

# Legal Punishment: Citizens, the State, and the Expression of Blame

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## **Abstract**

This paper was originally written for Bruno Guindon, Philosophy 326 course *Topics in Law and Philosophy*. The assignment asked students to examine a topic or issue of their choosing connected to papers discussed throughout the semester, and to reference at least one paper assigned as class reading. My choice to pursue the expression of blame was inspired by Clayton Littlejohn's characterization of blame in his paper on the relation between truth, knowledge, and the standard of proof. The paper uses MLA citation style.

Punishment is an expected consequence from wrongdoing. Children are taught from a young age that punishment is a justified outcome when rules are not observed. However, the examination of legal punishment—the imposition by an authority of a reprobative burden on an offender for committing a crime (Duff and Hoskins)—presents philosophical conundrums. What justifies courts in assigning punishment? In this paper, I will attempt to address this question and others. I will argue that legal punishment correctly expresses blame, because the court system arises from the social contract citizens have with one another, and so, ultimately, legal punishment plays an essential role through expression of societal values.

Clayton Littlejohn maintains that punishment expresses blame (17), which, in turn, requires punishment to have a backward-looking aspect (16). He contrasts legal punishment with everyday actions such as betting on football matches; the former holds one accountable, and requires consideration of past events, while the latter does not (16, 17). Blameworthiness and the expression of blame necessarily require a belief in one's guilt in order to properly hold one accountable (Littlejohn 17). As Littlejohn states, "An agent cannot blame someone for having done something if they know that they don't know that the defendant did the deed" (24). Furthermore, the confidence in this belief or

knowledge will be affected by whether or not the agent in question actually did the deed; uncertainty in one's belief will transmit to uncertainty of the attribution of blame (Enoch and Marmor 422). The closer the agent gets to committing a certain action—for example, by initiating preparatory actions—the more likely we are to attribute blame (Enoch and Marmor 423).

The condemnatory aspect of punishment is often symbolized in what Joel Feinberg calls “hard treatment”, that is, in the actual burdens imposed on those being blamed (98, 100). Feinberg elaborates on this symbolism, stating, “It would be more accurate in many cases to say that the unpleasant treatment itself expresses the condemnation, and that this expressive aspect of his incarceration is precisely the element by reason of which it is properly characterized as punishment and not mere penalty” (99). Certain forms of hard treatment have simply become symbols for blame (Feinberg 100). This symbolism expresses more than mere blame; it can also indicate retribution achieved (Feinberg 100).

Consequently, the purposes of criminal trials extend beyond identification of criminals; they are also a means to express condemnation and hold individuals accountable for socially impermissible actions (Littlejohn 23). Punishment is an example of what David Enoch and Andrei Marmor call *blame-related reactions*, which are meant to attribute blame (Enoch and Marmor 412). Thus, the expression of blame is merely one function of criminal trials (Duff and Hoskins). Other functions include the results achieved by *penalties*, which are not in themselves meant to express blame (Feinberg 96). It can be seen, then, that the notion of blame is key in distinguishing legal punishment from other legal consequences (Littlejohn 17, 23).

This distinction of legal punishment from other blame-related reactions and penalties must be made, because, as will be discussed later, it is what punishment expresses that makes it so unique. Legal punishment contains several other key identifying aspects. Firstly, it involves depriving others of things they value, such as liberty, time, or money (Duff and Hoskins). It also forces the punished to do things they wouldn't ordinarily do, such as relinquishing their liberty, or other compensatory actions (Duff and Hoskins), all of which can be categorized as hard treatment (Feinberg 98). Although other blame-related reactions and penalties may possess these qualities, it is the condemnatory character of punishment that distinguishes it (Duff and Hoskins).

The key considerations of punishment, blame-related reactions, and penalties should also be noted. All consider further impacts such as deterrence and prevention (Enoch and Marmor 413). However, punishment is distinguished because it achieves the desired result with an underlying presupposition of its communicative content (Feinberg 103). Feinberg gives the example of the deterrence of killers, which, he says, might be accomplished through means other than punishment (103). However, the effective use of public condemnation seemingly requires punishment (Feinberg 103). Furthermore, it is only punishment in which the key concern is the blameworthiness of the agent, for it is the agent's blameworthiness that entails condemnation (Enoch and Marmor 413).

Antony Duff and Zachary Hoskins examine several prominent theories of legal punishment which justify the courts' authority to allocate punishment: consequentialist accounts, retributivist accounts, and what I shall call communicative accounts (what they call "punishment as communication"). Of these, I will argue that communicative accounts should be considered the correct basis for legal punishment, for communicative accounts provide a sociological perspective that the other two lack. It is precisely because communicative accounts comment on the expressive aspect of punishment that they accurately reflect the authority of the derivation of the courts' authority. However, an examination of all three accounts is in order.

Consequentialist accounts ground the justification of punishment in the results obtained from punishment (Duff and Hoskins). Under such views, the benefits of punishment must outweigh the costs in order to satisfy the requirements for justification (Duff and Hoskins). Duff and Hoskins suggest the most plausible good to arise from legal punishment is crime reduction, criminal conduct being definitionally harmful (Duff and Hoskins). Other goods that can arise from punishment include increased confidence in the state by those who fear crime, and satisfaction in those desiring justice brought to the offenders.

However, consequentialist accounts are insufficient, because they fail to make a distinction between blameworthiness and blame-related actions, and thus do not clearly distinguish punishment as the unique practice that it is. Under a consequentialist account, the results arising from punishment are indistinguishable from the results arising from blame-related reactions. Furthermore, consequentialists must be committed to manifestly unjust punishments being justified if they present a positive cost-benefit ratio (Duff and Hoskins).

Retributivist accounts claim that justification of punishment rests on one deserving it (Duff and Hoskins). There are two forms of retributivism, positive and negative (Duff and Hoskins). The former argues that an offender's infraction provides a positive reason in favour of punishment, whereas the latter provides a constraint on punishment, advising punishment only for those who truly deserve it (Duff and Hoskins). Two central questions arise in any retributivist theory of punishment (Duff and Hoskins): What is the justificatory relationship between crime and punishment that desert is meant to capture (Duff and Hoskins)? And why should punishment be imposed by the state, even if deserved (Duff and Hoskins)? Duff and Hoskins discuss several positive retributivist accounts that attempt to answer these questions but conclude no pure retributivist account adequately addresses both concerns.

The most compelling retributivist account justifies legal punishment through the rectification of the unfair advantage criminals appropriate when they commit crimes (Duff and Hoskins). Law-abiding citizens agree to a social contract, wherein citizens exercise self-restraint, so as to obey the law, in return for the protection from certain harms that the law provides (Duff and Hoskins). Under this account, the criminal deserves to have their unfair advantage rescinded (Duff and Hoskins). However, although this account may answer the two key questions, Duff and Hoskins note the account fails to accurately characterize the wrongness of crime as in the harm it does to the victim (Duff and Hoskins).

Lastly, Duff and Hoskins examine what I call *communicative accounts*. They characterize these accounts as a form of retributivism and yet also a form unto themselves (Duff and Hoskins). Here, justification of punishment is grounded in what the punishment expresses (Duff and Hoskins). This mirrors Littlejohn's account of punishment expressing blame; Duff and Hoskins say punishment communicates to offenders the condemnation they deserve—the censure of the entire community or society (Duff and Hoskins). The political community is seen as speaking through the law and the courts (Duff and Hoskins). Thus, there is a relationship between wrongdoing and censure (Duff and Hoskins), or, as expressed in Littlejohn's account, between a wrongful action and blame (Littlejohn 17).

Even if one accepts blame as an essential, communicative function of punishment, one might still question whether the courts correctly wield the authority to punish. This raises several concerns surrounding the state, its relation to citizens, and the role of criminal law (Duff and Hoskins). This includes the

“general justifying aim” of a system of punishment; identifying who should be punished and how the appropriate amount of punishment should be determined (Duff and Hoskins). Duff and Hoskins state that legal punishment presupposes a system of criminal law, and criminal law presupposes a state which has the correct political authority to make and enforce the law as well as impose punishments (Duff and Hoskins). Littlejohn argues it seems as though the law ought to care about whether the courts’ punishment correctly attributes blame (29). This is because doing so is an essential function of court verdicts, thereby ensuring the courts properly fulfill their role within society.

It is not simply that courts are correct in attributing blame, but, rather, that the courts are the correct vehicle by which to distribute blame on a societal level. In examining the relationship between the state and punishment, Duff and Hoskins state, “How far it matters in this context, to make explicit a political theory of the state depends on how far different plausible political theories will generate very different accounts of how punishment can be justified and should be used” (Duff and Hoskins). Questions surrounding the power of citizens to legitimately punish one another arise from this (Duff and Hoskins).

It is useful here to examine social contract theory. David Luban defines a political community’s legitimacy as through the consent, whether tacit or explicit, of its members (167). Luban distinguishes two ways of interpreting “political community”, the *horizontal contract* and the *vertical contract*, respectively (167). The former refers to the formation of a community by equals, ultimately creating what Luban calls a *nation* (167-168). The latter refers to the implementation of a sovereign or higher authority, to which members of the community confer power so as to better represent and fulfill the needs of citizens (Luban 167, 168). This creates a *state* (Luban 168). The nation precedes the state (Luban 168). This conception of the state can be applied to the law. A court system is an extension of the state, thereby established by a community to represent and fulfill their needs, which includes the need for societal condemnation.

The conferral of authority from citizens to the state and its extensions clearly accounts for the legitimacy of the courts. The general justifying aim of punishment is to express societal values and citizens’ disapproval of those who break the law. Criminals are the correct objects of punishment because they have exhibited a disregard for the rules which govern their society—which, as a citizen, they have implicitly or explicitly agreed to follow. And the courts are the

appropriate body to both allocate and determine the severity of punishment because the courts properly represent the citizens.

When the courts punish, the blame expressed in doing so is the blame of the community as a whole. This indication of societal values is important, because it communicates the constraints on citizens for acceptable behaviour. This condemnation adds further emphasis to the hard treatment imposed by the courts; it adds insult to the injury, as it were (Feinberg 114). Littlejohn states, “When we’re dealing with acts that have an expressive dimension, the justification of the act turns, in part, upon the justification of the relevant accompanying attitudes” (17). Thus, punishment as an expression of societal values can only be correct if those societal values are justified.

It is possible, though, that legal punishment in any context is a mistake. Duff and Hoskins present the arguments of abolitionists, who reject legal punishment entirely (Duff and Hoskins). Abolitionists argue justification of legal punishment, as well as the concept of crime, are inappropriate (Duff and Hoskins). This is because the word “crime” implies a public response is required to what are actually conflicts between individuals or parties (Duff and Hoskins). Feinberg also considers sceptics who favour replacing the condemnatory aspect of punishment. Similarly, Feinberg’s anticipated objections stem from whether the condemnatory aspect of punishment is necessary to achieve the desired results (115). The failings of legal punishment are further highlighted by arguments of moral relativism (Duff and Hoskins). Ultimately, abolitionists argue, the practice of legal punishment should be replaced with other practices of restoration or mediation, or even a penal system that does not respond to “public wrongs” (Duff and Hoskins).

Addressing the abolitionists’ first claim is not particularly challenging. Abolitionists view crimes as conflicts at the personal level, and consequently believe reconciliation ought to be relegated to the personal level (Duff and Hoskins). However, this is not the case. Condemnation is a required aspect of punishment, for it clearly indicates by and to the public what acts will not be tolerated. As well, unlike more minor infractions, the impacts of one’s crime are not limited to a single victim. To limit the harm to a single victim is to disregard the emotional suffering crimes impose on others. Therefore, the abolitionists’ claims of mischaracterizing crimes are inept.

However, I find the charge of moral relativism harder to reject. This line of argument is especially pertinent in the large, multicultural societies that exist today, where several cultural communities exist under a country's single legal system. Duff and Hoskins reject the abolitionists' claims of moral relativism by pointing out that the abolitionist cannot impose their own methods of response to crimes, because to do so constitutes hypocrisy; moral relativism urges against the imposition of ideas (Duff and Hoskins). I do not think this negates the abolitionists' concerns, though.

My own response rests in the social contract theory examined before. Although citizens may have specific personal values, they implicitly or explicitly consent to a state's overarching social policies in virtue of being citizens of that state. As discussed, the state and its extensions, such as the court system, arise from the establishment and consent of communities. Continuing participation as citizens of that state imply adherence to the state's conduct. Return to the social contract discussed by the retributivists, that citizens agree to certain self-restraints in order to receive the benefits provided by the law (Duff and Hoskins). Although I have dismissed retributivism as a justificatory response to legal punishment, that does not mean that this specific feature of the view is contrary to common sense. In fact, this aspect of social contract theory can be unproblematically absorbed and complements the arguments I propose.

In conclusion, abolitionists are wrong to reject legal punishment, for it fulfills a specific role within society. The expressive content of punishment is needed to communicate social norms to citizens, and, indeed, grounds the justification of legal punishment, as seen by communicative accounts. This communicative aspect also distinguishes it from other blame-related reactions and penalties. So, punishment must ultimately be regarded as a justified expression of blame.

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