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Liberalism and the general justifiability of punishment

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Abstract I argue that contemporary liberal theory cannot give a general justification for the institution or practice of punishment, i.e., a justification that would hold across a broad range of reasonably realistic conditions. I examine the general justifications offered by three prominent contemporary liberal theorists and show how their justifications fail in light of the possibility of an alternative to punishment. I argue that, because of their common commitments regarding the nature of justification, these theorists have decisive reasons to reject punishment in favor of a non-punitive alternative. I demonstrate the possibility of this alternative by means of a careful examination of the nature of punishment, isolating one essential characteristic—the aim to impose suffering—and showing how this characteristic need not guide enforcement. There is logical space for a forceful and coercive, yet non-punitive method of enforcement. This fact poses difficulties for many classical and contemporary justifications of punishment, but it poses particularly crippling problems for general liberal justifications.

Keywords Punishment · Justification · Liberalism · Liberal theory · Justice · Criminal justice · Crime · Abolitionism · Law · Legal theory · Restorative justice · Enforcement

1 Introduction

I will take contemporary liberal political theory (hereafter "liberalism") as a test case for the justifiability of punishment. I argue that liberalism cannot ground a general justification for the institution or practice of punishment.[1]

[1] Unless otherwise noted, I will be talking about the institution or practice of punishment throughout.

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By *general justification* I mean justifications that use general principles to justify punishment across all reasonably realistic social conditions. Roughly, these conditions are non-utopian conditions, conditions that are likely to hold in human societies for the foreseeable future such as imperfect law abidance, scarcity of resources and political and moral disagreement. A general justification rests on fairly permanent facts—about human societies and the nature of justice, for example—not on contingent conditions that only hold in particular societies at particular times (e.g., extremely limited resources or near anarchy). I argue that general considerations of the sort that liberal theorists offer in support of punishment also speak in favor of an alternative to punishment, the possibility of which undermines punishment's general liberal justificatory prospects.

The importance of a general justification is widely recognized. Considerations that philosophers typically offer in favor of punishment are quite general. Consequentialists, for example, claim that punishment is necessary to secure crucial goods. Particular social conditions may influence the kinds and degrees of punishment needed to secure these goods, but punishment, it is thought, is indispensable outside utopian settings. Similarly, retributivists appeal to general principles about deserved punishment. In appealing to such considerations, philosophers are proposing general justifications. A general justification is important because many think that punishment is justified, not as a temporary measure, but as a stable, enduring, and perhaps even desirable institution or practice. I will argue that liberalism cannot sustain this view of punishment. I will not do so by arguing that liberalism can never justify punishment, though I will offer reasons to think that it can justify punishment only for a limited set of circumstances. I only intend to establish that there are reasonably realistic conditions for which liberalism cannot justify punishment.

This conclusion would be significant. Even under conditions where punishment is justified, the lack of a general justification would likely affect the way that punishment could justifiably be conducted and would call into question its continued justificatory status. The reasons for the lack of a general justification could favor phasing punishment out in the long term and limiting its use in the short term, motivating reforms and the development of alternative enforcement techniques. And irrespective of whether such a thesis can be established, inquiry into punishment's general justificatory prospects helps us asses the relative force that the various reasons for punishment have across different contexts, and has the potential to influence attitudes toward punishment by subjecting them to critical assessment at a certain level of abstraction and generality. The practical significance of the possibility of a general justification of punishment is difficult to overestimate.

The possibility of a *liberal* general justification of punishment is important for several reasons. First, inadequate attention has been paid to the prospects for such a justification. Major contemporary liberal theorists often discuss punishment in passing (if at all) and are too quick to assume it generally justified Those who discuss punishment more extensively commit crucial errors (e.g., Hoekema 1980; Sterba 1977). There is a pressing need for a careful, comprehensive discussion. My discussion serves as a much-needed call for caution, hopefully highlighting important difficulties in liberal theorizing about punishment.

Second, the liberal framework facilitates assessment of the possibility and acceptability of alternatives to punishment. It is particularly helpful in disentangling retributive principles (which are inadmissible at the initial stages of liberal theorizing; Murphy 1985, pp. 7–8; 1990, p. 224) from consequentialist considerations, allowing assessment of the justificatory force of the latter in isolation of the possibly prejudicial influences of the former. This in turn may bear on the reliability and relevance of retributive considerations. If, say, retributive considerations garner some support from implicit consequentialist assumptions (e.g., that only punishment can secure crucial goods), showing that those assumptions are mistaken could weaken the retributivist case. This bears directly on the traditional debate over punishment.

Third, liberalism's supposed difficulties with punishment are sometimes taken to speak against liberalism, but my discussion effectively serves as a qualified defense of liberalism. Some criticize liberalism by arguing that it cannot justify punishment (for reasons quite different than the ones I give). They propose alternative political theories that they think can justify punishment (Lacey 1988; Matravers 2000). The possibility of a non-punitive alternative safeguards liberalism from outright rejection on these grounds.

My methodology is as follows. I examine the general justifications proposed by a sample of major contemporary liberal theorists. I show how the possibility of an alternative to punishment undermines these justifications. These theorists' discussions provide a convenient, accessible framework for assessing punishment's general liberal justificatory prospects. Their arguments are familiar, and the sufficiency of their arguments bears significantly on punishment's justificatory prospects outside liberal theory. In Sect. 2 I offer a minimal characterization of contemporary liberalism. In Sect. 3 I characterize punishment. In Sect. 4 I criticize proposed general justifications proposed by John Rawls, Bruce Ackerman and Brian Barry (though somewhat indirectly in Barry's case).[2] I conclude with a short list of the most important errors that undermine the justifications I examine.

2 Characteristics of liberalism

I will list and briefly discuss some relevant characteristics of liberalism. First, liberalism is committed to justifying exercises of power (Ackerman 1980). For my purposes, I do not need a comprehensive assessment of this concept. I will simply assume that punishment is an exercise of power. On the liberal view, exercises of power such as punishment stand in need of justification. The legitimacy of punishment can be challenged and its advocates must furnish reasons in its support.

These reasons are directed towards people in an attempt to justify certain practices to them, particularly to those adversely affected by them. Liberalism's second characteristic is a commitment to justificatory equality. Everyone is entitled

[2] Barry does not offer a general justification himself. He proposes using Thomas Scanlon's criterion of reasonable rejection as a principle of liberal theorizing. See Scanlon (1998). Scanlon uses this criterion to make some important remarks on the justifiability of punishment.

to demand justification and no one is entitled to ignore such demands. Those punished are entitled to be given reasons in its support. People can justifiably punish unless reasons can be furnished to justify their doing so.

Liberalism also requires certain sorts of reasons that satisfy certain constraints. Theorists model the constraints differently, but the aim is to achieve neutrality between different comprehensive conceptions of the good (Lacey 1988, pp. 146–147; Murphy 1985, p. 8) and to prohibit appeals to intrinsic superiority, either moral or epistemological (Ackerman 1980, p. 11). This is liberalism's third characteristic. The reasons given must be generally acceptable to people irrespective of their particular comprehensive conceptions of the good and they cannot rest on a particular comprehensive conception.

Each of the major contemporary liberal theorists I discuss incorporates these commitments in different ways. Rawls' original position, for example, reflects a commitment to justification. Its setup reflects a commitment to justificatory equality and justificatory neutrality; everyone is represented and the representatives are placed behind a veil of ignorance that bars superiority claims as well as appeals to particular comprehensive conceptions of the good. Ackerman's approach requires justifying exercises of power with reasons that satisfy certain principles. His principles of Rationality and Neutrality (Ackerman 1980, pp. 4, 11) reflect a commitment to justifying exercises of power and to justificatory equality and justificatory neutrality, respectively. Barry's Scanlonian approach holds that justified sets of rules are such that they cannot reasonably be rejected by anyone as a basis for informed, unforced, general agreement (Barry 1995; Scanlon 1998). The commitment to agreement reflects a commitment to justification. The generality of the agreement, the conditions under which it is reached, and the allowance for reasonable rejection reflect a commitment to justificatory equality and justificatory neutrality.

These commitments set a high bar of justification. Since punishment is coercive and harmful, compelling reasons must be given for it. This becomes especially clear once one realizes that liberalism seeks to justify punishment to everyone, including the punished. In the original position, for example, the deliberators are deprived of knowledge of their identities and comprehensive conceptions of the good. When making enforcement related decisions, deliberators must consider the possibility that they will turn out to be offenders. They may have reasons to favor punishment, but they also have obvious self-interested reasons against punishment (Narveson 1974). In Ackerman's framework, prospective punishers have to furnish reasons that satisfy the principle of Neutrality, a principle that bans appeals to intrinsic superiority (the basis, on Ackerman's view, for thinking many offenses unjustified). There must be a principled, relevant way of distinguishing punishments from offenses. Otherwise, Neutrality will place them on a par. In Barry's Scanlonian framework, there is a prima facie case for reasonable rejection of any system of rules that coerces and harms people. Since punishment does these things, there is a prima facie case for reasonable rejection of punishment.

These are just preliminary observations. For the moment I take only the three commitments to be secure. Whether a general justification of punishment is

consistent with them is the subject of what follows. Before I elaborate, however, I must discuss the nature of punishment.

3 Characteristics of punishment

Antony Flew identifies five characteristics of punishment (Flew 1954). His highly influential characterization is helpful, so I will select some of the characteristics he lists, slightly modifying and clarifying some of them. I understand punishment to be something that aims (4) to inflict pain, suffering or burdens (1) on an actual or supposed offender (3) for a violation of rules (2).

The numbers above roughly correspond to Flew's. I will deal with them as numbered. First, punishment inflicts pain, suffering or burdens. Punishment hurts people or at least imposes burdens on them. Philosophers use a variety of terms to capture this characteristic, including *harm*, *imposition*, *evil*, *deprivation* and *suffering*. I will use the term *suffering* as a sort of catchall. All the terminology is getting at the same idea: when we punish people we treat them in ways that we expect them to find unpleasant and we do this because they are expected to find the treatment unpleasant. In doing so we treat them in ways that would otherwise be unjustified.

Second, punishment is imposed for rule violations. I do not limit my discussion to punishment for offenses against legal rules. My wording is broader than H.L.A. Hart's and that of others who limit their discussions to legal punishment, setting aside the practice of punishment in religious groups, clubs, schools and families (Hart 1959 [1968], p. 5; cf. Flew 1954). This narrow understanding is inappropriate for my purposes. Liberalism seeks to grant citizens a generous amount of fundamental rights and liberties that hold even in these sorts of contexts.[3]

I also said that punishment is imposed *for* a violation of rules. If a person is accidentally made to suffer, or is made to suffer for some reason other than a rule violation, he has not been punished. The reasons for punishment, including the aims and intentions of punishers, are crucial (Flew 1954 [1969], p. 86; Hart 1959 [1968], p. 5). I will elaborate when discussing the fourth characteristic.

Third, punishment is inflicted on people generally thought to be offenders. This excludes vicarious punishments, collective punishments and punishments of known innocents. Whether or not such cases can strictly be called cases of punishment is unimportant. Traditionally, discussions of punishment's justification exclude such cases. Even if such cases are appropriately characterized as punishments, I can simply be taken to be concerned with a particular type of punishment.

Fourth, punishment aims to impose suffering on offenders. Most discussions in the literature are not as precise or as explicit as they should be about the relation

[3] These contexts introduce complexities that I set aside, e.g., the case of the punishment of young children in the context of the family. I set the punishment of children aside because it is not clear what justificatory status children have on liberal theory (there may not be as pressing a need to justify the punishment of young children to them, given their limited intellectual and moral capacities) and I do not think the permissibility of punishing young children terribly relevant to the permissibility of punishing adults.

between suffering and punishers' intentions. Following Hart, punishment is often characterized as "involving" pain or unpleasant consequences (Hart 1959 [1968], p. 4). Antony Duff is more precise, however. Suffering is not a "mere unintended" side effect of punishment but is among its objectives (Duff 1992, p. 49; 2001, pp. 96–97). This characteristic is widely recognized, if often underemphasized (Benn and Peters 1959, p. 174; Feinberg 1963 [1970], p. 67; Golash 2005, pp. 45, 77–78; Honderich 1969, pp. 1, 77; Lucas 1968, p. 207; McCloskey 1962, p. 323; Sayre-McCord 2001, pp. 2–3; Scanlon 1998, p. 265; Ten 1987, p. 15; Wasserstrom 1982, p. 476). For my purposes, this is the most significant characteristic of punishment. The aim to impose suffering is essential. "Incidental," unintended suffering, even if foreseen, is insufficient (McCloskey 1962, p. 321; Ten 1987, p. 15). I take this characteristic to be intuitively compelling and obvious, but the distinctions it helps us make also speak in its favor (Ten 1987, pp. 14–15). Those who prefer a broader understanding can take my thesis to be about a type of punishment.[4]

These four characteristics distinguish punishment from other practices, including some often thought to be punishments. Consider involuntary psychiatric treatment. A definition of punishment that omits reference to aims risks classifying involuntary psychiatric treatments imposed on offenders because of their offenses as punishments. My understanding avoids this. People who undergo such treatment often suffer, but even when they are subjected to such treatment because they have offended, the aim of such treatment is not to make them suffer.

My understanding also helps avoid a dubious claim that sometimes appears in the literature on expressive justifications of punishment and in critiques of abolitionism (among other places): the claim that any unpleasant response to offenders is punishment, including criticism (Estlund 2002; cf. Hanna 2008). To take criticism, criticism need not be punishment. If we criticize someone for violating rules, it does not look like we are punishing him. We may simply be trying to draw his attention to certain characteristics of his behavior to show him that what he did was unacceptable and to get him to resolve to behave differently. If we criticize someone for violating grammatical rules, for example, we are not necessarily punishing him, even if the criticism generates unpleasant feelings.

In order to avoid classifying such criticism as punishment without referring to aims, one could try to define punishment as something imposed only for offenses against certain types of rules. Such a move, however, would not only introduce significant complications into our understanding of punishment, it would also mean that responses to certain types of rule violations could not be punishments. That seems unattractive. If I treat someone harshly for violating a grammatical rule, and do so in order to make him suffer, I am punishing him. This suggests that the character of the rules seems less important than the character of the response to rule

[4] Even if my arguments are put in terms of types of punishments, however, they are no less significant. Advocates of punishment argue for the type of punishment that my arguments are directed against and the justificatory limitations on liberal enforcement that my arguments reveal have significant consequences for the manner in which liberal enforcement can justifiably be conducted. For an example of a theorist who takes a broader view of punishment see Collingwood (1989).

violations. The aims behind the response seem crucial. Punishment aims to impose suffering.

To take another example, consider forced compensation. Though compensation can be forced with the aim of imposing suffering, the aim is not an essential characteristic of forced compensation, as it is of punishment. Forced compensation can be imposed without the aim of making the offender suffer and is often justified in terms quite different than those offered in support of punishment (Duff 2001, p. 24; Golash 2005, p. 163; Lacey 1988, p. 35; Sayre-McCord 2001; Ten 1987, p. 38).

This understanding leaves significant logical space for non-punitive enforcement. Many techniques often thought of as punitive need not be punitive. We need not aim to impose suffering when coercively limiting offenders' liberties and abilities (Sayre-McCord 2001). To take a mundane example, suspensions or revocations of driver's licenses need not be punishments (cf. Lacey 1988, p. 33). Dangerous drivers can be denied driving privileges solely to protect others, absent an aim to impose suffering. Even restrictions on privacy or freedom of movement need not be punitive. Probation, surveillance, and restrictions on movement can all be applied without aiming to impose suffering. This is not to say that these practices are not sometimes imposed and applied in order to impose suffering, only that with a proper understanding of punishment, we can see that these practices need not be punishments.

Even more harsh techniques like imprisonment and execution, need not be punitive, and can in principle be used by a non-punitive approach.[5] Enforcement is guided by a variety of aims that influence the selection and application of enforcement techniques. Eliminating only one of these aims may not have as radical an effect as many abolitionists favor (cf. Bianchi and Swaaningen 1986; Golash 2005). Eliminating the aim to impose suffering need not eliminate the use of force or coercion and it need not eliminate infliction of incidental suffering (Duff 2001, p. 7).

These observations can obscure an important point, however: divested of the aim to impose suffering, enforcement is more easily reconciled with the aim to minimize offenders' suffering (Sayre-McCord 2001). The aim to make offenders suffer conflicts with an aim to minimize their suffering in part because it places a principled limit on minimization of their suffering. These conflicting aims take center stage in what follows. Recognizing that punishment aims to impose suffering helps us identify logical space for non-punitive alternatives. A non-punitive alternative guided by the aim to minimize offenders' suffering will, I argue, sometimes have a decisive justificatory advantage over punishment. This undermines punishment's general liberal justificatory prospects.[6]

[5] This, of course, does not mean that there are not strong reasons against such practices. False imprisonment and murder are not necessarily punishments either, but much can be said against them.

[6] I should note that the alternative I propose is significantly different from those traditionally proposed by opponents of punishment and their sympathizers. See, e.g., Bianchi and Swaaningen (1986) and Golash (2005). Abolitionists, as they are sometimes called, traditionally propose non-forceful, non-coercive alternatives, sometimes seeking to limit the use of force and coercion to cases of imminent self-defense. Their alternatives include purely formal trials and symbolic condemnation, forms of "restorative justice" like compensation and various attempts to effect reconciliation between offenders, their victims and the wider community. While there is room for these alternatives, I think there is also room for substantial, non-punitive use of force and coercion. The perceived plausibility of Abolitionism has suffered by Abolitionists' failure to take sufficient account of these possibilities.

4 Against a general liberal justification

A general liberal justification must provide reasons that favor punishment over possible alternatives (cf. Flew 1954). Many ignore or summarily dismiss alternatives to punishment, however. In doing so they fail to acknowledge that many of the reasons offered for punishment also favor an alternative. Because punishment aims to impose suffering, there is a strong reason against punishment that does not speak against certain non-punitive alternatives. Given these considerations, it seems, the burden of proof is on the advocate of punishment to show that punishment can be given a general liberal justification. I examine the nature of a possible alternative and show how its possibility undermines proposed general liberal justifications of punishment.

4.1 The original position and punishment

4.1.1 The assurance problem and an alternative to punishment

Rawls discusses punishment only briefly, but what he says is familiar and important. According to Rawls, some coercive system is necessary to address what he calls the assurance problem. When citizens lack assurance that others are honoring their responsibilities under the terms of social cooperation, they may be tempted shirk their responsibilities (pp. 240–242, 268–270).[7] In this way, lack of assurance increases the strains of commitment, (pp. 145, 176) undermines stability and leads to the breakdown of social cooperation. Punishment exerts a stabilizing influence by enforcing the rules, generating assurance and providing sufficient security for citizens against one another (pp. 240–241, 270, 576; cf. Dimock 1997).

Rawls' justification rests on a necessity claim: coercion is necessary to ensure stability and so to secure basic liberties (pp. 240–241). It is therefore rational for the deliberators to authorize punishment (p. 576). Given the understanding of punishment proposed earlier, this reasoning is deficient. Even if coercion is necessary, punishment may not be. Since there are non-punitive forms of coercion, a valid argument for punishment needs additional premises. Rawls may think that only punitive coercion is capable of generating sufficient assurance, but he does not say this. I argue against this assumption in much of what follows. Rawls may also be working with an overly broad understanding of punishment, one on which any coercive or forceful means of enforcement is punitive. Such an understanding is unacceptable if my earlier discussion is plausible (and insufficient to justify certain important types of punishment even setting that discussion aside). Whatever the underlying assumptions, I argue that Rawls' proposed general justification fails.

So we need a rough idea of the proposed alternative. It does not aim to impose suffering, but to adequately enforce the rules and to minimize the suffering imposed on offenders insofar as this is feasible and consistent with adequate enforcement. Resulting suffering is incidental, an unavoidable result of the needed enforcement techniques. Under adequate enforcement two conditions hold: (1) the assurance

[7] Unless otherwise noted, page references in this subsection are to Rawls (1971).

needed for sufficient stability has been secured and (2) the least favored group is better off compared to the least favored groups under other possible enforcement conditions. Instead of punishment, the alternative confiscates, compensates and incapacitates. It confiscates illicit benefits, compensates relevant parties and imposes restrictions on offenders to limit their ability to re-offend. It has two general goals: reducing the prospects for benefiting from offenses and limiting offenders' abilities to re-offend.

More detail is to come. For now, I must deal with a misunderstanding and show why the alternative has a justificatory advantage. First, the misunderstanding: I am not appealing to the doctrine of double effect (cf. Golash 2005; Sayre-McCord 2001). When I say that punishment aims to impose suffering I am making a conceptual distinction. Punishment aims to make offenders suffer and my proposed alternative aims to minimize their suffering.

The justificatory difference comes in by way of what the aim to impose suffering entails. The aim places a principled limit on the minimization of offenders' suffering. If an enforcement technique (or way of applying it) satisfies other important aims but does not cause sufficient suffering, it will be inadequate. The aim to impose suffering influences the choice and application of enforcement techniques. It can motivate the use of harsher techniques than might otherwise be sufficient to secure other aims and it can motivate applying those techniques more harshly than is necessary to secure those aims. Consider confinement, for example. An aim to impose suffering can motivate confining people we might otherwise not have reason to confine and it can motivate making the conditions and duration of confinement harsher than they otherwise need to be.[8]

An aim to impose suffering is justificatorily significant, not because aims themselves are justificatorily decisive, but because aims influence the acts that flow from them, favoring some actions over others. The aims of an enforcement system significantly influence selection and application of enforcement techniques. It is reasonable to think that, other things being equal, an enforcement system that aims to make offenders suffer will subject offenders to harsher treatment than an enforcement system that aims to minimize their suffering. This affects the systems' justifiability. If important aims can be achieved without aiming to impose suffering, an enforcement system that does so is at a disadvantage.

4.1.2 Assurance and stability

I begin by considering the choices the deliberators would face in the original position.[9] Placed behind the veil of ignorance and allowed only general information,

[8] One may worry that, since my proposed alternative incapacitates, it is committed to restricting offenders' rights and so to harming them. This does not follow, however, as offenders presumably do not have the right to commit their offenses. Taking away someone's ability to commit murder is arguably not, in itself, the taking away of a right. Of course, with relatively crude enforcement techniques at hand (e.g., imprisonment), incapacitation does limit rights, but this is arguably incidental. Moreover, it is the sort of effect my alternative would be concerned to minimize where possible.

[9] I will simplify things a bit. When the deliberators are in the original position, they do not have to decide whether or not to authorize punishment. They must decide in a constitutional convention conducted after

the deliberators would not know their identities or comprehensive conceptions of the good. Since they are self-interested and mutually disinterested, each would want to secure a sufficient amount of primary goods. Since they do not know their identities, this motivation translates into securing primary goods for others as well, in accordance (Rawls thinks) with the maximin principle. The rationality of using maximin in the original position is controversial, but I will ignore this. Rawls designed the original position so that use of maximin would be rational, yielding his preferred principles of justice (p. 155). If he is wrong, the original position may simply fail as a model of liberal reasoning. My only concern is to determine the compatibility of punishment with those principles. The original position offers a simple means of doing this. I will therefore assume that it suffices as a model. My discussion of other theorists will have to suffice if this is not the case.

Since liberties are primary goods, Rawls thinks that the deliberators would choose principles that guarantee to each the most extensive set of basic liberties compatible with a similar set for all (p. 302). In conjunction with the two principles, two priority rules the deliberators would adopt yield the following general conception of justice:

> All social primary goods – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored. (p. 303)

According to this conception, punishment is justified only if it benefits the least favored—more specifically, according to the first priority rule it is justified only if it benefits them in terms of liberty (p. 302). This is because it deprives offenders of primary goods, including basic liberties (p. 61). The most obvious way punishment could benefit the least favored is by securing sufficient stability. Sufficient stability benefits the least favored since it preserves the benefits they gain from social cooperation.[10] If a non-punitive alternative can secure sufficient stability, however, punishment may not be generally justified. Unless there is reason to think a non-punitive alternative inadequate at this point, it seems the most that can be said is that some coercive enforcement system is necessary.

But who are the least favored? In the context of enforcement there are two plausible candidates: apprehended offenders and victims (Sterba 1977, p. 356). Things are straightforward if apprehended offenders are the least favored—systematic infringement of offenders' liberties is justified only if it makes them

Footnote 9 continued
they have chosen principles of justice in the original position (pp. 196–199, 240). In the constitutional convention, the veil of ignorance is partially lifted and the deliberators know relevant general information about their society such as its culture and economic development. They remain ignorant of their places in society, their natural talents and their comprehensive conceptions of the good, however. These aspects of the veil of ignorance are all I need for my argument against a general liberal justification. For the sake of simplicity, then, I do not distinguish between the different stages, save for the purposes of addressing complications related to the increased information available in later stages.

[10] Extremely harsh punishment, however, would threaten to make offenders worse off than (or perhaps as worse off as) the least favored group would be in the absence of cooperation.

better off relative to how well off the least favored group would be in the absence of social cooperation. Their liberties, then, could probably be infringed only to the extent necessary to secure stability. But if victims are the least favored, infringements of offenders' liberties beyond those needed to preserve stability might be justified, perhaps up to or near the point where offenders would become the least favored. I argue that an alternative can secure sufficient stability and that an alternative is preferable regardless of whether offenders or victims are the least favored.[11]

I will deal with stability first. To determine if an alternative can secure sufficient stability, we must keep in mind my narrower understanding of punishment. The broader understanding I have rejected prejudices the discussion. Theorists who use this understanding risk falling into a false dilemma: either we punish or we use only non-coercive enforcement techniques like verbal criticism (cf. Hoekema 1980, pp. 249, 252). On a narrower understanding these options are not exhaustive and we can identify alternatives that are least prima facie feasible. The initial question the deliberators face, then, is whether an alternative can solve the assurance problem. Presumably, non-coercive means cannot and punishment can.[12] What about an alternative?

Solving the assurance problem requires removing "the grounds for thinking that others are not complying with the rules" (p. 240). But not all such grounds can be eliminated. Some non-compliance and suspicion is tolerable and inevitable. Relatively high degrees of assurance can probably be purchased only at the expense of significant liberty. Some approaches may generate more assurance than the alternative I have in mind, but they may generate it at an unacceptable cost.

If the considerations Rawls offers for thinking that punishment can secure enough assurance are plausible, then it is also plausible to think that my proposed alternative can secure enough assurance. To defend this claim, I must describe in more detail the non-punitive techniques the alternative could employ. As I have observed, many of the techniques used by contemporary criminal justice systems can be used without aiming to impose suffering. Though incidental suffering is unavoidable, much can be done to minimize it, both in the selection and application of enforcement techniques. A short list of such techniques includes compensation, probation and confinement.

Offenders could be forced to compensate the state for enforcement costs, courts costs and so on. They could also be forced to pay compensation for financial burdens they have imposed on their victims. Some of an offender's property could also be confiscated for these purposes. Such techniques can be motivated by certain views on property rights or, as some argue, by principles of self-defense (Golash 2005, p. 163); they need not be imposed with the aim of inflicting suffering. In the absence of such an aim and assuming limiting principles on the infliction of

[11] I suspect the least favored group would actually satisfy a quite complex description, e.g., economically disadvantaged apprehended offenders who have also been the victims of serious offenses. This does not seriously affect my argument however, so I will set it aside for simplicity's sake.

[12] This is not to say that non-forceful, non-coercive means of dealing with offenses can never work. Rawls, for example, thinks that in a well-ordered society sanctions may never have to be imposed (p. 240). Such exotic possibilities can be set aside, however.

incidental suffering, awards in excess of those needed for compensation, i.e., punitive awards, would not be justified.

Offenders could also be sentenced to probation, with restrictions appropriate to particular cases: restrictions on freedom of movement, association, ownership, privacy and so on, for the purposes of incapacitation, i.e., limiting their ability and opportunity to commit similar offenses for some period (Ten 1987, p. 8). Offenders for whom probation cannot offer or has not offered adequate means of control could be confined in a way similar to quarantine, not to impose suffering but to incapacitate more reliably.[13] This is more easily reconciled with an aim to minimize suffering. Incidental suffering can be minimized by using the least harsh techniques needed for adequate enforcement and by applying those techniques in ways that minimize the suffering caused (Ten 1987, p. 15).

This is only a faint sketch of non-punitive enforcement, but it is sufficient for my purposes. It is only intended to demonstrate that there is an intelligible, prima facie feasible alternative to punishment. The deliberators do not need a detailed enforcement model. They have no such model for punishment. Determination of specific policies is left to later stages in the deliberative process (pp. 200–201; cf. note 7). The deliberators must solve the assurance problem and can do so by authorizing punishment or an alternative. They have to ask what sorts of institutions or practices can solve the problem while posing a relatively limited threat to their interests. If non-punitive enforcement can solve the assurance problem—and it looks like it can—there is a viable alternative to punishment. If it can do so while also posing less of a threat to the deliberators' interests, there is an alternative that is preferable to punishment.

To determine the deliberators' choice we have to get clear on something else, however: assurance. Rawls says that punishment generates sufficient assurance that others are complying with the rules. Punishment limits the prospects for benefiting illicitly, in doing so reduces rational motivations to offend and therefore reduces suspicion that people are offending (p. 336). According to Rawls, punishment addresses the assurance problem by reducing the possibility that one's self-interest can be served by offending. It assures citizens that others have insufficient or limited self-interested reasons to offend.

Punishment does this because it aims to impose suffering. This suffering is calculated to outweigh the benefits of offending. But if assurance is understood in Rawls' terms, i.e., as a reduction in self-interested reasons to offend, aiming to impose suffering is not necessary to secure assurance. Punishment does not merely limit the prospects for benefiting. It aims to attach a specific disincentive to offending, namely suffering. But this is not necessary to limit the prospects for benefit, nor is it necessary even to attach disincentives to offending. Non-punitive enforcement can do these things. In some cases one can simply confiscate illicit benefits and force offenders to furnish compensation. Theft, for example, is disadvantageous in Rawls' sense when thieves are forced to return stolen property

[13] Here I mean both recidivists who have committed crimes of sufficient severity and offenders who, even if they have only offended once, have committed offenses so serious that our risk tolerance for recidivism is quite low.

and to furnish compensation. Similarly, when tax evaders are forced to pay their taxes as well as interest on the amount owed, tax evasion is disadvantageous. The need to limit self-interested reasons to offend does not uniquely favor punishment.

Things are, of course, less straightforward in cases of more serious offenses. Here there are complications with assurance. Rawls emphasizes, almost exclusively, financial offenses like tax evasion, offenses where the benefits are clear and temptation is widespread (p. 240). His description of how offenses of this sort can lead to social instability if left unchecked is relatively clear and plausible. Fewer people are tempted to commit more serious offenses, however, and the resulting benefits are often less tangible if not unclear. Left unchecked, offenses of this sort can encourage other offenses, but not to the same degree or in the same way as less serious offenses.

More serious offenses require accounting for another factor in the assurance problem: fear. Citizens have reason to fear for their safety when others can harm them with impunity. The benefits of social cooperation are not sufficiently protected and citizens are less likely and less able to take full advantage of their rights and the other benefits of social cooperation. A more complex picture involving repeated offenses, the generation of fear and consequent withdrawal from and breakdown of social cooperation is needed. Fear is surely what Rawls has in mind when he invokes Hobbes and claims that "effective penal machinery serves as men's security to one another" (p. 240). Citizens need assurance that they will not be harmed.[14]

Punishment secures stability not simply because it attaches disincentives to offending, but because in doing so it removes grounds for fear by preventing offenses. There are other ways of doing this besides aiming to impose suffering, however. Some of these techniques involve substantial coercion. It is only because of an overly broad conception of punishment that arguments like Rawls' seem plausible. Punishment is not the only way of securing crucial goods like stability and sufficient assurance.

In conjunction with confiscation and compensation, even relatively limited forms of incapacitation can reduce self-interested motivations to offend, can prevent recidivism and can deter. Limitations of an offender's rights and abilities can curtail the pursuit of his self interest, can make him suffer and can reduce his very ability to offend. A non-punitive enforcement system, however, would impose these sorts of limitations in such a way that the resulting suffering would be incidental and it would also aim (within practical limits) to minimize the resulting suffering. Such restrictions would be imposed because they limit offenders' abilities to engage in offenses of the sort they have demonstrated a willingness to commit. More serious offenders would be subject to more invasive techniques. None of these techniques need be imposed for the purposes of inflicting suffering and they can be imposed with the aim to minimize incidental suffering. Such techniques seem sufficient to address the assurance problem as Rawls characterizes it since they reduce the prospects for benefiting from offenses and take steps to limit the ability of offenders

[14] The assurance problem cuts both ways, however. Extremely harsh, poorly regulated enforcement systems will themselves threaten assurance.

to offend. The reasons Rawls offers in favor of punishment seem to speak with comparable force in favor of the alternative.

4.1.3 The least favored and the limited justifiability of punishment

We cannot yet conclude that the deliberators would choose the alternative, however. The assurance problem was just one of the issues I set out to address. I also said that an alternative would be preferable regardless of whether apprehended offenders or victims are the least favored.

Suppose victims are the least favored. If non-punitive alternatives cannot adequately better their position, punishment might be preferable on Rawls' view. I will argue, however, that punishment is not superior in this regard.

One might think, most obviously, that punishment benefits victims by reducing the number of victims, say by straightforward deterrence. But it is not obvious that punishment is more capable than the proposed non-punitive alternative (as opposed to straw men like purely denunciatory enforcement systems) of generating the deterrence needed to make them better off. Furthermore, appealing to the need to make victims better off in this way can at best only speak in favor of punishment contingently. To show that punishment is generally justified on grounds of deterrence, the advocate of punishment must show that punishment can and that the alternative cannot generate the degree of deterrence needed across a broad range of reasonably realistic conditions. This is a tall order.

There are several other ways punishment might be thought to make victims better off, though. One way is by incapacitating offenders. Punishment is not uniquely suited to do this, though. This should be clear given that my alternative focuses on imposing just these sorts of restrictions. Punishment can also reduce the probability of being subject to more serious offenses by generating relative deterrence, i.e., discouraging more serious offenses by responding to them more harshly. But an alternative that incapacitates offenders, imposing stricter restrictions in response to more serious offenses, can also generate relative deterrence. Compensating victims can also make them better off, but a non-punitive alternative can also compensate victims (Duff 2001, p. 24; Sayre-McCord 2001).

Victims can also be made better off by taking steps to preserve their self-respect, say by satisfying resentful feelings or by allaying feelings of diminished self-respect. This is obviously relevant to Rawls since he holds that self-respect is the most important primary good (p. 440). But an alternative can also preserve victims' self-respect. It just would not do so by aiming to impose suffering. This aim is not uniquely suited to maintaining victims' self respect. True, in a society where aiming to make offenders suffer is standard practice, victims' self-respect could be diminished when the aim is absent. Such contingent consequences, however, are not indicative of what is necessary to preserve self-respect. Loss of self-respect in such cases is the result, not simply of the absence of an aim to impose suffering, but of nonstandard responses suggesting inequality. It is more likely that self-respect requires recognition and protection of rights, things that the proposed alternative does.

Because punishment and the alternative can employ similar techniques, punishment is not uniquely capable of making victims better off. The most familiar reasons offered in support of punishment also favor the alternative. But one might still think punishment capable of making whoever the least favored are better off by generating more deterrence, more assurance and more stability. One might think that aiming to impose suffering is crucial for deterrence and that the more deterrence there is, the better off citizens are generally. This seems false. Deterrence purchased at the expense of significant liberties is less likely to be beneficial on the whole because of the value of liberty and the destabilizing effects of limited liberty. More deterrence does not necessarily benefit the worst off. If apprehended offenders are the worst off, for example, more deterrence does not make them better off—they are made worse off to generate more deterrence.

Even if punishment is more efficient at generating deterrence than a non-punitive alternative could be, its higher efficiency in this regard is of questionable importance. Liberalism is willing to sacrifice efficiency if less efficient means can achieve important ends while posing less of a threat to liberty. Liberal states must place significant restrictions on their enforcement systems. Given this, it is not obvious that, from the perspective of liberalism, punishment has any advantages over a non-punitive alternative like the one proposed.

Such observations, however, may not completely allay one's concerns, so let me say more by way of comparison. As I have said, the alternative does not aim to impose suffering. Enforcement may be an important means of making the least favored better off and it may have to be conducted partially in service to this aim, but this does not necessitate aiming to impose suffering. It may require modifying investigation and apprehension strategies or it may require changes in sentences, perhaps longer terms or more reliable forms of incapacitation. Since standard enforcement techniques can be used by the alternative, it seems capable of securing crucial goods—certainly more capable than advocates of punishment seem to acknowledge. Faced with the alternative's capacity to do this and the resulting challenge posed to the arguments for punishment, the burden of proof is on the advocate of punishment to show why it is preferable despite the alternative's comparatively limited threat to liberty.

The task is a difficult one. The alternative seems to rival punishment even in the context of a simple isolated comparison. Considered in the context of the broader political and social framework in which they would function, however, the justificatory task becomes even more complex. Possible shortcomings of a non-punitive enforcement system could be compensated for by other elements of the social and political framework. One must not forget that enforcement is just one practice or institution among many and that there are many ways of preventing offenses (Murphy 1973). Traditional enforcement's emphasis on suffering distracts from this. Because punishment aims to impose suffering, it may impose suffering needlessly, calling for more suffering than is needed to secure sufficient assurance and to make the least favored better off (Narveson 1974, p. 187; Sayre-McCord 2001). The alternative has no such limitation. For the alternative, suffering is not a means to important ends, but an undesirable and ideally eliminable effect of techniques needed to achieve these ends, techniques applied in concert with other

means of securing a just society. Faced with these two enforcement options, the deliberators in the original position would reject punishment in favor of the alternative—or at least, we have strong reason to think they would do so unless we can find more compelling reasons for punishment.

There is one complication, however. On Rawls' view, punishment will be justified under select conditions. This is because when the deliberators face the relevant decisions they have more information. Rawls distinguishes between different stages of deliberation. The original position is only the first stage (see note 7). Selection of institutions occurs in the second stage, a constitutional convention where the veil of ignorance is partially lifted and the deliberators know relevant general information about their society such as its political culture and economic development. It is not clear what Rawls means by political culture, but it is possible that it could involve strong commitments in favor of punishment, commitments so strong that they would threaten stability if simply ignored. It is easy to overestimate the degree to which a given political culture is like this, but there is no denying that an anti-alternative climate, one that highly values offenders' suffering, is possible. How then can I claim that punishment lacks a general liberal justification?

There is no such justification because possibilities like this are not sufficiently representative. Rawls himself acknowledges that slavery would be justified under select conditions, but only transitionally, i.e., to temporarily avoid worse injustices pending liberal progress (pp. 152, 248). Showing that punishment is justified under contingent (and in this case rather undesirable) conditions like this does not yield a general justification. For a general justification, punishment must be justified as a stable, enduring practice, one that would be favored by deliberators over a broad range of reasonably realistic conditions. The possibility of an alternative like the one I have described undermines the prospects for such a justification. In what follows I will reinforce this point by considering general justification proposed by two other theorists. They offer justifications similar to Rawls' and their arguments suffer from similar defects.

4.2 Neutrality and punishment

I will now briefly discuss Ackerman's general justification. Before people can function as members of liberal communities, Ackerman claims, they must be able to justify their behavior to others with neutral reasons. Ackerman calls this the "behavioral test for citizenship in a liberal state" (p. 81).[15] A state is not liberal unless enough of its citizens pass this test. No one, Ackerman observes, can pass the behavioral test in every conceivable situation. It is easy to imagine situations where one would behave illiberally, i.e., where one would violate others' rights in the pursuit of self-interest. Since no one is capable of perfect conformity with liberal requirements, constraints must be placed on everyone if they are to pass the behavioral test.

Ackerman's justification takes us through some idealizations. As he dispenses with the idealizations and works his way towards a realistic enforcement scheme, the constraints take on the familiar character of punishment. The first idealization is

[15] Unless otherwise noted, page references in this subsection are to Ackerman (1980).

what he calls a "perfect technology of justice" (p. 82). This technology—Ackerman's example is a set of futuristic ray guns that citizens could use to protect themselves—would detect attempts to offend and painlessly incapacitate aspiring offenders. Ideally, people would be preemptively incapacitated whenever they attempted offenses. Such an enforcement scheme would prevent many offenses and so would make it significantly easier for people to pass the behavioral test.[16] This idealization illustrates the fundamental aim of a liberal enforcement system. Such a system aims primarily to ensure that people behave in accordance with liberal requirements, e.g., that they refrain from violating others' rights.

But we do not have this technology. Ackerman claims that without such a technology a liberal state must punish. He drops his first idealization and introduces a second: an ideal punishment system that apprehends and punishes all offenders and only offenders, making them worse off than they would have been had they not offended (p. 83). In light of practical realities, preemptive incapacitation that makes offending impossible gives way to punishment that makes offending irrational. Under such a system, punishment functions as a prudential disincentive, i.e., a deterrent. Under an ideal punishment system, one needs only a minimal degree of prudence to pass the behavioral test and function as a liberal citizen.

But there are further complications. Not everyone is minimally prudent, not all offenders are apprehended and innocents are mistakenly punished. These complications require modifying the punishment strategy. Ackerman claims that punishment is generally justified because it generates a deterrent effect sufficient to "induce most prudent people to conform to the behavioral" test (p. 88). Because only some offenders will be punished and because not all prospective offenders are minimally prudent, the need for sufficient deterrence means that actual punishments have to be more severe than they would need to be under a more reliable system. To minimize punishment of the innocent, institutional safeguards must be introduced, yielding a system similar to contemporary ones.

Ackerman's general justification exploits his concept of liberal citizenship and his understanding of the liberal state. Like many justifications, his turns on necessity claims. Punishment is justified because it is necessary to enable people to pass the behavioral test and to secure the existence of the liberal state. Where Ackerman differs from Rawls is in his greater sensitivity to the difficulty of formulating a general justification of punishment that is consistent with liberal principles. He is more cautious before concluding that punishment is generally justified, taking pains to emphasize a restriction.

> Only the *least restrictive alternative* that will satisfy the behavioral test can be insulated from attack under the Neutrality principle. (p. 86; cf. Murphy 1985, pp. 4–5)

[16] I qualify things with the word "many" here because Ackerman's discussion implicitly involves another idealization. He does not consider offenses that involve refraining from certain behaviors. He only discusses aggressive attempts to tamper with the liberal state's distribution of resources. Offenses of the former sort seem to call for a different sort of coercion than the kind of incapacitation Ackerman describes, but I will set these complications aside since the idealization is effectively discarded as his argument progresses.

Ackerman's discussion of his first idealization illustrates this. If a liberal state can reliably preemptively incapacitate aspiring offenders, that is the only enforcement strategy it can justifiably use. Punishment is generally justified because there is no less restrictive, comparatively effective alternative available. Practical complexities that hold across a broad range of reasonably realistic condition make it necessary for securing crucial goods.

This more cautious approach still fails. Ackerman errs in the transition from his first to his second idealization. He assumes that the liberal state must punish because it cannot reliably preemptively incapacitate. This conclusion is partially aided by an overly broad understanding of punishment that overlooks the significance of the aim to impose suffering. Nothing Ackerman says insulates this aim from challenge under Neutrality. We can easily imagine an offender issuing a challenge to punishment. Why, the offender might ask, should he and others like him be punished? Why do we aim to make offenders suffer? The answer Ackerman must give if he is to give a neutral answer is that doing so is necessary to help people pass the behavioral test and necessary to secure the existence of the liberal state. But this claim seems false.

The claim is similar to Rawls' claim that punishment is necessary to secure sufficient stability. Instead of focusing on stability, though, Ackerman focuses on behavior, claiming that citizens must behave in certain ways if their state is to qualify as liberal. As Ackerman's discussion implicitly acknowledges, however, perfect behavioral conformity is not necessary for a liberal state. This becomes clear as he dispenses with his idealizations. Non-ideal punishment systems are in principle capable of securing the existence of liberal states despite a failure to prevent and punish many offenses. This is because they can secure sufficient behavioral conformity. But if punishment can secure sufficient conformity despite practical complications, why does Ackerman so quickly abandon the non-ideal analogue of his first idealization? Why is incapacitation, understood a bit more broadly than he understands it, insufficient?

Ackerman considers incapacitation as a preemptive measure. Once an offense is perpetrated, the opportunity to incapacitate has passed. On Ackerman's first idealization, incapacitation suffices because of the existence of a perfect technology of justice. If incapacitation is understood in this way, a non-ideal incapacitation system is less attractive than a non-ideal punishment system because it is much less reliable, does little to discourage offenses and does nothing to respond to successful offenses. Understood more broadly though, incapacitation can be usefully employed by a non-punitive system like the one proposed. Like many theorists, Ackerman does not consider the possibility of a middle ground between punishment and the limited set of non-punitive alternatives he considers.

The alternative does not only try to preemptively stop offenses. As well as confiscating illicit benefits where possible and forcing offenders to furnish compensation where appropriate, it also limits offenders' abilities to offend. As such, it secures both specific and general deterrence—specific because it makes it less likely that offenders will successfully re-offend, general because prospective offenders must face the prospect of having their liberties and abilities restricted, the prospect of having illicitly acquired benefits confiscated, the prospect that they may

be forced to compensate others for their offenses and the prospect of having to endure any incidental suffering such techniques cause. Though such techniques are applied with the aim of minimizing incidental suffering, they nevertheless serve as prudential disincentives. Combined with reasonably effective investigative and apprehension strategies and reasonably just political and social conditions, such an enforcement scheme seems capable of achieving a significant amount of behavioral conformity. The advocate of punishment who doubts that such an alternative can generate a sufficient amount of behavioral conformity must furnish us with reasons to accept his reservations.

Ackerman does not say enough to generally justify punishment. Offenders can challenge punishment, citing the possibility of a non-punitive alternative. Why, they might ask, do we aim to make them suffer when non-punitive alternatives seem capable of safeguarding the liberal state? If an alternative can do this it has a significant advantage over punishment. Neutral reasons speak in its favor and against punishment. As for protecting the rights of possible victims, the liberal state cannot claim that offenders are on unequal footing with possible victims. Such a claim would violate Neutrality. An acceptable balance must be struck between the claims of offenders and victims. That balance permits placing restrictions on offenders, but it does not permit aiming to make them suffer.

4.3 Reasonable rejection and punishment

Barry does not explicitly discuss punishment. For a proposal on how to justify punishment on the Scanlonian framework, we must turn to Scanlon. Barry does have important things to say that should be kept in mind, however. He claims that Scanlon's criterion of non-rejectability "achieves Rawls's objectives better than does the construction proposed by Rawls himself" (Barry 1995, p. 70). Barry thinks that Scanlon's criterion more plausibly generates the principle that inequalities, especially inequalities in basic liberties, have to be justified to those adversely affected by them. The criterion

> leads directly to a very strong presumption in favor of equality here, since it invites us to ask why anybody should freely consent to being treated less well in respect of rights than anybody else in his society. (Barry 1995, p. 70)

Barry thinks that Rawls cannot make a case for the first principle of justice and that Scanlon's criterion "directly" yields a similar principle. Whether or not Barry is right, he correctly points out that Scanlon's criterion reflects a shared aim: the aim of justifying inequalities to those adversely affected by them.

This aim is especially important to enforcement and the importance Scanlon's account places on it emphasizes a point I have made throughout, one acknowledged if not sufficiently appreciated by many: the general liberal justification of a coercive enforcement system rests on necessity claims, and particularly strong ones at that. As Barry puts it:

> the necessity for truncating the rights of some (compared with those of others) must be so compelling that even the victims should not be able reasonably to

> withhold their consent. Only some dire emergency, in which the whole system of liberty was at stake, could with any plausibility satisfy this condition. (Barry 1995, p. 71)

Both Rawls and Ackerman justify punishment with this appeal. Even though offenders have limits placed on their liberty, they argue, the existence of liberal society requires the imposition of these restrictions. Rawls and Ackerman err in thinking that this justifies punishment. Scanlon makes a similar error, despite the fact that his framework seems particularly suited to demonstrating punishment's justificatory shortcomings.

Scanlon does not offer a general justification of punishment, though he explicitly assumes that punishment is generally justified. He spells out some conditions for general justification and notes some characteristics a general justification would have. He does this by means of an analogy between hazardous waste disposal and punishment, presented in the context of a discussion of reasonable rejection and the value of choice.

Scanlon argues that we have compelling reasons for wanting what happens to us to depend on our choices. I will not describe this argument in detail. Suffice to say, he holds that the opportunity to choose is valuable. He claims that when one is placed in a sufficiently good position and has been given the opportunity to choose, one can have no valid complaint about any resulting harm that one suffers. As an example, he takes a case of hazardous waste disposal. Some city officials need to remove and dispose of hazardous waste that will eventually contaminate the water supply. Excavating and transporting the waste will release chemicals into the air and subject people to adverse health effects, but leaving the waste would be much more dangerous. To see what a justified disposal program would be like, Scanlon considers things from the perspective of someone who suffers harmful exposure. He asks what a disposal program would have to be like in order for such a person to have no valid complaint against it.

Scanlon claims that if sufficient precautions are taken, anyone who suffers harmful exposure will not have a valid complaint. Sufficient precautions include treating the waste and transporting it in sealed trucks to minimize air dispersal, disposing of the waste in a site away from populated areas, and fencing in and posting guards and warning signs at the excavation and disposal sites. People would have to be notified of the program and informed of ways to avoid exposure, e.g., staying indoors when the trucks pass. With these precautions in place there would be no significant threat to people who take the recommended means of avoiding exposure. Treating the waste, transporting it carefully, and placing guards and fences at the excavation and disposal sites would also minimize the risks to those who fail to do so.

If the listed precautions are taken, enough has been done. The precautions put citizens in a sufficiently good position: they can, at little cost, avoid exposure and the resulting harm should they risk exposure has been minimized. Under these conditions, someone who suffers harmful exposure will have no valid complaint against the program.

I have omitted much of Scanlon's discussion, but I have gone over the relevant parts. My concern is not with the plausibility of Scanlon's view on the value of choice and its relation to reasonable rejection, but with the analogy he draws between the justified disposal program and punishment. Scanlon proceeds via analogy to describe what a justification of punishment would look like given his account of choice and reasonable rejection. In doing so he does not fully account for important disanalogies between the two practices and takes the general justifiability of punishment for granted. Examined by his own lights, however, punishment faces significant justificatory difficulties. Scanlon's analogy actually helps to bring this out.

He begins by noting four characteristics that the disposal program and punishment share (p. 264).[17] First, they both pursue a critical social goal. Second, the strategy for achieving that goal involves creating a risk: harmful exposure and punishment, respectively. Third, they both create certain areas that one cannot enter without risk of harm (metaphorically speaking in the case of punishment). Fourth, even with the introduction of safeguards, people will suffer harm.

To justify the practices, Scanlon notes, we must show that the goals they achieve justify creating the risks. Enough must also be done to protect those who fail to take the prescribed avoidance measures, however. In the disposal case, some people will risk exposure. The city officials know this. Unless they take steps to sufficiently minimize the risk of harm to those who do not take the prescribed measures, the latter will have valid complaints against the program (p. 263). Treating the waste, transporting it carefully, and placing guards and fences at the excavation and disposal sites are reasonable steps that sufficiently minimize the risk of harm to these people.

So Scanlon thinks that two things have to be done for the disposal program to be justified: the likelihood that people will incur the risk of exposure has to be reduced and reasonable steps have to be taken to sufficiently minimize the risk of harm to those who incur the risk. The latter effectively eliminates the possibility of valid complaints on the part of those who incur the risk. Curiously, however, Scanlon does not advocate an analogous attempt to minimize harm in the case of punishment. He notes the need for education, publicity, and the maintenance of social and economic conditions to make it less likely that people will offend, but says nothing about minimizing the harm inflicted on offenders.

Scanlon does not explain this difference. It undoubtedly has something to do with an important disanalogy he notes between the disposal program and punishment. When harm occurs in the disposal case it is merely a side effect of the program, whereas the harm inflicted by punishment is deliberately inflicted, rendering punishment, as Scanlon notes, more difficult to justify (p. 265). Perhaps Scanlon thinks that minimization of harm in the case of punishment is inappropriate since harm is the means by which punishment pursues a critical social goal. But such a position would be mistaken. Not just any punishment will be justified for any given offense. Even if punishment is generally justified, only the minimum punishment

[17] Unless otherwise noted, page references in this subsection are to Scanlon (1998).

needed to achieve a sufficient degree of social protection will be acceptable on Scanlon's view.

Scanlon may acknowledge this, but what he says seems ambiguous. When he says that "a person who knowingly and intentionally violates a justifiable law lays down his or her right not to suffer the prescribed punishment" (p. 265) he says nothing about what justifies the particular punishment prescribed. He does hold that justifying an institution or practice of punishment "involves" justifying the penalties it imposes (p. 265). But he does not spell out what "involves" means and so gives no indication about the nature or direction of justification. Is a prescribed punishment justified because the practice or institution that imposes it is justified or is the institution justified because the particular punishments that it imposes are justified?

Scanlon misses something important here. The general justifiability of punishment would not leave offenders without valid complaints against the severity of particular punishments. On Scanlon's criterion justification requires minimization in the case of punishment as it does in the disposal case. This suggests a more serious problem. Scanlon does not consider the possibility of non-punitive alternatives. Urged on by a narrower understanding of punishment, we cannot ignore this possibility. An alternative may be more compatible with the minimizing aims crucial to passing the reasonable rejection test. In this respect, such an alternative seems more analogous to the disposal program Scanlon outlines. The importance of minimization may actually undermine punishment's general justificatory prospects.

Granting Scanlon's claim about the importance of social protection, we can begin by considering the second similarity he notes between the disposal program and punishment: their strategies for promoting a critical goal. If the enforcement strategy we use is to be generally justified, those who suffer under it can have no reasonable complaints against it. If an alternative to punishment can achieve the relevant goals at lesser cost, punishment will be unjustified. The proposed alternative is just such an alternative.

Consider the alternative's social protection strategy. Instead of aiming to make offenders suffer, suppose we take a more direct route and simply limit the ability of offenders to offend, confiscate illicit benefits and force offenders to furnish compensation where appropriate. Combined with effective investigative and apprehension strategies as well as various social measures such as those Scanlon mentions, i.e., education, publicity and the maintenance of adequate social and economic conditions, this strategy seems capable of generating a significant amount of deterrence and it offers a significant degree of protection, all without aiming to make offenders suffer. More significant restrictions of liberty, such as those that would likely be imposed by an institution of punishment, would run afoul of Scanlon's criterion in light of such an alternative. As Barry notes, the reasons for the restrictions we impose must be quite compelling. Restrictions beyond those needed to achieve a sufficient degree of protection will be unjustified, even if they do achieve further offense reduction. Offenders who are punished are more likely to have reasonable complaints than those subject to the alternative because the aim to inflict suffering can motivate and even require more than the incidental suffering that would be endured by offenders under the alternative.

What about victims? I have focused on offenders and their possible complaints. One might think that the claims of victims and offenders conflict, that the claims of victims must prevail and that the interests of offenders must be sacrificed by means of punishment to satisfy those claims. Such a worry underestimates the alternative's capabilities, ignores other means of reducing the offenses and overlooks constraints imposed by liberal principles. Liberal requirements demand that we take all reasonable alternative means of achieving important goals before we do so at the expense of citizens' liberties. The aim to impose suffering does not seem necessary to achieve these goals and it generates requirements that will, under reasonably realistic circumstances, conflict with the liberal requirement to minimize infringements of liberty.

The various social means of reducing the incidence of offenses, such as access to education and the maintenance of adequate social and economic conditions, have priority. Valid complaints that victims have may very well speak, not against the enforcement system but against the social conditions in which that system operates. And complaints that do apply to the enforcement system need not speak against techniques and policies regarding the disposition of offenders, but to the investigation and apprehension apparatuses. Only the restrictions that are necessary to generate sufficient protection with adequate social conditions and adequate investigative and apprehension mechanisms in place have any prospects for general justification.[18] Restrictions that are not needed to maintain such conditions and that are not needed to generate sufficient protection are not generally justified.

Since the alternative can use the techniques available to contemporary enforcement systems, albeit applied without the aim to impose suffering, it seems capable of achieving a sufficient degree of protection. In light of this alternative, there will be reasonably realistic social conditions where offenders will have reasonable complaints against punishment. Hence, punishment cannot be generally justified on Barry's Scanlonian framework—or at least, we have reason to think it cannot be unless more compelling reasons can be furnished in its support.

5 Conclusion: taking stock

Each of the theorists I have discussed offers a general liberal justification of punishment. They all fall prey to significant errors, however. These are errors that liberal advocates of punishment, and advocates of punishment generally, must avoid if they are to offer plausible general justifications of punishment. The theorists I have discussed do one or more of the following. They

(1) adopt an unacceptably broad conception of punishment,
(2) adopt an unacceptably narrow conception of incapacitation,
(3) classify incapacitation as a form of punishment,
(4) present the enforcement options in terms of a false dilemma,
(5) misrepresent the rationality of the enforcement options.

[18] This is not to deny that harsher enforcement techniques might be necessary to achieve these conditions in the first place. Such a fact would not mean that harsher enforcement techniques are generally justified.

These errors seriously prejudice enforcement questions. The first three effectively characterize nearly every form of enforcement as punishment and lend an air of legitimacy to the fourth. The few non-punitive alternatives that are acknowledged, e.g., verbal denunciation, barely merit consideration. This culminates in the fifth error, making the authorization of punishment seem rational.

Things could be conceptualized differently from the start. But even conceiving things this way, distinctions can still be made and further questions asked. This is where prejudices in favor of punishment, i.e., in favor of the aim to impose suffering, cut inquiry short. We are presented with an overly broad understanding of punishment on which nearly every form of enforcement constitutes punishment. But not all forms of enforcement can be assumed generally justified even if some forms are.

If it is plausible that the aim to impose suffering influences the choice and application of enforcement techniques, we should ask whether such an aim itself can be generally justified, irrespective of whatever word we use to describe the practice or institution involved. If such an aim lacks a general liberal justification, there is a significant restriction on liberal enforcement—whether we classify that enforcement as punitive or non-punitive. I have argued that such an aim cannot be given a general liberal justification.

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