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LAW AS PUNISHMENT
LAW AS REGULATION

Edited by

Austin Sarat,

Lawrence Douglas,

and Martha Merrill Umphrey

Law as Punishment / Law as Regulation

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To Stephanie, Lauren, Emily, and Ben (AS)

Acknowledgments

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On the Blurred Boundary between Regulation and Punishment

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Seven-year-old Megan Kanka lived with her parents and two siblings on a quiet street in suburban Hamilton Township, New Jersey. On July 29, 1994, Megan was lured into the home of a neighbor, Jesse Timmendequas, on the promise that she could visit with his new puppy. Shortly afterward, thirty yards from her front doorstep, Timmendequas raped and murdered her. Unbeknownst to Megan's parents or anyone else in their neighborhood, fifteen years earlier he had pled guilty to the attempted aggravated sexual assault of a five-year-old girl in another New Jersey town. He was given a suspended sentence but, after failing to go to counseling, he went to prison for nine months. In 1981, he pled guilty to the assault of a seven-year-old girl and was imprisoned for six years.

Reaction to Megan's death and Timmendequas's arrest was immediate and explosive. More than 400,000 citizens signed a petition addressed to the New Jersey state legislature demanding enactment of legislation that would increase penalties for sex offenders, require them to register with local law enforcement whenever they established a new residence, and provide notification of the whereabouts of sex offenders to the communities in which they reside. Eighty-nine days later the legislature enacted what was to become known as "Megan's Law."

In 1996, President Clinton signed the Jacob Wetterling Crimes against Children's Act, one provision of which required every state to develop a procedure for notifying the public when a person convicted of certain crimes is released near their homes. Today each of the fifty states requires some form of public notification,[1] and, as the discovery of Jaycee Dugard, who survived being kidnapped at age 11 and held captive for 18 years, in August 2009 demonstrates, the

problem of child sexual abuse is sadly still very much with us.[2] The same year that President Clinton federalized Megan's Law, the Third Circuit Court of Appeals heard a challenge to the constitutionality of the original, New Jersey version of the law. That case provides a striking lesson in legal categorization and in the difficulty of saying what punishment is and what differentiates it from nonpunitive, regulatory measures. It also illustrates the judiciary's tendency to develop legal categories by taking a top-down perspective, in this instance determining what counts as punishment by starting with the intention of the legislature.

As is generally known, law depends on various modes/forms of classification. How an act or a person is classified may be crucial in determining what rights obtain, what procedures are employed, and what understandings get attached to the act or person. Critiques of law often show the arbitrariness of its classificatory acts, but no one doubts their power and consequence. Thus, as a regulatory act, detention is associated with such practices as the creation of quarantines in the face of a medical emergency or the holding of refugees seeking political asylum. In the post-9/11 period the Bush administration turned to noncriminal detention of suspected terrorists and immigration detention as a means of fighting the "war on terror."[3] As a punitive act, detention is associated with practices of incarceration that follow the determination of guilt in a criminal trial. Detention as regulation is meant to carry no moral opprobrium and is controlled by norms that give administrative or executive agencies great discretion and flexibility; detention as punishment is controlled by constitutional-juridical norms that constrain state power.

Law as Punishment/Law as Regulation considers law's physical control of persons/bodies and how that control illuminates competing visions of the law: as a tool of regulation, and as an instrument of coercion/punishment. In this book we inquire about the distinction between regulation and punishment as a way of understanding the power and legitimacy of this crucial legal classification. At the start of the twenty-first century, what remains of the distinction between punishment and regulation? What can we learn about law's more general practices of classification by attending to punishment/regulation?

The petitioner in *Artway v. The Attorney General of the State of New Jersey*, the legal challenge to Megan's Law, engaged in his own classificatory activity, insisting that the law categorize Megan Law's registration and notification re-

quirements as punitive. He claimed, among other things, that they constituted a second punishment for sex offenders who had been imprisoned and therefore violated the prohibition of double jeopardy.[4] At the heart of the decision in *Artway* was the question of how one could determine whether a legal enactment was regulation or punishment.

The court began by noting that if registration and community notification did not count as "punishment" then they could not violate double jeopardy no matter how painful and burdensome registration and notification might be to those subject to them. In its effort to categorize those requirements, the court developed a three-part test. The court argued that whether registration and community notification was punishment depended on the legislation's "(1) actual purpose, (2) objective purpose, and (3) effect . . ."[5]

Starting with the law's actual purpose, the court noted, "If the legislature intended Megan's Law to be 'punishment,'" i.e., retribution was one of its actual purposes, then it must fail constitutional scrutiny. If, on the other hand, "the restriction of the individual comes about as a relevant incident to a regulation," the measure will pass this first prong.[6]

If the legislature's actual purpose does not appear to be to punish, "we look next to its 'objective' purpose. This prong," the Court said, "in turn, has three subparts."

> First, can the law be explained solely by a remedial purpose? . . . If not, it is "punishment." Second, even if some remedial purpose can fully explain the measure, does a historical analysis show that the measure has traditionally been regarded as punishment? . . . If so, and if the text or legislative history does not demonstrate that this measure is not punitive, it must be considered "punishment." Third, if the legislature did not intend a law to be retributive but did intend it to serve some mixture of deterrent and salutary purposes, we must determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its usual manner, consistent with its historically mixed purposes. . . . Unless the partially deterrent measure meets both of these criteria, it is "punishment."[7]

The court continued, "[If] the purpose tests are satisfied, we must then turn to the effects of the measure. If the negative repercussions—regardless of how they are justified—are great enough, the measure must be considered punishment."

Focusing on Megan's Law itself and reconstructing its legislative history,

the *Artway* court found "that the legislature's actual purpose was not punishment. It speaks of 'identify[ing] and alert[ing] the public' to enhance safety and 'preventing and promptly resolving incidents.' Protecting the public and preventing crimes are . . . 'regulatory' and not punitive."[8] With respect to "objective purpose", the court again invoked the regulation/punishment distinction. Comparing the registration of sex offenders to required registration of membership corporations, lobbyists, professional gamblers, and of citizens under a military draft, the court held that "[r]egistration is a common and long-standing regulatory technique with a remedial purpose."[9] Here the court explained that

> the solely remedial purpose of helping law enforcement agencies keep tabs on these offenders fully explains requiring certain sex offenders to register. Registration may allow officers to prevent future crimes by intervening in dangerous situations. Like the agent who must endure the snow to fetch the soupmeat, the registrant may face some unpleasantness from having to register and update his registration. But the remedial purpose of knowing the whereabouts of sex offenders fully explains the registration provision just as the need for dinner fully explains the trip out into the night. And the means chosen—registration and law enforcement notification only—is not excessive in any way. Registration, therefore, is certainly "reasonably related" to a legitimate goal: allowing law enforcement to stay vigilant against possible re-abuse.[10]

Finally, turning to the actual effect prong of its three-part test, the court acknowledged that "there doubtless are some unpleasant consequences of registration." It found, however, that this "impact, even coupled with the registrant's inevitable kowtow to law enforcement officials, cannot be said to have an effect so draconian that it constitutes 'punishment' in any way approaching incarceration."[11]

Several things may be said about the *Artway* court's effort to differentiate punishment from regulation. First, its test is complicated and difficult to administer.[12] Second, it reflects an anxious effort to police and stabilize an uncertain and blurred boundary, trying to name different forms of state power and different experiences of that power. Third, it insists on an absolute distinction between punishment and regulation instead of attempting to understand regulation and punishment in relational terms, with regulation the more inclusive concept. Punishment, in this account, might be seen as a particular type or manifestation of the state's effort to regulate human conduct and subject it to

the "governance of rules."[13] As one scholar puts it, "[R]egulation is the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement."[14]

Thrust by the language of the double jeopardy clause as well as the Eighth Amendment's prohibition of "cruel and unusual punishment" into a definitional morass, courts regularly try to stabilize the boundary between punishment and regulation.[15] In this sense the *Artway* court provided a somewhat more elaborate version of a familiar set of definitional moves. In the jurisprudence of double jeopardy and the Eighth Amendment courts have insisted that the mere fact that pain is imposed by, or that unpleasant consequences are associated with, a legal enactment is not sufficient to establish that such a law is punitive.[16] Here the courts associate themselves with those who exercise state power rather than those on whom state power is exercised. For them, what is crucial is the perspective of those who authorize or administer the state's regulatory and punitive power.[17]

To offer another example of this tendency, thirty years prior to *Artway* the Supreme Court wrestled with the blurred boundaries between regulation and punishment in *Kennedy v. Mendoza-Martinez.*[18] That case arose from the efforts of the federal government to enforce the Nationality Act of 1940 and the subsequent Immigration and Nationality Act of 1952 by stripping two draft evaders of their American citizenship. Justice Goldberg, writing for the *Kennedy v. Mendoza-Martinez* majority, said that in determining whether this response to draft evasion was punitive the Court would consider:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.[19]

Most of the attributes of *Kennedy v. Mendoza-Martinez's* effort to distinguish regulation from punishment are mirrored and extended in H. L. A. Hart's classic five-part definition of punishment. In *Prolegomenon to the Principles of Punishment,* Hart establishes the following criteria for an act to be considered punishment:

(i) It must involve pain or other consequences normally considered unpleasant.

(ii) It must be for an offence against legal rules.

(iii) It must be of an actual or supposed offender for his offence.

(iv) It must be intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[20]

Despite such classificatory efforts, efforts to demarcate a stable boundary separating punishment from other phenomena, that boundary has been destabilized in a variety of ways and by a variety of factors. As Carol Steiker puts it in describing the criminal-civil distinction:

> This blurring or destabilization of the criminal-civil distinction is partly due to the increase in the sheer number of "hybrid" legal institutions and practices: From civil penalties to punitive damages, civil forfeiture to criminal restitution, legal devices that are arguably criminal-civil hybrids seem to be more common than they were a century ago. But this shift in actual practice is partly a function of shifts in the conceptual or intellectual foundations of the criminal-civil distinction (which are themselves, in turn, reinforced by changes in institutions and practices). This complex relationship between conceptual and institutional change lies at the roots of the current instability of the criminal-civil distinction in all of its messy manifestations.[21]

In social and political thought recognition of the blurred boundaries between regulation and punishment is associated most clearly with the work of Michel Foucault. In the familiar Foucauldian account, historically state imposed punishments were crucial to the efforts of sovereigns to maintain the obedience of their subjects. Through public demonstrations of awesome power, the public was rendered fearful.[22] As Foucault tells it, taking the individual as its object, this way of proceeding was very inefficient and undermined the legitimacy of the very state it was used to protect. Another way of ordering citizens emerged with the rise of what Foucault calls "discipline." Disciplinary power is a diffused form of governance that employs a variety of agents and institutions to organize individuals for maximum efficiency.[23]

While disciplinary power may take the individual as its object, it is aimed at the control of populations through biopolitical techniques designed to ensure their welfare. In *The History of Sexuality Volume 1*, Foucault writes:

> If the development of the great instruments of the state, as institutions of power, ensured the maintenance of production relations, the rudiments of anatomo- and bio-politics created in the eighteenth century as techniques of power present at every level of the social body and utilized by very diverse institutions (the family and the army, schools and the police, individual medicine and the administration of collective), operated in the sphere of economic processes, their development, and the forces working to sustain them.[24]

The diversity of the institutions that Foucault identifies as utilizing biopower and the fact that their common aim is to govern populations suggests that discipline has substantial overlap with various types of decentered regulation.[25]

The rise of disciplinary power, and subsequently of regulation, as a mode of governance and the decline of spectacular punishments deployed by the sovereign does not mean that discipline or regulation have replaced sovereignty and punishment. Indeed Foucault himself argues that sovereignty hasn't disappeared; instead it has been subsumed by disciplinary power's new manifestation: "I wouldn't say exactly that sovereignty's old right—to take life or let live—was replaced, but that it came to be complemented by a new right which does not erase the old right but which does penetrate it, permeate it."[26] For Foucault, punishment may not be the predominant system of governance, yet it is present in a changed form, subsumed by the regime of regulation.[27] Boundaries are blurred, classificatory schemes destabilized, as regulation "penetrates" and "permeates" punishment.

Law as Punishment/Law as Regulation attends to this blurring and destabilization in the various and complex relations of punishment and regulation as modes of governance but also as cultural phenomena helping to constitute legal subjects. We are less interested in the "accuracy" of philosophical or juridical definitional exercises than in helping to contextualize those efforts and understand their significance. Moreover, we want to question the adequacy of a view of punishment/regulation that neglects the perspectives of those who are at the receiving end of these exercises of state power. Contributors to this book examine various instances of punishment and regulation to illustrate points of overlap and difference between them, but also to capture the lived experience of the state's enterprise of subjecting human conduct to the governance of rules. They remind us that the power of law as punishment/law as regulation is inscribed on the bodies of persons, but that it also insinuates itself into their consciousness. Thus the blurring of boundaries between punishment and

regulation is not a problem just for courts but also for citizens seeking spaces of freedom within and beyond law's gaze.

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Markus Dubber opens this book by noting the complex and unsatisfying efforts to articulate differences between punishment and regulation and reframing the discussion of the distinction between punishment and regulation, labeling the former law and the latter police. Doing so, Dubber claims, relocates this classification in a particular historical genealogy. Reconceptualizing the terms of the discussion in this fashion suggests that while law operates on the individual, the object of police regulation tends to be collective.

One of the distinctions frequently invoked as crucial to the difference between punishment and regulation is the difference between private and public. However, the notion of private law and public regulation relies, according to Dubber, on an overly simplistic model and history of law. It disregards, for example, the increasing privatization of the penal process that is currently underway.

Comparing punishment and regulation is like comparing apples and oranges, because they are two fundamentally different things. Regulation, Dubber contends, is an empty label unless it is combined with a mode of governance. That mode of governance, which parallels and complements law, is the concept of police. Police and law are contemporary manifestations, Dubber argues, of the ancient Greek distinction between household governance and public governance.

In Greek political thought, Dubber explains, governance of the household (*oikos*) rested in the hands of the householder (*oikonomos*), who was responsible for the organization and management of humans, animals, and property of the *oikos*. All of the constituents of the *oikos* were incapable of governing themselves and thus required the *oikonomos* to govern them. The *oikonomos* was capable of self-government and subsequently of participation in the *agora*. Thus Greek social order contained two fundamentally different governing models: the heteronymous government of the *oikos* and the democratic arrangement of free and equal *oikonomos* in the *agora*.

The shift toward state sovereignty and republican self-government resulted, Dubber contends, in the politicalization of the heteronymous model of government and the shift from autonomy to heteronomy. Through a process of abstraction and "scientization" heteronymous government developed into a