Criminal Punishment and the Right to Rule

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Introduction

Nothing, it seems, could be further from the modern realities of criminal justice than the abstract and often pedantic debates among criminal law theorists about the nature and justification of criminal punishment. These debates focus on how and why we should respond to a particular criminal offender in a highly abstract and general way, far from the real life of criminal justice which is interwoven with the decisions of institutional players at many levels: legislators considering new crimes to add to the books, prosecutors, sentencing judges, police officers, and many more. What do the abstract theories of criminal punishment have to say about any of this? One might easily think that they are simply beside the point, for they do not directly answer many of the most pressing questions in contemporary criminal justice. But it turns out that the traditional accounts of criminal punishment are highly instructive, albeit indirectly. Neither of the accounts that dominate the contemporary debate presents a plausible account of criminal punishment, but by identifying the roots of their failure – most importantly, the assumption shared by all sides about the what sort of question we need to answer when justifying criminal punishment – we can start to see a new and more promising approach to the issue. What is more, once we have this new approach to the justification of criminal punishment in view, a new way of thinking about the many institutions of criminal justice opens up to us, as well.

Examining the many different views in contemporary debates about the nature and justification of criminal punishment, one might imagine that they differ on almost everything. On one side are those who insist that criminal punishment is simply a "generically coercive rule rule-enforcement mechanism."[1] Seen in this light, the justification of criminal punishment is not

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[1] I take this helpful expression from Vincent Chiao, "What is the Criminal Law For?" (2016) 35 *Law and Philosophy* 137 at 139.

distinctive from other questions of political theory: it is simply a matter of finding the best general justification for state coercion (in general and in its distribution to particular individuals) and applying it to our institutions of criminal justice. Although we often tend to think of advocates of this approach as utilitarians, they can be partisans of almost any general account of justified state coercion: egalitarian liberals, communitarians, republicans, etc. On the other side of these old debates are those who insist on the distinctiveness of criminal punishment, focusing on criminal *wrongdoing* as its distinguishing feature. On these accounts, criminal punishment, to qualify as such, must be a response to *wrongdoing* of some sort and it must respond to it *as* wrongdoing. Although the best-known advocates of this position are moral retributivists, this wrongdoing-focused account is also to be found among expressive and communicative theories of punishment and also among many punishment abolitionists who recognise the importance of wrongdoing to our practices but who cannot find any plausible way to connect it to the practice of criminal punishment.

It might seem that the traditional debates on the nature and justification of criminal punishment represent almost every conceivable position on the issue. But that is not so. For although they offer many different answers, they all understand the question they take themselves to be answering in the same way. The question of justified punishment – what purpose does criminal punishment serve? – may be answered in a number of different ways. The contemporary debate, however, is dominated by accounts all of which look to some good that can be identified entirely without reference to the law or legal institutions: giving moral wrongdoers their due, minimizing harm, ensuring stable terms of interaction, etc. The trouble is that when we try to make sense of criminal punishment as serving one of these ends, we end up unable to make sense of the whole of the practice of criminal punishment as we know it. We can capture one part of what is going on in criminal punishment (its status as a form of justified state coercion, say, or its focus on wrongdoing), but we are unable to account for others. If the standard for evaluating theories of criminal punishment is its fit with existing practice, they seem to do rather poorly, even after centuries of refinements.[2]

[2] I have made this point many times before: "Criminal Law as Public Law", "Punishment and Public Authority" etc.

But, of course, the standard for evaluating theories of criminal punishment is not just their fit with existing practices.[3] If one of these normative accounts were sufficiently compelling, we would do well to abandon even core aspects of our existing practices where they are inconsistent with that account. The trouble is that there is also a deeper problem with both of the standard accounts that dominate the punishment theory debate. For they look to a set of questions that one should properly answer only once one has good answers to another, conceptually prior, set of questions. That is, before we get around to asking what worthwhile tasks the state should carry out, we must first ask what is required by the state's claim of practical authority over its subjects in the first place. A more promising account of criminal punishment, I argue, comes from the thought that the possibility of criminal punishment is a necessary condition for the very possibility of state authority in the first place. Whatever purposes we might like the state to serve, criminal punishment (understood as a remedy to vindicate the state's exclusive right to rule) must be a part of our account for it is not merely useful to the state's accomplishment of some particularly valuable end; it is conceptually required by the state's claim of practical authority itself.

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The account of criminal punishment I defend in this essay is an old one with deep roots in an equally longstanding conception of state authority. That said, that conception of state authority has been almost altogether forgotten in recent years – so much so that the very possibility of understanding and justifying criminal punishment in this way has been obscured from view. Accordingly, an important part of my project in this essay will be to revive a way of thinking about state authority and legal order that has fallen out of fashion, but which contains the seeds of a promising account of criminal punishment.

The basic thought is this: states claim not only to have the effective *power* to secure their subjects' compliance with their will; they also claim a *right* to rule their subjects. This idea of the state's right to rule involves at least three important normative claims. First, it involves the claim that states exercise normative powers over their subjects, not just the effective power to coerce. As HLA Hart made famous half a century ago in his critique of John Austin's

[3] Cite to Duff, *Answering for Crime*, on Dworkinian rational reconstruction.

theory of legal obligation,[4] an important difference between a state in charge of a legal system and a gunman who can oblige people to do his bidding is that whereas the gunman claims only effective power over others, a state in a functioning legal system claims a normative power to make law, thereby changing the legal rights, obligations, powers, and liabilities of its subjects. A gunman may only oblige through his effective power, but a state may create obligations through the exercise of normative powers. To make sense of this distinction, HLA Hart introduce the idea of "the internal point of view" on the normativity of law. Although one might be able to predict when the law will impose coercion on us without considering its normative claims, there are many aspects of law (especially the operation of legal powers) that cannot be properly understood without taking seriously its normative claims "from the inside."

Second, in modern times – in the common law world, since the time when "the King's peace" was extended across England and across different subject matters[5] – states claim the *exclusive* right to determine the content of the law, and through it, the legal rights and obligations, powers, and liabilities of their subjects.[6] They do not merely claim to be *a* source of legal norms within the jurisdiction; they claim the exercise of that normative power over the content of the law as a matter of exclusive right[7] – the right to rule – against all comers.[8] This means that if we wish to identify the political authority within a particular jurisdiction (say, to distinguish the British Parliament's claim of authority to make law from the claim of a madman

[4] HLA Hart, *The Concept of Law*, third edition (Oxford University Press, 2012) at 58: "Rex will not only in fact specify what is to be done but will have the *right* to do this; and… it will generally be accepted that it is *right* to obey him. Rex will in fact be a legislator with the *authority* to legislate, i.e. to introduce new standards of behaviour into the life of the group…"

[5] Sir Frederick Pollock, "The King's Peace in the Middle Ages" 13 *Harv. L. Rev*. 177 (1900).

[6] Of course, within the framework set out by the state, individuals may have powers to change the legal rights and duties of others. But those powers exercised by individuals are always subject to the superior power of the state to alter their normative powers.

[7] I will leave aside for now questions of how international law, and the application of foreign law might be integrated into this picture. But the various accounts in public international law of how these are to be received within a jurisdiction points to the fact that this issue is one to which that field is alive – and the starting assumption of state monopoly on law-making within the jurisdiction is operative in the field.

[8] This is the crucial grain of truth in Max Weber's claim that "a state is that human community which (successfully) lays claim to the monopoly of legitimate physical violence within a certain territory." ("Politics as a Vocation" at 310-11 *Weber: Political Writings* ed. Peter Lassman and Ronald Speirs (Cambridge University Press, 1994)) On one level, this claim is clearly false: private actors may sometimes legitimately use physical violence (for example, in self-defence). The deeper truth here is that the state successfully claims the exclusive right to determine the conditions under which any persons may act coercively within the territory.

standing on a soapbox at Speakers' Corner), we cannot rely only on Hart's idea of the "internal point of view." The "internal point of view" is helpful in making sense of the normative relationship between ruler and subject (the relationship of power and liability), but it does not help us to understand the relationship between the genuine ruler (who claims the exclusive right to be the one to make laws in the jurisdiction) and the many would-be rulers in a given jurisdiction (who are under a duty not to usurp the state's law-making power). For this, we need the idea of exclusive legal rights and their necessary connection to the availability of legal remedies.

The third normative claim at work in the state's claim to have the exclusive right to rule is the possibility of some remedy to address violations of that right. According to the old equitable maxim, "ubi jus ibi remedium [est]"[9]: the very idea of a claim of right is that there must be available some remedy for the violation of that right. For a right is not just a matter of present fact, it is something to which we are *entitled* even when facts change. So when we say that the state has the (exclusive) right to rule within the jurisdiction, we are interested in vindicating the claim that the state and *only* the state is entitled to make law within the jurisdiction. To make sense of the idea of the right to rule and its connection to a remedy for its violation, we need to make clear precisely what would constitute a violation of that right. As in private law, it is not usually enough to violate another's exclusive right to exercise a legal power merely to utter a verbal formula (such as "I hereby abolish all private property in Canada"). What is required is some recognisable effort actually to make it the case that one's decision changes legal relations in the world. This is precisely what we see in the case of intentional criminal conduct: a decision that legal relations should change in some way (that your property should become mine, say, or that your body should be open to my interference) and an attempt to make it the case that the world should conform to that decision. When we think of the state's right to rule as an exclusive right to make law within the jurisdiction in this way, it becomes clear that some sort of remedy must be available to vindicate that right in the face of its violation. What is required is a legal remedy that can vindicate the state's claim to be the

[9] Loosely: "wherever there is a right, there is a remedy." Lord Chief Justice Holt's judgment in Ashby v White (1703) 14 St Tr 695, 92 ER 126 is usually cited as the classic statement of this maxim.

exclusive holder of the right to rule in the jurisdiction.[10] Properly understood, I argue, criminal punishment is that remedy.[11] Criminal law and punishment, then, is not just another branch of the law with its own specialized subject matter and its own freestanding function;[12] it is, instead, an essential part of the state's exclusive claim to practical authority over all within its territory.[13] The availability of criminal punishment for violations of the state's right to rule is a necessary part of that claim of practical authority.

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It will take some effort to show how it is that true crimes[14] are best understood as wrongs against the state's right to rule, and even more effort to show that criminal punishment

[10] And so it is not murders and assaults and thefts as such that are subject to criminal punishment, but only those committed within the state's jurisdiction – *under the King's peace*. Even the most egregious wrongs, such as intentional killing, are no crime when committed in wartime simply because they were not committed under the King's peace. See my "Soldiers as Public Officials: Justifying the Legal Equality of Combatants" forthcoming *Ratio Juris* 2018.

[11] This account of criminal law as the backstop of the law's authority sounds very unfamiliar to contemporary Anglo-American criminal law theory. But it was the received wisdom in nineteenth and early twentieth century German criminal law theory. As Markus Dubber points out in his forthcoming book, *The Dual Penal State*, (OUP forthcoming 2019) chapter 2 manuscript at 18-19: "[The great nineteenth century German criminal law theorist Karl] Binding… insisted that the state's "right to punishment" was "nothing but the right to obedience of the law, which has been transformed by the offender's disobedience." […] [His great antagonist in the "battle of the schools" among German criminal law theorists, Franz von] Liszt stressed that state punishment must be a means to an end. That end was, after the historical evolution of the power to punish from the family to the peace community (*Friedensgenossenschaft*) to the state, the protection of the legal order: "State power grasped the sword of justice to protect the legal order against the malefactor who has assailed it." An offense "disturbs the state's legal order"; punishment protects the state's "legal order"; therefore, the state has the right to punish. [These are Dubber's translations of passages from Karl Binding, *Das Problem der Strafe in der heutigen Wissenschaft*, in 1 *Strafrechtliche und strafprozessuale Abhandlungen* 61, 85 (1915); 39 Franz v. Liszt, *Der Zweckgedanke im Strafrecht*, in *Strafrechtliche Aufsätze und Vorträge*, vol. 1, at 126, 139 (1905) (1883); see also Karl Binding, *Die Entstehung der öffentlichen Strafe im germanisch-deutschen Recht* 941, 944 (1909); Gustav Radbruch, *Der Ursprung des Strafrechts aus dem Stande der Unfreien*, in *Elegantiae Juris Criminalis: Vierzehn Studien zur Geschichte des Strafrechts* 1 (2d ed. 1950) (1938) (English translation: Gustav Radbruch, The Origin of Criminal Law in the Status of the Unfree, in *Foundational Texts in Modern Criminal Law* 407 (Markus D. Dubber ed., 2014)).

[12] Michael Moore famously described criminal law as a functional kind of this sort in *Placing Blame* (OUP). But as in many things, Moore was simply making explicit what a great many criminal law theorists of the time took for granted.

[13] Or, as Rousseau puts the same point: "criminal laws… [are] at bottom… *less a specific kind of law than the sanction of all the others*. *On the Social Contract* (Penguin Books) at 99. (emphasis added). The full original passage (*du contrat social* at 394 in Pléiade edition) reads: "On peut considérer une troisieme sorte de rélation entre l'homme et la loi, savoir celle de la désobéisance à la peine, et celle-ci donne lieu à l'établissement des loix criminelles, qui *dans le fond sont moins une espece particuliere de loix, que la sanction de toutes les autres*."

[14] As will become clear below, the account I put forward here draws a sharp and important distinction between so-called "true crimes" and mere regulatory penalties. This distinction is alive and well in Canada and in Germany. It is not quite as clear that this distinction is still respected in some US jurisdictions.

is a remedy to ensure that the state's right to rule survives its own violation. Sketching a defence of these two core claims will be the first task of this paper; but it is only the beginning. For there are good reasons why this otherwise attractive account of criminal wrongdoing and punishment with such a long and distinguished pedigree[15] has been thrown aside by many thoughtful criminal law theorists in favour of what often turn out to be bizarre and highly implausible alternatives.[16] This, I believe, is not only because the "right to rule" account is built into an unfamiliar account of state authority. It is also because the account has for many years been seen as necessarily connected with a host of spurious claims. In order to put the "right to rule" account in its best light, then, I shall begin the task of separating out the promising core of this account of criminal wrongdoing and punishment from these unnecessary and unattractive accretions. First among these accretions is the so-called principle of mandatory prosecution.[17] As a legal remedy for a rights violation, criminal punishment must in principle be *available*, but (like remedies for the violation of private rights), it need not be *exercised* in every case.[18] The next spurious accretion is a familiar reading of the *lex talionis* that appears to demand severe punishments for serious criminal wrongdoing.[19] Although criminal punishment must involve

[15] As I have suggested elsewhere ("Punishment and Public Authority" in *Criminal Law and the Authority of the State* (Oxford: Bloomsbury, 2017)), the pedigree of this account of punishment is indeed long and distinguished, stretching centuries through the natural law tradition, from Aquinas and Suárez through Rousseau and Kant and dominating nineteenth century German criminal law theory. It is only in the twentieth century that it is eclipsed in favour of moralist retributivism and pure deterrence theories.

[16] HLA Hart was not alone in thinking that moralist retributivism "seems to rest on a strange amalgam of ideas. It represents as a value to be pursued at the cost of human suffering the bare expression of moral condemnation, and treats the infliction of suffering as a uniquely appropriate or "emphatic" mode of expression. But is this really intelligible? . . . [It] is uncomfortably close to human sacrifice as an expression of religious worship." (HLA Hart, *Law, Liberty, and Morality* (1962) at 65)

[17] This is sometimes identified with the "Legalitätsprinzip" in German criminal procedure principle. For more on this, see the vigorous discussion between Thomas Weigend, Mirjan Damaška, John Langbein and others. It is also a consequence of Immanuel Kant's dictum that "the law of punishment is a categorical imperative" [6:331] leading him (infamously) to require, on that principle, the execution even of the last murderer remaining in prison as a society is about to disband. [*Metaphysics of Morals* 6:333]

[18] Since it is the state – the public authority – that decides when to pursue that remedy, however, its pursuit will be subject to important public law constraints to which the enforcement of private rights is not subject.

[19] The most famous formulation is from the book of Exodus 21:23-24 (King James Version): "[T]hou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe." But, more relevant to the present discussion is Immanuel Kant's infamous endorsement of the *lex talionis*: "But what kind and what amount of punishment is it that public justice makes its principle and its measure? None other than the principle of equality… whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself." [*The Metaphysics of Morals*, 6:332, at 473 in Cambridge Edition] Notwithstanding the

some form of coercion, it need not involve a form of coercion of anything like the seriousness of the crime to which it is a response.[20] In a rule of law state, the severity of punishment should be dictated by principles of parsimony and procedural fairness. Third, although criminal punishment must always, in principle, be *available* to vindicate the state's right to rule, it a clear sign of failure on the state's part every time it has to resort to this sort of measure. As Jean-Jacques Rousseau put the point, "frequent punishments are a sign of weakness or slackness in government."[21] States have the right to rule and the associated right to punish those who violate that right – but good government involves ordering a society so that criminal wrongdoing is infrequent and the resort to punishment in response is even more seldom.[22]

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This paper proceeds in four parts. In part I, I set out the context within which this account of criminal law and punishment is set. It is a battle of opposing accounts, each focusing on one aspect of the phenomenon of criminal law and punishment (either wrongdoing or coercion) at the expense of the other. In part II, I set out the basics of the "right to rule" account of criminal punishment: how all modern states claim the right to rule, why there must be some remedy for violations of the state's right to rule, and why that remedy must take the form of criminal conviction and punishment. In part III, I distinguish criminal punishment (for so-called "true crimes") from mere deterrent sanctions (for so-called "public welfare offences"): whereas the former constitutes a remedy for wrongdoing against the state's right to rule, the latter may be understood simply as a state-imposed price on conduct without an attendant finding of wrongdoing. Criminal punishment is best understood as a *conceptually* necessary part of the very idea of legal order. Mere deterrent sanctions, by contrast, are (at best) *causally* necessary to the establishment of legal order under certain empirical conditions. That is,

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Kantian, formalist feel of much of the argument presented here, it is deeply at odds with Kant's insistence on *lex talionis*.

[20] On this point, Andrew Ashworth and Andrew von Hirsch's pioneering work on cardinal and ordinal proportionality are extremely helpful. See: *Proportionate Sentencing: Exploring the Principles* (OUP).

[21] *The Social Contract*, book II, chapter 5, p. 79 (Penguin).

[22] The role of what Rousseau refers to as *mœurs* – usually (inadequately) translated as "mores" or "manners" – in maintaining the rule of law has not been sufficiently integrated into contemporary liberal political theories of crime and punishment. Rousseau rightly points out that mœurs "forms the true constitution of the state, a law which gathers new strength every day and which, when other laws age or wither away, reanimates or replaces them…" [*The Social Contract*, book II, chapter 12 at p. 99 in Penguin; p. 394 in Pléiade]

although no part of the idea of legal order calls out for mere deterrent sanctions, it is likely that some use of such sanctions (together with a variety of other mechanisms) will be necessary to secure the degree of general compliance with the state's laws necessary to maintain the state's claim of effective power. In part IV, I consider the merits of the "right to rule" account of criminal law and punishment and reply to a number of expected criticisms.

I. The Ongoing Debate

My purpose here is not to provide a general review of the ever-growing criminal law theory literature on the nature and justification of criminal punishment. Rather than to summarize the debate in all its intricacy, my objective is simply to highlight some of the notable and regular failures of standard accounts of criminal punishment in order to demonstrate how they all share a common starting point. The "right to rule" account holds promise not only because it fits well with existing practices of criminal justice, but also because it shows that criminal punishment is actually required to perform a task that is conceptually prior to those put forward by both of the camps that dominate the present debate.

Over the course of much of the twentieth century, an account of criminal law and punishment focused on the deterrence of what was sometimes referred to as "socially harmful conduct"[23] dominated the scene, at least in the English-speaking world. On that account, the purpose of criminalization was to identify undesirable forms of conduct and to prohibit them. When concerned with the general part of the criminal law, deterrence theorists divided between those who insisted that even here, the guiding principle should be utility (punishing when and only when it was most useful to the project of harm minimization) and those who insisted that principles of distributive justice ought to guide the allocation of deterrent sanctions. Advocates of the former position often went so far as to do away with criminal responsibility altogether and often advocated for indeterminate sentences, allowing officials to incarcerate offenders for as long as deemed necessary to carry out the necessary rehabilitation; advocates of the latter position insisted that punishment should be imposed only on those who had a "fair opportunity" to avoid engaging in the prohibited conduct and usually insisted that

[23] Paul Robinson. Cite also to Herbert Wechsler, *Model Penal Code*, etc.

punishment should not be disproportionate to the seriousness of the offender's conduct. What all versions of this account excluded from consideration, however, was any thought to whether the offender had committed a *wrongful* act (rather than just an act that the state had reason to deter).[24] Punishment, instead, was reconceived as a cost to be distributed – according to principles of distributive justice based on fair opportunity – in the service of a shared social goal of minimizing harmful conduct. The basic difference between a deserved punishment and a fairly distributed social burden was lost.

In the 1970s, a set of rival accounts of criminal law and punishment arose, focused on the centrality of criminal *wrongdoing* as a distinctive feature of criminal punishment. Whether it was expressivists, communicative theorists, or old-fashioned "positive retributivists,"[25] advocates of this new wave of criminal law theory insisted that the criminal law's morally infused language – of wrongdoing, of justification and excuse, of culpability, of punishment, and more – was an essential part of the institution that called for explanation and justification. They found such an explanation in the idea of moral wrongdoing. Core criminal *mala in se*, they pointed out, are all serious moral wrongs, so it is no surprise to find criminal offenders branded as *wrongdoers* for having committed them and invoking denials of moral responsibility or moral justification or excuse to avoid punishment for their conduct. Once we recognise that lawmakers serve a morally significant role in solving coordination problems, *mala prohibita*, too, could be understood to be morally wrong for they undermine the possibility of living together under stable terms of interaction.[26] Those who violate these norms deserve something – moral sanction, perhaps calling to account by the community organized around these shared norms. But it has proven extremely difficult to show why the state should be morally entitled to impose coercive punishment as a response to these moral wrongs. And so,

[24] I set out my account of Hart's "limiting retributivism" and why it is best understood as simply a principle if distributive justice in the administration of coercive sanctions in "The Radical Orthodoxy of Hart's Punishment and Responsibility" in *Foundational Texts in Modern Criminal Law* ed. Markus Dubber (Oxford: Oxford University Press, 2014).

[25] Distinguished from "negative retributivism" – the claim that individual wrongdoing ought to serve as a limit on the distribution of punishment. Most advocates of s-called "negative retributivism," however, are actually advocates of a principle of distributive justice in the allocation of deterrent sanctions.

[26] Antony Duff has set out the most compelling account of the moral significance of *mala prohibita*: see *Answering for Crime* (Oxford: Hart Publishing, 2007) at 89ff.

with the exception of a few who continue to insist that the imposition of retributive punishment is an intrinsic good,[27] many legal moralists turn out to be something very close to punishment abolitionists.[28]

In short, criminal law theory today seems to be what Andrew Ashworth refers to as "a lost cause":[29] neither of the rival accounts can explain core features of the existing practice; those who focus on justified state coercion cannot explain what makes criminal punishment distinctive from any other form of coercion; and those who focus on the moral wrongdoing of offenders have been unable to explain why coercive punishment is the appropriate way in which the state should respond. What is more, neither side seems to have anything to say about the core principle of modern criminal law that the criminal process and criminal punishment in particular belong to the state, and not to the particular crime victim or to anyone else.

II. Wrongs Against the State's Right to Rule

The "right to rule" account of criminal law and punishment takes a very different starting point from most of its rivals. For deterrence theorists and moralists alike assume that the key question in criminal law theory concerns a choice among the state's purposes. They ask: what should we *do* with the authority of the state? Ought we to minimize the incidence of harmful conduct through deterrence (and perhaps rehabilitation, incapacitation, etc.)? Or ought we to pursue the putatively intrinsic goods of retribution for moral wrongdoing or (more plausibly) calling wrongdoers to account? The "right to rule" account, by contrast, does not pursue this line of inquiry, for the very *existence* of state's right to rule is conceptually prior to the question of *how* it should be exercised. And when we look more closely, we find that

[27] Michael Moore, Larry Alexander and Kim Ferzan

[28] Antony Duff on "calling to account" and "secular penance"; John Gardner, "Crime: in Proportion and in Perspective" in *Offences and Defences* (OUP 2008) at 214-15: "The criminal law (even when its responses are non-punitive) habitually wreaks such havoc in people's lives, and its punitive side is such an extraordinary abomination, that it patently needs all the justificatory help it can get… [T]he case for abolition of the criminal law comes a step closer to victory."

[29] I mean to invoke Andrew Ashworth's well-known article, "Is the Criminal Law a Lost Cause?" 116 *Law Quarterly Review* (2000) 225. As I shall argue below, those who have lost track of the basic "right to rule" rationale for criminal punishment are thereby unable to explain other features of the criminal process that Ashworth claims are being lost in English criminal law.

criminal law and punishment are essential constituent elements of that right to rule. When we try to make sense of the institutions of criminal justice, our starting point, at least, should be to set out the necessary institutional arrangements for the state to claim a right to rule.[30]

The "right to rule" account begins with a basic feature of modern legal orders: modern states claim a *right* to rule over their subjects. That is, they do not merely assert that they have more effective power than we do, so it would be prudent to do as we are told to avoid the coercive force of the state and its agents. Instead, they claim that they are legitimate practical authorities – that they have put in place a normative system concerned not merely with what its subjects *will* do (or have or decide), but with what they *are entitled to* do (or to have or to decide). Although the legal order that states put in place will, in fact, alter how we act in myriad ways (if it is an effective legal order at all), it does not do so merely by the direct threat of coercion – attaching threats of coercion to a series of commands. Instead, states in functioning legal systems guide our conduct indirectly, by putting in place a framework of rights and duties, powers and liabilities that, in turn, structure the coercive relations among their subjects. That means that we are not concerned here with the legal realist's "bad man" perspective on the state, concerned only with what *will* happen to us as a result of our conduct.[31] Instead, our focus is on the state's normative claim that it is entitled to change what it is that we are *entitled* to – our rights and duties, our powers and liabilities – merely by deciding to do so.[32] It is, in Hart's language, a claim that makes sense only from within the "internal point of view" on the legal system – the perspective of at least some participants in the practice of legal order who see the state as exercising a genuine law-making power the exercise of which gives rise to

[30] With emphasis on the expression "starting point." Once we have the basics of criminal law and punishment in place according to this account, we might have good reason to use those same institutions to carry out some of the valuable purposes proposed by other accounts as well. But it is essential to see that they are secondary uses of an institution the essential purpose of which is connected to its role in securing the state's right to rule.

[31] O. W. Holmes, "The Path of the Law" 10 *Harv. L Rev* 457 (1910) at __: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. […] [T]he notion of legal duty… what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. But from his point of view, what is the difference between being fined and taxed a certain sum for doing a certain thing?"

[32] Andrew Halpin, "The Concept of a Legal Power" (1996) 16 OJLS 129-152.

genuine rights, duties, powers, and liabilities.[33] This is because the state's claim is one of right, rather than a merely descriptive claim of effective power: the state and only the state is *entitled* to exercise *normative* powers to change the basic rights and duties, powers and liabilities of subjects within the jurisdiction.

But the "right to rule" account, however, goes beyond Hart's insight. Of course, we cannot understand modern states' claims to have a right to rule unless we first recognise that their claim is being made from within the "internal point of view" where legal rights and duties, powers and liabilities are real and not mere tools for predicting when coercion may be imposed to force us to act in one way or another. But modern states' claim that they have a right to rule is a claim of exclusive right: it is the claim that the state – and *only* the state – has the power to make laws altering the rights, duties, powers, and liabilities of those within its jurisdiction. That is, like many familiar claims of right, the right to rule is a claim to *exclusive* control of some particular set of matters good against the world. We may speculate as to precisely why modern states claim the exclusive right to rule in this way. One explanation might be historical: over time, royal power grew, slowly but surely, to the point where the king claimed not merely to be in a position to adjudicate disputes between private parties, but also to claim sole authority over the governing law. Another explanation might concern the state's claim to *justified* political authority. A common rule of law argument justifying the existence of state coercive power concerns its necessary role in setting in place a legal order in which we are not subject to the will of any private persons. To put such a legal order in place, the state must necessarily claim an exclusive right to make laws for all its subjects. And so on. For now, though, we may simply note that the right to rule – the exclusive right to exercise normative powers to make laws setting out the rights and duties, powers and liabilities of subjects in its jurisdiction – is something claimed by all modern states.

The state's claim to have the exclusive right to rule is, of course, much more than a mere statement of fact or of moral right. The state's claim that it has the exclusive right to rule, like all claims of legal right, really concerns an institutional arrangement. For where we are concerned not simply with a state of affairs, but with a matter of *legal entitlement*, we are

[33] Cite to Hart, *The Concept of Law* at _.

concerned with a set of institutions that guarantee the existence of the right even in the face of specific violations of it. Contemporary republicans often make reference to the role of institutions in showing how both freedom and slavery are constructed by legal institutions.[34] The wrongness of slavery, they point out, lies not merely in the fact of specific acts done to slaves by their owners. The deep, abiding wrong of chattel slavery – the wrong that persists irrespective of empirical conditions, no matter how kind or weak the owner might be – lies in the fact that legal institutions treat one person's mistreatment of another as incidents of his abiding legal *right* to do so.[35] The institutions that make slavery possible are not ones that actually inflict any particular harm onto slaves; rather, they make it a matter of legal rights that one person is subject to the absolute discretion of another in all things. More to the point, the institution of chattel slavery does all this by providing legal remedies designed to vindicate the slave-owner's claims of right: it is not merely that slaves do not have the effective power to escape, but that they shall be returned to the owners as a matter of legal right; it is not just a matter that slaves cannot resist the injustices done to them by their masters, but that their masters are legally entitled to do so; and so on.

In these and other ways, legal institutions and legal remedies provide mechanisms through which legal rights are vindicated as the abiding normative structure governing our lives, notwithstanding the specific facts of our situation at the time. By returning a slave to his master *as a runaway*, we do not merely provide coercive power in support of the slave owner. We also vindicate the slave-owner's claim of right over his slave: you are being returned to my possession *because you belong to me*. Or, to take a less objectionable private law example, where you take my property from me, the private law remedy of *vindicatio* requiring that you to return it to me does not simply provide an incentive to encourage me to respect your property. Instead, the availability of a remedy to ensure that I may regain possession of my

[34] Philip Pettit, *Republicanism*; Quentin Skinner, *Liberty before Liberalism* both make essential use of the image of legal relationship of slavery as the central contrast to their conception of republican freedom, which is also an accomplishment of legal institutions.

[35] This is partly why it is so difficult to define "modern slavery" in contemporary legal instruments concerned with human trafficking. The concept of slavery is constructed through legal institutions. *De facto* slavery is a very different sort of entity. I discuss this issue in "Human Trafficking: Supplying the Market for Human Exploitation" in *What is Wrong with Human Trafficking? Critical Perspectives on the Law* (Oxford: Hart, 2019).

property is just part of what it means to have property rights in the thing in the first place. It is just what we mean when we say that we own a thing that whatever anyone else might do to our property – take it, damage it, use it without our permission, etc. – it remains the case that it is we, and not they, who are entitled to decide the use to which it is put.[36] So the point of private law remedies, then, is not to *support* claims of right by encouraging others to respect them, for the very idea of the claim of right itself is partly *constituted* by the availability of remedies for the violation of the right. Only where there are institutional mechanisms available for the vindication of a right can we say that the entitlement is legally meaningful.

Returning, now, to the state's claim to have a right to rule, we can see that its nature as a claim of right means that it is not merely a descriptive claim ("I have the effective power to make people do as I wish") or a free-standing moral claim ("it is morally right that others should act according to the rules I set down"). It is, instead, a distinctly *legal* claim, like the property-owner's claim to have the exclusive right to determine what shall happen to his property, that is partly constituted by a set of institutional arrangements – most importantly, a set of available remedies for any violations of that right. The question, then, is what sort of remedy might be appropriate to the vindication of the state's claim of right? In private law, the relationship of right to remedy is often fairly straightforward: where someone takes my property, he must return it; where he injures my property, he must provide me with the market cost of returning it to its prior state; and so on.[37] But not all cases are as straightforward as the return of a taken thing or damages for injury. One particularly pertinent example is the remedy for the unauthorised taking and profitable use of another's property.[38] In this sort of case, a defendant who takes it upon himself to take over another's property and make use of it as his own might not be liable for any of the usual sorts of remedies: he might have returned the property before the action began and he might not have caused any injury to the thing. Nevertheless, he has

[36] Larissa Katz, "Exclusion and Exclusivity in Property Law" UTLJ 2008.

[37] I do not mean to minimize the complexity of fitting rights to remedies in private law. The debate on this issue is famously complex. See, for example, the decades-long discussion of the appropriate remedy for breach of contract following the publication of Lon L Fuller and William R Perdue Jr., "The Reliance Interest in Contract Damages" 46 *Yale Law Journal* (1936) 52.

[38] The case of *Olwell v. Nye and Nissen* 173 P.2d 652 is a classic example of this sort, discussed at length in E. Weinrib, "Restitutionary Damages as Corrective Justice" *Theoretical Inquiries in Law* (2000) 1 1.

usurped the true owner's exclusive right to determine the uses to which his property may be put. In such a case, the appropriate private law remedy would be to treat the defendant's taking as though it were done at the plaintiff's behest. That is, if the defendant made a profit from the use of the thing, he must disgorge that profit to the plaintiff. Why would this be the appropriate remedy? Because by forcing the defendant to disgorge all profits, we would then be able to treat the defendant's actions as consistent with the plaintiff's ongoing claim of exclusive right to determine the use to which his property may be put. No judicial remedy can make it so that the wrong never occurred; but the remedy can provide the institutional mechanism to vindicate the plaintiff's exclusive ownership right over the thing. Put another way, the central point of the remedy is not to bring about some new, desirable state of affairs; it is just a re-assertion of the abiding normative salience of the plaintiff's claim of right.

I raise the somewhat recherché example of restitution remedies for private law wrongs because they share an important feature with criminal punishment under the "right to rule" model. For the state's exclusive right to rule, like the owner's exclusive right to determine the use of his property, may suffer a wrong even where there is no compensable injury or loss of property. The wrong in question is the simply the wrong of *usurpation*. In the private law context, the point of the remedy is not to make the world better in some way; it is simply to follow through on the normative implications of a claim of right. In the criminal law context, we are concerned with something similar. Where someone takes it upon himself to act contrary to the demands of the state's laws because he is acting instead upon his own view of his rights and duties, powers and liabilities, he is directly challenging the state's claim to have the exclusive right to make the law around here. Indeed, he is doing so in much the same way as the individual who takes another's property and uses it as he pleases (even though it causes no injury to the plaintiff's property). The nature of the wrong is simply that the criminal accused has attempted to usurp the state's role as sole law-maker in the jurisdiction. What, then, should be the appropriate remedy to vindicate the state's exclusive right to rule? From the point of the right to rule, we are not concerned with the particular goods we may bring about through a particular remedy. Rather, our concern is what sort of remedy is required by the very idea of a state's exclusive right to rule. And the answer, it seems, is that there must be some remedy that

re-asserts the normative implications of the state's claim of right. That is, whatever happens, we may view all interactions between the would-be usurper and the state as subject only to the state's power to make the law.

The appropriate remedy through which to vindicate the state's right to rule is available only where the state threatens punishment for disobedience. For where the state only sets down rules of conduct (but does not also threaten punishment for their violation), it claims the normative *power* to change our legal rights and duties, but it does not yet do so *as a matter of exclusive right*. For where the state is confronted with individuals who show contempt for its authority by acting on their own view of their rights and duties, rather than on the legal relations set down in the state's laws, there is no remedy available through which we may show the state's right to rule to survive these attempts at usurpation. Where the state adds a threat of punishment for the violation of its rules, however, a new remedy is made available. Now, even in cases where offenders succeed in acting on their own view of things rather than the state's assertion of rights and duties, we have a further mechanism by which to vindicate the state's right to rule. For now it is open to the state to seek a conviction and administer punishment to anyone who has attempted to supplant its laws with their own. And when this is available, we are able to vindicate the state's right to rule as a claim of exclusive right.

III. True Crimes and Regulatory Offences

On the "right to rule" account of criminal punishment offered here, there is an important difference between punishment for true crimes and the imposition of penalties for the commission of regulatory offences. In Canadian and German criminal law, this distinction plays an important part in a variety of ways; in some other jurisdictions, it is not so well observed. The elision of the distinction between so-called "true crimes" and regulatory (or "public welfare") offences is of fairly recent vintage, however. In the early twentieth century, the place of regulatory offences in the scheme of state punishment played an important role in American criminal law theory,[39] and major mid-century treatises such as Jerome Hall's *General*

[39] Francis Sayre, "Public Welfare Offences" 33 *Columbia Law Review* 55 (1933); R M Perkins, 'The Civil Offense' (1952) 100 *University of Pennsylvania Law Review* 832.

Principles of Criminal Law[40] continued to emphasize the importance of the distinction. Moreover, the traditional common law presumption of subjective fault for true crimes[41] suggests that the distinction still plays an important part in many common law systems of criminal justice. And the abiding distinction between true crimes (*Verbrechen*)[42] and regulatory offences (*Ordungswidrigkeiten*) in German-influenced criminal law demonstrates its significance even now in that tradition.

The two traditional accounts of criminal punishment have long puzzled over the significance of this distinction. The accounts of criminal punishment that assimilate it to the broader category of justified state coercion have little use for the distinction. This is because they deny the distinctiveness of the idea of criminal punishment itself. The imposition of coercive sanctions on those who violate criminal prohibitions is, on this account, no different from the imposition of sanctions on those who violate regulatory prohibitions. In both cases, we are concerned with deterrent sanctions applied according to some principle of fair distribution. Those accounts that emphasize the distinctiveness of criminal punishment because it is a response to wrongdoing as wrongdoing are equally hard pressed to make sense of the distinction between true crimes and regulatory offences as we find it in criminal law doctrine. For according to these accounts, the distinction ought to be drawn according to the moral seriousness of the underlying conduct: murder, rape, robbery and the like must be true crimes because the underlying conduct is clearly morally wrongful; failure to abide by regulations concerning driving or fisheries management or the filing of disclosure forms for securities must be regulatory offences because they are concerned with conduct that is not *per se* morally wrongful. The distinction, however, is not usually drawn along those lines. Instead, the subject matter of true criminal law is drawn according to the intentions of the offender. Where an individual intentionally sets out to engage in conduct that is prohibited by law for whatever

[40] Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis: Bobbs-Merill, 1960) at 70ff. See also Francis Sayre, "The Present Signification of *Mens Rea* in the Criminal Law" *Harvard Legal Essays* 411 (1934) at 412: "*mens rea* today means… a criminal intent, that is, the intent to commit a crime… to do that which, whether the defendant knew it or not, constitutes a breach of the criminal law."

[41] Canada; cite also to Ashworth on English criminal law.

[42] Although German criminal law distinguishes Verbrechen and Vergehen as two forms of crime, the core concept in the theory of criminal law is that of serious crimes, the *Verbrechen*. On the distinction and relation between these concepts, see Claus Roxin, *Strafrecht, Allgemeiner Teil* vol. I, at pp. 272ff.

reason (whether this is because it is per se morally wrong or because it is inconsistent with some regulatory regime), this conduct can properly be called a "true crime." This is because the core feature of true crimes is not their subject matter, but the attitude of the offender toward the relevant law. By choosing to act as he pleases notwithstanding the law's rules, the offender has threatened the state's claim to have an exclusive right to rule.[43]

Under the "right to rule" account, there is a place for regulatory offences alongside true crimes. Indeed, the account of regulatory offences is strikingly similar to the account of crime provided by many of the accounts that try to assimilate it to justified state coercion more broadly. Regulatory offences are simply government-instituted prices attached to undesirable conduct in order to provide incentives to subjects to conform to the demands of a given regulatory regime. They do not convey any sense of wrongdoing against the state and its right to rule, for they do not require proof of subjective fault. Once can commit a regulatory through mere negligence or, in many cases, without proof of fault of any kind. And that, in the field of regulatory offences, is as it should be. In this area, unlike in true criminality, we are simply concerned with the fair distribution of burdens in pursuit of valuable social goals.

IV. Clarifications and Criticisms

So far, we have focused our attention on the *form* of criminal punishment as a remedy for wrongs against the state's right to rule. We have not (yet) taken time to set out what sort of place such an account of criminal punishment should occupy in the real life of criminal justice today. But, as I suggested in the introduction, this highly formal matter actually has deep and important implications for the real world of criminal justice today. To see how, we will need to

43 The Canadian Criminal Code ss. 126 and 127 capture the idea rather nicely: "**126 (1)** Every one who, without lawful excuse, contravenes an Act of Parliament by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years." And "**127 (1)** Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of **(a)** an indictable offence and liable to imprisonment for a term not exceeding two years; or **(b)** an offence punishable on summary conviction."

draw out some less obvious implications of the view and to show why some views that have often been associated with the right to rule approach are not part of the account at all.

I will focus here on three points. (1) The "right to rule" account, by focusing on the formal features of criminal punishment within a legal order, provides room to democratic decision-making on questions (such as what should be a crime, how severe punishments should be, etc.) and to rule of law concerns (about arbitrariness, etc.) where other accounts may wish to stipulate specific answers from first principles. (2) The "right to rule" account provides a robust answer to the question why it must be the state that controls the system of criminal punishment. (3) The "right to rule" account vindicates what we might call "the naïve theory of punishment" according to which we are punished *for having committed a crime* (rather than for some pre-legal reason, such as having caused unjustified harm, having engaged in pre-legal moral wrongdoing, etc.) It does not, however, commit us to any sort of totalitarian conception of state authority,[44] nor does it deny the moral seriousness of much criminal wrongdoing. Although it explains how punishment and the state's positive law are conceptually related, this alone is not sufficient to establish that the state is justified in instituting any criminal prohibitions or criminal punishments it wishes. Instead, it simply distinguishes formal claims about what criminal punishment is and what is designed to accomplish from substantive questions about when and where and how it may justifiably be employed.

(1) <u>The Right to Rule: Form and Substance</u>

It is important to keep in mind that the idea of criminal punishment in the "right to rule" account is a highly formal one. Indeed, the "right to rule" account of criminal punishment is not concerned with bringing about any particular desirable outcome through criminal punishment, whether it be giving moral wrongdoers their due or even ensuring general compliance with legal norms. The point is simply that the very idea of criminal punishment – that there is some legal mechanism through which the state may vindicate its right to rule in the face of attempts to usurp it – is part and parcel of the state's claim of exclusive right to rule. This means that

[44] Shachar Eldar makes this suggestion in his review of an earlier essay of mine. See: "Criminal Law, Parental Authority, and the State" *Criminal Law & Philosophy (Forthcoming)*

although the account is demanding in one way, it is highly flexible in many others. It is demanding in the sense that the institution of criminal punishment as a form of coercive response to criminal wrongdoing *must* be available within any legal system where the state claims an exclusive right to rule. This is not a contingent matter about ordering incentives; it is a conceptual matter about the very idea of a right to rule. It is highly flexible, however, because the formal requirement of an institution of punishment leaves a great deal to be settled by other (sometimes related) considerations.

The "right to rule" account concerns the *availability* of criminal punishment as a remedy for wrongs against the state's exclusive right to rule. Crucially, however, it does *not* require that the state avail itself of that remedy in all cases. Indeed, as the parallel to private law remedies for violations of private rights should make clear, the demand that remedies be made available as part of the claim of right does not mean that they should or will be exercised in every case (or even in most cases). The state's decision of whether to pursue a caser against a particular offender should be guided by political principles concerning the rule of law (demanding that decisions to prosecute must, at least, be principled and non-arbitrary), concerns about ensuring respect for the law (requiring that the state actually have recourse to punishment where necessary to ensure respect for the law), and constitutional principles of proportionality in restricting the use of punishment only to those cases where such severe incursions on the rights of individuals are justified by the importance of the state's legitimate aims in ensuring respect for the law and (in cases such as murder, sexual assault, and the like) the vindication of particularly important individual rights. Indeed, because the right to rule account of criminal punishment is highly formal, it allow most of the decisions about the state's decisions concerning what to criminalize, when to pursue a conviction and how severe the punishment should be for particular offences to be driven by our substantive political and constitutional commitments.

(2) The Right to Rule and the State Monopoly on Criminal Punishment

One of the persistent puzzles in contemporary criminal law theory is why it is that almost all systems of criminal law in the modern world jealously guard the power to impose

criminal punishment to the state.[45] On both of the standard models of criminal punishment, the question remains unanswered. For those who see criminal punishment as a way of marking out the offender's moral wrongdoing, the focus remains *on the offender* and his wrongdoing. The task of administering criminal punishment, on this view, is simply to give to moral wrongdoers what they deserve. Understood in this way, there is no principled reason why this is a task that states, rather than anyone else, should carry out. At best, it seems, we might have reasons of effectiveness (or perhaps concerns regarding corruption) to prefer the state, but this is a highly contingent matter.[46] Those who see criminal punishment as just another form of justified coercion face the same problem. Their account of justified criminal punishment turns on the justification of the practice itself – is there good reason to impose coercion on this person? – without essential reference to the party carrying out the punishment. Once again, although there may be contingent reasons to prefer the state to impose those coercive sanctions, there is no reason in principle why it must be the state.

The "right to rule" account of criminal punishment, by contrast, is focused squarely on the *relationship* between offender and the state. The point of criminal punishment is not merely to ensure a desirable state of affairs or to give the offender what he deserves (both tasks which could, in principle, be carried out by anyone). Rather, it is to vindicate the state's exclusive right to make the law "around here" in the face of a wrong against that exclusive right by the offender. Since the criminal wrong is understood in an essentially relational way, the remedy, too, must be understood in just the same relational way. It would not be a remedy to a private law wrong if the defendant were made to pay damages to a third party;[47] similarly, it would not constitute criminal punishment if it were administered by anyone other than the state that has been wronged in its right to rule by the offender.

[45] Alon Harel's series of articles ("Why Only the State may Inflict Criminal Sanctions" 14 *Legal Theory* 113 (2008) etc.) and his book, *Why Law Matters* (OUP 2014), are an ongoing attempt to answer this question. Although this is the most sustained inquiry into this topic, it is not the only one. (See contributors list to forthcoming *Cambridge Companion to Privatization*).

[46] John Gardner, following Joseph Raz, explicitly endorses this view. See: his "Justification under Authority" and "Criminals in Uniform".

[47] See Ernest Weinrib, *The Idea of Private Law* (2nd ed.), (Oxford University Press, 2012) on the essentially correlative structure of private law wrongs and remedies.

(3) The Right to Rule and the Importance of Legal Order

The "right to rule" account of criminal punishment brings together a number of disparate ideas in criminal law theory in order to show how they form a conceptual unity. By focusing on *legal* wrongdoing – a violation of the positive law as set down by the state – allows us to bring together two apparently disparate ideas. On the one hand, criminal punishment does not necessarily track any particular conception of pre-legal moral wrongdoing. On the other hand, the idea of *wrongdoing*, and not mere rule violation, seems to be at the core of the idea of criminal punishment. We can rescue the idea of criminal wrongdoing by recognising that the wrong in question is a wrong against the state's right to set down the positive law. That is, by violating the positive law, whatever its content, we commit a wrong against the state in its exclusive right to make the law around here.

This idea – that we commit a wrong by violating the law, whatever the content of that law might be – sounds dangerously authoritarian to some. That is, it sounds as though the "right to rule" account of criminal punishment provides a justification to any state to punish anyone who dare to violate the state's laws, no matter how awful their contents. But that would be a dangerous misreading of the account, for it ignores its purely formal nature. That is, the right to rule account does not purport to provide an all-things-considered justification for punishment based only on the fact that an offender has intentionally engaged in legally prohibited conduct. Instead, it provides only an account of the place that criminal punishment must play in any account of a state's right to rule. That is: insofar as a state claims the right to rule, it must also have in place some institutional mechanism for punishing those who intentionally violate its legal prohibitions. The point is that criminal punishment is an intrinsic part of the institutional architecture of a state that claims the exclusive right to rule; it does not purport in any way to justify the particular laws through which a given state exercises that right to rule. Where the laws are unjust or where the punishments are draconian, there is good reason to insist that the administration of punishment is wrong.

Finally, legal moralists might be inclined to think that the right to rule account of criminal punishment eliminates the role of the victim in criminal justice. The formal account of criminal punishment presented here focuses entirely on the relationship between the state as

the wronged party and the offender. The particular victim of any given offence is nothing more than the means through which the offender wrongs the state in its right to rule. What is more, one might also think that right to rule account ignores the significance of the underlying wrong to the victim that the offender has committed. Surely, one might think, the relevant wrong of murder or rape is the serious, terrible wrong done to the particular victim. Whatever wrong might be done to the state in its right to rule pales in significance to these. Any account that states otherwise, one might think, is morally tone deaf, if not worse. But here, too, the criticism misses the mark. For the right to rule account does not deny the moral significance of the underlying interpersonal wrong that the offender might have committed. It is just that the *way* in which the account recognises moral wrongs is mediated through the positive law in a particular way. We mark out murder, rape, assault and the like as serious wrong through criminalization; states have many good reasons to prohibit these forms of conduct, not least of which is that they constitute serious wrongs to other persons. By emphasizing the wrong against the state's right to rule in our account of criminal punishment, we do not deny the moral seriousness of the underlying conduct; instead, we simply articulate the grounds upon which the state claims the right to respond to such wrongdoing with coercive punishment. It is through the legal system *as a whole* that the state aims to protect us for wrongdoing. The state is able to ensure a decent, peaceful society to its subject through many different means: providing decent health care and education, providing adequate policing and other public safety measure, promoting a culture of tolerance and respect, and much more. Criminal punishment plays a necessary role as *ultima ratio*, or, as Rousseau puts it, the "sanction behind all laws." The error that the "right to rule account" allows us to avoid, however, is to think that the role of criminal punishment is singlehandedly to right the wrongs in a given society, to give offenders their due and to offer solace to victims. To have a system of criminal punishment in place is a necessary condition for the state's right to rule, but each time we punish, and especially when we punish harshly, we have failed a little as a society.