# DOWNLOAD PDF PENAL THEORY AND PRACTICE

## Chapter 1 : Theories of Criminal Law (Stanford Encyclopedia of Philosophy)

*PENAL THEORY AND PRACTICE The development of the criminal law and penal philosophy for the most part has been left to or accepted by the sociologists, psy-.*

Background Philosophical reflection on punishment has helped cause, and is itself partially an effect of, developments in the understanding of punishment that have taken place outside the academy in the real world of political life. A generation ago sociologists, criminologists, and penologists became disenchanted with the rehabilitative effects as measured by reductions in offender recidivism of programs conducted in prisons aimed at this end Martinson  This disenchantment led to skepticism about the feasibility of the very aim of rehabilitation within the framework of existing penal philosophy. To these were added skepticism over the deterrent effects of punishment whether special, aimed at the offender, or general, aimed at the public and as an effective goal to pursue in punishment. That left, apparently, only two possible rational aims to pursue in the practice of punishment under law: Social defense through incarceration, and retributivism. Public policy advocates insisted that the best thing to do with convicted offenders was to imprison them, in the belief that the most economical way to reduce crime was to incapacitate known recidivists via incarceration, or even death Wilson  Whatever else may be true, this aim at least has been achieved on a breathtaking scale, as the enormous growth in the number of state and federal prisoners in the United States some 2. At the same time that enthusiasm for incarceration and incapacitation was growing as the preferred methods of punishment, dissatisfaction with the indeterminate prison sentenceâ€”crucial to any rehabilitative scheme because of the discretion it grants to penal officialsâ€”on grounds of fairness led policy analysts to search for another approach. Fairness in sentencing seemed most likely to be achievable if a criminal sentence was of a determinate rather than indeterminate duration Allen  But even determinate sentencing would not be fair unless the sentences so authorized were the punishments that convicted offenders deserved. Aside from being an impractical goal, it is morally defective for two reasons: The oddity of a theory that affirms having and exercising a right to be punished has not escaped notice. Second, justice or fairness in punishment is the essential task of sentencing, and a just sentence takes its character from the culpability of the offender and the harm the crime caused the victim and society Card , von Hirsch , Nozick  In short, just punishment is retributive punishment. Philosophers reached these conclusions because they argued that there were irreducible retributive aspects to punishmentâ€”in the very definition of the practice, in the norms governing justice in punishment, and in the purpose of the practice as well. As a result, the ground was cut out from under the dominant penal policy of mid-century, the indeterminate sentence in the service of the rehabilitative ideal for offenders behind bars. Probation as the essential nonincarcerative alternative sanction received an expanded role, but release on parole came to a virtual end. In its place but as it turned out, only in theory was uniform determinate sentencing, which would avoid the follies of unachievable rehabilitative goals and ensure both incapacitation and even-handed justice for all offenders. This was, of course, before the political process distorted these aims. Not all admirers of justice in punishment supported determinate sentencing. The doctrine has not been without its critics, both in theory and in practice Zimring  But to date, no alternative approach shows any signs of supplementing the just deserts sentencing philosophyâ€”no matter how preposterous in practice the claim that a given punitive sentence is justly deserved may be in most cases. There has been a third development concurrent with the two outlined above, far less influential in the formation of actual penalty policy even if it is of equal theoretical importance Harding  We refer to the reconceptualization of the practice of punishment arising from the work of Michel Foucault in the mids. Foucault invited us to view the practice of punishment under law as subject to general forces in society that reflect the dominant forms of social and political powerâ€”the power to threaten, coerce, suppress, destroy, transformâ€”that prevail in any given epoch. And he also cultivated a deep suspicion toward the claims that contemporary society had significantly humanized the forms of punishment by abandoning the savage corporal brutality that prevailed in the bad old days, in favor of the hidden concrete-and-steel carceral system of the modern era Foucault  Professed goals of punishment, norms constraining the use of power in the pursuit of these goals, the

aspiration for justice in punishmentâ€”all these, if Foucault is right, turn out to mask other not necessarily conscious intentions among reformers that belie the ostensible rationality not to say rationalization of their aims since the Enlightenment. Thus, the movement against capital punishment in the late eighteenth century is not to be explained or, presumably, justified by the influence of conscious, rational utilitarian calculations of the sort that Beccaria and Bentham argued had persuaded them to oppose the death penalty Bedau , Maestro First, he ignored the analytical distinctions that philosophers in the Anglo-American tradition had made familiar to be discussed below. None plays any visible role in his account of the theory or practice of punishment. Some interpreters might not only acknowledge this, they would go further and argue that Foucault offers no philosophical views about punishment at allâ€”because conceptual and normative analysis and the search for principles on which to rest policy are at best obscurely and indirectly pursued in his writings. Instead, so this interpretation declares, he is just a social commentator or some other form of critical humanist Garland But this interpretation fails to do him justice. Not only do they issue in claims that are not obviously testable empirical hypotheses, they involve large-scale reflections on and reinterpretations of human nature, public institutions, and the point of our punitive practices. Second, Foucault implicitly challenges the very idea of any form of justification of the practice of punishment. He is, in his way, a paradigmatic thinker whose views about punishment can be called anti-foundationalist. What emerges from his account is the view that what passes for the justification of punishment as with any other social practice is inextricably tied up with assumptions, beliefsâ€”in short, with ideologyâ€”that have no independent rational foundation. The very idea that penal institutions can be justified is suspect, self-delusive. Foucault more than any other recent thinker who has reflected on the institutions of punishment in western society, has brought historicist, anti-analytic, and anti-foundationalist convictions together, thus sowing deep uncertainty over how and even whether to address the task of justifying punishment. The cumulative effect of these forces, political and intellectual, has been to undermine confidence in the classic Enlightenment or liberal view of punishment found, for example, in Hobbes, Locke, Bentham, and Mill. Perhaps this is an exaggeration; one might argue that since it is unclear just what a liberal view of punishment really is, successfully undermining it is equally uncertain. What is needed is a reassertion, reformulation, and redeployment of recognizably liberal ideas in the theory of punishment see the discussion below. Theory of Punishment The prevailing features in the modern theory of punishment were developed by analytic philosophers half a century ago. The theory in the Anglo-American philosophical world was and still is governed by a small handful of basic conceptual distinctions, self-consciously deployed by virtually all theorists no matter what substantive views they also hold about punishment. The terminus a quo of these ideas are the influential writings of H. Though both Hart and Rawls pass muster as centrist liberals, they believed these analytic distinctions to be ideologically neutral. Defining the concept of punishment must be kept distinct from justifying punishment. A definition of punishment is, or ought to be, value-neutral, at least to the extent of not incorporating any norms or principles that surreptitiously tend to justify whatever falls under the definition itself. To put this another way, punishment is not supposed to be justified, or even partly justified, by packing its definition in a manner that virtually guarantees that whatever counts as punishment is automatically justified. Conversely, its definition ought not to preclude its justification. Justifying the practice or institution of punishment must be kept distinct from justifying any given act of punishment. For one thing, it is possible to have a practice of punishmentâ€”an authorized and legitimate threat systemâ€”ready and waiting without having any occasion to inflict its threatened punishment on anyone because, for example, there are no crimes or no convicted and sentenced criminals. For another, allowance must be made for the possibility that the practice of punishment might be justified even though a given act of punishmentâ€”an application of the practiceâ€”is not. Justification of any act of punishment is to be done by reference to the norms rules, standards, principles defining the institutional practiceâ€—such as the classic norms of Roman law, nullum crimen sine lege and nulla poena sine lege no crime without law, no punishment without law. Justification of the practice itself, however, necessarily has reference to very different considerationsâ€—social purposes, values, or goals of the community in which the practice is rooted. The values and considerations appropriate to justifying acts are often assimilated to those that define judicial responsibility, whereas the values that bear on justifying the

punitive institution are akin to those that govern statutory enactments by a legislature. The practice of punishment must be justified by reference either to forward-looking or to backward-looking considerations. If the former prevail, then the theory is likely to be consequentialist and probably some version of utilitarianism, according to which the point of the practice of punishment is to increase overall net social welfare by reducing ideally, preventing crime. If the latter prevail, the theory is deontological; on this approach, punishment is seen either as a good in itself or as a practice required by justice, thus making a direct claim on our allegiance. A deontological justification of punishment is likely to be a retributive justification. Or, as a third alternative, the justification of the practice may be found in some hybrid combination of these two independent alternatives. Attempts to avoid this duality in favor of a completely different approach have yet to meet with much success Goldman , Hoekema , Hampton , Ten , von Hirsch , Tadros  Acknowledgment of these distinctions seems to be essential to anything that might be regarded as a tolerably adequate theory of punishment. Two substantive conclusions have been reached by most philosophers based in part on these considerations. First, although it is possible to criticize the legitimacy or appropriateness of various individual punitive actsâ€”many are no doubt excessive, brutal, and undeservedâ€”the practice of punishment itself is clearly justified, and in particular justified by the norms of a liberal constitutional democracy. Second, this justification requires some accommodation to consequentialist as well as to deontological considerations. A strait-laced purely retributive theory of punishment is as unsatisfactory as a purely consequentialist theory with its counter-intuitive conclusions especially as regards punishing the innocent. The practice of punishment, to put the point another way, rests on a plurality of values, not on some one value to the exclusion of all others. So much by way of review of the recent past as a stage setting for what followsâ€”a sketch of what we take to be the best general approach to the problem of defining and justifying punishment. Justifications of Punishment As a first step we need a definition of punishment in light of the considerations mentioned above. Can a definition be proposed that meets the test of neutrality that is, does not prejudge any policy question? Punishment under law punishment of children in the home, of students in schools, etc. The classical formulation, conspicuous in Hobbes, for example, defines punishment by reference to imposing pain rather than to deprivations. This definition, although imperfect because of its brevity, does allow us to bring out several essential points. First, punishment is an authorized act, not an incidental or accidental harm. It is an act of the political authority having jurisdiction in the community where the harmful wrong occurred. Second, punishment is constituted by imposing some burden or by some form of deprivation or by withholding some benefit. Deprivation has no covert or subjective reference; punishment is an objectively judged loss or burden imposed on a convicted offender. Third, punishment is a human institution, not a natural event outside human purposes, intentions, and acts. Its practice requires persons to be cast in various socially defined roles according to public rules. Harms of various sorts may befall a wrong-doer, but they do not count as punishment except in an extended sense unless they are inflicted by personal agency. Fourth, punishment is imposed on persons who are believed to have acted wrongly the basis and adequacy of such belief in any given case may be open to dispute. Actually being guilty is not. For this reason it is possible to punish the innocent and undeserving without being unjust. Fifth, no single explicit purpose or aim is built by definition into the practice of punishment. The practice, as Nietzsche was the first to notice, is consistent with several functions or purposes it is not consistent with having no purposes or functions whatever. Sixth, not all socially authorized deprivations count as punishments; the only deprivations inflicted on a person that count are those imposed in consequence of a finding of criminal guilt rather than guilt only of a tort or a contract violation, or being subject to a licensing charge or to a tax. What marks out nonpunitive deprivations from the punitive ones is that they do not express social condemnation Feinberg , Bedau  This expression is internal, not external, to the practice of punishment. Finally, although the practice of punishment under law may be the very perfection of punishment in human experience, most of us learn about punishment well before any encounters with the law. It is helpful in assessing various candidate justifications of punishment to keep in mind the reasons why punishment needs to be justified. Punishmentâ€”especially punishment under law, by officers of the governmentâ€”is as noted above a human institution, not a natural fact. It is deliberately and intentionally organized and practiced. Yet it is not a basic social institution that every conceivable society must have. It is a testimony to human frailty, not

to the conditions necessary to implement human social cooperation. It also has no more than an historical or biological affinity with retaliatory harm or other aggressive acts to be found among nonhuman animals or despite thinkers from Bishop Joseph Butler to Sir Peter Strawson to the contrary with the natural resentment that unprovoked aggression characteristically elicits. The practice or institution of punishment is not necessary, conceptually or empirically, to human society. It is conceivable even if impracticable that society should not have the practice of punishment, and it is possibleâ€”given the pains of punishmentâ€”that we might even rationally decide to do without it.

## Chapter 2 : penal theory and practice | Download eBook pdf, epub, tuebl, mobi

*The contributors include criminologists, sociologists, lawyers and philosophers, judges, civil servants involved with penal policy, and those with practical experience in prisons and in other aspects of penal practice and reform.*

Features of Criminal Law The life of the criminal law begins with criminalization. On this view, we are not invited to commit crimesâ€"like murder, or driving uninsuredâ€"just as long as we willingly take the prescribed legal consequences. As far as the law is concerned, criminal conduct is to be avoided. This is so whether or not we are willing to take the consequences. It is possible to imagine a world in which the law gets its wayâ€"in which people uniformly refrain from criminal conduct. Obviously enough this is not the world in which we live. These powers and permissions exist ex anteâ€"prior, that is, to the commission of crime. We can add those that exist ex postâ€"once crime has been committed. By the time cases reach the courts those accusers are typically state officials or those to whom the state has delegated official power. Some legal systems do make space for private prosecutions. But such prosecutions can be discontinued or taken over by state officials and their delegates. In this way, the state exercises a form of control over criminal proceedings that is absent from legal proceedings of other kinds Marshall and Duff  It may seem from the above that criminal proceedings are tilted heavily in favour of the accusing side. These typically include the right to be informed of the accusations in question, the right to confidential access to a lawyer, and the privilege against self-incrimination. At least on paper, the procedural protections on offer in criminal proceedings are more robust than those available to the accused in legal proceedings of other kinds. This is explained in large part by the consequences of criminal conviction. This is to say nothing of criminal sentences themselves. Those sentences are typically punishments: This is not to say that suffering or deprivation must be the ultimate end of those who punish. What it cannot be is a mere side-effect. This is one thing that distinguishes criminal sentencesâ€"at least of the punitive kindâ€"from the reparative remedies that are standard fare in civil law. But we can imagine cases in which this is not so: The award may remain a reparative success. It cannot be anything other than a punitive failure Boonin , 12â€"17; Gardner  Obviously suspicions are sometimes misplaced. So it is no surprise that the most destructive powers and permissions are jealously guarded by the criminal law. But a moot court has no power to detain us in advance, to require us to appear before it, or to sentence us to imprisonment. Force used to achieve any of these things would itself be criminal, however proportionate the resulting punishment might be. As this example shows, criminal law is characterised by an asymmetryâ€"it bestows powers and permissions on state officials and delegates which are withheld from private persons, such that the latter are condemned as vigilantes for doing what the former lawfully do Thorburn a, 92â€"93; Edwards forthcoming. This remains the caseâ€"often to the great frustration of victims and their supportersâ€"even if the official response, assuming it comes at all, will be woefully inadequate. Functions of Criminal Law Few deny that one function of criminal law is to deliver justified punishment. Some go further and claim that this is the sole function of criminal law Moore , 28â€" Call this the punitive view. Rules of criminal procedure and evidence, on this view, help facilitate the imposition of justified punishment, while keeping the risk of unjustified punishment within acceptable bounds. Rules of substantive criminal law help give potential offenders fair warning that they may be punished. Both sets of rules combat objections we might otherwise make to laws that authorize the intentional imposition of harm. To combat objections, of course, is not itself to make a positive case for such laws. That case, on the punitive view, is made by the justified punishments that criminal courts impose. This is not to say anything about what the justification of punishment is. It is merely to say that criminal law is to be justified in punitive terms. Some object that this focus on punishment is misplaced. The central function criminal law fulfills in responding to crime, some say, is that of calling suspected offenders to account in criminal courts Gardner , 80; Duff c,  This view puts the criminal trial at the centre, not just of criminal proceedings, but of criminal law as a whole Duff a,  Trials invite defendants to account for themselves either by denying the accusation that they offended, or by pleading a defence. The prospect of conviction and punishment puts defendants under pressure to offer an adequate account. Call this the curial view. It differs from the punitive view in two ways. First, part of the

positive case for criminal law is independent of the imposition of punishment. Second, part of the positive case for imposing criminal punishment is dependent on the punishment being part of a process of calling to account. The following two paragraphs expand on both these claims. As to the first, we often have reason to account for our actions to others. We can leave open for now the precise conditions under which this is so. But it is plausible to think that if Alisha steals from Bintu she has reason for account for the theft, and that if Chika intentionally kills Dawn she has reason to account for the killing. Defenders of the curial view argue that criminal proceedings are of intrinsic value when defendants are called to offer accounts of themselves that they have reason to offer in criminal courts Gardner , â€"; Duff c, 15â€" Imagine Alisha stole from Bintu because she was under duress. Imagine Chika intentionally killed Dawn to defend herself or others. Neither of these defendants, we can assume, is justifiably punished. On the curial view, things are different. Alisha and Chika both have reason to account for their behaviourâ€"to explain what they did and why they did it. Criminal proceedings invite each to provide that account and put each under pressure to do so. Assuming Alisha and Chika have reason to account in a criminal court, proceedings in which they are called to do so are of intrinsic value. To endorse the curial view is not, of course, to say that we should do away with criminal punishment. But it is to say that the connection between trial and punishment is not merely instrumental. Some think that the facts that make punishment fittingâ€"say, culpable wrongdoingâ€"obtain independently of criminal proceedings themselves Moore ,  The fitting way to respond to criminal wrongdoing, on this view, is to call the wrongdoer to account for her wrong. We can see the implications of this view by imagining a world in which trials are abolished, because some new-fangled machine allows us to identify culpable wrongdoers with perfect accuracy. On the curial view, the punishments we impose are inherently defective: Though our new-fangled machine might justify doing away with trialsâ€"once we factor in how expensive they can beâ€"we would lose something of value in doing away with them. If criminal law does have a particular function, we can ask whether that function is distinctive of criminal law. We can ask, in other words, whether it helps distinguish criminal law from the rest of the legal system. It has been claimed that criminal law is distinctive in imposing punishment Moore , 18â€"30; Husak ,  One might also claim that criminal law alone calls defendants to account. But punishments are imposed in civil proceedingsâ€"exemplary damages are the obvious case. And it is arguable that civil proceedings also call defendants to accountâ€"that they too invite defendants to offer a denial or plead a defence; that they too use the prospect of legal liability to put defendants under pressure to account adequately Duff a. In response, one might try to refine the function that is distinctive of criminal law. What we should make of this proposal depends on what a public wrong is Lamond ; Lee ; Edwards and Simester  To make progress, we can distinguish between primary dutiesâ€"like duties not to rape or robâ€"and secondary dutiesâ€"like duties to answer, or suffer punishment, for rape or robbery. We incur duties of the latter kind by breaching duties of the former. Many wrongs are both crimes and torts. So the two bodies of law often respond to breaches of the same primary duty. A more promising proposal looks to secondary duties. Perhaps the function of civil law is to respond to wrongs on behalf of some of usâ€"to discharge secondary duties owed to particular individuals. This might be thought to explain why criminal proceedings, unlike civil proceedings, are controlled by state officials: The view described in the previous paragraph conceives of criminal law as an instrument of the communityâ€"a way of ensuring that the community gets what it is owed from wrongdoers. Call it the communitarian view. If we combine this with the curial view, the distinctive function of criminal law is to seek answers owed to the community as a whole. One might doubt that the functions of criminal and civil law can be so neatly distinguished. More importantly, one might claim that in the case of paradigmatic crimesâ€"like robbery, rape, or batteryâ€"criminal law responds to wrongs on behalf of particular individualsâ€"on behalf of those who have been robbed, raped, or battered. Those who reject the communitarian view might be thought to face the following difficulty: First, we should not always require the wronged to have to pursue those who have wronged them. Second, we should not always support those who think themselves wronged in pursuing alleged wrongdoers. As to the first point, some are trapped in abusive relationships with those who wrong them. Others are susceptible to manipulation that serves to silence their complaints. Some wrongdoers can use wealth and social status to stop accusers in their tracks. As to the second point, the temptation to retaliate in the face of wrongdoing is often great. It is all

too easy for the pursuit of justice to become the pursuit of revenge, and for the perceived urgency of the pursuit to generate false accusations. Official control can help vulnerable individualsâ€”like those described aboveâ€”to get what they are owed. And it can mitigate the damage done by those trying to exact vengeance and settle scores Gardner , â€” It can ensure that those in positions of power cannot wrong others with impunity, and reduce the likelihood that vindictiveness begets retaliation, which begets violent conflict from which all lose out Wellman , 8â€”

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