes, about thinking of acts such as murder, rape, and assault not as serious moral wrongs but rather as disruptions of the smooth running of a contingent institutional structure. A corollary of this is the objection that political constructivism leaves decisions regarding such profoundly controversial issues to a political dialogue, which will be more easily manipulated and yield skewed results rather than lead to some consensus regarding criminalization and punishment.

These are difficult objections to respond to but let me attempt to outline the beginning of a response. First, political constructivism does not require citizens to forsake their moral beliefs. However, it does require them to show reasonable regard for others when the question is which norms are to apply to everyone within the political community. Now, this may of course be put to the test, because not everyone may be motivated by reasonableness in this sense. There are at least two safety mechanisms. First, certain citizens' duties will not be put to such tests of public dialogue, because they will already follow from the philosophically worked out normative foundations of the political community. For example, violations of others' (p. 365) bodily, sexual, and psychological integrity more than deprive the victim of some good; they signify a rejection of the victim as a member of the political community. One is therefore under a duty to forbear from such acts of violence because not doing so would amount to a self-contradictory refutation of the normative framework of the political community.

It is, however, true that anything short of this will be more controversial. Political constructivism relies a great deal on the hope that citizens within a well-grounded and just state will be able not only to recognize their political duties but also to be motivated by that recognition. It expects citizens with no complaints against the state to understand why acts, which they may consider punishable, are not punished or the other way around. And it also expects citizens to build their political duties within the structure of norms, which govern their lives. This balance between motivation and external obligation may indeed pose a problem for political constructivism. But in this context we can only note it rather than discuss it in any depth or detail.

III. The Justification of Crime And Punishment

1. What is crime?

The question should probably be reformulated in a more detailed manner: is there a class of acts (or omissions), which are distinguished from other acts in a way that is of special concern to the whole of the relevant community and warrants the use of the label of crime as appropriate? If so, what exactly is the *differentia specifica* of this class of acts?[12]

The point of putting the question in such an abstract way is to avoid prejudicing the answer and to acknowledge the profound disagreements as to what crime is and what the appropriate response to it is. To illustrate the range of this disagreement: some consider criminalization to be a necessary institution while others regard it as altogether unjustifiable;[13] some think that a theory of crime should (p. 366) try to accommodate some of our shared intuitions, whether they be institutionally entrenched or not, whereas others are overtly and fully revisionist; some believe that the concept of crime has some immutable transcendental properties the content of which is waiting to be discovered by us while others see it only as politically constructed and pertaining to our character as citizens; some are not squeamish about extending the scope of the criminal law whereas others set tight restrictions to its range.[14]

There is, however, one thing on which most would agree and this is that crime involves some *wrongful* conduct, which is *public* in nature, that is, it is somehow of concern not only to the actor and the immediate victim but also the community at large.[15]

The question of wrongfulness is addressed in more detail elsewhere in this Handbook so in this context it suffices broadly to distinguish between two general approaches to the question of wrongfulness (approaches which are unsurprisingly marked by a great deal of internal variation and disagreement): liberal and moralist.[16]

The standard liberal position is that all the members of a political community ought to be allowed to decide how to live their lives in any way they choose and consider fulfilling. The purpose of the state is largely to provide the framework within which individuals may pursue happiness as autonomous individuals. The state is therefore generally not justified to demand of citizens to act in a certain way; it is only authorized to mark the outer boundaries of citizens' freedom. And any transgression of these boundaries on the part of citizens counts as wrongful and as prima facie eligible for criminalization.

The question, then, is what these outer boundaries of liberty are. The view with arguably the greatest currency in criminal law theory as well as criminal law doctrine in various jurisdictions is that one's liberty meets its limits at the point of causing harm.[17] The "harm principle" generally requires that action does not constitute an unjustified interference with the comfort or interests of the other, which would leave the other worse off. Again, this basic position does not preclude disagreement on the details. For example, one may hold that harm is a necessary condition of specifically criminal wrongfulness (therefore

wrongfulness being nothing but harmfulness). Others believe that, whereas harm is normally required for an act (p. 367) to count as wrongful, this is not always the case. For example, some hold that certain instances of causing offense to others (say, by ridiculing their religious beliefs) are equally wrongful.[18] Or one might think that posing the risk of harm is already wrongful even if no harm in fact is caused (this is a commonly used justification for the criminalization of attempts).

Not all liberals subscribe to the harm principle as the decisive condition of wrongfulness. Some think that the harm principle sets the threshold too high. For example, thinkers in the republican tradition shift the focus from harm to the duties to which we are subject by virtue of our membership of the political community and the institutional structure that frames it.[19] Although refraining from harming others will be one of those duties, it will not be the only one. All duties stemming from the politically determined institutional structure will be of the same kind and therefore prima facie eligible for regulation through the criminal law.[20] What is also distinctive of this approach is that the grounds of wrongfulness are now necessarily social. Although allowing individuals the space in which they can exercise their free choices is still a concern, it is no longer the focal point, because individual freedom presupposes a scheme of social cooperation, which determines normative relations.

The liberal groundwork of these approaches to wrongfulness also already accounts for the *public* nature of crimes. Acts which harm or interfere with the independence of others and so forth are wrongful in a publicly, and therefore legally, relevant way because they interfere with others in their particular capacity as members of the political community. Liberal theories draw a sharp—though not always entirely clear-cut—distinction between the political and the social/associational with only the former falling within the remit of the criminal law.

The central liberal premise that wrongdoing is relative to the space of freedom of others is not shared by conceptions of wrongfulness, which we can roughly group together as moralist. Moralists generally hold that we are under certain duties, which are prior to and independent of our joint membership of political communities in the sense that they are not determined by but rather determine the reasons animating our political associations and their form. The option is therefore available to moralism to enforce a specific conception of the good thus circumscribing people's positive freedom at least by limiting the range of options available to them. Thus, our failure to abide by our moral duties is wrongful independently of whether it has an impact on others. Depending on the moral scheme on which they rely, moralist theories of crime would therefore not hesitate to include in the category of (p. 368) crime acts or courses of conduct, which liberals would generally consider exempted from the coercive powers of the state, such as sexual preferences or the recreational use of drugs.[21] Nevertheless, most moralists would espouse the liberal view that for an act to be criminal it must have some external impact on the world. They therefore generally steer clear from considering mere thoughts as being the proper object of criminalization.

The moralist conception of crime diverges from the liberal one regarding the question of publicity on the same grounds. Whereas liberal theories of crime normatively bracket off the political, moralist theories reject this distinction and consider the bond of the community to be moral. This means that the community is constituted by a set of duties (and corresponding rights), which preexist it, rather than the other way around.

2. What does it mean to be responsible for a crime?

If one thinks that criminalization presupposes some external impact, then one is more likely than not to also think that criminalization also presupposes acting. For an act to be wrong, it does not suffice that it brings about a result or that it is in violation of a certain duty. It must also be *someone's* act. It is impossible even to speak of authorless wrongs. Natural disasters, for example, may have a horrendous impact on people's lives but calling them wrongful is to overstretch our linguistic intuitions.

The question of criminal responsibility refers to the conditions under which an act or a result can be attributed to a particular person as an offense. It is therefore a two-pronged question. First, how can an act *simpliciter* be attributed to an actor? When, for example, can we say that it is A's actions rather than something else, which caused bodily harm to B? Secondly, under which conditions is one blameworthy? To use the same example, when can we say that A is to be held responsible for wrongfully causing bodily harm to B?

The question of mere attributability is generally treated as partly subjective and partly objective. It is subjective in that for one to have genuinely acted one must have exercised a certain degree of control over one's actions. So, if A is pushed, loses control of her body, and crashes through a window, we would not be able meaningfully to say that the window broke as a result of A's action. This is a rather pared down requirement of subjectivity in that the actor's attitude refers only to the intention of the actor to act in a certain way rather than not to bring about the wrongful (p. 369) result as such or, to put it more generally as not all criminal wrongs are result-based, to give her action the meaning of the wrongful act.

The objective leg of the attributability question presents us with greater difficulty in result-based crimes, where the stake is to draw a connection between acts and events in the world. Most regard this as an issue of causation. The sort of question typically asked here is "did A's injecting B with a noxious substance causally contribute to B's death to a sufficient degree"? Some believe that there are robust metaphysical or scientific principles allowing us to determine causal links.[22] However, on many occasions most people would intuit that one is responsible for an event in the world despite the absence of any causal link. We might think, for example, that one is responsible for failing to act in circumstances in which an unwanted event has occurred. Such cases prompt some thinkers not to give up on causation as a desert base but to rethink it. Instead of regarding it as a question of metaphysics or science, they turn to our common sense understanding of connections between events in the world.[23] In this way, they also draw distinctions between causal contributions of varying degrees, distinctions which have a bearing on the actor's

criminal responsibility. This take on causation seems implicitly to conflate the question of attributability of an event with that of an actor's substantive responsibility for the event coming about. Others merge these two explicitly. In the case of omissions, for example, they believe that the event is attributable to the actor to the extent that the latter was under a duty to act even though there can be no causal link between the failure to act and the event.

Most would agree that whether one is blameworthy is to be judged in relation to one's attitude toward one's act but what kind of attitude this must be is contested.[24] One approach to it, indeed one adopted by many jurisdictions, is cognitive. The actor is held to be blameworthy to the extent that she knows and appreciates to a sufficient degree the implications of her acts. So, for example, one will be blamed for the death of another if one has caused the death with an act which she knew or could foresee would result in the other's death. The stronger the cognitive connection of the actor to the act, the stronger the case for blameworthiness. So, if A believes that his stabbing B will cause B's death, then A is held to have intended to kill B and his blameworthiness is therefore stronger. If, however, A does not have such a direct belief, his foresight of the likely outcomes of his acts will suffice for him to be held to be reckless and therefore blameworthy, albeit to a lesser degree than if he had intended the result. And, of course, if one is not in a position to be fully aware of the meaning of one's actions, for instance because of mental illness, then one is either altogether exempted from criminal responsibility or one is held responsible to a lesser degree. **(p. 370)**

What is important to note about this approach to blameworthiness is that it is generally not sensitive to the actor's moral disposition toward her acts. As long as the actor has the requisite ability and mindset to realize the meaning and possible implications of her actions, whether she morally endorses (for some, whether she wants or welcomes) the result of her actions is largely irrelevant in ascertaining her prima facie culpability. The threshold of criminal responsibility is therefore lower. For example, rightful ulterior motives will generally not make a difference to one's responsibility.[25] This approach also implies a certain division of moral labor between the state and citizens. It is based on the assumption that the moral demerit of an act has already been determined by the state and that individuals do not have the moral discretion to hierarchize between goods.

But, and although this is generally the position in law, there is also a strong argument that it is precisely that kind of moral attitude that one should be attentive to when judging one's blameworthiness. Some try to see this moral stance as part and parcel of the actor's character as developed throughout her life and link criminal responsibility with agency and the expression of bad character.[26] If we fail to show regard to one's moral dispositions, the argument goes, then we will also fail to capture the nuances of acting for different reasons. For example, one might argue that it is one thing to foresee that another will die as a result of your actions and be morally indifferent to that, even though you may not intend it, than it is to foresee the other's death and regret that eventuality.

The moral circumstances of the act may, however, have an external impact, even if one subscribes to a cognitive understanding of culpability. One might hold that the baseline of criminal responsibility is determined by the actor's cognitive disposition and at the same time accept that there may nevertheless be concurrent facts of moral salience, which condition that disposition. There may, for example, be facts, which affected the actor's reasoning ability in the circumstances. Typical such examples would be acting on having been provoked by another or in defense of one's life or the life of another.[27]

One important point should be highlighted here, which connects to the earlier methodological discussion. Whichever tack one takes on the question of criminal responsibility, one presupposes a certain conception of the acting person and her reflective and reasoning faculties. Some hold that this conception of the characteristics of the person is context-independent and therefore unaffected, at least in all its salient respects, by the setting in which it is manifested. (p. 371) Others, however, believe that viewing the person as an abstraction fails to pay sufficient attention to the complexities and the differences generated by the actual context, institutional and otherwise, in which the criminal law finds its addressees.

Take the example of acting in self-defense. One's view on whether and how exactly acting in self-defense justifies exculpation will depend on whether one views the conception of the person relevant to the criminal law as constituted through its relations with others or not. To explain, say that one regards the person as bearer of certain features, which do not depend on the person's social environment and in particular her relations with others. In that case, one might regard the acts of others, which give rise to the claim to self-defense, as events wholly external to the actor. Consequently, what the threshold of, say, what the justified perception of threat is will be set accordingly. But if one considers that the relevant conception of the person is social or political and therefore constituted by relations with others, then the expectations that the criminal law will have of us as to the trust we should display to each other will be determined differently.

3. Responding to crime

One would be very hard-pressed to find real criminal justice systems built around a single and coherent justification of punishment. Take as an example the Criminal Justice Act 2003 in England and Wales which, in section 142, lists a variety of purposes of punishment: (a) the punishment of offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public; (e) the making of reparation by offenders to persons affected by their offenses. Many of these aims seem to be at odds with each other, first, because they cannot all be fully pursued at the same time. We cannot, for example, punish only for the sake of punishing *and* only to rehabilitate offenders. Secondly, it is not clear at all to which cases each of these rationales should apply. For example, which offenders should be treated so as to protect the public and which ones should we aim to reform?

Nevertheless, some analytical distinctions can be and have been drawn between various justifications of punishment and they can help us to organize our thinking about our punitive practices.

Many people might think that neither can there be punishment without crime nor crime without punishment. But, on more careful thought, it is not clear at all that there is a necessary, two-way link between the two. Even if we manage to reach an agreement on what properly qualifies as a crime, we still have no compelling reasons to agree as to whether we ought somehow to respond to crime, let alone that the appropriate response is punishment. The matter of the response to crime is analytically separate and entails four central questions: Why do wrongful acts warrant (p. 372) a response? Who is to respond? How ought one to respond to crime generally? How ought one to respond to particular instances of crime?

Some hold that the criminal wrongdoing itself already justifies a response. They think that the fact that someone has committed a crime is in itself a sufficient reason for taking some accountability-holding measure, because wrongdoers deserve to be held accountable, precisely for committing a wrong of a certain kind. The views that converge in that point are generally classified as *retributivist*.[28]

Some retributivists might believe that the desert thesis suffices as a comprehensive justification of punishment. This, however, does not seem to be the case. For retributivism to answer all the other relevant questions that a theory of punishment must address, it must employ more than the desert thesis. First of all, to argue that certain types of wrongdoing are deserving of a distinctive response, one must have a corresponding theory of criminal wrongdoing, which differentiates crimes from other types of wrongs (such as, say, tortious ones). In other words, one must have a theory of why certain wrongful acts deserve punishment while others do not. And such a theory must avoid the circularity of grounding desert on desert, that is, claiming that crime is what deserves to be punished while simultaneously arguing that certain types of wrongs ought to be punished, because they are distinctive in a separate way. At the same time, retributivist theory regarding wrongdoing, and criminal responsibility too, must be of the same *character* as the desert claim, namely it must be experience-independent. For example, a theory of wrongdoing on the basis of the unwanted consequences of the wrongful act is not available to retributivists.

A second difficult point that retributivism must grapple with is what exactly it is that the wrongdoer deserves. Some believe that the right response is punishment in its standard understanding of depriving the wrongdoer of certain rights, liberties, facilities, resources, and benefits which she otherwise would have been able and entitled to enjoy, a deprivation which most people would consider an unpleasant state of affairs. (Note here that what counts as punishment is generally regarded as an objective matter rather than as relative to the attitudes of the punished.[29]) Some might even believe that the distribution of penalties, too, is determined by the wrongdoing. However, such connections of equivalence between wrongdoing and punishment are notoriously difficult to draw. The difficulty lies in that contingently developed punitive technologies (situated theories of punish-

ment very convincingly show that such practices are historically conditioned) are being represented as necessary normative (p. 373) consequences of wrongdoing, which is so defined independently of any empirical fact.

One possible way for retributivists to overcome this difficulty is to argue that it is not exclusively punishment in its current understanding that is deserved by the wrongdoer but suffering generally. This time the claim is that the wrongdoer deserves to be treated harshly, because she or he has caused some unpleasant consequence in an impermissible way. This way of linking crime and punishment appeals more plausibly to the intuition of *lex talionis*: you caused suffering, therefore you deserve to suffer for it.

For example, in Kantian thought the wrongdoer is held to have unilaterally, therefore unwarrantedly, imposed her will upon others. In doing so, she not only violates the rights of others but also undermines the law, which has exclusive authority heteronomously to impose constraints to how people may act on their choices. A response to crime is normatively *required* to restore the rightful balance, which the wrongdoer upset with her action. And the response must be the imposition of suffering to the wrongdoer, because this turns the latter's own choices against her.[30] According to a similar argument, this time influenced by Hegel, the wrong that the wrongdoer has committed can only be annulled by turning it against the wrongdoer in the form of imposition of suffering.[31]

Focusing on suffering rather than punishment in the narrower sense begins to address the problem identified earlier but it does not do so fully and it also creates new problems. First, it seems that retributivism still cannot escape relying on ungrounded intuitions when making the transition between crime and punishment or suffering. It is telling that it so frequently relies on metaphors of "undoing" or "eradicating" the wrong or restoring the normative standing or the wrongdoer vis-à-vis her victims and others. Attempts have been made to address the vagueness that so often undermines the retributivist thesis. Some, for example, focus on the expressive function of punishment and believe that it forcefully communicates that the wrongdoer has unjustifiedly upset the normative relations with the victim.[32] Others think of imposing suffering in retribution as canceling out the unfair advantage that the wrongdoer has gained.[33] These alternatives may face difficulties of their own (e.g. thinking of wrongs such as murder or rape in terms of "gaining unfair advantage" seems rather odd) but they do begin to give a more plausible account of the link between wrongdoing and suffering. (p. 374)

Secondly, the new problem created is that the strict retributivist thesis must be either watered down by placing weight on the consequences of punishment or by resorting to other reasons outside its pedigree to specify the suffering that the wrongdoer deserves. This relates to the kind of suffering (should it be incarceration? a fine?), the independent amount of suffering (how long a sentence? how hefty a fine?), and the amount of suffering in relation to that imposed for other wrongs (should a murderer be imprisoned for a term longer than a thief?). It does not seem possible that these questions can be answered on the basis of the pure retributivist thesis alone.[34]

Similarly, even if we agreed that the response to wrongdoing is a matter of desert and, indeed, that the response ought to be suffering or punishment narrowly conceived, this still does not tell us why anyone else *may* make the wrongdoer suffer.[35] The retributivist thesis will need to be complemented by an argument authorizing or compelling others to impose punishment. The more austere versions of retributivism, such as the Kantian one briefly outlined previously, try to address this by employing the same kind of metaphors that they use to ground desert: something would be amiss and the moral balance in the community would be upset, if wrongdoers remained unpunished. Therefore, others (who these others may be will be discussed later in this section) are under a *duty* to respond to criminal wrongdoing by imposing suffering.

The philosophical tradition customarily juxtaposed to retributivism is consequentialism.[36] Whereas for retributivism punishment can only be justified in relation to the past wrong, consequentialism in punishment, like in all other domains, is forward-looking in that it grounds punitive practices on an evaluation of their results. A consequentialist may therefore attach no independent value to punishment; she may consider it a practice that we may or may not have (unless one evaluates consequences in terms of their intrinsic value). Consequentialism must therefore place punishment in a wider web of practices, in order to ascertain whether it is indeed the best possible way of addressing whichever problems need to be addressed. In other words, it needs to be part of a comprehensive theory that transcends the narrower boundaries of punishment. Quite evidently consequentialism also does not necessarily link punishment to wrongdoing, that is, it does not follow analytically from the barest formulation of the consequentialist thesis itself that punishment must necessarily come only as a response to wrongdoing. **(p. 375)**

Arguably the most typical and influential example of consequentialist thinking is utilitarianism, for which an act is justified to the extent that it maintains the appropriate balance of welfare.[37] Responding to wrongdoing is therefore justified to the extent that it maximizes happiness and minimizes pain. But how may general felicity be maximized through punishment? The most common answers to the question, both in theory and in actual criminal justice practice, are deterrence, and rehabilitation (or reform). Deterrence is said to be directly achieved either by incapacitating the offender altogether or by giving the wrongdoer a strong disincentive not to reoffend. The basic idea is that, once one has been subjected to the hard treatment of punishment in a way that cancels out the value of one's wrong, it is only rational and prudent for one not to repeat the same or any other punishable wrong. And the aggregate of happiness in the community will be greater if fewer offenses are committed. This aim of individual deterrence is accompanied by general deterrence. The idea here is that punishment will have an impact not only on the punished but also on the public at large, who will witness the punishment and the disvalue of offending and therefore be prevented from committing the same or a different offense.[38] Obviously, these basic ideas of deterrence rely on a range of assumptions: that people, offenders and the public at large alike, are rationally motivated, that the surrounding social circumstances allow them to exercise their rational faculties to the requisite degree, and so on. The deterrence thesis must therefore necessarily form part of a comprehensive scheme of management of people's incentives. But, interestingly, this may lead to the

refutation of the deterrence thesis itself because it may be the case that, all things considered, the utility of tolerating a certain amount of crime is greater than its opposite.

Rehabilitation fell from favor toward the end of the twentieth century but seems to be enjoying increasing popularity again. Not many people would argue anymore that offenders are somehow defective and have to be treated for them to overcome their criminal tendencies.[39] Indeed, it is hard to see how rehabilitation in that sense can ever be an aim of punishment, given that punishment presupposes that the person punished is responsible and aware of the meaning of his or her suffering. In its contemporary conception, rehabilitation targets the structural and personal factors that may have contributed to the offense. This is achieved by training offenders and facilitating their reintroduction and integration in the community. Once again, note that this has much wider implications. This type of rehabilitation which targets the so-called "causes of crime" must be part of a wider (p. 376) web of policies of non-coercive prevention of crime, that is, prevention through institutions and practices which will ensure that people will not have compelling incentives to offend in the first place.

The objection most frequently leveled against utilitarianism in particular and consequentialism generally is that it disregards the value of each individual human being, precisely because it dissociates punishment from any sense of desert. If wrongdoing ceases to be a necessary condition for punishment, then there seems to be nothing stopping us from punishing too severely for minor offenses, punishing the undeserving, or, worse even, punishing the altogether innocent. The problem in this is that it is impermissible to use others solely (we will all inevitably use others instrumentally to *some* extent) as a means to ends, which they have not set for themselves. Using others in that way is to fail to show due respect to them as persons.

One possible retort is that the insufficient respect critique draws a caricature of the utilitarian pleasure/pain calculus. Utilitarianism, the argument would go, is much more sensitive to the implications of punishing the innocent or meting out disproportionate sanctions. And in the real world, especially now that everything may be put to close scrutiny by civil society at all times, punishing the undeserving or the innocent or meting out punishments disproportionate to the wrong.

One could insist that this is simply to keep one's fingers crossed. It still does not convincingly respond to the objection that there is nothing in the pedigree of utilitarianism to protect people from undeserved punishment. Now why should this perturb a utilitarian, who prioritizes happiness in numbers over the happiness of concrete individuals? One could argue that there is a contradiction in this. Utilitarianism's concern with maximizing statistical happiness already implies a concern with the happiness of individuals. Although it may not be possible to satisfy all preferences, all preferences will be taken into account. Actively depriving the innocent of their freedom of choice by punishing them is altogether to disregard their preferences and their chance at achieving happiness.

According to a more modest kind of retributivism which incorporates consequentialist considerations, wrongdoing does not *necessitate* a response but it is the only justification of it.[40] The most convincing way of making this argument is by considering wrongdoing as the violation of certain duties, which are justifiable to their bearers. The question then is what being under a duty entails. At the very least, and independently of whether duties correspond to rights, it seems to be part of the concept of a duty that it gives the person to whom the duty is owed the right to hold accountable the party which violated the duty. Seen from a different angle, the violation of a duty is a necessary requirement of punishment. For a response to be made, it must be a response to someone's specific act, which was in violation (p. 377) of a duty. This eliminates the risk of punishing those who have done no wrong, a risk inherent in utilitarianism. The difference of this type of retributivism to the stricter type outlined earlier is that there is nothing in the basic justification of holding wrongdoers accountable to determine *how* a wrongdoer may be held accountable. The type of the response will have to be determined in a way unconnected to the justification of the response or the wrongdoing. Most in this tradition would justify the response in utilitarian terms with a view to maximizing the effectiveness of responding to wrongdoing in terms of reassuring the citizens, maintaining stability, and so forth. Clearly, there is a residual risk in this of the same kind that utilitarianism entails. If punishment as an accountability-seeking measure, its type, and amount are determined in terms of their consequences alone, then it is still possible to instrumentalize offenders. The only way of avoiding this is by placing the justification of punishment within a general scheme of justification of public norms, which includes everyone on which public norms may have an impact. This may be done by democratic deliberation or on the basis of rationality and reciprocity but, at the very least, punishment must be justified in a way that is acceptable by all participants in the political community.

The final distinct question has to do with *who* is authorized to punish. But theories of punishment also need to engage with urgent practical issues in the real world so the question must be put more specifically: why is the *state* authorized to punish? Some try to extrapolate the justification of the authority of the state to punish from conceptions of one-to-one, interpersonal moral relations. For instance, some regard state punishment as justified by the impact that the wrongdoing may have on a wider range of people (some regard it to be a form of collective self-defense) or on the basis of the relationships of the victim with others (e.g. a moral duty to rescue). There are, however, various problems with this approach. First, it tries to ground the involvement of the community and the state in punishment on wrongdoing but it inescapably assumes that agents are placed within normative relational frameworks, which are prior to and not constituted by the wrongdoing. Secondly, it offers a rather one-sided account of the state, which is much more than the bearer of the authority to punish.

So it seems that to be able to justify why the state is authorized to punish, let alone that its authority is exclusive, one needs a theory which will account for the distinctly public character of certain instances of wrongdoing and, on this basis, proceed to ground the authority of the state to hold wrongdoers accountable. Such a theory of punishment must form a coherent part of a comprehensive theory of the state and its institutions.[41] This

may be done in a variety of ways. One might, for example, consider our normative relations as constituted exclusively within the political normative framework that is the state and therefore regard crime and (p. 378) punishment as specifically political categories (note that this coheres with various justifications of punishment generally). Alternatively, one may be a utilitarian and believe that the state is authorized to punish because this is the most appropriate way of pursuing the good consequences, which justify punishment generally. One may think of crime as the violation of certain duties Either way, the important point is that a comprehensive theory of the state as authorized to mediate between us in our normative relations must take precedence.

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Notes:

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(1) See characteristically the editors' introduction in R. A. Duff and Stuart Green (eds.), *Philosophical Foundations of Criminal Law* (2011). This methodological debate has been rife in general legal theory for a long time, although the focus there is slightly different. See indicatively, John Finnis, "Law and What I Truly Should Decide," (2003) 48 *American Journal of Jurisprudence* 107 ff.; Ronald Dworkin, "Hart's Postscript and the Character of Legal Philosophy," (2004) 24 *OJLS* 1 ff.; Andrei Marmor, "Legal Positivism: Still Descriptive and Morally Neutral," (2006) 26 *OJLS* 683 ff.

(2) There is, of course, a variety of views as to how these agent- and context-independent principles are grounded. Some are moral realists (see e.g. Michael S. Moore, *Placing Blame: A Theory of the Criminal Law* (1997)), others ground the law and punitive practices on a correct construction of reason (Kant's theory of punishment is of that sort; see Immanuel Kant, *Groundwork of the Metaphysics of Morals* (transl. Mary Gregor, 1997)), others are intuitionists and so forth.

(3) For a critique of this view of the criminal law from a Marxist perspective, see Evgeny Pashukanis, *Law and Marxism: A General Theory* (transl. Barbara Einhorn, 1978).

(4) For a critique of criminal law and criminal law theory on these grounds, see Alan Norrie, *Crime, Reason and History* (2001).

(5) For a defense of situated method, see Nicola Lacey, "Institutionalising Responsibility: Implications for Jurisprudence," (2013) 4 *Jurisprudence* 1, 1 ff.

(6) This can arguably be traced back to the influential thought of Michel Foucault. See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (transl. Alan Sheridan, 1979). For an account of how punishment mutually interacts with a wider network of social practices but also for a critical account of the way in which various influential social theorists have made sense of punishment, see David Garland, *Punishment and Modern Society: A Study in Social Theory* (1991).

(7) See e.g. Loïc Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (2009) and Nicola Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008).

(8) See among others T. M. Scanlon, *What we Owe to Each Other* (1998).

(9) An example of a constructivist theory specifically of crime and punishment is Matt Matravers, *Justice and Punishment: The Rationale of Coercion* (2000).

(10) John Rawls, *Political Liberalism* (1993). For a reconstruction of a broadly Rawlsian outline of a theory of crime and punishment, see Emmanuel Melissaris, "Toward a Political Theory of Criminal Law: A Critical Rawlsian Account," (2012) 15 *New Crim. LR* 122 ff.

(11) Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (transl. William Rehg, 1996).

(12) For such an abstract philosophical account of crime, see Grant Lamond, "What is a Crime?," (2007) 27 *OJLS* 609 ff.

(13) For a variety of arguments skeptical of punitive practices from various perspectives, see Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* (1939); Louk Hulsman, "Critical Criminology and the Concept of Crime," (1986) 10 *Contemporary Crises* 63 ff.; Nils Christie, "Conflicts as Property," (1977) 17 *British Journal of Criminology* 1 ff.; Hyman Gross, *Crime and Punishment: A Concise Moral Critique* (2012); Deirdre Golash, *The Case Against Punishment* (2005).

(14) See e.g. Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008).

(15) On the public nature of criminal wrongs, see Markus D. Dubber, "Criminal Law Between Public and Private Law," in R. A. Duff et al. (eds.), *The Boundaries of the Criminal Law* (2010).

(16) This standard terminology should not confuse us. That some approaches to crime are labeled as "liberal" does not imply that moralist theories are somehow anti-liberty. The difference between them revolves around the conception of liberty, which they entail, and the placement of liberty in the overall normative scheme.

(17) The standard formulation of the harm principle goes back to J. S. Mill, *On Liberty* (1859). See also Joel Feinberg, *Harm to Others* (1984).

(18) Joel Feinberg, *Offense to Others* (1985); A. P. Simester and Andrew von Hirsch (eds.), *Incivilities: Regulating Offensive Behaviour* (2006).

(19) For a republican, anti-domination theory of punishment, see John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (1990).

(20) See e.g. a Kant-inspired account along these lines, Arthur Ripstein, "Beyond the Harm Principle," (2006) 34 *Philosophy and Public Affairs* 215 ff.

(21) Arguably the most characteristic, though perhaps not the most sophisticated, example of a moralist theory of crime in terms of the enforcement of purportedly shared moral convictions in the community is Patrick Devlin, *The Enforcement of Morals* (1965). Lord Devlin was, of course, engaged with H. L. A. Hart in a debate over this, triggered by the question of decriminalization of homosexuality in England and Wales in the 1950s. See H. L. A. Hart, *Law, Liberty and Morality* (1963).

(22) See Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (2009).

(23) See H. L. A. Hart and Tony Honoré, *Causation in the Law* (2nd ed., 1985).

(24) See Winnie Chan and A. P. Simester, “Four Functions of Mens Rea,” (2011) 70 *Cambridge LJ* 381 ff.

(25) There are, however, strong arguments that it should. See indicatively Douglas Husak, “Motive and Criminal Liability,” (1989) 8 *Criminal Justice Ethics* 3 ff.; Victor Tadros, “Wrongdoing and Motivation,” in Victor Tadros (ed.), *The Ends of Harm: The Moral Foundations of Criminal Law* (2011).

(26) For a recent account of criminal responsibility on the basis of character, see Victor Tadros, *Criminal Responsibility* (2005).

(27) See Jeremy Horder, *Excusing Crime* (2004); John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007).

(28) Retributivism can be a broad church. See John Cottingham, “Varieties of Retribution,” (1979) 29 *Philosophical Quarterly* 238 ff.; Nigel Walker, “Even More Varieties of Retribution,” (1999) 4 *Philosophy* 595 ff.

(29) For a suggestion as to how we should speak about punishment, see Antony Flew, “The Justification of Punishment,” (1954) 29 *Philosophy* 291 ff.

(30) B. Sharon Byrd, “Kant’s Theory of Punishment: Deterrence in its Threat, Retribution in its Execution,” (1989) 8 *Law & Philosophy* 151 ff.

(31) Georg Hegel, *Philosophy of Right* (transl. T. M. Knox, 1952).

(32) R. A. Duff, *Punishment, Communication, and Community* (2001); Jean Hampton, “The Moral Education Theory of Punishment,” (1984) 13 *Philosophy & Public Affairs* 208 ff.

(33) Michael Davis, “Criminal Desert and Unfair Advantage: What’s the Connection?,” (1993) 12 *Law & Philosophy* 133 ff.

(34) For a defense to this kind of objection, see Jeffrie G. Murphy, “Three Mistakes about Retributivism,” (1971) 31 *Analysis* 166 ff.

(35) For this and more objections to retributivism, see David Dolinko, “Three Mistakes of Retributivism,” (1992) 39 *UCLA LR* 1623 ff.

(36) Some think that the distinction is no longer representative of how people think about punishment. See Mitchell N. Berman, “Two Kinds of Retributivism,” in R. A. Duff and Stuart Green (eds.), *Philosophical Foundations of Criminal Law* (2011).

(37) Utilitarianism in punishment is traced back to the thought of Jeremy Bentham. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (ed. J. H. Burns and H. L. A. Hart, 1970).

(38) Daniel M. Farrell, “The Justification of Deterrence,” (1985) 94 *Philosophical Review* 367 ff.

(39) This way of thinking about crime in the modern era goes back to Cesare Beccaria. See Cesare Beccaria, *An Essay on Crimes and Punishments. By the Marquis Beccaria of Milan; With a Commentary by M. de Voltaire* ([1764] 1872).

(40) H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968); John Rawls, "Two Concepts of Rules," (1955) 64 *Philosophical Review* 3 ff.

(41) Michael Philips, "The Justification of Punishment and the Justification of Political Authority," (1986) 5 *Law & Philosophy* 393 ff.

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