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Injustice and the right to punish

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Abstract

Injustice can undermine the standing states have to blame criminal offenders, and this raises a difficulty for a range of punishment theories that depend on a state's moral authority. When a state lacks the moral authority that flows from political legitimacy, its right to punish criminal law-breakers cannot depend on a systematic claim about the legitimacy of the law. Instead, an unjust state is permitted to punish only criminal acts whose wrongness is established directly by morality, and only when criminal guilt is established through legal procedures that meet minimal standards of fairness. These restrictions narrow the proper scope of criminal law and invalidate popular rationales for punishment that construe punishment as blame.

1 | A MORAL DILEMMA FOR UNJUST STATES

Legal punishment is the application of sanctions for an offense against the criminal law.[1] The conditions under which punishment is morally permissible or required have received much philosophical attention, and the main positions on the justification of punishment—retributivism and its consequentialist rivals, as well as positions that mix them—are familiar to most philosophers.[2] Yet less attention has been paid to the background assumptions that should be in play when we theorize punishment. Should we ask whether punishment is permissible or desirable when the state is legitimate, the crime punished is universally recognized as criminally wrongful, and the offender freely chose to break the law? Or should we assume that one or several of these circumstances do not obtain? The choice matters, because while punishment might be permissible in an ideal society, it could well be impermissible in imperfect societies such as ours.

Drawing on such observations, philosophers have increasingly started to investigate punishment from a "non-ideal" perspective.[3] Our aim in this paper is to present and discuss a prominent question that belongs to this line of inquiry: the permissibility of punishment in unjust states. We will understand an unjust state to be a state which significantly flouts important duties it has towards the members of society, for example, failing to secure minimally just socio-economic opportunities or to protect basic rights. Our question is whether, and if so how, a state's being unjust affects its right to punish. This question is different from whether injustice morally affects punishment by altering offenders'

negative desert, that is, whether criminal wrongdoers who suffer social injustice are less deserving of punishment.[4] Perhaps some unjustly treated offenders morally deserve punishment, but a claim about their moral desert would not imply that a particular state is permitted to punish them, which is the broader question we focus on here.

The question whether unjust states are permitted to punish those it treats unjustly does not obviously pose a problem for some theories of punishment. Utilitarian theories that settle questions about the permissibility of punishment by appeal to the aggregate good would not seem to be especially challenged by the presence of social injustice. Retributivist theories that locate the justification of punishment in the infliction of deserved suffering seem to be relevant under any conditions, just or unjust, in which suffering can be deserved. What matters, according to these theories, is that punishment maximizes total well-being or is morally deserved, neither of which turns directly on whether the state that is meting out punishments is just.

By contrast, state injustice immediately complicates the permissibility of punishment for theories of criminal justice that treat punishment as an authoritative act of blaming or an official call for the offender morally to account for his or her actions. One example of such a theory is the communicative form of retributivism defended by Antony Duff. Duff argues that, by punishing, the state communicates moral disapproval to offenders and invites them to repent and reform. As an authoritative act of blaming, punishment implies that the state has *standing* to call offenders to account. But when the state is deeply unjust, it may no longer stand in a position of legitimate authority over its members—at least not those it treats unjustly. Loss of moral standing could therefore undercut a state's right to inflict punishment.[5]

A similar conclusion threatens to follow for all theories that tie the state's right to punish to its having political legitimacy over its members. Political legitimacy describes the moral authority of law as such. It makes the fact of law normative. That is, political legitimacy implies that members of society have some *moral* reason not to perform actions that are *illegal*. The permissibility of law enforcement, generally speaking, follows from the moral authority of law and is unsettled by its absence. Political legitimacy might be thought to be derived from, for example, a democratic process or a political community's shared values. Egregiously unjust states clearly lack it.[6]

Since seriously unjust states lack political legitimacy, they are bound to stand in a precarious position when it comes to the justification of punishment. Utilitarian theories might attempt to work around this problem through direct appeal to the principle of utility, as retributivists would appeal to the retributive principle, yet these efforts rightfully attract criticism. There is reason to be wary of the notion that the state is morally permitted to inflict morally deserved or utility-promoting suffering on those it seriously disadvantages. It matters for the permissibility of punishment who the agent *inflicting* punishment is.

The discussion surrounding unjust states' right to punish is circumscribed by two widely held (and in our opinion plausible) assumptions. First, punishment by unjust states involves moral tension which can only be resolved by reforming the state so that it no longer perpetrates injustice (Duff, 2001; Tadros, 2009; Watson, 2015). Second, unjust states nevertheless retain some right to inflict punishment or penal coercion, when this is needed to secure basic social order and protect rights of (actual or potential) crime victims (Fritz, 2018; Reiman, 2007). The challenge philosophers face, then, is finding a reasonable position that respects both assumptions. It is plausible that injustice affects the state's right to punish, meaning that it is not permitted to treat some lawbreakers in a way it would otherwise have been permitted to treat them, but it remains unclear how that claim should be fleshed out.

We start by discussing the prominent idea that injustice undermines the state's right to punish for reasons of complicity or hypocrisy. Then we discuss the idea that unjust states lose the right to punish, but not coerce, socially deprived offenders. This takes us into some puzzles about the relationship between punishment and moral censure. We will argue that when a state lacks the moral authority that flows from political legitimacy, its right to punish criminal lawbreakers cannot depend on a systematic claim about the legitimacy of the law. Instead, an unjust state is permitted to punish only criminal acts whose wrongness is established directly by morality, and only when criminal guilt is established through legal procedures that meet minimal standards of fairness. These restrictions narrow the proper scope of criminal law and invalidate popular rationales for punishment that construe punishment as blame.

2 | MORAL STANDING, HYPOCRISY, COMPLICITY

We understand the right to punish as a moral permission: Agent A has a right to punish agent B if and only if A is morally permitted to inflict punishment on B (Fritz, 2018). There is a further question whether there can also be a duty to punish, but since a duty to punish presupposes a right to do so, nothing important turns on this question for the purposes of this paper.

There are several ways in which the state can lose the right to punish. For one thing, the right to punish is undermined whenever punishment does not respect or promote values that are relevant for rendering punishment permissible, such as justice or well-being. That is why consequentialists would deny that the state has a right to punish if punishment does not have beneficial consequences, for example, by reducing future crime.[7] For another thing, the right to punish is widely taken to depend on its being inflicted for an act that is appropriately criminalized. Tomlin (2013) offers the example of criminalizing the eating of bread to illustrate that, intuitively speaking, there are limits as to which acts may permissibly be punished by *any* state.

Our focus is on how a state's right to punish is affected specifically by its perpetrating or not preventing injustice against some members of society. Hence, we will assume that punishment respects or promotes the right kind of values and is inflicted for acts that are in principle permissibly punished. A useful way to bring out what we have in mind is to imagine the criminal law of a just state and then suppose an unjust state has an identical criminal law. What significance does state-perpetrated injustice have for how these two states may go about punitively enforcing that law?

Victor Tadros (2009) has supplied a way to explain why an unjust state has a compromised right to punish. Tadros starts out from the premises that severe social deprivation is criminogenic and that states are aware of this. That is, the state is able to predict that some "extra" crimes will occur by, for example, allowing some citizens to languish in areas where educational and economic opportunities are very poor. Tadros argues that this situation challenges the state's right to punish the victims of the injustice for two reasons. First, punishment would be *hypocritical*. The state cannot "with a straight face" punish citizens for showing insufficient concern for the rights and interests of others when its own policies fail the same test. But, second, it would also be inappropriate for the state to pass judgment on severely deprived offenders since it is *complicit* in their crimes. If the state avoidably has furnished a society in which some are driven to crime, and is aware of this fact, then it should rather be co-defendant than judge.[8]

Tadros points out important reasons why the punishments of an unjust state may be the subject of moral criticism. However, it is not clear that his account is able to fully explain the intuition that unjust states' right to punish is undermined. After all, it is possible that an unjust state punishes an offender for a crime that contravenes against values that the state genuinely endorses. It is also possible that the state's unjust policies played no causal role in the occurrence of the crime. In such cases, we cannot charge the state with hypocrisy or complicity (Ewing, 2018). Yet the intuition remains that the state disqualifies itself from enforcing the law against people it treats very unjustly.

Antony Duff (2001; cf. Duff, 2007, pp. 191–193; Duff, 2010) offers a more fundamental reason why unjust states' right to punish is compromised. His account centers on the concept of inclusion. Duff argues that citizens are answerable to the laws of a political community only insofar as they are sufficiently included in that community. Inclusion requires enjoying the rights to, and real opportunities for, meaningful political participation and a fair opportunity to acquire wealth and income, as well as being treated with equal concern and respect. When the state seriously excludes citizens on any of these dimensions, Duff argues, it loses the right to hold them to account, since they are then effectively not members of the community on whose behalf punishment is meted out.

Part of Duff's account is the idea that excluded citizens are no longer under a political obligation to obey the law *qua* law. Unjust exclusion undermines the state's right to hold excluded citizens to account for lawbreaking, because people who are not bound to obey the law violate no obligation in breaking it and, in that sense, have nothing to answer for. Duff thus argues that excluded citizens may not be held to account by the state for so-called *mala prohibita* crimes—crimes whose wrongness depends on their being illegal—or for crimes the moral status of which

is subject to reasonable disagreement. Such crimes assume that the offender is politically obligated to the state, and unjust states fail to generate political obligation in those it seriously excludes (Duff, 2001, p. 182).

Duff is careful to note, though, that some laws simply codify our natural duties, and people are not released from such duties just because they are treated badly at the hands of the state. In that sense, it will not always be correct to say that excluded offenders have nothing to answer for. Excluded offenders often have a *moral* (as opposed to a political) obligation to follow the substance of the law.[9] But Duff argues that the right to punish is undermined even in such cases. The right to punish does not only depend on whether an offender has breached a political or moral obligation but also depends on whether the punisher has the *standing* to call him or her to account. And the unjust state has no such standing in relation to excluded citizens. Citizens are not answerable to a state that significantly violates their rights and interests.[10]

Accordingly, Duff argues that unjust states' right to punish is undermined for two closely related reasons: It loses the ability to bind citizens to obey the law *qua* law, and it loses its standing to hold citizens to account, even in cases that involve clear prelegal wrongs. Despite this, he does not end up endorsing an abolitionist position. He argues that *just* punishment of the excluded is impossible. However, the state ultimately retains a right to punish them. This is because not punishing would constitute a failure to protect the rights and interests of potential or actual victims (who, importantly, are often also victims of the state's injustice) and because punishing them is a crucial step in establishing an inclusive political community in the future. But we should not regard punishment of the excluded as something we can wholeheartedly endorse. It is subject to serious moral doubt, and whatever penal action unjust states take, it must include "some recognition of the wrongs [unjustly excluded offenders] have suffered and the morally flawed nature of their punishment" (Duff, 2001, p. 200; cf. Tadros, 2009).

Duff's account has generated considerable discussion. One question is whether an unjust state's right to punish is compromised only in relation to those it has treated unjustly or whether it loses the right across the board.[11] Some defend the former position. Shelby (2016) argues that under conditions of fundamental injustice, as in the ghetto, it is not wrong specifically for disadvantaged people to commit certain kinds of crimes. For example, they might sometimes be permitted to steal, to participate in the underground economy, or to join gangs. Others argue that if significantly unjust states lose the right to punish the victims of injustice, it also loses the right to punish citizens in general (Poama, 2018; cf. Fritz, 2018). This is because the state's *general* authority to punish is lost as soon as it shows insufficient concern and respect for *some* citizens.

In between these positions, Peter Chau (2012) has suggested that an unjust state's authority to punish could be partially retained. He draws a distinction between a political community's right to hold offenders to account and the right of its courts to do so. Courts should be taken to speak on behalf of the "just citizens," that is, citizens who are not implicated in the state's injustice. Courts therefore retain the right to hold severely deprived offenders to account. Howard (2013) disputes this by arguing that the criminal law is typically taken to embody shared values of the whole political community, making the idea of courts acting only on behalf of some segment of the population suspect. But surely the social fragmentation produced by serious social injustice, and public involvement with the state's injustice, cast doubt both on the idea that a unified political community exists and on the idea that the state's institutions represent only "just citizens."

Whether the putatively lost right to punish should be seen as partial or across the board is an ongoing discussion. We would add that, if the right is lost only in relation to severely disadvantaged offenders, we face difficult questions of individuation, especially since not all deprivation is due to the state (Ewing, 2018). Another question we want to flag concerns the state's right to punish noncitizens. When we premise the right to punish on sufficient inclusion in a political community, we draw on the theoretical landscape of political obligation, with its emphasis on a bond between a citizen and his or her particular state. This raises intriguing questions regarding the right to punish people who can scarcely be said to share a bond with the state, like tourists or asylum seekers whose claim for asylum has been denied. The right to punish noncitizens is an underexplored topic in general, and one that is especially problematic on an account like Duff's, but we will not delve into it here. In the rest of the paper, we assume that we are speaking of citizens or more permanent residents.[12]

3 | LIMITING THE RIGHT TO BLAME

Although it faces some unresolved issues, we believe that Duff's focus on the flawed moral relationship between the unjust state and (some or all of) its members is on the right track. But exactly which aspects of a state's aims and practices of punishment are called into doubt by its unjustly exclusionary relationships? The crucial question, for Duff's view and, more generally, for morally condemnatory accounts of punishment, concerns the extent to which an unjust state has a right to blame offenders for lawbreaking. In the remainder of the paper, we explore this question.

Blame, as we understand it, is a moralized response to wrongdoing that includes criticism, anger, resentment, disappointment, and demands for apology and amends. Blaming involves an *evaluation of the wrongdoer*—of his character or personhood—in response to moral wrongdoing as well as a moral *judgment about a fitting response* (Scanlon, 2008; Smith, 2015; Wallace, 1994). Underwriting blame is the belief that a culpable wrongdoer deserves a negative moral response for failing to demonstrate sufficient moral concern and respect for other people. Blame enacts that response. If punishment is used as an instrument of blame, it follows that when a state censors a criminal wrongdoer, the state blames the guilty wrongdoer for his crime. The state, in effect, asserts that the wrongdoer's crime has revealed moral flaws in the agent's psychological dispositions and moral values that render punishment an appropriate moral response.

Now, suppose we accept the view that seriously unjust states can make no systematic claim on their subjects to obey the law. That is to say, these unjust states would be illegitimate. Legitimate institutions treat their subjects as valued members of society whose interests count. In that way, they can be supported on the basis of moral reasons their subjects can reasonably share. Illegitimate institutions lack those reasons for moral support. Their laws *as such* do not command, on moral grounds, the obedience and support of their subjects. While some laws might be good, and even morally necessary, the legal order *per se* does not command the respect and deference of all its subjects because it is not produced by a state that is committed to the rights and interests of all of its members. How might we think about the possible use of punishment under those conditions?

A position that works its way around problems posed by illegitimacy is the following: By challenging the state's standing to blame criminal offenders, social injustice compromises the expressive function of punishment, even though law enforcement, suitably qualified, might still be permissible by virtue of the good it can do. This argument accepts Duff's contention that the blaming function of punishment depends on the state's moral standing, and it bears some relation to Tadros' "hypocrisy" argument. It adds that the tension inherent in punishment by unjust states can be mitigated *by toning down what punishment seeks to do*. More specifically, punishment should not be portrayed as an authoritative expression of blame in the name of the political community.

Whether or not a criminally guilty person morally deserves to be blamed, the state is not in a morally defensible position to cast blame. This is because in blaming a convicted person, the state implies that he has violated rights and interests the state itself is in the business of protecting. This precondition of the state's blame is undermined by the state's own failure to protect people's basic rights and interests as equal members of society. Though a state might be sincere in condemning criminal acts, and in that sense is not hypocritical, it has failed to satisfy its duty to protect interests that are basic to social membership and within its charge. More broadly speaking, it has failed to fulfill its duty to ensure that people's moral choices have the support of mutually beneficial social institutions, and this failure unsettles its standing to blame. Since punishment typically expresses blame, punishment must be qualified.

The case for this position is even stronger under conditions in which the state's failures to protect basic rights and opportunities for all citizens helps causally to explain crime, as in Tadros' "complicity argument". When the state's unjust policies are a cause of crime, the state is in a poor position to condemn and to stigmatize individual criminal actors, particularly those whose crime types are most susceptible to explanation by social causes.

Still, the state's application of criminal sanctions might sometimes be morally permissible. Even though an illegitimate state's standing to blame is compromised, it may be that the state is permitted and perhaps even obligated to take law enforcement measures to protect important rights, while refraining as much as possible from emphasizing

punishment's blaming function. That is, it may be permitted to enforce parts of the law: those parts in which the moral stakes are high. Though it lacks legitimacy, the state may be permitted to take steps to prevent and to reduce morally serious criminal wrongdoing, such as murder, rape, and assault. The authority to do this does not come from a presumption that the state systematically represents the interests of all of its members; the conditions of that presumption are undermined by the state's injustice. But it might come directly from morality, in view of the moral interests involved, the special obligations to the public that officials are recognized to have taken on, and the mechanisms of public accountability that apply to officials, however compromised those mechanisms may be. After all, not reducing morally serious criminal wrongdoing would represent a further failure of the state to be just.[13]

Though this approach seems right to us, it faces some challenges. The central problem lies in the viability of disentangling enforcing the law from communicating blame. To see this problem, it is useful to consider Garvey's (2015) argument that unjust states retain a right to *merely coerce* lawbreakers.

Garvey's account is based on a distinction between punishment and mere coercion. Mere coercion is the infliction of hard treatment on offenders. Punishment is a species of coercion, but one that is accompanied by an intention to censure the offender. As Garvey puts it, "what transforms coercion into punishment … is the intent to condemn or censure" (2015, p. 61). Based on this distinction, Garvey suggests that unjust states lose the right to punish unfairly disadvantaged offenders but not the right to coerce them. In the interest of preserving social peace, unjust states retain the right to threaten, and use, hard treatment against such offenders. However, since the relevant moral community is lacking, the treatment must not take on the texture of public condemnation. Indeed, Garvey suggests that the hard treatment inflicted by unjust states should be seen as on a par with a threat-based order a foreign occupying power might supply.

Garvey's account relies on the idea of imbuing punishment with the role of communicating a community's blame and disapproval, and while this idea is common among contemporary philosophers of punishment, it is by no means universal or obviously justified.[14] For those who think about punishment purely in terms of deterrence, for example, Garvey's distinction between punishment and mere coercion is not relevant since "mere coercion" arguably already captures what is meant by "punishment."[15] Retributivists that associate punishment with the infliction of deserved suffering will likewise struggle to find Garvey's distinction fundamental, as they regard censure as just another component contributing to the overall harshness of a punishment. When punishment is measured in terms of how much suffering it produces, it is difficult to maintain that there is a principled moral difference between censure and other measures designed to cause harm. For those who endorse a censuring rationale for punishment, however, Garvey's distinction provides a promising framework for how unjust states' right to enforce the law against severely disadvantaged offenders is compromised.

Yet, for all its appeal, the account faces some nagging questions. One problem is that the extent to which a piece of hard treatment communicates blame and disapproval may not be under the state's control. Garvey suggests that the difference between punishment and mere coercion lies in the intention of the state; outwardly, the two types of treatments will often be indistinguishable. (As Garvey notes, in both cases, the offender will often be "carted off to prison," 2015, p. 81.) But this raises the question whether the relevant audience will distinguish between the two modes of treatment. If the offender or the community does not see the difference between full-blooded punishment and mere coercion, such that mere coercion will be *understood* as blaming the offender, why does an unjust state retain even a right to coerce?

This brings us to a set of difficult questions regarding the relationship between censure and hard treatment. Some philosophers argue that the degree to which a punishment censures is a function of the amount of hard treatment; others argue that the two components are separable such that relatively mild treatment can be deeply censuring (Duus-Otterström, 2018b; Feinberg, 1965; Husak, 2010; von Hirsch & Ashworth, 2005). We need not get into the details of this debate here, but the point is that if the amount of hard treatment affects the degree of censure (such that a lengthy term of incarceration is more censuring than a short one *in virtue of* involving more hard treatment), then the state's intentions alone will not have the significance Garvey attributes to them. For instance, if the extent to which a sanction expresses blame and disapproval is a function of how much hard treatment it involves,

two offenders who are given the same hard treatment will be taken to be equally censured, regardless of what the state intends. It is unclear why the intention merely to coerce should then make all the difference.

To avoid this, an unjust state could take measures to increase the difference between punishment and mere coercion. One possibility is to make merely coercive sanctions institutionally distinct from punishment. Garvey's solution—punishment under conditions of legitimacy; mere coercion under conditions of illegitimacy—would be more compelling if the two modes of treatment took on different outward characteristics. For example, if the state incarcerated merely coerced offenders in separate and non-punitive facilities, it would be easier for the public to track that the state has no blaming intention in putting them there.

Another possibility is to explicitly assign a shaming function to punishment, apart from hard treatment. Some philosophers have entertained this idea, but it has not attracted much support. Dan Kahan, who defended shaming punishments as superior to incarceration, later retracted his view on the grounds that the historical and cultural connotations of shaming (the stocks, etc.) are alienating to people with liberal values (Kahan, 1996, 2006). But appointing the state as moral judge has the further disadvantage of bringing the state more deeply into the domain of personal moral evaluation, and this extension of state power raises worries about its possible abuse. While Kahan does not highlight this problem, we think it is serious. Evaluations of blameworthiness are the subject of moral disagreement. Reasonable people may differ greatly about when blaming attitudes should yield to either empathy or a more disengaged response, and differences in judgment might not be resolvable by reference to objective criteria. This opens the way for the state to claim authority without adequate public standards of accountability.

Alternatively, the state could disavow blame altogether and treat all justified punishment as coercion that is a permissible response to criminal wrongdoing, not for its fit with an offender's moral culpability, but rather in view of its desired consequences.[16] This approach would emphasize the difference between the wrongfulness of a criminal act and a criminal wrongdoer's blameworthiness. While the state would criticize criminally wrongful acts and punish the persons who commit them, it would refrain from using criminal punishment to condemn a criminal lawbreaker as morally blameworthy for committing his crime. The state would not endorse any particular interpretation of the moral meaning of criminal acts for the personal or impersonal relationships of the people affected.

This proposal to rid punitive sanctions of their blaming message more generally fits well with the act-focus of criminal law. Yet it is vulnerable to the aforementioned charge that the state's intending to rid punishments of blame is not the same thing as actually ridding them of blame, since the punishments might still be interpreted as authoritative impositions of blame by the offender or the general public. Popular norms surrounding the practice of criminal justice would therefore also have to change (Kelly, 2018). This would arguably necessitate changing the content of punishments and not just the moral tone with which it is meted out. For example, the state could signal its renunciation of blame by rendering punishment as mild as possible while retaining its commitment reasonably to protect members of society from crime, and it could seek actively alternatives to incarceration whenever possible. Finally, the state could acknowledge that members of society who are both severely disadvantaged and eligible for punishment are owed compensation for the burdens imposed upon them. One way in which it could do this is by improving prison conditions to include social, health, and job training services. Such reforms would emphasize the importance of treating all political subjects with concern and respect, even those who have broken the state's laws. If an unjust state were to take such steps, it would not act wrongly in enforcing the law, at least when law enforcement is used to protect people's basic rights. The beneficial consequences of punishment, including for disadvantaged people more generally, would permit even unjust states to apply punitive sanctions.

Yet there are some remaining questions facing anyone who takes this line. Since it relies on the claim that unjust states' right to punish flows directly from morality, and not from a claim to citizens' legal compliance with the law *qua* law, it is necessary to think about how extensive the criminal law of an unjust state should be. An intuitive answer is that unjust states are permitted to punish core crimes against persons—crimes like murder, assault, and rape—but not crimes like drug dealing, benefits fraud, or tax evasion. However, the viability of this answer ultimately depends on the extent to which punishment of lesser offenses is necessary to furnish a social order in which people's basic rights are secure. Until we know this, it will simply be unclear how different the criminal law of just and unjust states should be.

ENDNOTES

[1] It is typically argued that, in order for a sanction to qualify as punishment, it must intend to set back the interests of the offender, express reprobation, and be meted out by an authority (Boonin, 2008, pp. 4–28). We will have reason to touch on some of these criteria below.

[2] For overviews of the philosophy of punishment, see Honderich (2006), Boonin (2008), and Brooks (2012).

[3] Duff (2001, p. 179f) calls this focusing on the "preconditions," as opposed to the "conditions," of justified punishment (cf. Honderich, 2006; Murphy, 1973). It should be noted that, on a popular understanding of the term, punishment is necessarily a species of "non-ideal" justice, since it is occasioned by a previous wrong (Rawls, 1999). Even so, non-ideal topics can be approached in more or less idealized ways.

[4] There is a longstanding debate, for example, on whether injustice can furnish a (full or partial) justification or excuse for lawbreaking. See, for example, von Hirsch and Ashworth (2005), Holroyd (2010), Lippke (2011), Green (2011), Shelby (2016), and Ewing (2018). A famous question in this debate is whether having a "rotten social background" should be admitted as a potential defense in criminal trials (Bazelon, 1976; Delgado, 1985; Heffernan, 2000).

[5] We return to Duff below.

[6] Legitimate authority thus understood is the correlate of political obligation, that is, people's duties *qua* citizens. These duties include duties of deference and legal obedience but may also include duties of support (Duus-Otterström, 2018a; Knowles, 2010; Shelby, 2016; Simmons, 2001).

[7] Abolitionists about punishment, while not all consequentialists, typically argue that punishment is impermissible because there are better ways of respecting and promoting the relevant values. See Davis (2003), Boonin (2008), Zimmerman (2011), and Hanna (2009).

[8] Tadros speaks about "democratic citizens" as co-defendants as opposed to the state, but this terminological difference is not relevant for the main point, which is that furnishing an unjust society in which crime is more likely creates complicity.

[9] Political obligations are also moral in the sense that people ought morally to discharge these obligations *qua* citizens, and because the law "marks a reasonable attempt by the legislature to serve the common good" (Duff, 2001, p. 65). By contrast, purely moral obligations flow directly from the moral status of an act, apart from whether the conduct in question is illegal. A person can therefore be morally bound not to murder, for example, without being politically bound to obey a state's criminal law.

[10] Duff (2001, p. 188) notes, however, that excluded offenders may well be answerable to other parties, such as crime victims or communities in which the offender *is* included. See, further, Husak (2015).

[11] This discussion ties in with a wider theoretical inquiry whether there a state can be simultaneously legitimate and illegitimate depending on the reference group (Klosko, 2005; Simmons, 2001).

[12] Bill Wringe explores the punishment of noncitizens in a working paper (Wringe, 2018). The topic is most famously discussed by Locke (1689 [2009], p. 8), who took states' apparent right to punish noncitizens as evidence for a natural right to punish,

[13] One of us develops this argument in Kelly (2018), Chapter 6. See also Shelby (2016, pp. 228–234).

[14] For communicative or expressive theories of punishment, see, for example, Feinberg (1965), Duff (2001), Bennett (2008), and Wringe (2016).

[15] For discussion of different kinds of retributivism, see Berman (2011). For the argument that people who have been subjected to extensive censure may deserve less hard treatment, see Husak (2010).

[16] For those who hold censure or reprobation as a necessary component of punishment, these sanctions would not count as "punishment." For those who define "punishment" as the intentional harming of lawbreakers for an offense, however, they would.

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