

It's Only Natural: Legal Punishment and the Natural Right to Punish

Introduction

Some philosophers try to justify legal punishment by appealing to a natural right to punish wrongdoers, a right that people would have in a state of nature (SON). Classical defenders of this view include Locke and Grotius.¹ Contemporary defenders and sympathizers include Daniel Farrell, Thomas Hurka, Stephen Kershnar, Robert Nozick, Michael Otsuka, Warren Quinn, Murray Rothbard, A. John Simmons, and Christopher Heath Wellman.²

Many of these philosophers argue that legal punishment can be justified by transferring this right to the state. Call this the Transferral Argument (TA). Here's a simple version of TA.

- P1) People in a SON have a natural right to punish wrongdoers.
- P2) They can transfer this right to the state.
- C) So, legal punishment can be justified by the transferral of this right to the state.

TA's advocates think that there are good arguments for P1. They take P2 to be fairly obvious if P1 is true. I think this take on P2 is mistaken and

¹John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: Cambridge University Press, 1988); see esp. §§7-13 of the Second Treatise (cited hereafter in the text as "ST"). Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006), available at: <http://oll.libertyfund.org/title/1718>; see esp. p. 87.

²Daniel M. Farrell, "Punishment Without the State," *Noûs* 22 (1988): 437-53; Thomas Hurka, "Rights and Capital Punishment," *Dialogue* 21 (1982): 647-60; Stephen Kershnar, "The Forfeiture Theory of Punishment: Surviving Boonin's Objections," *Public Affairs Quarterly* 24 (2010): 319-34; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 137-42; Michael Otsuka, *Libertarianism Without Inequality* (New York: Oxford University Press, 2003); Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy & Public Affairs* 14 (1985): 327-73; Murray N. Rothbard, *The Ethics of Liberty* (New York: New York University Press, 1982), pp. 85-95; A. John Simmons, "Locke and the Right to Punish," *Philosophy & Public Affairs* 20 (1991): 311-49; Christopher H. Wellman, "Rights and State Punishment," *The Journal of Philosophy* 106 (2009): 419-39.

that it obscures much of importance. I'll argue that even if there is a natural right to punish, there are reasons to doubt that the right can survive the transition out of anarchy.³ If it can't, it can't be transferred to the state. In a nutshell, my worry is this. A compelling reason for P1—that people in a SON have few if any viable enforcement options besides punishment—doesn't obviously hold in state contexts. Among other things, creating a state substantially broadens the enforcement options and may thereby eliminate this basis for the right. To overcome this worry, TA's advocates can't just focus on a SON. They have to establish that the reasons that generate the right to punish in a SON also hold in state contexts.

I have three reasons for examining TA. First, it merits attention because of its pedigree and the endorsements that contemporary philosophers have given it. Second, because of its focus on a SON and the limited enforcement options available there, TA exhibits—in a particularly serious form—an insufficiently appreciated difficulty with justifications of legal punishment. Justifications typically underestimate the range of alternatives to legal punishment. Highlighting the full range of options clarifies what TA's advocates—and advocates of punishment generally—have to show to make their case. This may strengthen the case for Abolitionism, the view that legal punishment is unjustified.⁴ Third, my discussion highlights important nuances of Abolitionism. Abolitionists don't have to endorse absolute prohibitions on punishment. They can grant that punishment may be justified in certain contexts like a SON. And they can hold that the reasons why punishment might be justified in these contexts cast doubt on its justifiability in other contexts. This shows that Abolitionism is not as radical as one might think.

The paper proceeds as follows. I start by examining arguments for P1 that ground the natural right to punish in the rights to engage in self-defense and defensive assistance. These arguments put restrictions on the right to punish that, I will argue, make transferring it to the state more

³This criticism also threatens natural rights-based arguments that don't appeal to transferral. Wellman assumes that if everyone has a right to punish in a SON, then the state has a right to punish too ("Rights and State Punishment," pp. 425-26). For reasons that will become clear, I think this is too quick.

⁴For recent defenses of Abolitionism, see Deirdre Golash, *The Case Against Punishment* (New York: New York University Press, 2005); David Boonin, *The Problem of Punishment* (New York: Cambridge University Press, 2008); Michael J. Zimmerman, *The Immorality of Punishment* (Ontario: Broadview Press, 2011); and Nathan Hanna, "Facing the Consequences," (unpubl. ms.), "Retributivism Revisited" (unpubl. ms.), "Liberalism and the General Justifiability of Punishment," *Philosophical Studies* 145 (2009): 325-49, "The Passions of Punishment," *Pacific Philosophical Quarterly* 90 (2009): 232-50, and "Say What? A Critique of Expressive Retributivism," *Law and Philosophy* 27 (2008): 123-50.

difficult than TA's advocates think. I then examine another argument for P1. It claims that offenders forfeit certain rights. I argue that the most plausible version of this argument suffers from similar difficulties.⁵

1.

A popular defense of P1 grounds the natural right to punish in the rights to engage in self-defense and defensive assistance.⁶ Locke takes this route. In the *Second Treatise* (ST), he says that people have natural rights to defend themselves and others and that people in a SON have a natural right to punish, grounded in these rights (ST, §6). He also says that these rights have important limitations and that the right to punish inherits these limitations.

[Punishment must be limited to] what is proportionate to [the offender's] Transgression, which is so much as may serve for Reparation and Restraint. For these two are the only reasons, why one Man may lawfully do harm to another, which is that we call punishment. (ST, §8)

Each Transgression may be punished to that degree, and with so much Severity as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie others from doing the like. (ST, §12)

For one to have a right to punish, Locke thinks, punishment must do things like deter, incapacitate, and secure compensation. But that's not all.

For the end of Government being the preservation of all, as much as may be, even the guilty are to be spared, where it can prove no prejudice to the innocent. (ST, §159)

He thinks punishment is permissible only if punishment is *necessary* to do things like deter, incapacitate, and secure compensation. On Locke's view, there is no right to punish if there are less harmful ways of doing

⁵I'll focus on the arguments TA's advocates usually give for P1. However, one could try to defend it in other ways. For example, one might try to defend P1 on retributivist grounds. For the claim that desert can ground the right to punish see, e.g., F.H. Bradley, *Ethical Studies*, 2nd ed. (London: Oxford University Press, 1927), pp. 26-27. I criticize Retributivism elsewhere, so I won't discuss it here (Hanna, "Retributivism Revisited," and "Say What? A Critique of Expressive Retributivism"). Another potential defense of P1 that I won't discuss grounds P1 in a contractualist view. See, e.g., Alan H. Goldman, "Rights, Utilities and Contracts," *Canadian Journal of Philosophy*, suppl. vol. 3 (1977): 121-35 (cf. Christopher W. Morris, "Punishment and Loss of Moral Standing," *Canadian Journal of Philosophy* 21 (1991): 53-80). I criticize these justifications of punishment elsewhere (Hanna, "Liberalism and the General Justifiability of Punishment").

⁶Aside from the philosophers discussed below, others who try to justify legal punishment on this basis include Phillip Montague, *Punishment as Societal-Defense* (Lanham, Md.: Rowman & Littlefield, 1995), and Anthony Ellis, "A Deterrence Theory of Punishment," *Philosophical Quarterly* 53 (2003): 337-51.

these things. Grotius holds a similar view.⁷

Many contemporary defenders of the natural right to punish put similar restrictions on it. For example, Daniel Farrell thinks that the right to punish and the rights to engage in self-defense and defensive assistance all derive from the following principle of distributive justice (which I've simplified slightly).⁸

If a wrongdoer W knowingly and wrongfully brings it about that someone else E must choose either to let an innocent victim V be harmed or to harm W, justice allows E to harm W, provided the harm to W is commensurate with the harm V would otherwise have to endure.⁹

This principle straightforwardly grounds the rights to engage in self-defense and defensive assistance, not the right to punish. But Farrell thinks it can ground a similar principle that grounds the right to punish.¹⁰ By victimizing us, he says, wrongdoers publicize our vulnerability, thereby increasing the risk that others will victimize us. Because of their actions, he says, we're faced with a choice: punish those who victimize us, thereby deterring further attacks, or accept the greater risks. Within limits, he thinks we're entitled to punish wrongdoers to reduce these risks.

Farrell's principle places two limitations on harming, only one of which is fully explicit. One is a proportionality limitation. The other is evident in the phrases "must choose" and "have to endure." The principle applies only to situations in which E's options are limited to letting V be harmed or to harming W instead. It doesn't sanction harming W unless doing so is necessary to prevent harm to V. If the harm to V can be prevented without harming W (or in a way that harms W less), the principle won't sanction harming W (or harming W more than is necessary to prevent the harm to V).

Thomas Hurka argues that if we have any natural rights, we have a natural right to enforce those rights with force and coercion. If we have such a right, he thinks, we have the right to threaten to punish potential rights violators and the right to subsequently punish rights violators.¹¹ He subjects this right to what he calls a "minimum necessary qualification," though.

⁷Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Indianapolis: Liberty Fund, 2005), available at: <http://oll.libertyfund.org/title/1947>, p. 212; and *Commentary on the Law of Prize and Booty*, pp. 23, 85-90.

⁸Similar principles are endorsed by Phillip Montague, *Punishment as Societal-Defense*, p. 42, and "Recent Approaches to Justifying Punishment," *Philosophia* 31 (2002): 1-34, p. 26; and Erin Kelly, "Criminal Justice Without Retribution," *The Journal of Philosophy* 106 (2009): 440-62.

⁹Farrell, "Punishment Without the State," p. 443.

¹⁰Daniel M. Farrell, "The Justification of Deterrent Violence," *Ethics* 100 (1990): 301-17, p. 316.

¹¹Hurka, "Rights and Capital Punishment," pp. 649-51.

Although Y's right to enforce his right to ϕ sometimes entitles him to act in ways which would otherwise involve violating X's right to ψ , it only does so when it is not possible for Y to prevent the violation of his right to ϕ just as effectively by acting in ways which would otherwise involve violating only rights of X's which are less important than his right to ψ .¹²

Hurka thinks that we can sometimes treat wrongdoers in ways that would normally violate their rights. But we can do this only when treating them that way is necessary to prevent them from violating comparably important rights and only if less drastic options are unavailable.¹³

These theorists agree that people have a right to punish only if punishment is necessary to protect people from rights violations. And they think that punishment is necessary for this purpose. Call this *the necessity claim*. I'll argue that even if the necessity claim is true in a SON, it isn't obviously true in state contexts.

2.

In this section, I'll criticize attempts to defend TA along the lines just discussed. I'll start by briefly explaining why such arguments might make a compelling case for P1. Then I'll argue that they make a much less compelling case for P2.

There are good reasons to think that people in a SON have a natural right to punish. The worse the SON, the stronger the case is for the right.¹⁴ The resources and abilities—and consequently the enforcement options—of people in a SON are very limited. This makes the necessity claim plausible in a SON. And the dangers people in a SON face can be particularly serious and pervasive. This makes the need to protect oneself especially pressing. Given all this, it seems implausible to deny that people

¹²Ibid., p. 653.

¹³Warren Quinn is also sympathetic to TA. He takes Hurka to be suggesting that the right to punish can be grounded in a right to threaten to punish, and develops this suggestion differently. Quinn's argument for the right to threaten to punish grounds it in the right to self-defense. Threats of punishment are, on his view, justified by their deterrent effectiveness. Quinn, "The Right to Threaten and the Right to Punish," pp. 339-40; cf. Otsuka, *Libertarianism Without Inequality*, pp. 57-65. Given Quinn's emphasis on deterrence, the criticisms I level in the next section against the defenses of TA discussed in this section will also apply to attempts to defend TA along Quinn's lines.

¹⁴There may also be a case for the right in certain state contexts, e.g. where the state is collapsing or where it's sufficiently tyrannical or incompetent (cf. Simmons, "Locke and the Right to Punish," p. 315). I set these cases aside for simplicity: they won't furnish material for a general defense of P2. Also, the points I'll make about the right to punish in state contexts may also apply to relatively peaceful SONs characterized by high degrees of social organization, e.g., institutions like Nozick's protective associations (see *Anarchy, State, and Utopia*).

in a SON can have a right to punish. A moral theory that denied them this right would be too demanding.

Things are importantly different in state contexts. If we just focus on the way things are in a SON, we'll overlook the differences. Among other things, creating a state substantially broadens the enforcement options. This poses problems for P2, or so I'll argue. This isn't immediately obvious, though. To see the problem, we have to reflect on the following claim, which I'll assume without argument.

H The aim to harm is essential to punishment.

In other words, ϕ counts as punishment only if ϕ is performed in order to harm. H is intuitive and largely uncontroversial. I defend it elsewhere.¹⁵ Among others, David Boonin and Michael Zimmerman also defend versions of H.¹⁶

Let me preempt some common objections to H before proceeding, however. Note that H is compatible with many popular descriptive and normative claims about punishment. Among them: that punishment aims to take away rights, impose burdens, or express criticism, and that it should be used to deter wrongdoing or to give people what they deserve. H is consistent with such claims, and advocates of them have no obvious reason to reject H outright.¹⁷ Those who reject it, though, can take my argument as follows. If H is false, we can still distinguish between types of punishment: those that aim to harm and those that don't. Punishment's advocates do think the former are justified. Those who reject H can take TA to be a defense of this type of punishment and they can take me to be challenging this defense of it.

H has important implications here. Many philosophers assume that nonpunitive sanctions are very limited and that only noncoercive sanctions like criticism are nonpunitive. Call this *the limitation assumption*. It plays an important role in justifications of punishment (sometimes an explicit role, but usually an implicit one). It bolsters the case for punish-

¹⁵Hanna, "Liberalism and the General Justifiability of Punishment," and "Say What? A Critique of Expressive Retributivism."

¹⁶Boonin, *The Problem of Punishment*, pp. 6-28; Zimmerman, *The Immorality of Punishment*, pp. 7-10. Many others endorse versions of H. See Boonin, *ibid.*, p. 13 n. 14, and Hanna, "Liberalism and the General Justifiability of Punishment" and "Say What? A Critique of Expressive Retributivism," for more examples. I leave the concept of harm unanalyzed. A commonsense understanding is sufficient for my purposes.

¹⁷One might object that H is incompatible with consequentialist justifications of punishment because they endorse punishing only to deter, not to inflict harm for its own sake. This misunderstands H. In H, the word *aim* doesn't mean *end* or *ultimate goal*. Consequentialist advocates of punishment endorse aiming to harm to achieve certain ends. Denying this betrays a fundamental misunderstanding of these justifications.

ment by making the necessity claim seem obviously true.¹⁸ I take it that the limitation assumption explains why TA's advocates don't seriously consider whether the state could enforce the law without punishment. If the assumption is true, the state's nonpunitive options are no more substantial—or at best only slightly more substantial—than those available to people in a SON. And there's no reason to think the state can effectively enforce the law just by using noncoercive sanctions. I'll argue that the nonpunitive options aren't so limited and that a state can do substantially more with nonpunitive sanctions than can people in a SON.

H entails that the limitation assumption is false. Many standard sanctions can be used nonpunitively. Consider an example: confinement.¹⁹ One can confine someone without aiming to harm her. One can even reject this aim and try to minimize the confinement's harmfulness. Since H is true, this isn't punishment (and even if H is false, it's an importantly different kind of punishment from confinement that aims to harm). Because of the aim to minimize its harmfulness, such confinement is importantly different from punitive confinement. Other things equal, it would probably harm prisoners less and wouldn't harm them more (I'll argue for this below). This puts the two on different justificatory footing. Those who want to confine offenders to harm them need to justify using confinement to do that.

The same is true of other standard sanctions. Nonpunitive enforcement can use these sanctions, including probation, community service, compensation orders, fines, and imprisonment. These sanctions can be used to harm, but they don't have to be used that way. They aren't essentially punitive and harming isn't the only reason to use them. They can and typically are used to do other things (indeed, if our only aim was to harm, we probably wouldn't use many of the sanctions we do). Imprisonment and probation are also used to incapacitate, for example. Compulsory community service, compensation orders, and fines are also used to secure compensation.

I won't defend a specific nonpunitive enforcement proposal here, since it's not necessary for my purposes. Others do, though. David Boonin proposes replacing punishment with a system of compulsory victim restitution.²⁰ He argues that many standard sanctions can be used to secure restitution. Geoffrey Sayre-McCord defends replacing punishment

¹⁸For examples of arguments that explicitly appeal to the limitation assumption, see Hanna, "Liberalism and the General Justifiability of Punishment," and "Say What? A Critique of Expressive Retributivism."

¹⁹I'll use confinement as an example to illustrate certain points. This should not be construed as an endorsement of any view about when or how often confinement should be used.

²⁰Boonin, *The Problem of Punishment*.

with legal reparations—essentially, forcing offenders to make amends for their offenses.²¹ Deirdre Golash suggests replacing punishment with a combination of measures, including certain social policies, symbolic trials and convictions, compensation orders, and reconciliation techniques.²²

These proposals illustrate my abstract point in concrete terms: non-punitive enforcement that rejects the aim to harm can be much more robust than the limitation assumption entails. So the assumption is false. Indeed, it straw-mans Abolitionism.

This has important implications for TA and attempts to defend it along the lines discussed so far. The philosophers discussed in the last section think that harming wrongdoers is permissible when harming them is necessary to protect the innocent. But there are at least two ways harming might be necessary here. Harm itself might be necessary to protect the innocent. Or it might be a byproduct of things we need to do to protect the innocent. I'll start by discussing the second sense. The discussion of deterrence at the end of this section will address the first.

Consider Farrell's and Hurka's principles. If the limitation assumption were true, and if, as seems plausible, one couldn't typically protect the innocent without doing things that harm the guilty, their principles would straightforwardly permit punishment. H forestalls this result. The permissibility of an act that will harm doesn't entail the permissibility of performing it to harm. Consider confinement again. The permissibility of confining someone dangerous doesn't entail the permissibility of confining her to harm her. Medical quarantine and psychiatric commitment are forms of confinement that are sometimes justified. But the reasons why they are justified don't justify aiming to harm the people we quarantine or commit. Harmful treatment like confinement might only be permissible under certain conditions, for example, when the harm is incidental to the pursuit of sufficiently important aims, when efforts are made to minimize the harm and the risk of harm in ways consistent with these aims, and when there are no acceptable alternatives that threaten less harm or less risk of harm. The same considerations would seem to apply to enforcement.

One might object that the above argument assumes the doctrine of double effect and that this principle is false.²³ This objection fails. I'm

²¹Geoffrey Sayre-McCord, "Criminal Justice and Legal Reparations as an Alternative to Punishment," in Ernest Sosa and Enrique Villanueva (eds.), *Social, Political, and Legal Philosophy* (Philosophical Issues 11) (Malden, Mass.: Blackwell, 2001), pp. 502-29.

²²Golash, *The Case Against Punishment*. Cf. John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002).

²³Abolitionists often appeal to the doctrine of double effect. I don't. This is an important difference between my view and theirs. See Boonin, *The Problem of Punishment*, pp. 15-16, 28-29, 61-62; Golash, *The Case Against Punishment*, pp. 45-48; Sayre-McCord, "Criminal Justice and Legal Reparations," p. 507; and Zimmerman, *The Immorality of Punishment*, pp. 159-65.

not assuming the doctrine of double effect. I'm relying on the claim that aims have predictive significance.²⁴ If aiming to harm affects the likelihood that an act or practice will harm or if it affects the potential harmfulness of an act or practice, then the aim to harm is morally significant and requires independent defense.

The predictive significance of the aim to harm can be demonstrated by comparing cases. Take two potentially harmful acts. The first aims to harm someone. The second doesn't. Instead, the agent aims to minimize the incidental harm she inflicts in pursuit of her aims. The acts are otherwise identical. This comparison lets us isolate the aim to harm and assess its influence. Consider the following questions. Is one of the acts more likely to harm? Is one of them potentially more harmful? The answer is yes, at least for some acts in some circumstances. Criminal sanctions are among such acts. Again, compare two cases involving the imposition of a sanction, say, confinement. First case: we confine someone to harm him and to incapacitate him, say. Second case: we confine him to incapacitate him, don't aim to harm him, and instead aim to minimize the confinement's harmfulness in ways that don't seriously compromise incapacitation. Other things equal, the potential harmfulness of the act in the first case is greater.²⁵ This is because our aims affect things like the conditions of confinement. This point generalizes to other sanctions and to sentencing policy generally. The aim to harm affects how sanctions are applied as well as which sanctions are imposed. And in the long term, it can affect the evolution of enforcement, for example, the development of new sanctions.

If I'm right, the restriction on harming endorsed by the authors in the last section should also apply to aiming to harm. That is, aiming to harm must be necessary to protect the innocent if there is to be a right to act with this aim. This restriction may not pose much of a problem for P1, given the characteristics of a SON. But P2 is another matter. Even if people in a SON are justified in aiming to harm wrongdoers to protect themselves and others, that doesn't show that a state would be justified in aiming to harm offenders to protect citizens.

Recall that the defense-based case for a right to punish in a SON seems compelling because the resources and abilities—and consequently

²⁴Cf. T.M. Scanlon, *Moral Dimensions* (Cambridge, Mass.: Harvard University Press, 2008), pp. 30-32.

²⁵There's an important qualification. This claim is only true when the aim to minimize harm and other aims like the aim to incapacitate are given comparable weight. If we give too much weight to the aim to incapacitate and relatively little to the aim to minimize harm, that can motivate extremely harmful sanctions (e.g., dismemberment, blinding, and so on). In such cases, it wouldn't make much of a difference whether we aim to harm or not. I take it none of this speaks against the basic point above: that the aim to harm influences enforcement in certain ways and therefore has to be justified as an enforcement aim.

the enforcement options—of those in a SON are very limited. In a SON, there's no apparatus for doing things like confining wrongdoers, putting them on probation, or exacting compensation from them. These sanctions are either unavailable or not readily available in a SON. Simple corporal punishment may be justified in a SON, since people might not be able to do much else.

This isn't true in state contexts. States have sophisticated enforcement apparatuses and more resources than people in a SON. Consequently, they have more nonpunitive sanctions at their disposal, they can implement these sanctions more effectively, and they're better equipped to develop nonpunitive sanctions. In addition, states can implement social policies that can affect the crime rate, reduce the need for enforcement, and potentially make nonpunitive forms of enforcement more effective than they might otherwise be. Given such considerations, the necessity claim is less plausible in state contexts. It might still be true, but one would have to establish that independently. Even if it is true in a SON, it may not be true in state contexts. It takes more to establish P2.

The obvious strategy here is to argue that punishment is necessary to deter in state contexts. I criticize deterrence justifications of legal punishment at length elsewhere, so I'll be brief.²⁶ In a nutshell, my criticism is this. Such a defense of P2 will inherit a fundamental and insufficiently appreciated difficulty with deterrence justifications of legal punishment: the lack of evidence for key assumptions they make about legal punishment's deterrent effectiveness. Given this, such a defense of P2 will be incomplete at best. I'll elaborate.

Many seem to assume that legal punishment is necessary to deter. The fact that standard enforcement techniques can be used nonpunitively shows that this assumption is false. Assuming for the sake of argument that legal punishment deters, it does so because it's harmful.²⁷ Nonpunitive sanctions can be harmful too, and substantially so. The harm inflicted is just incidental to the pursuit of other enforcement aims. Incidental harm can deter, so nonpunitive enforcement can also deter.

To defend P2 on deterrent grounds, one must argue that punishment is necessary to deter *enough* in state contexts. There are two tasks here. First, one must specify and defend a standard of sufficiency. One must say what counts as enough. Second, one must furnish evidence that non-

²⁶Hanna, "Facing the Consequences."

²⁷For criticism of the assumption that legal punishment deters and of related assumptions such as the assumption that increased sanction severity usually deters more, see Paul H. Robinson and John M. Darley, "Does Criminal Law Deter? A Behavioral Science Investigation," *Oxford Journal of Legal Studies* 24 (2004): 173-205; and Anthony Doob and Cheryl Webster, "Sentence Severity and Crime: Accepting the Null Hypothesis," *Crime and Justice* 30 (2003): 143-95.

punitive enforcement can't meet the proposed standard. If the limitation assumption were true, this task would be easy. Since the options aren't as limited as the limitation assumption entails, this task is more difficult than many seem to think. The standard strategy of comparing legal punishment to noncoercive sanctions does not make the case for punishment.²⁸ Given the genuine range of nonpunitive sanctions, nonpunitive enforcement can deter substantially if punishment can. Empirical evidence is needed to show that only punishment can deter enough in state contexts and philosophical argument is needed to establish what counts as enough.²⁹ TA's advocates can't just assume that a proposal like Boonin's, Sayre-McCord's, or Golash's can't deter enough.

One might object that the preceding remarks commit me to punishment. Consider the following line of reasoning. If certain sanctions can deter enough, and they deter because they are harmful, then a state will be aiming to harm—and so punishing—if it imposes these sanctions in order to deter.³⁰ This reasoning is right, so far as it goes. But it does not show that anything I've said commits me to punishment. I have not said that a nonpunitive enforcement system would or should impose sanctions *in order to deter*. What I've said is that such a system may deter enough when it imposes sanctions for *other* reasons, for example, to incapacitate dangerous offenders and to secure compensation. For all we know, the incidental harm it thereby inflicts can deter enough (or even more than enough). If a nonpunitive enforcement system operates in this way, it won't be aiming to harm and so won't be punishing. So, the objection fails.³¹

²⁸Notice that this makes the first task harder. If the limitation assumption were true, one could forgo offering a specific standard and say that nonpunitive enforcement can't meet any plausible standard. If I'm right about what options there are, more work has to be done specifying the standard.

²⁹For a discussion of contemporary deterrence research and its bearing on deterrence justifications, see Hanna, "Facing the Consequences." Briefly, the problem with thinking that the research provides the required evidence is that deterrence researchers accept the limitation assumption. Consequently, they don't evaluate the deterrent effectiveness of the sort of nonpunitive enforcement I have described.

³⁰Thanks to an anonymous referee for posing this objection.

³¹The referee suggests another way to put the objection, though. Suppose a state tries to conduct enforcement in this way and rejects calls for punishment, maintaining that its sanctions deter enough. This demonstrates a concern with deterrence. One might claim that this shows that the state is aiming to deter, aiming to harm, and therefore punishing. This claim is mistaken. That the state acknowledges the importance of deterrence and says that current sanctions deter enough does not entail that it is using those sanctions in order to harm and deter. The state is not crafting sentencing policy or imposing particular sentences in order to harm and deter—indeed, it is explicitly refusing to do so. I take it the state would have to be doing such things for it to count as aiming to harm and deter in the relevant sense. Recall my gloss on H: ϕ counts as punishment only if ϕ is performed in order to harm.

My remarks in this section pose an important challenge to the defenses of TA that I have considered so far. TA's advocates have to argue that the conditions that ground the right to punish in a SON also hold in state contexts. The arguments I've considered so far don't do this. They don't establish that the right to punish can survive the transition out of anarchy. There are reasons to doubt that it can.³²

There are other ways of defending P1 that may not create such trouble for P2, though. For example, one might defend P1 on the grounds that offenders forfeit certain rights. I'll discuss this argument in the next section.

3.

A popular defense of P1 claims that offenders forfeit certain rights.³³ Such a defense needs a clear forfeiture principle. Here's an obvious candidate.

³²Suppose, however, that the right can survive the transition. The transition could nevertheless significantly weaken the right. Punishment may be permissible much more often in a SON than in state contexts. Many acts that would be punishable in a SON may not be punishable in state contexts, given the range of enforcement options available to the state. Even if we grant that TA justifies legal punishment, then, we could still worry that it does not justify systems of legal punishment like the ones that exist in most modern states.

³³Kershnar, "The Forfeiture Theory of Punishment," Nozick, *Anarchy, State, and Utopia*, pp. 137-38, and Simmons, "Locke and the Right to Punish," take this route. Others who defend legal punishment on the basis of rights forfeiture include: Alan H. Goldman, "The Paradox of Punishment," *Philosophy & Public Affairs* 9 (1979): 42-58; Vinit Haksar, "Excuses and Voluntary Conduct," *Ethics* 96 (1986): 317-29; David Hume, *An Enquiry Concerning the Principles of Morals* (1751) (Indianapolis: Hackett, 1983), p. 23; Stephen Kershnar, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," *Philosophia* 29 (2002): 57-88; Morris, "Punishment and Loss of Moral Standing"; Roger Pilon, "Restitution, Punishment, or Both?" *Ethics* 88 (1978): 348-57; W.D. Ross, *The Right and the Good* (Indianapolis: Hackett, 1930), pp. 54-64; and Wellman, "Rights and State Punishment." It's unlikely that this sort of view can vindicate P1 all by itself. The absence of a right not to be punished doesn't obviously entail a right to punish (cf. Morris, "Punishment and Loss of Moral Standing," p. 63; Ross, *The Right and the Good*, pp. 54-56). I won't emphasize this difficulty, though some of the authors I'll discuss overlook it. Forfeiture of the right not to be punished would provide some support for P1. Hopefully, my arguments will show that this support wouldn't obviously transfer to P2.

There are at least two other strategies that rights theorists can take here. First, instead of claiming that wrongdoers forfeit rights, one might claim that punishment is justified as a permissible infringement of their rights. This strategy is not generally thought plausible, since justifiable infringements typically call for things like compensation and regret, whereas on the standard view justified punishment doesn't (Quinn, "The Right to Threaten and the Right to Punish," p. 328). Second, one might claim that rights have qualifications built into them. As Quinn puts it, one might hold that morality "designs variances in our rights so that these rights will not interfere with a range of defensive strategies" against rights violations (ibid., p. 349). My criticisms of a rights forfeiture defense of TA will also apply to a defense of TA along these lines.

- F If P violates Q's right to X, then P forfeits P's right to X (or an equivalent right or set of rights).³⁴

Boonin subjects F to sustained criticism. According to him, F is false because it entails that inalienable rights can be forfeited. Examples include the right not to be tortured and the right not to be raped.³⁵

Forfeiture may still have its attractions, though. Examining arguments for F can help bring these out. Later, we'll see whether these arguments can be adapted in defense of another forfeiture principle. Simmons defends F by claiming that offenders have no grounds for complaint when we treat them in ways similar to the ways they treated others.³⁶ Alan Goldman agrees, but adds a qualification: offenders won't be able to complain about injustice only if we have good consequentialist reasons for treating them in such ways.³⁷ Simmons also claims that it would be unfair for a set of right-defining rules to extend a right to violators of it, especially if doing so would facilitate rights violations.

Valid moral rules do not extend protection to persons unfairly taking advantage of others' willingness to abide by them ... Rights forfeiture can thus be seen as what secures the

³⁴Cf. Boonin, *The Problem of Punishment*, p. 105; Goldman, "The Paradox of Punishment," p. 45.

³⁵See Boonin, *The Problem of Punishment*, pp. 103-19. An obvious response is to say that equivalent rights are forfeited instead. Boonin replies that if the rights are equivalent, then if one of them isn't forfeited, neither is the other (*ibid.*, p. 111). Kershnar ("The Forfeiture Theory of Punishment") responds that some rights like the right not to be raped might be inalienable because of side-constraints that prohibit attacks on human dignity. But he suggests that what makes rights equivalent might be something other than the basis of these constraints, e.g., the degree to which rights protect well-being (cf. Goldman, "The Paradox of Punishment," p. 45). If this is right, he thinks, rapists might forfeit a right like the right not to be treated in ways that would have an impact on well-being equivalent to that of rape. This response won't work. We can concoct counterexamples by pressing on whatever equivalence criterion is offered. Take a well-being criterion. Imagine a horrific wrong that has a massively negative effect on well-being. It's implausible to think that the wrongdoer has forfeited the right not to be treated in some way that would have an equivalent impact on well-being. Defenders of F need a plausible equivalence criterion that avoids this problem. I'm skeptical that there is any such criterion.

Ross also seems to think that there are straightforward counterexamples to F (*The Right and the Good*, pp. 54-56). It's hard to be completely sure about this, though, because he puts his discussion entirely in terms of duties (since he thinks the concept of a right is less clear than that of a duty).

³⁶Simmons, "Locke and the Right to Punish," p. 335.

³⁷Goldman, "The Paradox of Punishment," p. 45. Proponents of punishment often appeal to the alleged groundlessness of offenders' complaints against being punished. See, e.g., John Kleinig, *Punishment and Desert* (The Hague: Martinus Nijhoff, 1973), p. 67; Quinn, "The Right to Threaten and the Right to Punish," pp. 364-65; and T.M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), pp. 256-67.

possibility of natural fairness and what renders impossible ongoing but morally protected patterns of (ab)use by others.³⁸

W.D. Ross also seems to sympathize with the complaint argument.³⁹ He rejects F for natural (as opposed to contractual) rights and duties, but claims, somewhat cryptically, that “the main element in any one’s right to life or liberty or property is extinguished by his failure to respect the corresponding rights in others.”⁴⁰ He goes on to say that the state

is morally at liberty to injure [an offender] as he has injured others, or to inflict any lesser injury on him, or to spare him, exactly as consideration both of the good of the community and of his own good requires.⁴¹

Hume and Wellman endorse similar views.⁴²

Advocates of these views don’t have to abandon forfeiture theory because of the problems with F. The complaint and fairness arguments may support a different forfeiture principle. I’ll investigate whether they can yield one that can support TA. I’ll argue that the principle they yield doesn’t obviously do this. I should note at the outset that none of the following is meant as an endorsement of forfeiture theory.

I think the considerations that the complaint and fairness arguments appeal to support a different forfeiture principle. This principle would make forfeiture depend on context, particularly on what it takes to protect people’s rights. Goldman’s and Ross’s consequentialist qualifications suggest sympathy with this suggestion. Absent a similar qualification, I don’t think Simmons’s fairness argument can be rendered plausible. If I’m right, a forfeiture defense of P1 won’t obviously vindicate P2—and for the same reason the defenses of P1 I’ve already considered won’t. Suppose wrongdoers in a SON forfeit certain rights like the right not to be punished—thereby, let’s grant, generating a right to punish them. It doesn’t follow that offenders forfeit that right in state contexts. This is because such a right might not place an excessive burden on en-

³⁸Simmons, “Locke and the Right to Punish,” pp. 335-36.

³⁹Ross, *The Right and the Good*, p. 54.

⁴⁰Ibid., p. 60; cf. pp. 54-55.

⁴¹Ibid., p. 60.

⁴²Hume: “When any man, even in political society, renders himself, by his crimes obnoxious to the public, he is punished by the laws in his goods and person; that is, the ordinary rules of justice are, with regard to him, suspended for a moment, and it becomes equitable to inflict on him, for the *benefit* of society, what, otherwise, he could not suffer without wrong or injury” (*An Enquiry Concerning the Principles of Morals*, p. 30). Wellman ignores Ross’s “main element” remark, though. He claims that anyone, including the state, is morally at liberty to punish wrongdoers because they have forfeited rights. But he claims that the *institution* of state punishment, which he takes to consist partly in the state having an exclusive right to punish, must be justified on the basis of good consequences (“Rights and State Punishment,” pp. 426-31).

forcement in state contexts. I'll examine the complaint and fairness arguments in an attempt to show this.

Let's start with the complaint argument. If an offender's complaints about being treated in some way are groundless, she lacks a right not to be treated in that way.⁴³ But we need to know when such complaints are groundless if their groundlessness is to give us any indication of what rights offenders forfeit. To respond that offenders lack grounds for complaint when they're treated in the ways they treated their victims (or in equivalent ways) presupposes F. If the complaint argument is to serve as a good argument for F or some other forfeiture principle, it needs a non-question-begging criterion of groundlessness.⁴⁴

Perhaps something like the fairness argument can support the complaint argument here. Maybe offenders' complaints against certain forms of treatment are groundless if it would be unfair for offenders to have a right not to be treated in those ways. Appeals to fairness here require care, though. What exactly would be unfair about offenders having such rights? The claim that it would be unfair for some set of right-defining rules to extend a right to violators of that right isn't obviously true. What's unfair about that? It would be unfair if violating rights amounted to depriving others of them, but it doesn't. Denying F doesn't commit one to the claim that victims lack the rights in question and violators still have them.

Simmons offers a different suggestion: extending a right to violators of it is unfair because violators fail to restrain themselves in the ways that those who respect the right do.⁴⁵ The alleged unfairness here consists in unequal self-restraint. There are two problems with this suggestion.⁴⁶ First, at least with respect to many rights, Simmons's unfairness claim is implausible and rests on a false assumption. It isn't unfair to non-rapists that they refrain from rape while others don't. Moreover, non-rapists typically don't have to restrain themselves from committing rape. For them, not raping others isn't a burden that can ground an unfairness claim. Second, even if Simmons's unfairness claim were correct, it wouldn't obvi-

⁴³Cf. Quinn, "The Right to Threaten and the Right to Punish," p. 85.

⁴⁴I think much of the attraction of the complaint argument stems from the mistaken view that offenders cannot consistently complain about being treated in the ways they have treated others *and* that this shows that they don't have rights not to be treated in those ways. Both claims are false. Violating others' rights doesn't commit one to any claim that would contradict one's complaints against being treated in the same way. Nor would such an inconsistency entail the absence of a right on the rights violator's part.

⁴⁵Simmons, "Locke and the Right to Punish," p. 335.

⁴⁶They parallel standard difficulties with the fair-play justification of punishment. See Boonin, *The Problem of Punishment*, pp. 119-43, for references and an extended discussion of this view. Also see Boonin's discussion for possible responses to the following objections and counters to them.

ously support F. Why think unfairness of this sort would entail rights forfeiture, let alone systematic forfeiture of the specific rights violated or equivalent rights? At the very least, the argument requires some filling in.

I'll pass on discussing this view further and move on to briefly explore an alternative fairness rationale for forfeiture, one I take to be more promising, though still problematic in certain ways.⁴⁷ If fairness can ground forfeiture, it may be because peoples' rights have a bearing on enforcement. The thought is this: within limits, fair right-defining rules would give people the moral resources they need to protect themselves from rights violations. Rules that assign rights in a way that makes it too difficult for people to do this by limiting them to seriously ineffective enforcement would be unfair.⁴⁸ It would extend rights violators and their interests too much protection and give the innocent and their interests too little protection.

An example can help motivate this rationale. Rules that assigned a right to bodily integrity so strict that force could never be used to protect people's rights would arguably be unfair. This is because it would give too much protection to the interests of rights violators and not enough to the interests of others. Under such rules, the unscrupulous can easily take advantage of those who refuse to break the rules. This can be avoided if the rules stipulate that rights violators don't have a right against forceful interference if such interference is necessary to prevent sufficiently serious rights violations. This point extends to rights against specific kinds of forceful interference. This suggests that what rights we have can depend on context and consequences, since what's necessary can vary across contexts.

Making rights contingent in this way isn't obviously objectionable. For example, rights in defensive situations arguably depend on the capabilities of those involved. Farrell's and Hurka's principles suggest agreement with this. Locke thought the acquisition of property rights could be contingent in this way. He claims that one can only acquire property rights over something if taking it for oneself leaves as much and as good for others (ST, §27). Wellman argues that private individuals have a natural right to punish in a SON but not in state contexts, because the state is better at enforcement and because private enforcement has very bad consequences.⁴⁹ Quinn rejects the standard utilitarian case for

⁴⁷The following argument may not need to be put in terms of fairness at all. Putting things in these terms may still be helpful, though. Considerations of fairness may be a good way to gauge the plausibility of certain rights claims without providing a systematic or decisive explanation of why people have certain rights. My purpose here is just to show that the following argument has attractions similar to arguments like Simmons's.

⁴⁸Cf. Quinn, "The Right to Threaten and the Right to Punish," p. 349.

⁴⁹Wellman, "Rights and State Punishment," pp. 427-30.

punishment, but is open to the claim that what rights we have can depend on consequences.⁵⁰

Aside from being intrinsically more plausible than Simmons's fairness argument, this alternative rationale for forfeiture has other advantages. It squares with Simmons's claim, quoted above, that right-defining rules should not unwittingly protect patterns of rights violations. It also integrates his concerns with fairness and consequences in a way he doesn't. It offers a non-question-begging criterion of groundlessness for complaints. It also explains why advocates of the complaint argument might, like Goldman, think that consequences have a bearing on offenders' rights. And it provides a fairness-based rationale for principles like Farrell's and Hurka's.

But important questions remain, few of which I can address. Among them: How bad do the effects on enforcement have to be to make it unfair for offenders to have certain rights? I don't know the answer to this question. In outlining the alternative rationale, I said that a set of right-defining rules would give people the moral resources they need to protect themselves from rights violators. But what counts as needed? Construe this too permissively, and we'll get rules on which offenders forfeit inalienable rights at least some of the time. Construe it too strictly, and we'll end up with rules that place unacceptably severe restrictions on enforcement. An initially plausible construal will probably be subject to counter-examples.

The best a proponent of the alternative fairness rationale can do, I think, is adopt an attitude of caution. We must, she should say, carefully consider what the enforcement options are and not endorse the claim that offenders lack certain rights unless their having those rights would place a severe burden on enforcement. The word *severe* is again vague, but the point is just that there's a burden on those who would claim that offenders don't have certain rights. Presumably, the burden is heavier for certain rights than for others, given that the interests protected by certain rights are more important.

This is, I think, the best one can say. My only point is that this rationale will yield a forfeiture principle that is more plausible than F. It won't obviously result in the systematic forfeiture of inalienable rights among the worst of offenders. But neither will it obviously result in the systematic forfeiture of the right not to be punished in state contexts.

Suppose offenders do forfeit rights, and for the sorts of reasons outlined. Instead of assuming that they always forfeit the rights they violate or equivalent rights, a more cautious suggestion, in line with the alternative fairness rationale, is this.

⁵⁰Quinn, "The Right to Threaten and the Right to Punish," p. 330.

- F* If an offender violates someone else's rights, then *at most* the offender forfeits alienable rights that she violated or equivalent rights and *only* alienable rights that she violated or equivalent rights.

Combined with standard arguments for proportionality, the alternative rationale yields something like F* rather than F. Aside from the explicit ban on forfeiting inalienable rights, there are two important characteristics of F*. First, it imposes a proportionality limit on forfeiture. Second, it allows for the possibility that, in certain situations, rights violators will forfeit only less important rights than the ones they violate, even when the rights they violate are alienable.

The first characteristic doesn't deviate from F. Its rationale is obvious and aligns with a fundamental rationale behind rights theories. Since the following remarks are largely uncontroversial among rights theorists, I'll be brief. Rights impose side-constraints on the ways people can be treated, making it impermissible to sacrifice a person's interests to secure just any gains for others. Things seem different in enforcement contexts, though. *Some* trade-offs are permissible there. However, offending doesn't make it OK for others to use someone in whatever ways benefit them. The alternative fairness rationale appeals to fairness to justify certain trade-offs. Offenders' interests can only be sacrificed to offset harms or risks of harm they've culpably imposed on others. Moreover, there are limits on sanction severity, stemming from the seriousness of the offense and the offender's culpability. A natural formulation of this requirement is that we can't treat offenders worse than they treated their victims.

The second characteristic constitutes an important deviation from F. The grounds for it are as follows. The alternative fairness rationale makes unfairness, and so forfeiture, a function of context and consequences. Subject to the culpability limitation, if it would severely burden enforcement for offenders to have a certain right, they don't have the right. But whether their having the right would severely burden enforcement depends on things like whether there's a formal enforcement system and what that system can do. Whether offenders have a right not to be punished, say, turns on things like the available nonpunitive sanctions and how effective those sanctions are at protecting rights.

Presumably, people typically have a right that others not try to harm them. On the alternative fairness rationale and F*, whether offenders have this right depends on how their having it would affect enforcement. An attempt to justify TA on this basis, then, faces the same difficulty that I claimed the defenses in the first section face. Given the range of nonpunitive sanctions available in state contexts, it's not obvious that offenders having a right not to be punished would have a sufficiently

negative impact on enforcement in state contexts. This is something TA's advocates would have to show.

Again, though, even if such a right would not have this effect in state contexts, things may be different in a SON. As I've noted, people in a SON have extremely limited enforcement options. If wrongdoers in a SON have a right not to be punished, this will further limit the already limited enforcement options available there. So people in a SON may have a natural right to punish. But it's not obvious that this right can survive the transition out of anarchy. Even if wrongdoers can forfeit the right not to be punished in a SON, this needn't be true in state contexts.

Conclusion

I've challenged TA on the grounds that a natural right to punish might not be able to survive the transition out of anarchy. If it can't, this strikes me as an additional reason to make that transition. Some will disagree, but that's a topic for another time.

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