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The Presumption of Punishment: A Critical Review of its Early Modern Origins

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Abstract

Our conversations about punishment have been constrained by the presumption that crimes ought to be punished. This presumption does not entail that crimes must be punished, but rather that punishment occurs as a natural response to wrongdoing instead of as a conventional creation. As a consequence, the challenges for punishment's justification have been reduced to the problems of purpose, opportunity and form, leaving unaddressed the question of the authority of a certain polity to impose this form of treatment on a given individual. In order to present and criticize this presumption, the article traces its origins by revisiting the debate about the nature of punishment that took place during the emergence of liberal political philosophy. After evaluating the main arguments of this debate the article concludes by arguing that liberal theories of punishment should give up this presumption.

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Footnotes

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The Presumption of Punishment: A Critical Review of its Early Modern Origins

by Rocio Lorca

Introduction

Our conversations about punishment have been constrained by the presumption that crimes ought to be punished. This presumption does not entail that crimes must be punished, but rather that punishment occurs as a natural response to wrongdoing instead of a conventional creation. Even if it troubles us, we seem to believe that the maintenance of social order requires that we punish the actions that frustrate our most fundamental normative expectations.[1]

Operating in this context, the philosophy of punishment has limited its space of inquiry to the problems of punishment's permissible aims, techniques and opportunities, leaving unattended the question of what is the source of the state's authority to set up this practice and exercise this particular kind of power over an individual.[2] Theories of punishment **have** not dwelt too much on the question of authority, because under the presumption that punishment is the natural corollary to crime instead of a purely artificial

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[1]Unfortunately, however, our actual penal practices do not only concern themselves with these "most fundamental" normative expectations but also with a large group of conduct that is of little, if any, social importance. In this sense, see Douglas Husak, *Overcriminalization* (New York: Oxford University Press, 2008) [Husak, *Overcriminalization*].

[2] This is what Anscombe defined as the second part of the justification of punishment, i.e., the question of who has the authority to punish someone in particular GEM Anscombe, "On the Source of the Authority of the State" in Joseph Raz, ed, *Authority* (New York: NYU Press, 1990) 163 [Anscombe, "On the Source of the Authority of the State"]. A salient exception to this tendency in punishment theory is the work of Antony Duff. See, for example, Antony Duff, *Punishment, Communication, and Community* (New York: Oxford University Press, 2001) [Duff, *Punishment, Communication, and Community*]; Antony Duff, "I Might Be Guilty, but You Can't Try Me: Estoppel and Other Bars to Trial" (2003) 1:1 Ohio St J Crim L 245 [Duff, "I Might Be Guilty, But You Can't Try Me"] Antony Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial" (2010) 23:2 Ratio 123 [Duff, "Legitimacy of the Criminal Trial"].

practice, the state does not appear to be the author of the practice, but only its administrator. If there is to be an author of this practice, it should be nobody but the offender. Or, as Hugo Grotius would put it, since punishment is a natural consequence of crime, it is the criminals who have brought punishment upon themselves.[3]

In this article I will trace the origins of this presumption in liberal philosophy and question its validity. In order to do so, I will revisit the debate about the nature of punishment that took place during the emergence of liberal political philosophy. I have chosen this debate because, in the context of liberalism, this was when the issue of the source of the authority to punish was last raised, and thus likely where the presumption of punishment originated. In particular, I will consider the work of 16th and 17th century philosophers such as Francisco de Vitoria, Thomas Hobbes, Hugo Grotius, John Locke and Samuel Pufendorf, all of whom dedicated part of their scholarship to the question of the nature of the power to punish. I will proceed by first describing in more detail what I have called "the presumption of punishment." Then, I will present and evaluate the main arguments of the Early Modern debate and I will conclude the article by considering why liberal theories of punishment should give up this presumption.

The Content of the Presumption of Punishment

The point of departure in Western political philosophy is a presumption of liberty according to which individuals are equally free so that no one has a natural privilege to exercise power over someone else.[4] This presumption triggers a suspicion over political power which is meant to guard the integrity of the individual by distributing burdens of justification: any exercise of power that is exerted over an individual is *prima facie* impermissible and requires a justification.[5] Now, let me stipulate the following definition of punishment: whether intended to serve a forward-looking goal or not, punishment is always a deliberate imposition of hard treatment that follows the finding of an individual's misconduct.[6] As such, punishment is always an exercise of power, both normative and

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[3] H Grotius, *The Rights of War and Peace: Including the Law of Nature and of Nations* (MW Dunne, 1901) at 222 [Grotius, *The Rights of War and Peace*].

[4] For a critical **review of this,** see Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press,1988) at 8–12 [Raz, *The Morality of Freedom*].

[5] Thomas Hobbes, *Leviathan* (Indianapolis: Hackett, 1994) at ch XIII [Hobbes, *Leviathan*]; John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), at ch II [Locke, *Second Treatise of Government*]; Raz, *The Morality of Freedom*, *supra* note 4 at 12–14; Anscombe, "On the Source of the Authority of the State," *supra* note 2 at 146–47; Joel Feinberg, *Social Philosophy* (Upper Saddle River: Prentice-Hall, 1973) at 20–22.

[6] Neil MacCormick & David Garland, *Sovereign States and Vengeful Victims: The Problem of the Right to Punish* (Oxford**:** Clarendon Press, 1998) [MacCormick & Garland, *Sovereign States and Vengeful Victims*]. Grotius's definition of punishment is quite similar**,** so it should not be a problem to translate their debates into our contemporary views, according to Grotius, "**[p]**unishment

physical, so if the presumption of liberty holds, any imposition of punishment should be considered impermissible until it is appropriately justified.

An appropriate justification of punishment, in turn, should demand that we account for two sets of issues: first, the appropriateness of punishment as a response to wrongdoing, and second, the normative standing of a certain individual to interact in this way with someone else.[7]

Most punishment theories, however, do not see things this way, and limit the justificatory challenge of punishment to the question of its appropriateness as a response to a certain offense. This limitation comes as a result of the presumption of punishment. In the context that is created by this presumption, the second part of the justificatory challenge, i.e., the question of what gives someone a right to punish someone else, does not arise because here it is the wrong itself that calls for the practice and not someone's conventional capacity to establish and impose it. As a consequence, within this framework, what needs to be justified is not the very existence of the practice of punishment and the standing of someone to bring it about, but the ways in which it is exercised. Thus, the question of the state's entitlement to punish is translated into the question of why *only* the state can punish, which can be easily answered as an issue of expediency or as a matter of political necessity.[8]

Under a presumption of punishment, the existence of standards of good and bad, or right and wrong, entails the existence of punishment, because it is the very possibility of punishment that confirms the existence of social normativity.[9] So, as long as there are crimes, there ought to be punishment; as long as individuals have rights that we consider to be of primary value, their serious violation must trigger the possibility of punishment upon conviction.[10] Accordingly, it is not up to political agents to decide whether to establish this practice or not, our job is rather to identify punishment's appropriate opportunities and to

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taken in its most general meaning signifies the pain of suffering, which is inflicted for evil actions." Grotius, *The Rights of War and Peace*, *supra* note 3 at 221.

[7] Anscombe, "On the Source of the Authority of the State," *supra* note 2 at 163.

[8] In the first sense, see Alon Harel, "Why Only the State May Inflict Criminal Sanctions: The Case against Privately Inflicted Sanctions" (2008) 14:2 Legal Theory 113. Regarding punishment as a way in which the state constitutes itself, see M Weber, "The Profession and Vocation of Politics" in P Lassman & R Speirs, eds, *Weber: Political Writings* (Cambridge: Cambridge University Press,1994) 309. M Foucault, *The History of Sexuality, Volume 1: An Introduction*, translated by Robert Hurley (New York: Vintage, 1990) at 133–45.

[9] Of course, there will be disagreement about what constitutes serious wrongdoing, but we can find appropriate ways to deal with such disagreement. See Jeremy Waldron, *Law and Disagreement* (New York: Clarendon Press Oxford, 1999) at ch 8.

[10] The main theoretical resource to determine the appropriateness of punishment will thus be a theory or a principle criminalization. See Husak, *Overcriminalization*, *supra* note 1.

impose it in appropriate ways. Again, as we have not created punishment, we do not have to spend much time explaining what gives us the standing to bring it about.[11]

Now, because this view of punishment constitutes a presumption, we can find evidence of its existence but we lack a contemporary debate about its plausibility. Indeed, the presumption is made apparent by the very fact that the second part of punishment´s justificatory challenge, i.e., the question of political standing, is not a concern for most theories of punishment, because if there was no presumption of punishment this would be a primary issue.

A more positive embodiment of the presumption, however, can be found in some contemporary understandings of the idea of impunity as a political and moral failure.[12] According to these views it is not just the imposition of punishment that requires a justification, but also the failure to impose it.[13] Here, the power to punish is understood as a duty of the state or the international community, rather than as a contingent mode or technique of governance; it is, so to speak, a demand of justice. Even for scholars who are committed to a critical approach to the criminal law, it is inconceivable that punishment would not be available as a response to the most serious and uncontroversial wrongs; so for most of them, the social problems that are always present in our systems of punishment do not ignite a specific philosophical problem as much as they evince punishment's tragic nature or the urgent challenges that our policy makers must confront.[14]

In sum, punishment has been naturalized to the extent that we see it as part of how things are, rather than as something that we have created by use of our imagination and our

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[11] This stands in contrast to other areas of government. In the case of tax law, for example, it is clear that the regulation is a political convention, and as such, the very existence of the practice of taxation has been brought into question, not just the substantive prescriptions of a particular taxation scheme. On the other hand, it has been thought that the criminal law is less demanding in terms of legitimacy, as most of its duties are considered pre-political duties. See in this sense, A John Simmons, *Moral Principles and Political Obligations*, (Princeton: Princeton University Press, 1981) at 195–201; David Copp, "The Idea of a Legitimate State" (1999) 28:1 Philosophy & Public Affairs 3 [Copp, "The Idea of a Legitimate State"].

[12] For a salient example of the strength of the rhetoric of impunity in the Preamble of the UN General Assembly, see the Rome Statute of the International Criminal Court (last amended 2010), July 17, 1998.

[13]Jesus-Maria Silva Sanchez, "Doctrines Regarding the Fight against Impunity and the Victim's Right for the Perpetrator to Be Punished" (2007) 28:4 Pace L Rev 865.

[14] Even Antony Duff would hold that when it comes to controversial *mala in se* we might have a permission to punish, regardless of the unfairness of the social and political conditions in which the offender has been placed by the political community. See, Duff, "Legitimacy of the Criminal Trial," *supra* note 2 at 136; Duff, "I Might Be Guilty, but You Can't Try Me," *supra* note 2 at 259; Duff, *Punishment, Communication, and Community*, *supra* note 2 at ch 5. About punishment's tragic nature, see David Garland, *Punishment and Modern Society: A Study in Social Theory*, (Chicago: University of Chicago Press, 1993) at ch 12.

physical and technological capacities.[15] This understanding modifies the principle of justification that is entailed by a presumption of liberty: punishment is seen as an instance of political power only to the extent that it is exercised by political agents and not as something they create willingly, and it follows that what must be justified is not the standing of the state to establish the practice, but instead the way in which it administers it. But are there any good reasons to hold this presumption true? And how should we begin a discussion about the reasons that ground a presumption when it has been so effective as to go unnoticed?

It is hard to find arguments about an issue when it has not been considered an issue at all, so for this purpose I will now review the main arguments regarding the nature of punishment when the issue was last openly debated in our philosophical tradition. To invoke Grotian rhetoric again, "[w]here should we begin, if not at the very beginning?"[16]

The Early Modern Debate on Punishment

The contemporary notion that crimes ought to be punished likely sprang from the early modern idea that individuals have a natural right to punish. Indeed, the most explicit defense of a naturalized view of punishment in western thought can be found in some of the foundational discourses of liberalism, like the early modern theories of natural rights developed by Hugo Grotius and John Locke. Basically, these philosophers argued that the power to punish confirmed the very existence of individual rights, and because individual rights were seen as part of individual's pre-political entitlements, so was the power to punish.[17]

It is true that the very idea of individual rights had been evolving long before the 16th century, but there was a particular shift in our understanding that took place at that time, and this shift was greatly determined by the idea of punishment.[18] In short, this was

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[15] See Oliver O'Donovan, *The Ways of Judgment* (Cambridge: Wm. B. Eerdmans Publishing, 2005) at 113 [O'Donovan, *The Ways of Judgment*]. There are other explanations of this move towards an understanding of punishment as something for which the community is not responsible. For example, Danielle Allen argues that anger no longer being considered as a problem of the political community might have led to this change in our understanding of punishment. Danielle S Allen, "Democratic Dis-Ease: Of Anger and the Troubling Nature of Punishment" in Susan A Bandes, ed, *The Passions of Law* (New York: NYU Press, 1999) 205 [Allen, "Democratic Dis-Ease: Of Anger and the Troubling Nature of Punishment"].

[16] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Indianapolis: Liberty Fund, 2006) at 19 [Grotius, *Commentary on the Law of Prize and Booty*].

[17] See a general account in Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press, 1999) [Tuck, *The Rights of War and Peace*].

[18] Brian Tierney, *The Idea of Natural Rights* (Grand Rapids: Wm B Eerdmans, 1997) at 45, 88–89, 342 [Tierney, *The Idea of Natural Rights*]; Tuck, *The Rights of War and Peace*, *supra* note

the time of a transition into a modern view of the individual, which was not as much determined by the idea that individuals have pre-political rights, as it was determined by a portrayal of a powerful individual whose rights came with a permission to punish.[19] It was the power to punish that ascertained the priority of rights over duties, and thus helped consolidate a discourse of the self that early modern philosophy was presenting as a turn from the medieval view of the individual, which was that of a teleological being mostly governed by duties.[20] These discussions contain explicit arguments about punishment as a necessary feature of morality rather than an artificial human creation, and so it must be here where our current reasons to hold this presumption true were conceived.

Of course, historical circumstances and geopolitical contingencies of the 16th and 17th centuries facilitated the emergence of this new view of the individual and its connection to the power to punish.[21] The debate took place in the context of a far-reaching colonization process undertaken by many European countries; and a permanent threat of war that was a consequence of the new political order of Europe, in which the church no longer had a unifying role.[22] The presumption of punishment came as a solution to the normative problems that were raised by these events. In the first place, the belief in a natural right to punish provided a justification for European colonization and the use of violent measures to secure new commercial routes.[23] This was possible because Europeans thought that they were entitled to punish the violations of the natural law that, according to them, were committed by people over whom they lacked civil authority, like the natives from the New World, thus the right to punish moral wrongdoers was translated into a title to wage just war and a permission to colonize.[24]

Additionally, the need to find a common normative language to strengthen the possibility of peace among European nations might have also been a factor for this new view of the individual, since it promoted the emergence of secular arguments that made it unnecessary to rely on religious explanations that had become too controversial after the

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17 at 81, 170–71.

[19] And even though this view seemed destined for oblivion by the end of 19th century, it regained influence after the Second World War. See Tierney, *The Idea of Natural Rights*, *supra* note 18 at 345.

[20] *Ibid* at 333.

[21] See a full account of this in Tuck, *The Rights of War and Peace*, *supra* note 17.

[22] Europe was then organized in several polities which had yet to find a common normative language that would help them deal with their conflicts without resorting to war or brute force. Tierney, *The Idea of Natural Rights*, *supra* note 18 at 288–89, 345.

[23] A full analysis of this debate can be found in Tuck, *The Rights of War and Peace*, *supra* note 17.

[24] See Grotius, *Commentary on the Law of Prize and Booty*, *supra* note 16 at 372–78; Francisco de Vitoria, *Political Writings* (Cambridge: Cambridge University Press, 1992) at 272–75 [Vitoria, *Political Writings*].

Protestant Reformation and the Counter Reformation of the Catholic Church.[25] Hence, the retreat of religion as a space in which to look for universal answers seems to have enabled a move from the idea of duties to the idea of rights and the emergence of the notion of the individual as the source of all political power, because this allowed for a discourse that could be universalized beyond religious allegiance: it is in the natural moral qualities of individuals that all power resides, and not in their belonging to a given community.[26]

The historical context of this philosophical shift, of course, does not say anything conclusive about the plausibility of the idea that individuals have a natural right to punish, but it is helpful to keep in mind that this idea was conceived in the context of a discussion about political authority. Essentially, it is an idea that was used to dissolve an apparent problem of standing that Europeans were confronting regarding the use of force against foreign communities, and this, of course, also had an impact on their understanding of political power on a domestic level. So let us consider the terms on the discussion.

The debate about a natural right to punish can be presented through two opposing views. One side of the debate regarded punishment as an act of political power that always requires a relationship of authority for it to be permissible. For instance, Scholastic philosopher Francisco de Vitoria explicitly argued that temporal punishment requires civil jurisdiction, i.e., a relationship of political subordination between the parties involved. Vitoria developed this view while discussing whether European colonization could be justified as a way to punish the sins of the colonized.[27] According to him, Europeans were not entitled to punish those over whom they lacked a relationship of civil authority, so they could not punish sinners from the New World, not even on the authority of the pope, because the pope also had no power to punish those who were not under his jurisdiction.[28] In sum, because punishment is primarily tied to the existence of a relationship of justified political authority, instances of force that are deployed outside of this kind of relationship were either acts of hostility or instances of a right to defend.[29]

The other end of the debate held that punishment is a natural attribute of human beings, and, as such, there is no need to establish a relationship of authority for punishment to be permissible — each individual's power to punish provides the primary source of political power. As we will see, this view can be represented in the work of Hugo Grotius and John Locke. Grotius, for example, openly contested Vitoria by defending a natural right

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[25] JB Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge: Cambridge University Press, 1998) at 7; John Plamenatz, *Man and Society,* Vol 1 (City: Longmans, Green, 1963) at 58; Tuck, *The Rights of War and Peace*, *supra* note 17 at 85.

[26] Tierney, *The Idea of Natural Rights*, *supra* note 18 at 52.

[27] Vitoria, *Political Writings*, *supra* note 24 at ch xii–xiv.

[28] According to Vitoria, the pope's temporal powers are limited to those who have subjected themselves to faith, thus he is powerless over nonbelievers, *Ibid* at 258–64.

[29] Hobbes, *Leviathan*, *supra* note 5 at ch XXVIII; Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (Cambridge: Cambridge University Press, 1991) at 158-162.

to punish in a way that would enable him to justify the international behavior of the Dutch, which involved features that were very problematic in the face of traditional principles of international relations.[30] According to Grotius, war could be waged against those who had offended the law of nature, even if they have caused no injury to their attackers, because he thought war could be understood as an instance of a natural right to punish offenses to this law. As a natural right, punishment did not require any particular institutional structure.[31]

Grotius's and Locke's substantive defense of a *natural* right to punish was made on three grounds: 1) political authority is superfluous in the sense that all its legitimate powers must have belonged to the individual in the first place, and as a consequence, if the state can punish, individuals must have had this capacity on the first place, 2) if there were no natural right to punish for offenses, governments would not be morally authorized to punish alien wrongdoers that commit crimes in their territory, and 3) natural law must be enforceable to be genuine law and this implies a right to punish the offenses against it. The presumption of punishment represents the triumph of this end of the debate, so in order to bring it into question, I will now review each of these three arguments.

The Superfluous Character of Political Authority

Both Grotius and Locke claimed that all governmental rights must proceed from the individual because political authority results from an agreement among its subjects and individuals can only transfer rights that they possess. Since political authorities punish, the argument goes, individuals must have had a right to punish before the constitution of civil society.[32] According to this approach, political authority is *superfluous* in the sense that public officials may not possess more rights than those that were previously possessed by each individual member of the political community.[33] As a consequence, the political structure represents merely a re-allocation of rights, and does not give rise to new normative realities; we can thus learn about individual's natural capacities from observing what political institutions do.[34]

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[30] Basically, the problem was posed by the fact that the Dutch were: 1) waging an offensive war to further their commercial interests without any recognizable justification; and 2) waging these wars without a recognizable political structure. Tuck, *The Rights of War and Peace*, *supra* note 17 at 81; Grotius, *The Rights of War and Peace*, *supra* note 3 at ch XX, XL.

[31] Tuck, *The Rights of War and Peace*, *supra* note 17 at 85, 103. Grotius, *The Rights of War and Peace*, *supra* note 3 at ch XX, XL; Grotius, *Commentary on the Law of Prize and Booty*, *supra* note 16 at 137.

[32] Grotius, *Commentary on the Law of Prize and Booty*, *supra* note 16 at Prolegomena, 136–37; Tuck, *The Rights of War and Peace*, *supra* note 17 at 85.

[33] A John Simmons, "Locke and the Right to Punish" in Marshall Cohen et al, eds, *Punishment: A Philosophy & Public Affairs Reader* (Princeton: Princeton University Press, 1995) 221 [Simmons, "Locke and the Right to Punish"].

[34] Tuck, *The Rights of War and Peace*, *supra* note 17 at 85.

It is of course debatable whether any theory of civil society according to which the power of the state is constituted by consent must embrace the view that institutions are morally superfluous in the sense that all their normative capacities and standards must have been part of pre-political individual morality. There are plausible consent-based theories of the state that do not hold such a view and which, indeed, argue that the power to punish can only arise in the context of a political society. Hobbes's and Pufendorf's theories are two good examples of this as they both argue that the constitution of a civil society provides the conditions under which certain powers, like the power to punish, can arise. So even though they did see political power as sourced in pre-political features of human beings, for them this did not imply that the specific capacities of political authorities must be equal to the pre-political capacities of individuals. In this sense, Pufendorf held that the right to punish requires a relationship of authority that is absent before the civil pact, where we are in a natural state of perfect equality.[35]

For Hobbes, the constitution of sovereign power provides the basic condition of assurance that makes possible certain normative standards and expectations, so punishment outside of the political context can only be an instance of hostility.[36] Now this may seem to contradict Hobbes's own views on punishment, where he argues that *the source* of the sovereign's right to punish is his own natural right to do everything that is necessary for his own preservation.[37] However, according to Hobbes, in a state devoid of assurance over the behavior of others, the basic right we have to do whatever we think necessary to protect ourselves does not give us a moral claim towards others. It is the very institution of the

[35] In his words, "it is impossible to conceive how […punishment] already existed in a state of nature where no man is subject to another." Samuel Pufendorf*, Of the Law of Nature and Nations*, translated by CH & WA Oldfather (Oxford: Oxford University Press, 1934) at 1160. In his view, there is nothing problematic about the idea that a power that is sourced in a transfer can be different from the thing that was transferred. He argues that just as the mixture of material bodies can give rise to completely new substances, so can moral bodies give rise to entities that are not reducible to their parts. *Ibid* at 249.

[36] According to Hobbes, for example, there can be no right to punish in a state of nature**.** This is because moral rights and duties can only arise under an authority that can provide enough assurance over the behavior of fellow human beings. Hence, it is only after the establishment of a sovereign that a right to punish can arise, before this it can only represent an act of hostility. Hobbes, "Leviathan," *supra* note 5 at ch XIII and XIV. See in this sense the conceptual restrictions to the idea of punishment in chapter XXVIII of *Leviathan***.** All these restrictions begin from the assumption that punishment can only be exercised by a public authority. These are not *definitional stops,* in the Hartian sense, but logical consequences of the substantive claim that there is no right to punish in a state of nature. See HLA Hart, "Prolegomenon to the Principles of Punishment" in HLA Hart, ed, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968) 5.

[37] Hobbes, "Leviathan," *supra* note 5 at ch XXVIII.

sovereign that transforms this basic right of self-preservation into a practice of justice instead of being an act of hostility.[38] In Hobbes's words:

To this war of every man against every man, this also is consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice. Force and fraud are in war the two cardinal virtues.[39]

A superfluous view of authority, then, does not seem to be an analytical requirement of any plausible consent-based theory of the state and, moreover, it can be argued that such a view is indeed inconsistent with the very liberal principles that ground consent-based theories of the state, as a presumption of liberty should demand that certain rights and duties only arise under certain institutional arrangements.[40] But, beyond the philosophical purchase of the idea that political authority is superfluous, there is a deeper question: Why would it matter?

Assume that Grotius and Locke are right that if the sovereign can punish, then individuals must have had a natural right to punish, such that the presumption of punishment holds. But in order to arrive at such a conclusion, we would first need to argue that states *can* indeed punish. In other words, Grotius and Locke seem to be starting from the assumption that states *can* punish and, as a result, this capacity must come from the source of all its power, i.e., the individual. Hence, the argument goes, individuals must have a natural right to punish. But the fact that the sovereign does punish says nothing about the permissibility of this practice, so it should also tell us nothing about the nature of the right to punish. So even if it was true that political authority must ground all its powers on individual natural attributes, absent an independent reason to believe that the sovereign *is* entitled to punish, this argument gives us no reason to believe that the individual had this power before entering the civil compact. To proceed otherwise is to derive 'an ought from an is.'[41] Hence, we need to find some other ground for the presumption of punishment to hold.

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[38] I thank Professor Waldron for pointing out the need to make this clarification.

[39] Hobbes, "Leviathan," *supra* note 5 at ch XIII p 78.

[40] Basic liberal inquiries should make us doubt that punishment is possible in a world of equals that lacks a legitimate political organization through which we can determine the boundaries between right and wrong, adjudicate a conflict and enforce the outcomes of these procedures. Locke was aware of these problems, and this is precisely what triggers his political theory and his claim in favor of the constitution of civil government as a remedy for this malaise. However, Locke's recognition of these problems did not stop him from affirming that, absent a sovereign, every individual has a natural *right* to punish, with all the problems that this may entail. Locke, *Second Treatise of Government*, *supra* note 5 at 12–13.

[41] See in this sense Rousseau's critique of Grotius philosophical methodology, Jean-Jacques Rousseau, *The Basic Political Writings*, translated by Donald A Cress (Indianapolis: Hackett, 1987).

Punishing Foreigners

Grotius and Locke also argued that without a natural right to punish there would be no ground to punish foreigners who commit crimes in a state's territory, but we do this all the time.[42] They both thought there was no other available explanation for this instance of punishment because they saw consent as the source of political authority and, since there is no civil compact between a foreigner and the punishing state, punishment must have been sourced in natural rights. In Locke's words,

> [I]f by the law of nature every man hath not a power to punish offences against it, as he soberly judges the case to require, I see not how the magistrates of any community can punish an alien of another country; since, in reference to him, they can have no more power than what every man naturally may have over another.[43]

Like the superfluous view of political authority, this is also a practice-based argument that suffers from the normative fallacy of deriving an ought from a judgment of fact, but before we dismiss this argument on methodological grounds, let us consider whether there is a deeper point worthy of attention.

The issue of punishing foreigners, who commit crimes within the territory of the state that aims to punish them, can be presented in two parts. First, there is the question of whether foreigners are politically related to the state they are visiting or traveling through in order for the state to have authority to punish them. And then, if we think they are not politically related in this way, there is the question of whether the fact that we do punish them gives us reason to hold that individuals have a natural right to punish. I will address these two issues in order.

The question of whether there is a relationship of political authority between a state and a foreigner such that the state has authority to punish depends on both the theory of political authority that one favors and the specific status that a foreigner holds. It is beyond the scope of this article to defend a view of political authority and apply it to the different capacities in which a person can be in the territory of a given state.[44] Instead, I will focus on

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[42] Locke, *Second Treatise of Government*, *supra* note 5 at 47; Grotius, *Commentary on the Law of Prize and Booty*, *supra* note 16 at 137. It is striking how similar their arguments are, yet it is not clear they had a chance to read each other's works. Regarding the possibility that this is just a case of intellectual convergence, see Tuck, *The Rights of War and Peace*, *supra* note 17 at 82.

[43] Locke, *Second Treatise of Government*, *supra* note 5 at 10–11. See also Grotius: "[T]he state inflicts punishment for wrongs against itself, not only upon its own subjects but also upon foreigners; yet it derives no power over the latter from civil law, which is binding upon citizens only because they have given their consent; and therefore, the law of nature, or law of nations, is the source from which the state receives the power in question. (…) For the cause of punishments is a natural cause, whereas the state is the result, not of natural disposition, but of an agreement." Grotius, *Commentary on the Law of Prize and Booty*, *supra* note 16 at 137.

[44] See generally Antony Duff, "Responsibility, Citizenship and Criminal Law" in Antony

Grotius's and Locke's view on the matter so we can get a conceptual grasp of their arguments about the nature of the power to punish. [45]

As we will see, it is surprising that both these philosophers thought it impossible to find a ground for a sovereign's authority to punish the crimes that are committed by foreigners who are passing through its territory, because consent-based theories of political authority, like the ones defended by them, have good resources to claim the opposite.[46]

Arguably, by voluntarily entering the territory of a given state, aliens tacitly consent to respecting its rules, and since both Grotius and Locke thought that tacit consent was a sufficient ground for political authority, it is not clear why they would consider the case of punishing foreigners problematic.[47] Indeed, even if one disagrees with the capacity of consent to ground political authority over a regular citizen, it appears as a more plausible theory of authority for the specific case of a state's authority to punish a foreigner.

For most citizens, consent is not a very promising basis for the state's standing to rule over them, as they have little choice about whether to enter the civil compact or to remain outside. In their case, tacit consent would have to be derived from the mere fact of "living under the dominion" of a given sovereign; but, as Hume argued, the circumstance of living under someone's dominion makes the idea of consent implausible:

> [S]uch an implied consent can only have place, where a man imagines, that the matter depends on his choice. But where he thinks (as all mankind do who are born under established governments) that by his birth he owes allegiance to a certain prince or certain form of government; it would be absurd to infer a consent or choice, which he expressly, in this case, renounces and disclaims.
>
> Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man, by remaining in a vessel,

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Duff & Stuart Green, eds, *The Philosophical Foundations of the Criminal Law* (Oxford: Oxford University Press, 2011) 125; Lucia Zedner, "In the Criminal Law Only for Citizens? A Problem at the Borders of Punishment" in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment* (Oxford: Oxford University Press, 2013) 40.

[45] Of course, the contrast between a foreigner and citizen cannot be drawn in a simple way. There are several complicated legal categories that define the status of an individual with respect to a given state, e.g., you can be a tourist, you can be a working guest, you can be a representative of a different state, etc., and these different statuses will entail different forms of relationships with the state. For the sake of the argument, I will circumvent this complexity and focus on the case of guests who are passing through and have no especial relationship of subordination with their host, which seems to be the case that Locke and Grotius had in mind.

[46] Locke, *Second Treatise of Government*, *supra* note 5 at 10–11; Grotius, *Commentary on the Law of Prize and Booty*, *supra* note 16 at 137.

[47] Simmons, "Locke and the Right to Punish," *supra* note 33 at 236.

freely consents to the dominion of the master; though he was carried on board while asleep, and must lean into the ocean and perish, the moment he leaves her.[48]

Now, it might be the case that, unlike the situation of a regular citizen, consent *is* enough to ground the thin and transitory relationship that takes place between a foreigner and a host state, which differs radically from the indeterminate and all-encompassing political relationship that takes place between an individual and the institutions that govern his or her life on a regular basis. Then, contrary to what Grotius and Locke thought, it seems to be precisely in the case of foreigners that consent-based theories of authority may work best. To put it again in Hume's words:

> The truest tacit consent of this kind, that is ever observed, is when a foreigner settles in any country, and is beforehand acquainted with the prince, and government, and laws, to which he must submit: Yet is his allegiance, though more voluntary, much less expected or depended on, than that of a natural born subject. On the contrary, his native prince still asserts a claim to him. And if he punish not the renegade, when he seizes him in war with his new prince's commission; this clemency is not founded on the municipal law, which in all countries condemns the prisoner; but on the consent of princes, who have agreed to this indulgence, in order to prevent reprisals. [49]

But remember that the argument had two parts. First, the lack of authority between a sovereign and a passerby, and then, the question of whether the fact that we do punish foreigners gives us reason to hold that individuals have a natural right to punish. We know that in the context of a consent-based theory of political authority, it is not so convincing that the state lacks authority to punish foreigners, but in order to assess the second part of the argument, let us assume that Grotius and Locke got it right in the sense that there is no relationship of authority between a state and a passerby. Should this tell us something about the nature of the power to punish?

According to Grotius and to Locke, the absence of a relationship of authority shows that individuals do have a natural right to punish for offenses because otherwise it would be impossible to understand on what ground polities punish foreigners. But again, the question is that they still have to show us that the state *can* indeed punish foreigners for their argument to make sense. And in this case not even an appeal to our intuitions gives us much insight because our legal practices seem to have systematically expressed certain ambivalence to punishing foreigners through the institutions of deportation and the excuse of normative ignorance. So despite the fact that the problem of standing to punish foreigners seems to be illusory for consent-based theories of the state, most of our legal systems seem to have expressed some ambivalence in punishing foreigners. If there were good reasons to believe in a natural right to punish, presumably this ambivalence would not have arisen.

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[48] David Hume, *Moral Philosophy* (Indianapolis: Hackett, 2006) at 367.

[49] *Ibid* at 368.

The Efficacy of Rights

Finally, it was argued that natural law and individual rights must come with the corollary entitlement to punish violations of them, without which these rights would be rendered hollow and superfluous intellectual creations with no real efficacy or meaning. As a consequence, the denial of a natural right to punish would amount to the denial of individual pre-political rights as a set of moral endowments through which we can value and criticize our institutions.[50]

Both Grotius and Locke thought that natural law must be enforceable to be genuine law and, for this purpose, punishment must be available as a means of enforcement.[51] According to Locke, for example, as creatures of God, human beings are morally bound to respect the law of nature and preserve mankind, which entails that before we set up political institutions, the enforcement of this law is equally placed in everyone's hands.[52] This general right to preserve mankind via the execution of the law of nature is substantiated by two distinct rights: the right to punish, and the victim's right to seek reparation.[53] Thus the source of the state's standing to punish: without punishment as a possible means of enforcement, natural law could not be recognized as a serious normative system, nor could we ascertain the view of the individual that early modern philosophy was pushing forward.[54]

Translated into contemporary jargon, this argument holds that an individual's pre-political rights must be enforceable through punishment if they are to be the kind of thing that we value so dearly as limits and ends of political action. In this view, legal punishment is an institutional expression of a natural element of morality that is meant to shield the integrity of the individual and therefore the question of authority is not a primary issue for its permissibility, instead, the priority is provided by the need to enforce rights through a forcible response to wrongdoing.

But how plausible is this idea? Consider that we have a commitment to view the individuals as possessing a set of moral endowments that we call rights and which are their most precious belongings, such that we believe that we should organize our world in order to protect and promote them. Should these rights come with a power to punish? Would

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[50] In Locke's terms, denying our capacity to enforce the natural law through punishment would amount to the denial of the natural law itself. Locke, *Second Treatise of Government*, *supra* note 5 at 9–10.

[51] *Ibid* at 9–10; Grotius, *Commentary on the Law of Prize and Booty*, *supra* note 16 at Prolegomena, 21, 27, 30–32. For a clarifying analysis of the way this argument appears in Grotius, see Tuck, *The Rights of War and Peace*, *supra* note 17 at 84–86.

[52] Locke, *Second Treatise of Government*, *supra* note 5 at ch II.

[53] *Ibid* at 11.

[54] *Ibid* at 13–14; Grotius, *Commentary on the Law of Prize and Booty*, *supra* note 16 at 21–31.

these rights be vain if their violation did not empower us to respond through punishment? In what is left of this section I argue that the answer to this question lies in the difference between defensive and punitive force. Once we situate ourselves in the context of this distinction, a presumption of liberty should entail that pre-conventional individual rights need not come with a right to punish in order to be the kind of moral attributes that we expect them to be.

Remember that I stipulated the definition of punishment as a deliberate imposition of hard treatment that follows an individual's misconduct and that is not intended to restore the victim to the situation in which he or she was before the crime.[55] Accordingly, punishment is not an exercise of force that is primarily meant to protect someone's right from a specific aggression; instead, it is primarily a response to an aggression that already took place. From the point of view of protection then, punishment always comes late. By contrast, defensive force is forward looking in the sense that it is meant to prevent a violation of right from taking place and, as a consequence, it is immediately triggered by a threat or any form of danger, and not by a wrong or an offense.

Of course, one can draw a continuum between punishment and protection as means for defending the integrity of moral values; as a matter of fact, one of the most popular rationales for punishment is the prevention of wrongs through deterrence or incapacitation, so the distinction may be sometimes hard to draw.[56] However, the fact that these practices converge in their aims does not make them equal as modes of human interaction and, accordingly, they can be governed by different rules. For example, I can lose weight by following a meal plan or by doing exercises, or both, but these are clearly different kinds of actions whose appropriate performance would be subject to very different principles. Similarly, one can understand both the legal permission for self-defense and **the legal institution of** punishment for murder as modes of protecting an individual's right to life, but as modes of interaction they are very different and will present different normative challenges.[57]

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[55] MacCormick & Garland, *Sovereign States and Vengeful Victims*, *supra* note 6.

[56] I am grateful to Jeremy Waldron for pointing out this problem to me, and the need to clarify this distinction. Punishment prevents offenses in many different ways; it does so through deterrence, rehabilitation, incapacitation, moral education, etc. In this way, punishment can be a mode of defense, but it is also something else, as by definition it takes place after an offense. A natural right of defense cannot fully ground a right to punish, because as a form of interaction, punishment is always morally different from defense as it is always a response to a wrong that already took place, and it is precisely as a form of interaction that punishment is being considered in this paper.

[57] Consider that in most legal orders self-defense is considered permissible while private punishment is not. Punishment and self-defense are certainly distinct, punishment is not a necessary response to protect a certain interest or right**;** the harm or wrong has already taken place. The logic of deterrence or prevention does not equal the logic of defense, which is an immediate and

As a mode of interaction, punishment cannot be fully explained as an instance of defense because it represents a response to something that already took place, and it is indeed the non-defensive aspects of punishment that trigger the requirement of political authority in the views of those who argued against a natural right to punish.[58] But beyond their opinions, the analytical point is that the enforceability or effectiveness of a right does not *depend* on the ability to punish violations of it; one can imagine alternative ways by which one can ascertain the importance of rights, so the argument for punishment must be one of choice rather than one of necessity. If this is correct, if the force that is needed to make sense of the idea of a right need not be punishment, then it may be the case that only the direct force that is required to secure rights against imminent aggressions is necessary.[59]

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necessary reaction in order to prevent a concrete harm or wrong from taking place. Now, there have been some attempts to understand punishment as self-defense in the sense of being an instance of societal defense, see in this sense Phillip Montague, *Punishment as Societal-Defense* (Lanham: Rowman & Littlefield, 1995). Unfortunately I have not time or space to give fair consideration of such views, but I will say that it seems very unconvincing to argue that societies have rights of their own. Rather they are conventional constructions created to protect the rights of the individuals within, any attempt to provide societies with the moral attributes of individuals seems to take us in a dangerous path.

[58] In Vitoria's reasoning, for example, this difference between the power to defend and the power to punish appears very clear, as only the defensive use of force is a natural moral entitlement of individuals, i.e., it is permissible outside a political relationship. Vitoria, *Political Writings*, *supra* note 24 at 287–88. Pufendorf also differentiated between the right to exact punishment and the right of self-preservation as distinct forms of response to offense, as punishment was unavailable in a pre-political moment while defensive force was permitted. Actually, he thought that the most that individuals could do in a pre-political state would be to retaliate against offenses, and this is a capacity that springs from the right of self-preservation and not from a right to punish. Pufendorf, "Of the Law of Nature and Nations," *supra* note **35 at** Book VIII, Ch. 3. According to his view, in order for the offensive force that is entailed by punishment to constitute an instance of punishment instead of an instance of hostility, there must be a relationship of authority that is absent in the state of perfect equality among individuals, which characterizes the pre-political condition of human beings. ***Ibid*** **at** Book VIII, Ch. 3, Section 1.

[59] Immanuel Kant, *The Philosophy of Law*, translated by W Hastie (Edinburgh: T and T Clark, 1887) at 218 [Kant, *The Philosophy of Law*]. Sharon Byrd offers the following understanding of Kant's argument: "every individual, as a moral agent with intrinsic value, is endowed with one natural right, namely freedom. To the extent that exercising his freedom externally does not violate another's right to external freedom, he may not be restricted in any way. At the point it does, it no longer is an expression of freedom that can coexist with the freedom of all under universal law. Any external coercion, that counteracts this infringement restores freedom and is necessarily compatible with the freedom of all. The force justified, which limits goal-directed behavior, is direct and immediate. It is not revenging, not prophylactic and can occur in the state of nature. It does not suffice to secure rights. It, therefore, cannot be the basis of society's right to punish criminal law violations." See B Sharon Byrd, "Kant's Theory of Punishment: Deterrence in Its Threat,

Hence, applying the distinction between offensive and defensive force, one could argue that the concern about efficacy can be sufficiently met by granting rights with a general permission to protect them through force, without assigning them with a power to punish their actual violation.

Going back to our inquiry about whether we can make sense of individual rights without a power to punish, imagine that rights entail a permission to use violence to secure or protect them but not to punish their violation. Would rights be in vain? Are they in vain even though they make it permissible for individuals to use violence against their equals? In the end, the issue raised by Grotius and Locke will turn on how we see forcible interactions, or how much violence we are willing to take for granted. But at least the point can be made that, in a world governed by a presumption of liberty, if I am morally entitled to repel by force a certain action because it infringes on some kind of interest I have, then such interest is not a hollow moral idea but something of significance.

Consider a normative theory that authorizes the use violence as a means to defend our possibility to walk freely. Would this be a normative theory that gives value and substance to my ability to walk freely, at least to the extent that it makes sense to say that I have a right to walk freely and you have a correlative duty not to interfere with it? I believe that it would, and that merely increasing the amount of violence that this right entails by going from a power to defend to a power to punish, should not have any impact on the plausibility of affirming that I do have a right to walk freely.

The analytical distinction between an exercise of defensive force and the force that is entailed by punishment thus allows us to overcome the worry that a right, without the faculty to punish its violations, is a hollow moral entity. Even though the distinction might be hard to place in some cases, it is a familiar distinction that pervades most of our normative judgments, whether legal or moral, as a standard to determine when coercion is acceptable and when it is not.[60] Now, if the primary assumption of liberal political philosophy is an assumption of liberty, according to which any exercise of power that is exerted over an individual is *prima facie* impermissible and should be justified, and if something can be recognizable as a genuine right without a faculty to punish its infringements, we seem to have little reason left to prefer a normative context that is governed by the presumption of punishment to one that is not.

In other words, in the context of a presumption of liberty, if the idea of a right need not entail **a permission to** punish, then it *should not*, because we should prefer a context in which there is more scrutiny over power than a context where power is not fully brought into question. In sum, to put it in Kantian terms, maybe for a right to be recognizable as

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Retribution in Its Execution" (1989) 8:2 Law & Philosophy 151 at 180–81.

[60] To my knowledge, most normative orders recognize a permission to use violence in order to protect oneself or someone else from a threat or a danger, but this permission does not cover violence that comes after the threat has materialized.

such it must come with the authority to exercise the amount of coercion that is necessary to limit any infringement of its rightful exercise.[61] If the violation of the right already took place, the foundation of the right to respond through punishment cannot be found in the right itself but must reside somewhere else. The locus of this justification resides in the second part of punishment's justification, i.e., in the question of what gives someone the standing to punish someone else.

Conclusion

The specific question that I raised in this article was a question about the origins of the presumption of punishment in our philosophical tradition and whether the reasons that were given by those who conceived of this presumption can convince us today. The answer is that they cannot, so either a new argument must be given or the presumption of punishment should be abandoned.[62] Now, in order to move forward, it is important to keep in mind what is at stake in this conversation, and how the revision of this presumption could alter the scope of political philosophy and punishment theory. So, let me say something about this.

In most of our conversations we use presumptions that allocate the burden of proving the different claims that we make and thus facilitate our communication while expressing our commitment to certain values. Some of our presumptions, however, serve no positive role and are merely maintained out of habit or as a way to bypass problems that may seem too hard to deal with, like the presumption that mothers are better caretakers than fathers or that individual action can have no impact on containing global warming. As I mentioned in the beginning of this piece, the specific way in which the tension between liberty and punishment could have been bypassed by the presumption of punishment is by making punishment part of our moral nature such that it is the offense that brings punishment about, and not our act of punishing. Hence, we are not fully responsible for punishing.[63]

The idea that crimes ought to be punished reduces the problem of punishment's justification to an issue of purpose, opportunity and form, leaving unaddressed the question of the authority of a certain polity to impose this form of treatment on a given individual. This has produced a disconnection between theories of punishment and general theories of political authority, because punishment has been taken to be sufficiently regulated by its own pre-institutional moral principles.[64]As an immediate consequence of this disconnect,

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[61] Kant, *The Philosophy of Law*, *supra* note 59 at 47.

[62] This conclusion, again, comes as a consequence of a skeptical stance against power that, in liberal thought, is triggered by the presumption of liberty.

[63] O'Donovan, *The Ways of Judgment*, *supra* note 15 at 113.

[64] Theories of punishment are basically concerned with the definition and defense of what these principles are, e.g. desert, deterrence, etc. Political theory, on the other hand, is concerned

punishment theory has been unable to address the impact that a context of extreme social injustice and political disenfranchisement should have on the justification of punishment. The point is not that the presumption of punishment has blinded criminal law theory from acknowledging the extreme levels of unfairness that surround the practice of punishment, but rather that it has made us believe that, whatever kind of problem this is, it is not a problem for a theory about the ideal justification of punishment. [65]

If, instead, we were to understand punishment as an artificial practice, in the sense of being a practice that we have willingly devised in the specific ways in which it exists, then the second part of punishment's justificatory challenge arises, i.e., the question of what gives someone the authority to punish someone else. This new space of inquiry immediately provides us with a framework to assess the normative problems that punishment's context could raise for its justification. In other words, once we assume that punishment requires a relationship of authority, its ideal justification will require us to describe the qualities and values of the relationship within which this authority can arise, and here, the fairness of punishment´s social and political context becomes crucial. Hence, once we abandon the presumption of punishment, a new space of inquiry opens up for theories of the criminal law, i.e., the question of what the qualities and values are that the political relationship must aspire to for punishment to be a justifiable form of interaction.

Such an approach will also open a new space of inquiry for political philosophy **given that** most of our contemporary accounts of political authority appeal to coercion in a generic way, and thus do not distinguish what it is precisely that the state can do when we say that it has normative authority to rule coercively. As I have argued before regarding the distinction between defensive and punitive force, there are different forms through which a community can forcibly protect and promote individual rights or public goods, and

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with a generic justification of public coercion and shows no particular concern with punishment, because it seems that the strong connection between criminal law and morality makes the issue of legitimacy less acute, See for example, Simmons, *Moral Principles and Political Obligations*, *supra* note 16 at 195–201; Duff, *Punishment, Communication, and Community*, *supra* note 2 at 182 ff. Copp, "The Idea of a Legitimate State," *supra* note 11 at 4.

[65] A salient exception to this tendency in punishment theory is the work of Antony Duff. See, for example, his Duff, *Punishment, Communication, and Community*, *supra* note 2; Duff, "Legitimacy of the Criminal Trial," *supra* note 2; Duff, "I Might Be Guilty, but You Can't Try Me," *supra* note 2. There is wide recognition of the appalling levels of social and political exclusion and discrimination in that constitute the environment of our penal practices, yet they are not usually taken as an issue for punishment's normative theory. See, for example, Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006); Robert A Ferguson, *Inferno* (Cambridge: Harvard University Press, 2014); William J Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press, 2011). We shall see that since the political nature of punishment is disguised, it will become untenable to keep the spheres of social and criminal justice separated from each other, because they, together, constitute the ground from which political authority stems.

punishment is only one of them. Different instances of force will entail different forms of interaction which, in turn, should trigger different standards of justification. As a consequence, just as we can imagine instances of coercion that are permissible outside a political relationship, like self-defense, we can also imagine a political relationship where the state has authority to rule coercively, and yet it lacks authority to punish.

In sum, if punishment originates in our conventions and not in some pre-political feature of human wrongdoing, it should be assessed like any other institution that we have designed to govern our social life, which implies that its permissibility will depend, at least partially, on the quality of the political relationship within which it takes place.[66] But, of course, such a shift towards a more integrated view of punishment cannot take place as long as we operate under the presumption that crimes ought to be punished.[67]

[66] I am here assuming that political authority requires some basic level of fairness in the political relationship, which translates mostly to the existence of certain social and political conditions. See in this sense, John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 2005) at ch 6; Ronald Dworkin, *Law's Empire* (Cambridge: Belknap press, 1986) at ch 6; Charles R. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton: Princeton University Press, 1990) at ch 5.

[67] According to Danielle Allen, this would be a move backwards, at least to the extent that punishment used to be considered an issue of the community and not a problem between the victim and the offender in which the community intervenes in a superficial manner. See Allen, "Democratic Dis-Ease. Of Anger and the Troubling Nature of Punishment," *supra* note 15 at 197.