



PUNISHMENT

Thom Brooks

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For my parents, Alan and Kathy

Preface

The literature on punishment has exploded in recent years. One of the main reasons is the increasing popularity of retributivist theories. A further significant reason is the rising popularity of several important alternative approaches, including the communicative theory of punishment, the restorative justice model, and new work on the unified theory of punishment. One aim of this book is to present a critical guide to the latest research on the leading theories of punishment and the most important alternative approaches. While there have been several excellent previous guides, these have become somewhat dated given the rapidly expanding literature in this field. It is my hope that this book will help readers become more familiar with the prospects and problems facing each approach to punishment.

The book is arranged to introduce readers to competing approaches to punishment and then to consider their application in particular contexts, such as the use of capital punishment, juvenile offending, and the punishment of domestic violence, rape, and child sex offences. Punishment is more than theory; it is about practices. It is my hope that the book's arrangement by theory and then practice will help improve the understanding of both abstract philosophical issues and how theories of punishment may fare as a practice – an aspect that has often been absent in previous commentaries but which is illuminating and thought-provoking.

This book is designed to attract a wide audience. Examples are drawn that are meant to have relevance for readers from different backgrounds, and this book is neither aimed primarily at a North American nor British audience, but rather both and much more. While I am an American by birth, I am a dual national with both American and British citizenship: I have adopted the spelling and grammar of my newly adopted home, but this book's arguments and research address punishment from a wide perspective. Examples will be drawn from the US, UK, and beyond to illustrate arguments throughout.

One further important aim of this book is to speak to politicians, legal practitioners, and policymakers. Chapters will include various recommendations on criminal justice policy, and these are summarized in

the conclusion. These recommendations flow from my defence of a unified theory of punishment that is both pragmatic and pluralistic, bringing together compelling elements of other views on punishment within a single, coherent, and comprehensive theory of punitive restoration. This theory has been the subject of much of my research over the years and was recently recognized as one of the top 100 'Big Ideas for the Future' in British universities.¹ This book presents the most thorough explanation and defence of the unified theory of punishment to date.

I have incurred any number of substantial debts to several friends and colleagues, as well as highly supportive institutions. If I were to thank them for all the help that they have given me over the years, then the list would run to far more pages than this book. I must record my sincere thanks for their continued support and encouragement on this and many other projects.

First of all, I must begin by thanking Brian O'Connor for supervising the initial research that has developed into this book. Few can claim to have had a better supervisor, and he always encouraged me to follow the arguments wherever they led. I owe further thanks to Bob Stern and Leif Wenar for supervising further initial work for this book.

Furthermore, I must warmly thank my former colleagues at Newcastle University and, most especially, Peter Jones and Richard Mullender for their many helpful discussions on crime and punishment, which have led to several amendments in this book. I should also thank the Newcastle Ethics, Legal, and Political Philosophy Group and colleagues more generally for the luxury of providing me with such a highly stimulating place to work.

My research has benefited tremendously from the financial support of several institutional bodies. I must first thank Newcastle's School of Geography, Politics, and Sociology for their generous assistance. I am also very grateful to Newcastle's Arts and Humanities Research Fund Awards and a Research Leave Grant from the Arts and Humanities Research Council, which together helped make writing this book possible. I have also benefited from a Visiting Fellowship in the Department of Moral Philosophy at the University of St Andrews through their Centre for Ethics, Philosophy, and Public Affairs. The research undertaken during this fellowship was fundamental in the drafting of several chapters. I further benefited from my time as an Academic Visitor in the Faculty of Philosophy at the University of Oxford and as a Visiting Fellow at the Department of Government at the University of Uppsala.

Different versions of several chapters have been presented at a variety of conferences and departmental seminar series over the years. I must thank audiences at the American Philosophical Association – Eastern Division conference in Baltimore; the Centre for the Study of Mind in Nature at the University of Oslo; the European Congress of Analytic Philosophy at Lund University; the Institute for Public Policy Research North; the Joint Session of the Aristotelian Society and Mind Association at the University of Kent, Canterbury; the Newcastle Ethics, Legal, and Political

Philosophy Group workshop; the Political Studies Association annual conferences at the universities of Bath, Leeds, and Swansea; the Scottish Postgraduate Philosophy Association conference at the University of Stirling; the annual Society for Applied Philosophy conference at St Anne's College, Oxford; the Senior Postgraduate Philosophy Seminar at the University of Sheffield; and the law, philosophy, and politics departments of the universities of Cardiff, Edinburgh, Glasgow, Lancaster, Lincoln, Newcastle, Oxford (and the Oxford Jurisprudence Group), St Andrews, Sheffield, University College Dublin, Uppsala, and York. I am very grateful to the audiences at these events for their helpful feedback.

I have benefited greatly from comments and discussions with a number of friends and colleagues over the last several years, including John Alder, Dave Archard, Liz Ashford, Clara Ramirez Barat, Hilary Benn, Chris Bennett, Mark Bevir, Brian Bix, David Boonin, John Broome, Gary Browning, Kim Brownlee, Elaine Campbell, Simon Caney, Alan Carter, Jenny Chapman, Willie Charlton, Jerry Cohen, James Connolly, Angelo Corlett, Ed Cox, Rowan Cruft, Michael Davis, Michelle Madden Dempsey, Maria Dimova-Cookson, Lynn Dobson, Antony Duff, Maureen Eckert, Sam Fleischacker, Christel Fricke, Miranda Fricker, John Gardner, Brian Garvey, Gordon Graham, Les Green, John Haldane, Nicole Hassoun, Tim Hayward, Clare Heyward, Ken Himma, Jules Holroyd, Chris Hookway, Gerry Hough, Stephen Houlgate, Sue James, Duncan Kelly, Tim Kelsall, Sadiq Khan, Dudley Knowles, Matthew Kramer, Jim Kreines, Matthew Liao, Matthew Lister, Margreet Luth, Liz McKinnell, Ali Madanipour, Raino Malnes, Bill Mander, Dan Markel, Sandra Marshall, Matt Matravers, Mary Midgley, David Miller, Tim Mooney, Dean Moyar, Rick Muir, Richard Mullender, Peter Nicholson, Brian O'Connor, Patrick O'Donnell, Ian O'Flynn, Diarmuid O'Scanlain, Jim O'Shea, Mike Otsuka, Gerhard Øverland, Thomas Pogge, Jon Quong, Tracey Robson, Doug Ryan, Geoffrey Scarre, Fred Schauer, Guy Sela, Russ Shafer-Landau, Stephen R. Shalom, John Skorupski, Saul Smilansky, Richard Stalley, Bob Stern, James Sweeney, Will Sweet, Bob Talisse, John Tasioulas, Helen Thompson, Jens Timmermann, Mark Tunick, Colin Tyler, John Vail, Helga Varden, Andrew Vincent, Vaughan Walker, Jeremy Watkins, David Weinstein, Mark White, Jo Wolff, and Leo Zaibert. While the usual qualifications apply, I am certain that this book has benefited substantially from their help and good advice, no matter how close or far the book settles their queries.

I must also record my special thanks to several more colleagues. Fabian Freyenhagen discussed the full contents of this book with me at length many times over the last few years and provided rich feedback. His advice remains invaluable and everything that follows has improved as a result. I owe a great debt to discussions with David Boucher, Peter Jones, Rick Lippke, Jeff McMahan, Martha Nussbaum, and Leif Wenar over the years, which have helped clarify several earlier confusions. In particular, I must also note my

very special debt to the work and constructive discussions I have had with Martha Nussbaum. While I may never fully answer her many probing questions, I am much the better for them.

I have also learned much from Bhikhu Parekh. His inspiration guides much of my work here and much more; Lord Parekh's influence on my thinking is profound in these pages and beyond. My work has benefited enormously from his intense intellectual rigour.

I owe warm thanks to my friends at Routledge, including Gerhard Boomgaarden, Emily Briggs, Ann Carter, Jenny Dodd, and Miranda Thirkettle, for their support of this project from its very beginning. My particular thanks for their being so supportive despite many delays. It has been a genuine pleasure to work with such a great—and very patient!—team. I am especially grateful to three anonymous readers for their useful suggestions on improvements as well. This book has benefited enormously from their constructive advice and helpful criticisms.

Special thanks must also go to my wife, Claire, whose excellent advice, patience, and warm support were never in short supply. My work and much more are all better because of her. This is not least because she regularly reminds me that there is much more to life than scholarly pursuits and meetings with politicians.

I warmly dedicate this book to my parents, Alan and Kathy Brooks. I will never forget trying to explain to them why I thought entering academic philosophy a more promising career path than continuing with my pursuit of a career in music as they listened bemused. However much they may never understand my attraction to philosophy and topics such as punishment, I would never be in the position I am in today without their love and support. I will never be able to thank them enough, but I suppose a book dedication is at least a small step in the right direction.

Mom and dad, this is for you.

T.A.K.B.
Newcastle upon Tyne

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Introduction

Introduction

Crime and punishment grip the public imagination. The media regularly bombards us with the latest news on crime statistics while our airwaves are saturated by pundits debating how crimes should be punished. Moreover, crime and punishment affects us. Today, approximately seven million Americans are either in prison or on probation or parole.¹ Nearly 60 million Americans have a criminal record. This is almost 30 per cent of the US adult population.² The associated costs have increased 660 per cent from \$9 billion in 1982 to \$69 billion in 2006.³ It is, then, easy to understand the increasing importance of crime and punishment to citizens and politicians alike. Some have even suggested that ‘the penal system is in a state of crisis’.⁴

The central question of this book is ‘how should we punish crimes?’ This question will be addressed in the following way. We will examine the leading theories of punishment individually in order to understand the diversity, strengths, and weaknesses of each.⁵ Some theories centre on a particular goal of punishment while others are hybrid theories and more pluralistic. They will each be considered individually before moving to specific case studies where we will examine how different theories of punishment may be applied. My approach throughout will be to assume that the reader may have come to this topic for the first time although there will be much of interest to those already deeply engaged with the field. We will learn that while different theories of punishment may often address attractive intuitions about punishment, these theories run into problems requiring a fresh perspective and new approach.

What is ‘punishment’?

Punishment may be defined in the following way:

- (1) Punishment must be for breaking the law.
- (2) Punishment must be of a person for breaking the law.

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- (3) Punishment must be administered and imposed intentionally by an authority with a legal system.
- (4) Punishment must involve a loss.

Any punishment must satisfy all four parts of this definition to count as 'punishment'. Therefore, if someone was 'punished' for breaking a law and the penalty was not imposed by a legal authority, then no punishment has taken place. I will examine each part to show more clearly why this is the case.⁶

Punishment must be for breaking the law

We use the term 'punishment' in any number of different ways. Consider the following examples:

- (1) Alan *punished* his dog for soiling the carpet.
- (2) Betsy *punished* her son by grounding him because he had failed to perform promised chores.
- (3) Chris was *punished* with extra work for coming into work late.
- (4) Danielle was *punished* by the state for a crime.

While we might speak of someone being *punished* in each of these cases in our casual everyday talk, we should be more precise about what we are specifically referring to. This is because what passes for being *punished* varies widely from one context to the next and it could lead to much unnecessary confusion.

The first three examples have at least one thing in common: they involve arbitrary executive decisions made by private individuals outside of a legal system.⁷ Now consider the fourth example. When we say that Danielle was punished for her crime, our use of 'punish' takes on a very different character from the other three uses of 'punishment'. Danielle was not punished simply because someone else disagreed with her. Instead, she was punished because of a particular act that she performed. This particular act is her committing a crime.⁸ Crime has a different character because it is enshrined in the criminal law.

When we speak of someone being *punished* in this book, we refer to someone who has committed a crime. This may appear controversial to some readers. We might believe that, in fact, there is no essential difference between a parent 'punishing' her child and the state 'punishing' a citizen. Indeed, some philosophers would argue this is correct although I believe this is a mistake.⁹ Of course, there are limits on how a parent and the state may act in these cases. However, there is also a crucial distinction. When the parent 'punishes', she acts for whatever reason she finds most appropriate: it is largely an issue between parent and child alone. These reasons may be largely arbitrary. Contrast this case with state punishment: the only reason

why the state may punish is because a person has performed a crime.¹⁰ So the definition of punishment as a response to crime is more than merely terminological. Punishment is a matter of public justice and of a very different character than the disciplining of children by private individuals.

If punishment must only be for breaking the law, then it need not follow that every violation of law entails punishment. Instead, we should accept that punishment can only be justified on account of someone performing a crime whether or not we do impose a punishment for that crime.¹¹ Where there is no crime, there is no punishment. The justification of punishment may rest upon the justification of law.¹² This is because it is difficult to conceive of a case where punishment is justified for unjustified crimes: any discussion of justified punishments must presuppose on some level that the crimes they correspond to are themselves justified. There can be no just punishment of an unjust law. For example, John Mabbott says that 'The justification of punishment is that a law has been broken; the justification of law is quite another matter'.¹³ We will be more interested in the former than the latter. We will ask which theory of punishment is best if, and only if, a relevant law is justified. The possibility of justified laws reveals the horizon of just punishments.

Punishment as response

What then counts as a punishment for crime? One well-known distinction is offered by Joel Feinberg.¹⁴ Feinberg separates 'penalties' from 'punishments'. Penalties are sanctions, such as fines and warnings. Punishments are understood as 'hard treatment', or 'imprisonment'. The difference between penalties and punishments is not simply in severity, but in character. For Feinberg, punishment as imprisonment is not only a more severe sanction than imposing a fine, but imprisonment alone 'expresses' public censure to the criminal.¹⁵

There are several problems with this distinction. For example, why should we not also call fines 'punishment'?¹⁶ Any sanction, including fines, might be said to 'express' public censure to the criminal. Of course, a small fine cannot be said to convey the same message as a substantial prison sentence. However, the difference here is simply that one sanction is more severe or punitive than the other: it is not the case that the two are entirely different in kind. Both may arise in relation to crimes, and penal sanctions are often embodied in fines and imprisonment. The view that penalties and 'punishments' (understood as imprisonment) are different in character is then a distinction drawn too sharply that we should reject.

Only about 5 per cent of all convicted offenders receive a custodial sentence. A theory of punishment that is unable or unwilling to account for the punishment of most, if not all, convicted offenders is incomplete at best.¹⁷ This book will consider punishment broadly conceived as a response to crimes and how it may be justified as a response. Punishment understood

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here is pluralistic in form where punishment may take the shape of a penalty, imprisonment, or some other alternative. It is worth noting that one important merit of my approach is that it coheres best with current practice and policy-making on punishment.

Our study of *punishment* is a study of the best *response* to crime. We might call this the *punishment as a response to crime approach*.¹⁸ This response to crime may take the form of a fine, imprisonment, a written warning, or other alternatives.¹⁹ Whatever our response, punishment must only be for breaking the law.

Punishment must be of a person for breaking the law

We have now seen that punishment must only be for breaking the law. A further necessary part of punishment's definition is that punishment must be of a person for breaking the law. This is an important consideration. Suppose that a murder has taken place on your street. If punishment need only be a response to someone's breaking the law, then it might follow that we can punish whomever we like so long as a crime has taken place. It would not be necessary to punish the person who actually did break the law. However, this would be deeply unacceptable. When we punish in response to a crime, we must only punish the person(s) who broke the law(s). We do not punish groups where not all broke the law nor other innocent persons.

Indeed, this part of the definition is often understood as *the punishment of the innocent objection*. The objection is that it is always unjustified to punish those who have not broken the law. There must be a connection between the person punished and crime committed. Where a person is innocent, this person has not acted in such a way that would warrant punishment and, thus, he should be unpunished.

Punishment must be administered and imposed intentionally by an authority with a legal system

Our definition of punishment remains incomplete. Suppose that a person has stolen goods from a local store and we arrest the person for this crime. Punishment demands not only that it must be for breaking the law and of a person for breaking the law. It is important that punishment is also distributed in a particular way. For example, the local thief may deserve punishment, but it would be wrong if we simply attacked him in the street. It is the legal system that determines the relevant crimes and the means for dealing with criminal transgressions. Punishment is not distributed arbitrarily: it is intentionally inflicted on a criminal for his crime. Therefore, punishment cannot be something that happens to criminals by accident or unexpectedly. Instead, the punishment of criminals for their crimes must be intended.

Moreover, the punishment of criminals must be intended by an authority with a legal system.²⁰ This makes sense because punishment must only be of criminals for their crimes: it is necessary to have a legal system so we can identify the crimes to be punished. It would be unacceptable for any individual to act in a private capacity in carrying out punishments. Instead, the administration and imposition of punishment must only be managed by an authority with a legal system.²¹

Punishment must involve a loss

Finally, punishment must also involve a loss. If punishment did not involve a loss, then it might be a reward instead. The loss in terms of punishment may be understood in a variety of ways, including a loss of liberty, a loss of money through a fine, or some degree of suffering. The fact that punishment must involve a loss does not reduce punishment to a form of sadism. First, a loss is not to be imposed for public amusement, but instead as a response to criminal activity. Second, torture and six weeks imprisonment may both entail a loss, but this does not mean that all losses are justifiable: this will largely depend upon the overall theory of punishment that we defend. Instead, the loss of punishment is often temporary, such as the suspension of movement or a one-off fine.²²

Many argue that punishment must include some idea of pain: the loss that punishment involves must be painful. Some abolitionists who oppose punishment claim there cannot be any satisfactory explanation for why punishment must include suffering. It may be the case that the imposition of punishment will involve a loss that is painful. For example, imprisonment is the loss of a criminal's freedom of movement. This may be painful because these persons are unable to meet with family and friends at will. The mistake these understandings of punishment have involving pain or suffering is that punishment's loss need not always be painful or include suffering. Punishment may take many forms, such as the payment of a fine or a suspended sentence. It is difficult to see precisely how all impositions of a suspended sentence, for example, are inflictions of 'suffering'. Such cases would be instances of a loss, namely, a loss of full freedom of movement, as future offending might necessitate time in prison. Punishment must involve a loss, but this loss need not always include pain and suffering, understood as some physical discomfort or ordeal. Perhaps the loss of punishment should aspire to be a *painless loss* if possible, and punishment should be more goal-oriented rather than pain-oriented.

The aim and distribution of punishment

Now our definition of punishment is complete. Punishment must be for a crime: punishment is a response to crime. We must only punish the person(s) who broke the law and not innocent persons. The punishment must also

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be administered and imposed intentionally by an authority with a legal system, such as the state. Finally, the punishment imposed must involve a loss. Together, these four parts must be present for there to be punishment in the sense we will understand ‘punishment’ in this book.

There are two further considerations that we should note before proceeding. Herbert Hart set out a system that we can use to classify any theory of punishment:

- (1) The definition of punishment
- (2) The general justifying aim of punishment
- (3) The distribution of punishment.²³

Our discussion above has addressed the *definition* of punishment. However, this is only one aspect of our understanding of punishment. A further consideration is ‘the general justifying aim’. This refers to the general justification of punishment. Any leading theory of punishment will adhere to our definition of punishment above and, yet, each theory will differ often significantly from each other with respect to their general justifying aims. Such an aim may be to deter potential offenders. Or an aim might be to rehabilitate offenders. These aims will differ from one theory to the next and principally characterize and distinguish it from others.

A further consideration is the distribution of punishment. Let us suppose we have any plausible theory of punishment before us. This theory satisfies our definition, and its justifying aim is to deter potential offenders, for example. We must now understand how this justifying aim is to be applied in dealing with offenders. If punishment aims at deterrence, then how do we distribute punishments so that this aim is achieved?

To conclude this part of the discussion, any theory of punishment must first satisfy the definition of punishment. We must then identify the general justifying aim of punishment and how this aim may be achieved through the distribution of punishment. We best grasp a theory of punishment when we understand how it satisfies the definition of punishment, we can identify its general justifying aim, and we have a view to how the punishment should be distributed. The following chapters in Parts 1 and 2 offer different ideas about what the general justifying aim of punishment should be and how punishment should be distributed.

Legal moralism and the harm principle

Before concluding this introduction, we should become aware of a highly relevant and important debate. We have seen that punishment is intrinsically linked with crime: where there is no crime, there cannot be punishment. One broader implication of this fact is that our views on criminalization – our theories of what distinguishes crimes from non-crimes – may affect

our views on punishment. I will limit my discussion to the two main rival criminalization principles of legal moralism and the harm principle.²⁴

Legal moralism

Any number of things may serve as laws, and odd examples may be readily identified.²⁵ Many philosophers argue for not only what should serve as our theory of punishment, but also what should be our theory of criminalization. One leading view is called *legal moralism*. Legal moralists link the criminalization of certain acts with their immorality.²⁶ This perspective has broad intuitive plausibility. For example, it is not difficult to understand the criminal law as primarily focused upon criminalizing immorality. For example, consider the crimes of assault, murder, rape, and theft. These crimes are forbidden by all major religions and all modern societies. One important reason why this might be universally the case may not simply be because believers or citizens are simply happier living in a community where murder is condemned, but rather because murder is viewed as a grave wrong. It is then easy to see the initial attractiveness of legal moralism. Why not consider crimes as moral wrongs when we understand most, if not all, crimes in this way? This view of law is captured well by Antony Duff: 'The criminal law does not create wrongs: it does not make wrong what was not already wrong by criminalizing it. Rather, it declares certain kinds of pre-existing wrong to be public wrongs – wrongs that concern the whole polity'.²⁷ Crimes are public wrongs because they are moral wrongs of certain kinds.

Legal moralism has many attractions, but it has also attracted several criticisms. One objection is that suppose we only wish to criminalize immorality. This need not entail that we criminalize all immorality. An illustrative example is lying. Many acts of lying may be immoral. Someone might lie to win an interview for a new job. Or a witness may lie about a defendant's whereabouts in order to settle an unrelated personal vendetta. In these cases, we might support the right of employers to immediately terminate the contracts of employees who knowingly misrepresented themselves in being hired. We might also support sanctions against witnesses who knowingly offer false testimony. While many lies are immoral, this is not clearly true for all lies. Would it be immoral to deceive a friend about a surprise party for her that evening? I doubt many of us would find this immoral. Surely, no one would believe it criminal. If so, then there is good reason to believe that not all immorality should be criminalized. The objection then is that if some, but not all, immorality should be criminalized, we must have some threshold: it is not enough to say that because some act is immoral then it should be criminalized. The 'good' citizen need not be morally good to avoid punishment: she need only avoid what is criminalized.

A second problem concerns what we mean by 'immoral'. If we claim that some act is immoral, then we find this immoral in relation to a