Note: this is pre-print version, the article is published in Criminal Law and Philosophy, 2021, https://doi.org/10.1007/s11572-021-09617-1

Could We Live Together Without Punishment? On the Exceptional Status of the Criminal Law

Rocío Lorca
rlorca@derecho.uchile.cl

Many seem to find it hard to imagine a modern state and individual rights without criminal punishment, in this way giving exceptional status to the criminal law.[1] Despite the fact that modern states could not function without other forms of law, administrative and civil among them, criminal law seems to them to have a more crucial role in civil life – and thus to be "exceptional" in being so distinctively necessary.[2] Two key aspects of the modern state seem particularly dependent on the state's ability to punish: keeping the monopoly of violence by preventing informal justice,[3] and realizing individual rights.[4] The worry is that without the ability to punish the state may become impotent and rights vain.[5] Given that our earliest theories of the modern state as formulated by Hobbes and later by Weber[6] held the monopoly of violence as a primary condition for the state's constitution, many see the criminal law as a necessary condition for creating the very context that makes a civil and legal order possible.

However, as I will suggest in this short essay, it seems that often when we envision the costs of a state without punishment what we are really doing is stripping the state of its more general capacity to resort to force in order to compel obedience or realize rights, which is indeed necessary for the constitution of the state itself and civil order. A closer look into the ways in which the criminal law helps secure the state's monopoly over

[1] I will assume here (as many do) that the criminal law entails punishment (and when I talk in what follows about "punishment", I will mean criminal punishment). But against making this somewhat quick assumption see Antony Duff, The Realm of Criminal Law (Oxford: Oxford University Press, 2018), pp. 13-16.

[2] I am grateful to Antony Duff and Christoph Burchard for pushing me in making this clarification.

[3] See Douglas Husak, "The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law", New Criminal Law Review 23(1) (2020): 27; John Gardner, "Crime: in Proportion and in Perspective", in Andrew Ashworth and Martin Wasik (eds.), Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch (Oxford: Clarendon Press, 1998), 31.

[4] See e.g. Peter Ramsay, "A Democratic Theory of Imprisonment", in Albert W. Dzur and others (eds.), Democratic Theory and Mass Incarceration (Oxford: Oxford University Press, 2016), 84. The connection between rights and punishment can also be found in many human rights discourses: see Fernando Felipe Basch, "The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers", American University International Law Review 23(1) (2007): 195, p. 195; Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights", Cornell Law Review 100(5) (2015): 1069.

[5] On the modern origins of this worry, see Rocío Lorca, "The Presumption of Punishment: A Critical Review of its Early Modern Origins", Canadian Journal of Law & Jurisprudence 29(2) (2016): 385.

[6] Thomas Hobbes, Leviathan (Indianapolis: Hackett, 1994) at chaps. XIII and XIV and Max Weber, "The Profession and Vocation of Politics", in Peter Lassman and Ronald Speirs (eds.), Weber: Political Writings (Cambridge: Cambridge University Press,1994), 309.

violence and individual rights suggests that the criminal law is not as necessary or unavoidable as many might think for the constitution and promotion of these important aspects of the state. If this is true, the criminal law is not exceptional: it is just one more means of government, without which we can still make sense of the idea of a modern state and individual rights.[7]

1. Punishment and social peace

Regarding the ability to secure social peace and control violence, punishment has long appeared as a necessary price of renouncing retaliation, revenge or other forms of private justice. The deliberated and measured violence of punishment has the alleged capacity to neutralize fear and the vindictive emotions of victims, preventing blood feuds, violent vengeful mobs and the emergence of vigilantes.[8] Punishment is thus supposed to help reduce the overall levels of violence in a community and make us more civilized. If that is true, punishing too little, or not at all, might endanger this pacifying effect of punishment, leaving us prey to more violence and instability than that caused by the criminal law itself,[9] and ultimately also endangering the state's capacity to keep its monopoly of violence.[10]

But is it punishment that is needed to prevent violent forms of private justice that can endanger the state's capacity to monopolize violence? There are at least two reasons to doubt this assumption and to think that what is needed to prevent the emergence of vigilantism, vendettas, or blood feuds might not be punishment but the provision of genuine security, respect and protection.

First, we often leave crimes unpunished, and the supposed anger or resentment that this creates in victims has not produced a worrying increase in private violence.[11] When we do find examples of violent private justice

[7] I agree with those who think that coercion is essential to law and to that extent, to the modern state: see e.g. Ekow Yankah, "The Force of Law: The Role of Coercion in Legal Norms", University of Richmond Law Review 42(5) (2008): 1195; Grant Lamond, "The Coerciveness of Law", Oxford Journal of Legal Studies 20(1) (2000): 39. However, my point here is that public coercion, or the state's resort to force in order to compel obedience and secure civil order, need not take the form of punishment: see Oona Hathaway and Scott J. Shapiro, "Outcasting: Enforcement in Domestic and International Law", Yale Law Journal 121(2) (2011): 252.

[8] Husak, n. 3 above.

[9] Gardner, n. 3 above. Paul and Sarah Robinson have analyzed the issue in different terms, suggesting that the problem might lie less with vengeful victims than with a loss of confidence in the justice system that creates "shadow vigilantes" people who having lost trust in the criminal law and who undermine the system in subreptitious ways: Paul H. Robinson and Sarah M. Robinson, Shadow Vigilantes: How Distrust in the Justice System Breeds a New Kind of Lawlessness (Amherst: Prometheus Books, 2018), chap. III.

[10] See Philip Pettit, "Is Criminal Justice Politically Feasible?", Buffalo Criminal Law Review 5(2) (2002): 427, on the "outrage dynamic" exerting pressure on politicians and legislators.

[11] Criminologists often speak about the dark figure of crime—those crimes which are not reported and investigated by criminal law institutions; studies suggest that around 40% of crimes might not even be reported: see Terry L. Penney, "Dark Figure of Crime (Problems of Estimation)", in J. S. Albanese (ed.), The Encyclopedia of Criminology and Criminal Justice (Oxford: Blackwell Publishing, 2014), 1-6; Edwin H. Sutherland, "Is 'White Collar Crime' Crime?", American Sociological Review 10(2) (1945): 132.

these do not seem to compare with the levels of violence and social instability that the criminal law itself creates.[12]

Even in cases of systematic atrocities and widespread practices of impunity, victims often do not seek revenge or other forms of violent private justice. Consider the responses to state crimes committed by Latin-American dictatorships exemplified by groups such as the Chilean *Agrupación de Familiares de Detenidos Desaparecidos* or the Argentinean *Asociación Civil Abuelas de Plaza de Mayo*. In both cases, victims confronted, for decades, a complete absence of information, recognition, and accountability for the perpetrators. Their consistent fight against this lack of concern was often crushingly dismissed by legal institutions, yet they have not become notably vindictive or violent. To the contrary, they have shown persistent respect for the rule of law and for peaceful ways of pursuing justice.[13] This does not indicate that without punishment victims will never or should never become vindictive and seek private justice with violence. But it does suggest that the fear that this will often happen may not be fully warranted.[14]

Second, when contemporary failures to exercise penal power have ignited high levels of social indignation, informal violence and perhaps even institutional instability, what seems to be really happening is that the failure to punish flows from a background of structural injustice; this, rather than impunity itself, is what triggers and sustains private violence. If we are worried about informal justice as a threat to the state's monopoly of violence, the explanation might lie not in the need for punishment, but rather in a context of insecurity, abuse, unfairness or lack of protection. Indeed, the "war on drugs" led by the United States in many countries of Central and South America suggests that sometimes it may be the criminal law itself that endangers the state's ability to control violence.[15]

Consider for example the social unrest created by the killing of George Floyd in Minneapolis. One major engine driving the protests seems to have been a demand for the prosecution of the officers who killed

[12] Beyond the harms of punishment itself, the collateral social and political costs of punishment are very high. These costs fall not only on convicted people but also on their families and wider communities. See, e.g., Bruce Western, Punishment and inequality in America (New York: Russell Sage Foundation, 2006); Todd R. Clear, Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse (New York: Oxford University Press, 2007).

[13] I am grateful to Matías Díaz for raising this point.

[14] Criminal law itself might be part of the reason why we do not see so much private violence, since private violence is usually criminalized, and people may be afraid of being prosecuted if they pursue vengeance. However, the ways in which current social movements have confronted police and turned to violence in protest against the status quo suggest that fear of or respect for the criminal law is not such an important part of the story. I am grateful to Alejando Chehtman for pushing me on this issue.

[15] The crime and violence that surrounds the drug trade in some countries in South and Central America does not just consist of many infractions of the criminal law and much harm done to individuals; it also often threatens the political stability of these communities and the credibility of all of their legal institutions. See the declaration by the Latin American Commission for Drugs http://www.cicad.oas.org/fortalecimiento_institucional/planesnacionales/docs/Drogas%20y%20Democracia.%20Hacia%20un%20cambio%20de%20paradigma.pdf.

George Floyd, a demand strengthened by the fact that police violence deployed against black people in America tends to be less prosecuted than violence deployed against other groups.[16] While the demand might be a demand for punishment, the social and political issue is not punishment but the fact that in this political and institutional context some people's lives are systematically not treated as equally important.[17] Following Ruth Wilson Gillmore, we could say that the problem is racism, understood as "the production and exploitation of group-differentiated vulnerability to premature death."[18] When the focus is shifted to racism, the issue becomes larger than punishment and includes the killing itself and the conditions that made it possible; the primary demand seems to be one for equal respect and protection, and it is not evident that punishment has much to contribute to achieving these.[19]

Of course, if a community does use punishment as a way to respond to murder, it must do so with minimal levels of equality and to that extent, punishment matters. Also, I do not mean to suggest that we could transition to a society without punishment overnight, or that the attempt to do so would not create significant levels of chaos and insecurity. My point is simply that if we are concerned with informal violence, vigilantism, and institutional instability more generally, it is not obvious that punishment is what we need. Beyond the symbolic, punishment is not a way to protect or restore rights or to address unfairness in a society.

The state *needs* to prevent informal justice and private uses of force in order to secure its own existence, but it is not clear that it *needs* to do so through punishment, or that punishment will be of much help to the state's cause of creating and keeping social peace. Perhaps the role that punishment can play here is too limited to be of significance, and we may have to develop more appropriate means of dealing with social conflict and the legitimate demands of justice raised by victims and those who identify with them.

2. Punishment and individual rights

The second way in which the criminal law appears to be exceptional is by constituting and realizing individual rights. Natural right theorists such as Hugo Grotius and John Locke argued that individual rights must come

---

[16] Dwayne A. Mack and Felicia W. Mack, "Policing with Impunity", in Hector Y. Adames and others (eds.), Law enforcement in the age of Black Lives Matter: Policing black and Brown Bodies (Lanham: Lexington Books, 2017), 13; Devon W. Carbado, "From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence", California Law Review 105 (2017): 125.

[17] See the descriptions of Black Lives Matter: https://blacklivesmatter.com/about/; https://m4bl.org.

[18] Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California (21) (Oakland: University of California Press, 2007), p. 28.

[19] But see Maximo Langer, "Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then", Harvard Law Review Forum 134 (2020): 42. Compare Paul and Sarah Robinson's discussion of "shadow vigilantism" (n. 9 above): it is not clear that the lack of trust in the system that triggers these kinds of vigilante is directly a function of the lack of punishment. Rather, there is reason to believe that the system's credibility can be more directly secured through other means, such as social policies that contribute directly to prevent crime and corruption and create a more stable and genuine sense of security and concern.

with an entitlement to punish or they would be rendered hollow and superfluous.[20] Likewise, today, in the realm of international human rights law, to deny a right to punish serious violations of individual rights seems tantamount to the denial of the rights themselves.[21] But is it punishment that is needed to constitute or realize rights?

If the issue is effectiveness, it is not clear that the efficacy of a right is a function of punishing its infringements, or that punishment will fare better than other ways of making rights effective. There are many ways to realize rights, with or without force, that do not involve punishment: housing policies, environmental policies, policing, universal access to health care and education, powers of arrest, legal remedies, etc. If we have many of these policies at work, the absence of punishment hardly renders our rights vain.

When it comes to forceful means for realizing rights, punishment is not all that the state has in its arsenal; instead, the most obvious way in which public force is deployed for this purpose is enforcement. By 'enforcement' I understand the general capacity of public agencies to resort to force in order to compel obedience, secure the exercise of rights, or secure that harms caused by an infringement of rights and/or duties are repaired or compensated. The efficacy of a legal order relies fundamentally on its capacity to enforce rights and duties in the sense of making their infringement highly exceptional. And we (reasonably) believe that this requires legal institutions to be backed up by force.[22] But punishment itself is not an instance of enforcement; it comes too late. Punishment is primarily a response to someone's past behavior and not a way to make effective the interests or institutions that such behavior may have threatened or damaged.

There are at least two objections that can be made to the distinction between punishment and enforcement made above. First, it seems that we naturally think of the criminal law as part of the state's power of enforcement or, as Vincent Chiao has suggested, as a rule-enforcing institution.[23] However, my point is not that it is implausible or inadequate to talk about punishment as a means of enforcement, but rather that sometimes coercion is used as a means to directly secure compliance with the law or the effectiveness of a right (we can call this enforcement *stricto senso*), while at other times it is used primarily to address something that has already happened (punishment). Evidence of this difference in purpose between punishment and enforcement (*stricto senso*), is that in most jurisdictions a convicted offender who serves her sentence may still

[20] See John Locke, Second Treatise of Government (Indianapolis: Hackett Publishing Company, 1980), pp. 9-10; Hugo Grotius, Commentary on the Law of Prize and Booty (Indianapolis: Liberty Fund. Inc., 2006), pp. 21, 27, 30-32. See also Richard Tuck, The Rights of War and Peace (Oxford: Oxford University Press, 1999), pp. 84-86; Lorca, n. 5 above.
[21] See at n. 5 above.
[22] See e.g. Yankah, n. 7 above; Lamond, n. 7 above. But contrast Hathaway and Shapiro, n. 7 above.
[23] Vincent Chiao, Criminal Law in the Age of the Administrative State (Oxford: Oxford University Press, 2018) chap. 2.

be liable for damages in a civil court or to some form of administrative sanction, which will not entail a violation of the prohibition on double jeopardy.[24]

Second, there is a continuum between punishment and enforcement as means for protecting the integrity of rights and institutions that could make the distinction hard to draw. Indeed, one of the most popular rationales for punishment is the prevention of wrongs through deterrence, rehabilitation or incapacitation, and to that extent punishment can be loosely understood as a form of making institutions and rights effective. However, unlike the case of enforcement *stricto senso*, the fact that punishment can contribute to securing rights (and that this may be its ground for justification) does not entail that as a practice it consists in that. Public lighting, private guards, food stamps, and the legal permission for self-defense may all be practices that help protect private property, but they differ widely in the modes of interaction they entail. Likewise, both the practice of punishing murder and the establishment of shelters for victims of domestic violence may be ways of protecting people's lives, but as modes of interaction, only the second is directly about making a right effective.[25] This does not show that the criminal law cannot be instrumental for making rights effective, but it does suggest that punishment's contribution to the constitution and realization of rights may be more limited and indirect than we sometimes think.

3. Conclusion

Perhaps the key to realizing that punishment is non-exceptional, in the sense that it is not an unavoidable practice for the constitution of the modern state and individual rights, is to remain mindful of what punishment is and what punishment is not. Our public authorities need to have powers to fulfill their duties, and the capacity to compel obedience by force. This general capacity is what in continental law we usually call *imperium*. The modern state needs *imperium* to back up its policies as well as to offer protection and security, and it needs to have an exclusive claim over this capacity; but it is not clear that *imperium* must include the capacity to punish.

Ultimately, in the context of this inquiry into criminal law's exceptionalism, I hope to have shown that looking at punishment´s role in securing social peace and realizing rights reveals that punishment may be more a matter of choice than of necessity. If this makes it possible to imagine individual rights and a modern state without a power to punish, perhaps the criminal law is less exceptional than we sometimes think.

4. Discussion

[24] Interestingly, it seems that in a primitive stage of modern criminal law, punishment appeared in the common law as an alternative to compensation and not as complementary to it. See Chiao, n. 23 above, pp. 11-17.

[25] There have been, however, some attempts to understand punishment as self-defense in the sense of being an instance of societal defense: see e.g. Phillip Montague, Punishment as Societal-Defense (Lanham: Rowman & Littlefield, 1995).

The papers in this symposium deal with criminal law's supposed exceptionality in different ways, confirming Matravers's suspicion that concerns around this theme are like a "community stew" with each of us adding a different ingredient. However, all papers apart from mine engage with distinguishing what it might mean to say that criminal law is exceptional, so I will start this discussion by utilizing some of these distinctions in order to clarify my own view. I will then raise some considerations about the question of criminal law's exceptional features, as it appears in these papers.

Exceptionalism as an ideology of necessity

According to Matravers, there are at least two ways to look into the question of criminal law's exceptionality: a theoretical approach that examines the ideal functions or aims of the criminal law, and a practical approach that examines the features that distinguish criminal law from other institutions. I am not sure that these two approaches can be separated so neatly,[26] but the distinction does seem helpful for this conversation and also to situate my own view. In my essay, I take the first approach, i.e., I do not offer an account of the features that distinguish the practice, but instead, I consider a theoretical view according to which criminal law is exceptional because it is a necessary part of modern civil life, in the sense that without it we cannot constitute the state or individual rights.

What do I mean by "necessary" and why would this make the criminal law exceptional? Duff and Marshall offer helpful insights to answer these questions. They argue that in order to claim that the criminal law is necessary we need to establish what aspect of it is necessary, and for what purpose. In my view, one way in which the criminal law is thought to be exceptional is by the idea that *legal punishment,* as a specific aspect of criminal law, is necessary *for* the constitution and maintenance of the modern state and individual rights. But, more interestingly, Duff and Marshall distinguish two ways of understanding the claim that something is necessary: instrumental and constitutive. Instrumental necessity consists of an empirical claim about the exclusive capacity of a practice to achieve certain goals. Constitutive necessity, instead, identifies a sort of existential relationship, where a practice (in my account, punishment) is seen as a constitutive part of something (in my account, the modern state and individual rights), which then (almost *by definition)* could not exist or come to be without it. My view could have gained some clarity had I considered this distinction earlier, because although it may appear that I am considering a claim of instrumental necessity, the claim I am interested in is the constitutive one.

Indeed, I argue against a view according to which criminal law is exceptional because it is necessary to the constitution of the modern state and individual rights. It is deemed necessary, however, not as a matter of

[26] Indeed, both Christoph Burchard and Alice Ristroph seem to suggest the contrary, in the sense that, according to them, a belief about certain practical features of the criminal law has triggered a certain ideology or way of thinking about the criminal law as an ideal institution. I come back to this below.

fact, but as a presumption that becomes part of the very idea of statehood and individual rights. In such a relationship of constitutive necessity, the issue is one of identification, in the sense that it becomes impossible to identify a fully existing modern state or individual rights if they lack the element of punishment. This identification between punishment and both the modern state and individual rights makes punishment appear necessary regardless of whether it can, as a matter of fact, contribute to their efficacy. This does not mean that claims of fact have no bearing at all on the identification between punishment and the ideas of the modern state and individual rights. It is likely that a relationship of constitutive necessity originated at some point in an empirically founded perception, which later became a presumption about what makes individual rights and the modern state as a matter of identity, relatively independent of (and even resistant) to claims of fact. If this is the case, one can surely bring the claim of constitutive necessity into question by raising doubts over its possible empirical foundations.

Seeing the criminal law as necessary in this particular (constitutive) way gives it an exceptional status, precisely because it goes beyond a purely instrumental claim, which in the case of the criminal law appears distinctively tragic. Unlike what seems to happen in other areas of the law, the idea that punishment is necessary in this way places us in a tragic situation in which we relate to the practice as something we must endure, as though it was our destiny, despite all the objections we can find against it in the world of fact. Like Burchard and Ristroph, then, I too think that criminal law exceptionalism is, in the end, an ideology or a mode of thought that stands in the way of critique and helps to entrench the criminal law. Unlike them, however, I do not try to explain this ideology as the outcome of attributing a number of exceptional features to the practice. Instead, I consider that this ideology stems from a certain understanding of the state and individual rights which is relatively independent from the ideas we may have about the features of modern criminal law. Burchard and Ristroph may well be right in what they propose; in my view, we are just looking at different sources for a similar phenomenon.

The search for exceptional features

Duff and Marshall distinguish questions of exceptionality, of distinctiveness, and of necessity. They argue that criminal law is distinctive by virtue of a number of features but is not exceptional in being distinctive. One important distinctive feature of the criminal law is that it is "distinctively focused on culpable individual responsibility for wrongful actions."[27] However, in practice many criminal law systems do not display this distinctive feature, leaving us without grounds to distinguish criminal law in this way. This concern with a mismatch with reality is also raised by Matravers and Viganò. They both make the case that our current institutional practices demonstrate that criminal law is not exceptional (in practice). For example, Viganò claims that one of the supposed features that make criminal law exceptional as compared to other areas of the

[27] Antony Duff and Sandra Marshall, this issue.

law is that its sanctions are the most burdensome. He then argues that this no longer holds water in practice, because non-criminal sanctions can entail greater restrictions on our rights than those pertaining to criminal law.[28]

But to what extent does a mismatch with reality stand in the way of the criminal law being distinctive in the sense of having distinctive features? Maybe it is true that the degree to which we have seen the criminal law as being about blaming or burdening the punished is somewhat inaccurate when compared to reality, especially when we compare it to other areas of the law. As a result, if the criminal law's exceptionality is to be based on any of those distinctive features, it may be nothing but an illusion. But unlike fantasies, illusions are not something one can easily step out from, and I think that here Wilenmann's paper offers a productive way to interrogate our ideas about the practical features that distinguish the criminal law and, perhaps, make it exceptional.

In what he calls "dynamic pluralism" Wilenmann argues that criminal law's exceptionality can be established by looking at a set of features whose interactions produce certain effects. Taking blame and burden as an example, Wilenmann's approach could allow us to consider that what makes the criminal law exceptional is not the fact of blaming or burdening but rather a series of distinctive outcomes from the perception that criminal law is a practice that imposes burdens on the blameworthy. While we would still need to show that these distinctive outcomes are exceptional or peculiar to criminal law, blaming and burdening could continue to count as that which makes the criminal law exceptional, despite a mismatch with reality such as the one described in the previous paragraph.

As much as I like Wilenmann's proposal, however, I am not sure that his specific account of criminal law's exceptionality ends up exemplifying a view which is both dynamic and pluralistic. In his account of the features of the criminal law and the effects of their interaction, we find blame playing most of the melody *solo*. Even when we can hear other "features" contributing to the tune, it seems that blame is running the show in the production of most of criminal law's exceptional "interactive effects." So, while I find myself persuaded about the type of theory he suggests, I end up wondering whether the most we can get is a dynamic but *monistic* story of the many ways in which blame (or the illusion that criminal punishment is about imposing burden on the blameworthy) determines the exceptional social impacts that distinguish the criminal law.

[28] And criminal sanctions themselves are often not as burdensome as we seem to believe.