

T O M M I E S H E L B Y

Dark Ghettos

Injustice, Dissent, and Reform

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EIGHT

Punishment

When, if ever, is state punishment justified in a context where the state has failed to secure a reasonably just basic structure? To put it in the terms explained in the previous chapter, how should a criminal justice system operate in a society that exceeds the limits of tolerable injustice? I am not here thinking primarily about an unjust criminal justice system. That is, the problem I'm concerned with is not the fact that some societies routinely mistreat innocent persons, criminal suspects, those with outstanding warrants, defendants, and convicts, for example, through unjustified searches, racial profiling, police brutality, arbitrary and uneven enforcement, wrongful convictions, unfair sentences, and inhumane prison conditions. Imagine, if you will, a criminal justice system that is itself impartial and fair, given the content of its public rules and the way those rules are applied and enforced. But the system operates in a broader social context shaped by deep structural injustices—for example, unjustified economic inequality, widespread patterns of discrimination, and inadequate protection of basic liberties.

I maintain that serious injustices in the basic structure of a society compromise both the state's *authority to punish* criminal offenders and its *moral standing to condemn* crimes within its claimed jurisdiction. But I also think that a state in an unjust society, if that state fulfills certain requirements of fairness, may permissibly punish at least some legal violations, even some crimes perpetrated by the oppressed. On one plausible, even compelling, theory of punishment—what I'll call *penal expressivism*—these two theses would appear to be incompatible. So in

addition to defending these two normative claims, I cast doubt on the truth of penal expressivism while retaining its key insights.

Legitimacy, Authority, and Enforcement

A set of legal institutions constitutes a *state* when it effectively rules, and claims the right to rule, over the inhabitants of a territory. We speak of the existence of a state (as opposed to a failed state or the “state of nature”) only when inhabits of a given territory sufficiently conform their conduct to legal requirements such that social order and cooperation are maintained. States claim both the moral power to demand obedience to their laws from those within their territorial jurisdiction and immunity from outside interference with their internal affairs.

When we assess the *legitimacy* of a state, we may evaluate it from the standpoint of international relations or from the standpoint of those subject to its laws. The international community may assess a state for its human rights compliance to determine whether, for example, its claim of sovereignty should be respected or it should be subject to intervention. Those under the rule of a state’s laws may evaluate the state on grounds of social justice to determine whether they have an obligation to obey. When I speak of “legitimacy” I am concerned with the normative status of the relationship between a state and the individuals (citizens, legal residents, and undocumented immigrants) it claims a right to govern. I won’t address the relations between states or the limits of sovereignty.

It’s useful to make a distinction between two types of legitimacy—justifiable-enforcement legitimacy and right-to-be-obeyed legitimacy.¹ The right to use coercion to enforce a rule is different from the claim right to have the rules one lays down obeyed. A state may have the right to enforce laws against, say, murder and rape simply because these are serious wrongs that violate basic moral rights. The duty to comply with these laws arises from one’s natural duty to refrain from such reprehensible acts and from the contingent fact that the existing state is best positioned to maintain order and safety. The right to be obeyed, which we might call *legitimate authority*, includes the right to impose obligations outside the domain of natural duties (for example, duties to respect various property claims, to follow state regulations, and to pay taxes). In addition to enforcement rights, legitimate authority includes

rights to command and entitlements to obedience, and the commands in question needn't prohibit things that are intrinsically wrong to be authoritative. It is the commands themselves—that is, when they come from the right source and under the right conditions—that make non-compliance wrong.

To have legitimate authority is to have a special kind of prerogative: a right to demand that others comply with a command or rule one has issued. It is the right to create obligations for others, obligations they wouldn't have if not for the command or rule. Within the limits of political authority, authoritative rules override reasons for acting contrary to the rule, and they do so, not because of the content of the rules, but because of who issued them or because of the procedures through which they have come about. The subject must obey because of the *source* of the rules, not because of their *substance*.

That a rule is authoritative in this way does not mean that the subject has a duty to obey the *person* issuing the command or rule. The person is to be obeyed (if they are) only because they occupy an authoritative role or office. The person with the moral power to issue commands or to make rules may not be the party to whom, ultimately, obedience is owed. And the person with this moral power may not be the source of this power. In a liberal democracy, obedience to the law is something members of a just society owe to each other on grounds of reciprocity. We fulfill this obligation by submitting to the demands of the legitimate state within whose jurisdiction we live, even when we happen to disagree with the content of these laws.

To make these ideas concrete, let's consider legal prohibitions or regulations of the sale and use of certain narcotics and stimulants—cocaine, marijuana, heroin, and methamphetamine—that have high potential for abuse or addiction. Many people think such laws are unwise and wrongly interfere with individual freedom. Others believe these laws are prudent and necessary to protect individuals from harm (including self-harm) and to ensure public health. Let's assume that reasonable people can disagree over whether such drug laws should be instituted, over whether violations of these laws should be classed as misdemeanors or felonies, and over what the penalty should be for violating these laws. Further assume that selling these drugs to competent adults who intend to consume them (even for nonmedical purposes) does not wrong these persons. (After all, they have the liberty to un-

dertake dangerous activities provided they don't harm others; and it doesn't appear to be a violation of our natural duties to offer others habit-forming narcotics and stimulants even when we know these drugs are often abused, provided these dangerous properties are known to those who would use these drugs.) Were a state with legitimate authority, through democratic procedures, to proscribe the sale and use of such drugs, those within its jurisdiction would have a duty to refrain from selling and consuming these drugs, simply because the law demands this. Defiance of the drug laws would be wrong even if the sale and use of the drugs would not violate a natural duty. Yet if the state in question operates against the background of a seriously unjust basic structure, it is less clear that it would have a right to enforce such drug prohibitions or that citizens would have a duty to respect drug laws.

As discussed in Chapter 7, if a state fails to meet at least the minimum standard of justice, it does not have the authority to demand compliance with its laws as such, and those within the relevant territory have no obligation to recognize the state's claim to authority. In such cases the state lacks legitimate authority over those it claims to rule. Legitimate authority is, however, a matter of degree rather than all or nothing. As legitimacy goes down, the obligation to obey dries up before it evaporates. If the extent or type of injustice is serious enough, though, the duty to obey can be void or nonexistent.

Reciprocity and Protection

The legitimacy of a political order is to be judged by how well it maintains a fair system of social cooperation. We rightly submit to a state that claims legitimate authority over us when it protects our basic liberties (including those that enable democratic participation) and ensures an equitable distribution of the benefits and burdens of socioeconomic cooperation. It would violate fair-play principles to take advantage of the freedom and social benefits made possible by a just legal order without accepting the constraints of the law and contributing our share to maintaining the material conditions of social life.

The authority of law is not a matter of threats and brute force. Legitimate legal authority is part of the *normative order*, just as are our basic moral rights and obligations. When a state has legitimate authority,

we should think of its laws as the official promulgation of rules that should govern the conduct of those within the state's territorial jurisdiction. Law lays down public rules that make explicit what conduct is expected and what conduct will not be tolerated. When a state maintains a just social order, those in the society should *willingly* submit to its legal demands. As members of a political community, each expects all others to comply with these rules out of a sense of reciprocity, not out of fear of sanctions.

State imposed penalties for violations of the law are part of the *coercive order* of society. These penalties back up the legal order. We need this backup enforcement mechanism because without it some would succumb to temptations to accept the benefits of law without doing their share to uphold the law. An effective system of legal penalties provides reasonable assurance to law-abiding members of society that free riding won't be allowed.² In the absence of this assurance, those who respect legal authority would likely lose their resolve to comply, as their willingness to do their share in upholding the legal order is contingent on the willingness of others to do theirs. This assurance is thus required for the stability of the legal order.

Our duty to uphold and support the legal order is valid only if the state does a reasonably good job of maintaining a fair system of social cooperation. If it fails to meet this standard, as I have suggested is true of the United States, we no longer have a duty to respect its claim to authority.³ A person's *civic obligation* to comply with legal demands is contingent on the existence of a reasonably just social order. It is the duty of justice and simple reciprocity that ground the obligation to obey.⁴

If the authority of law and the duty to obey the law depend on a state's satisfying certain minimum standards of social justice, then we can say that a state that fails to meet these standards *lacks the legitimate authority to punish disobedience to its laws*. But the absence of legitimate authority does not entirely settle the question of whether the state could permissibly impose penalties for lawbreaking. Those who are most burdened by the injustices of a society may lack an obligation to obey the law (on reciprocity grounds); however, the state that claims jurisdiction over the territory within which the oppressed live may still have the right to impose penalties for certain crimes. That is, it may have enforcement legitimacy.

In particular, a state in an unjust society could still retain the right to penalize actions that are seriously wrong in themselves. There is a widely recognized moral right to repress actions that seriously threaten our lives, freedom of movement, bodily integrity, or material well-being. Indeed, there is a right to intervene, using threats and physical force if necessary, to protect *others* from unjust attack.⁵ And this right, I believe, extends to the state. Or, put more precisely, the same principle that justifies natural persons using force to prevent harmful wrongdoing can (with suitable qualifications) justify a formal system of punishment.

Because we know that not everyone will respect the right of others to be free from unjust attack, the state has to be prepared to take action before would-be offenders can do serious harm. Restitution and reparation, while sometimes appropriate and welcome, come on the scene too late, after the harm has already been done. Extensive police presence and public surveillance could help control crime, but on the scale necessary would come at a high cost to liberty and privacy, and it's not clear what good it would do to curtail domestic violence and sexual assault, which generally occur out of public view. Incapacitation of those who have repeatedly engaged in harmful wrongdoing, while sometimes necessary, still allows a lot of unjust aggression to go unaddressed. *Threatened* penalties are therefore necessary to deter would-be aggressors before they have a chance to victimize others.

Under what conditions would it be permissible for a state that lacks legitimate authority to threaten, penalize, and neutralize persons who engage in immoral aggressive acts? I won't try to offer a comprehensive list of conditions, but certain requirements of *fairness* stand out.⁶ First, the state would have to publicly announce that it was going to impose penalties for serious crimes and make clear what these penalties would be. A public warning is required, not only because realistic threats are often sufficient to deter and thus do less harm than imposing unannounced penalties, but also because such warning gives all subject to this immense state power an opportunity to stay away from the line of prohibition and therefore to reduce the risk of suffering unjustified penalties. Second, alleged offenders should have an adequate opportunity to publicly defend themselves against accusations that they have wronged others and to justify or offer excuses for their actions. Third, officials of the criminal justice system must apply the system's rules in a reasonably impartial and evenhanded way. Otherwise there

is no semblance of justice, just the arbitrary and capricious threats of a dictator or rogue regime, which no one is bound to respect or comply with. And finally, the penalties should be humane and no more severe than is justified by the need to deter the type of unjust conduct in question.

Though a state in an unjust society may lack legitimate authority over those it seeks to coerce into compliance with its laws, it may nonetheless have a legitimate enforcement right to compel their compliance with legal requirements that forbid certain harmful wrongdoing. A state in an unjust society may, at a minimum, permissibly penalize prohibited violent acts that are wrongs in themselves (*mala in se*). Such penalties would be justified by the need to protect innocent persons from harm due to wrongful aggression. This enforcement right may not, therefore, extend to penalizing the sale or use of mind-altering drugs among consenting adults. However, it would extend to penalizing those who use violence in the drug trade or who commit violent acts under the influence of drugs.⁷

For clarification, let's compare the view of the state's right to punish just described with an influential alternative: a retributive theory of punishment sometimes called the *benefits-and-burdens* account.⁸ According to this theory, the criminal law should be conceived as a system of rules that prohibit the interference with basic individual freedoms. We all benefit from such a system and we each should therefore refrain from violating the rules that make these benefits possible. In accepting the benefits without assuming the burden of self-restraint, the criminal offender takes unfair advantage of those who comply with the rules. The institution of punishment assures those who voluntarily comply with the law that others will not be allowed to receive the benefits of the system without assuming the burdens. Punishment is conceived as an institutional mechanism of redistribution—it reallocates the benefits and burdens of social cooperation when they are upset by criminal noncompliance. The criminal offender has more freedom than fairness permits and therefore owes a debt for the extra freedom he has effectively stolen. Punishment reestablishes equity (puts the scales back in balance, as it were) by taking away the offender's excess freedom, freedom to which he is not entitled. Punishment is thus framed on the

model of *restitution*—in effect, the offender has to “give back” what he has wrongfully taken (or at least its equivalent).⁹

I agree that, under *just* social conditions, crime violates requirements of reciprocity and that punishment can be a justified response to such violations. I also agree that punishment can be a practical and fair solution to the assurance problem. But I do not believe that punishment is plausibly viewed as a way to redistribute burdens so as to reestablish equity. Nor do I believe that the general justifying aim of punishment is retribution—that is, to ensure that criminal wrongdoers endure the suffering or deprivation they deserve. We can justify punishment because of its essential role in crime prevention, which is also necessary to stabilize the cooperative scheme as a whole. Also, on the benefits-and-burdens theory the moral idea of reciprocity is often used to explain *proportionality* in sentencing. I think reciprocity is an important value for understanding the *right* to punish, but not for understanding *how much* to punish.

The benefits-and-burdens theory also has implications for thinking about punishment in a context of social injustice. Jeffrie Murphy, for instance, claims that the right to punish is void when a society is marred by serious distributive injustice, because the permissibility of the practice of punishment depends on there being just background conditions. Within unjust societies, most criminal offenders (many of whom come from disadvantaged backgrounds) have not received their fair share of society’s benefits and thus do not owe a moral debt for their crimes. Criminal deviance, Murphy argues, therefore cannot be justifiably punished until the structural injustices in society have been adequately remedied. While I agree that a state in a seriously unjust society lacks the authority to impose duties to obey the law, such a state, as suggested earlier, might have the right to enforce laws against dangerous wrongdoing to protect the vulnerable from unjustified harm.¹⁰

Jeffrey Reiman argues (and I agree) that the victims of social injustice, having been denied their fair share of the benefits of social cooperation, have a *reduced* obligation to obey the law. He also claims that some of the crimes (particularly property crimes) that the unjustly disadvantaged commit are justified on the grounds that they are merely reclaiming what rightfully belongs to them. I don’t, however, think of property crimes among the unjustly disadvantaged as restitution for distributive injustice. The poor do sometimes appropriate the possessions

of those with unjust riches. But they often rob, defraud, and steal from those who are unjustly disadvantaged. It's not plausible that any of these latter property crimes reestablishes equity. Some property crimes that burden the oppressed may nevertheless sometimes be justified as (perhaps symbolic) *resistance* to illegitimate authority. It is not that crime reestablishes a fair (or fairer) system of social cooperation but that such lawbreaking is a permissible way to express one's refusal to submit to unjust demands for compliance with the law. This defiance of law needn't set things right or make things better (though the fact that such defiance would make things worse is a *pro tanto* reason to refrain from it). The oppressed do not have an overriding or preemptive reason to respect the law. The legal order has no authority over them.

Reiman also maintains that though the poor are unjustly treated and their moral culpability for their crimes is therefore reduced, they are often morally guilty and responsible for *upsetting the peace* (that is, creating a social climate of fear and distrust), which reduces individual freedom. Because one justification for state authority is, he claims, to secure the peace (the other is to secure background justice), even a state in an unjust society may impose penalties for upsetting the peace. By contrast, I see social justice as the sole justification for legitimate state authority, and justice includes protecting people from unjustified violence and illegitimate restrictions on their liberty. I say instead that, given the natural duty of justice, the poor should do what they can to help establish just conditions. Undermining trust among those committed to working for a more just society is incompatible with the duty of justice because it makes solidarity unworkable. I do not think the burdens (including restrictions on liberty of movement) imposed on the affluent by the criminal deviance of the poor are sufficient to override the right of the poor to disobey the law. The poor should not be forced to carry all the burdens of an unjust social structure, and if some of their crimes limit the freedom of the more affluent, this is not unfair. Moreover, many violations of the peace can help to produce more just circumstances by forcing those in power to address the injustices that prompt the disturbances of the peace.

A state that lacks legitimate authority but possesses enforcement legitimacy is similar to the *dominant protective association* that Robert Nozick famously describes.¹¹ So again, for clarification purposes, a brief comparison is in order. As will come as no surprise, I don't agree that

the “minimal state” is the most extensive state that can be justified. In fact, a state with mere enforcement legitimacy is, in my view, *unjust*. It should be striving to become fully just by ensuring equal political liberties and democratic accountability, a fair opportunity for all to secure valued positions in society, and an equitable apportionment of material advantages and work responsibilities. The state with mere enforcement legitimacy departs enough from what social justice requires that it lacks a claim to authoritative rule. But it sufficiently approximates justice in key respects that it retains the right to prevent and punish unjust aggression within a given territory.

I also wouldn’t justify even this minimal state in the way that Nozick does. I do not assume (and seriously doubt) that there is a natural or private right to punish wrongdoing. Nozick, following John Locke, takes it that the state enforces moral prohibitions against injustice and that it inherits this enforcement right from the moral right of individuals to punish and to forcibly extract compensation for serious wrongdoing. I’m suggesting that the state enforces its *laws* that forbid criminal acts and that this exercise of power is justified when the overall legal structure, including its criminal justice system, is reasonably just. These laws will prohibit certain moral wrongdoing of course, and the state’s right to criminalize these acts may extend only to serious and harmful wrongdoing. But this does not presume a preinstitutional individual right to punish those who do wrong. (This is not to deny that the right of a state to punish might rest on a more fundamental moral principle, like the permissibility of threatening aggressors to protect oneself and others from harmful wrongdoing.) The right to punish, on the view I’m defending, presupposes the existence of positive law and a functioning and fair judicial system. Thus, one difference between enforcement legitimacy and the mere right to protect those not liable to harm is that the state with enforcement legitimacy is part of a legal order.

Moreover, I am not assuming that there is a natural or preinstitutional right to accumulate property. Nor do I think of taxes as simply payment to the state for protective services. Property laws and tax policies are part of the basic structure and must be judged together (along with other fundamental aspects of the social scheme) on grounds of fairness and justifiable to all who are subject to them.¹² The right to punish and rights to property are to be justified as a system of public rules that constitute part of the basic structure of society.

I should make clear, however, that a state with mere enforcement legitimacy can and must penalize some economic crimes, and not just violent property crimes like robbery. The state cannot provide protection from unjust attack without revenue to fund the effort (personnel have to be paid and equipment and facilities must be secured and maintained), and it can't acquire this revenue without a tax base to draw on. This means that some among those being protected must have a way to make income within a functioning economy, which requires stable property relations and secure market transactions. Theft and fraud cannot be too prevalent, then, as this would make even a minimal legal order unworkable. The state with enforcement legitimacy can't allow all property claims to go undefended even when the distribution of income and wealth in society is unjust. Still, some nonviolent and low-level property violations can be tolerated (particularly those perpetrated by the most disadvantaged), as these crimes won't undermine the state or the social order. And, after all, the oppressed have no duty to respect the existing property/tax regime (given how unjust it is) apart from its instrumental role in supporting a stable and safe social order.

Condemning Crime

Within a *just* society, a criminal justice system would have more than one social function. Yes, it would be relied upon to keep lawbreaking within tolerable levels. But preventing crime would not be its sole legitimate purpose. It would also provide a political community with fair procedures for determining when its laws have been violated, including a fair way for those accused of lawbreaking to defend themselves against charges that they have violated the law. The criminal justice system is also an institutional mechanism for holding persons accountable for violating laws: it is used to call people to explain, justify, or accept responsibility for their criminal acts. In addition to crime prevention, due process, and holding people accountable, a criminal justice system in a just society may publicly *condemn* acts that have been duly demonstrated to violate the political community's laws against harmful wrongdoing. I want to focus on this *condemnatory* role of a criminal justice system and distinguish it from the system's *punitive* role.

Condemnation is the public expression, explicit or implied, of strong moral disapproval. Practices and speech acts that communicate con-

demnation are properly reserved for particularly serious wrongs, such as unjustified violent acts and criminal wrongdoing. Private individuals condemn crime but so do institutions like the state.

There are legitimate reasons for a state to publicly condemn criminal wrongdoing. The state might, for example, seek to reaffirm the political community's prohibition of the act in light of the transgression. Doing so makes it explicit that it would be a mistake to infer that the state doesn't take such violations seriously. The state might also want to indicate concern and respect for the victims of crime. By condemning a crime, the state communicates to victims that it takes their interests seriously and that their resentment toward those who wronged them is justified. And the state might also want to convey to offenders that it regards their conduct as unacceptable. Communicating condemnation to a criminal offender is one way to signify that any subsequent penalty is imposed because the person has committed some grave wrong. The wrongness of the act is why we seek to prevent acts of that type from occurring. Condemning the act is part of our explanation to the offender for why we are taking such drastic measures to repress such acts.

However, one purpose of state expressions of condemnation is to publicly disapprove of acts that *defy the state's legitimate authority*. In this case the condemnation is for disobedience to the law. A state might also condemn a criminal act for its inherent wrongfulness or the actor for his or her blameworthy ill will. But these further expressive acts of condemnation should be distinguished from condemning culpable failures to obey the law as such. If condemnation of disobedience is to be apt, then the state must have legitimate authority—it must have a right to demand obedience to its directives from those within its claimed territorial jurisdiction. A state with enforcement rights but that lacks legitimate authority might rightly condemn violent crimes for their wrongfulness. It could not rightly condemn offenders for their simple disobedience to its laws, though, as it is not entitled to obedience of this kind.

This way of thinking about the condemnatory functions of criminal justice shares some features with “penal expressivism,” according to which an essential part of the justification for punishment is that penal sanctions *express* or *communicate* public condemnation of criminal acts.¹³ I want to distinguish the view I'm defending from penal expressivism and, in the process, to raise some doubts about this influential view.

The central problem for penal expressivism is to explain why condemning crime requires hard treatment of offenders (for example, stiff fines, work penalties, imprisonment, deportation, and perhaps death). It would seem that we should be able to communicate our moral message of condemnation without imposing suffering or deprivation on those who do wrong. Yet Joel Feinberg insists that punishment has *symbolic significance*: it expresses attitudes of resentment, indignation, and disapproval. He also claims that condemnatory symbolism and hard treatment, while distinguishable for analytical purposes, are never separated in reality. Indeed, he maintains that legal punishment, *by definition*, involves both hard treatment and condemnation.

I don't believe that condemnation and punishment are inextricably linked—either conceptually or practically—in the way Feinberg maintains. A just state should certainly condemn violations of criminal law. It should not abide defiance of legal authority or egregious wrongs. But *at what stage* in criminal proceedings does (or should) condemnation occur and *what* exactly should be condemned? One might think that the state has already condemned the act when it prohibits it through law. The state effectively says, "This act is wrong and forbidden." But perhaps we can condemn only wrongful acts that are ongoing or have already occurred. If this is so, then the laws themselves don't condemn acts but only prohibit and perhaps deter them. Maybe the most we could say is that the state condemns *act types* through criminal legislation. It has not thereby condemned the particular concrete act of that type—the wrongful act performed by the offender. We might think, though, that the relevant condemnation properly occurs at the time of *conviction*—once the offender's admission of guilt has been formally accepted or when the judge or jury renders a guilty verdict after a trial—rather than at sentencing or when the sentence is being carried out. As conviction is the final public judgment of guilt, it would be natural to view it as also expressing condemnation of the legal violation and of the person for committing the prohibited act.¹⁴

Feinberg insists that not only is penal hard treatment (imprisonment in particular) inseparable from condemnation but hard treatment *itself* expresses condemnation. As he famously says, "the very walls of his cell condemn [the criminal] and his [prison] record becomes a stigma."¹⁵ This doesn't appear to be strictly true, however. What of those being merely detained in jails prior to trial? They are being incarcerated only

after being *accused* or *suspected* of committing a crime; they have not been convicted. A final judgment of guilt has not been rendered (though, once guilt has been settled, such jail time can be retroactively treated as “time served”). Imprisonment itself therefore can’t express condemnation. It is more plausible to think that the public judgment of guilt (say, at the end of a trial) expresses condemnation. Of course if we take this approach, we need to explain what is occurring at the sentencing phase and during the period when the sentence is being carried out. But this poses no difficulty. A sentence is a matter of containing dangerous individuals or providing potential lawbreakers with an incentive to refrain from violating the law. The sentence just needs to be fair and a reasonably good deterrent or crime-control device. We needn’t attach any *symbolic* significance to the sentence itself.

Feinberg is led to regard punishment as having symbolic significance because he believes that this expressive function is needed to distinguish punishments (for example, imprisonment or large fines) from mere penalties (such as minor fines). His mistake is thinking that the relevant distinction must be found in features of the *penalties* rather than in what type of *violation* the penalties are for. Some penalties are for minor legal failings (misdemeanors) and some for serious ones (felonies). While a state with legitimate authority will penalize and disapprove of all law-breaking (including parking violations), it will penalize and *condemn* crimes like murder and rape, as these are serious wrongs and bigger challenges to its authority. Criminal justice proceedings are reserved for wrongs that merit both penalties and condemnation. However, I see no reason that the condemnation must be encoded in the penalties.

I suspect that penal expressivism gains some of its plausibility from ambiguous uses of the word “condemnation.” It is sometimes said that the state has *condemned* an offender to prison or to death. This goes beyond saying that the state, acting on behalf of the public, strongly disapproves of the criminal act to saying that the state has expressed an intention to deprive the offender of liberty or life or that the state has actually taken his or her liberty or life. There is nothing wrong with speaking this way. It is perfectly fine English. But we should keep the two senses of “condemnation” separate when attempting to explain and justify punishment. For clarity, we might distinguish condemnation (the public expression of strong moral disapproval) from *damnation* (imposing suffering or deprivation on wrongdoers). It would thus be true

to say that a state can condemn an offender without damning the offender to prison; and that it can damn an offender to prison without condemning the offender.

R. A. Duff argues that punishment has not just an expressive purpose but a *communicative* one. That is, punishment involves reciprocal and rational engagement with the offender. Its point and justification is not mere condemnation but moral persuasion. As with other penal expressivist theories, though, Duff does tie this communicative purpose to hard treatment of criminal offenders, claiming that penal sanctions communicate condemnation. But he insists that these sanctions must also have a forward-looking (but non-deterrence-based) dimension if they are to be fully justified. Accordingly, for Duff punishment has three moral goals apart from condemning past wrongdoing: repentance, reform, and reconciliation. Repentance, he claims, requires that the offender take a period of time to reflect on his or her wrongdoing. Part of what a penal sentence accomplishes is providing a criminal offender with the necessary structure for moral reflection and an opportunity to come around to appreciating the moral reasons against such wrongdoing. This forced seclusion also functions as a formal apology to the community for breaking its laws, and once completed, the offender should be forgiven and allowed to join the community as a member in good standing.

By contrast, I believe the public condemnation of crime can be justified by its symbolic value alone. It establishes its value through what it communicates (warranted moral criticism and disapproval). Its worth does not rest on any beneficial practical consequences that may result from it, either for the offender or for the society (though these positive effects may be welcome). Such condemnation needn't be justified in terms of how it contributes to moral reform of offenders or to reconciliation of offenders with their fellow citizens. And the condemnation is not expressed through punishment but through formal conviction. Of course the guilty person's criminal act *merits* condemnation—that is, it merits strong public disapproval. Such a response is not only apt and permissible—in some contexts it would be a moral failure on our part if we didn't condemn such serious wrongdoing. But this is different from saying that the person who commits such wrongs deserves *prison*, and so, unlike Duff, the position I'm defending is not a form of retributivism.

No doubt the state's public condemnation of crime wouldn't and shouldn't be taken seriously if the state could do something to prevent such wrongdoing but didn't. We would then be justified in accusing the state of merely paying lip service to the wrongfulness of these acts, tolerating them, even tacitly approving of them. But the state could and should show its sincerity and good faith in condemning crime by doing what it can to prevent criminal wrongdoing.

Of prominent penal expressivists, Andrew von Hirsch and Uma Narayan hold a view most similar to the one I've been defending. I agree with the penal expressivists that the criminal justice system within a just legal order will have expressive dimensions—in particular, that it will condemn acts of criminal deviance. But I do not think the practice of punishment (imposition of penal sanctions for lawbreaking) can be justified, even in part, by appeal to the expressive (or communicative) functions of a criminal justice system. Von Hirsch and Narayan side with Feinberg and Duff in thinking that punishment expresses condemnation (or what they call “censure”). But they recognize that the need to express condemnation of crime is insufficient to justify the hard treatment that offenders typically receive. On their view, punishment is justified as public condemnation *plus* incentives to encourage compliance with the law.

For example, one can imagine the parties in Rawls's original position, after noting that those they represent might be morally weak, agreeing to establish a set of nonmoral incentives (penalties) to encourage themselves to comply with the principles of justice as articulated through law. If the political community should accept the practice of hard treatment as a prudential supplement to moral reasons for compliance, this avoids the problem of treating lawbreakers as enemies of the state, as outside the community, or as “mere means” to promote the common good. It also avoids the concern that on the view that the criminal law is an institution that issues general threats, citizens are treated as nonrational animals that need to be manipulated or frightened into obedience. The state isn't threatening us, on von Hirsch and Narayan's view. We, through the penal instruments of the state, are simply giving ourselves an incentive to comply with laws we make.

I deny that the condemnation of crime must be or should be expressed through penal sanctions. Yet I don't reject the idea of punishment as prudential incentive to obey the law. When it comes to the forward-looking dimensions of punishment, I wouldn't stop there, though. I think it

can be permissible to threaten would-be offenders with penal sanctions as a way of deterring them from wrongdoing.

Standing to Punish and Condemn in Unjust Circumstances

A state that punishes crime under seriously unjust social conditions is vulnerable to various types of moral criticism, resistance, and defiance. I want to conclude this chapter by explaining how the moral deficiencies of such a state can make it illegitimate for the state to publicly condemn crime while the state nonetheless retains the right to punish at least some crime.

When a society falls below the threshold for tolerable injustice and its governing institutions are responsible for the injustices (for either perpetrating them or not preventing them), the state's *right to punish crime* is compromised. And if its criminal justice institutions are insufficiently fair, effective, or humane, the state's right to punish can be completely undermined.¹⁶ Moreover, lacking the authority to create obligations through law, it has no moral basis for condemning *disobedience* to its laws as such, particularly the disobedience of those unjustly disadvantaged in society. Its laws serve to coordinate action and (when penalties are attached) to warn of impending sanctions. But the state's laws lack the moral power to impose duties of compliance. Such a state, if it is not too unjust, *may* have a right to punish serious and harmful wrongdoing as a defense of those whom it would be wrong to harm. However, it would lack the right to criminalize wrongful acts beyond these most serious ones, and it would lack altogether the moral standing to condemn defiance to legal authority.

Such a state might retain the moral standing to condemn wrongful acts, even the wrongful acts of the oppressed (more on that in a moment). But the state would not be justified in condemning the wrongful acts of the unjustly disadvantaged *on grounds of unfairness*. That is, given that the state has not secured basic liberties and has not maintained an equitable distribution of benefits and burdens in the cooperative scheme, when the oppressed violate the law, they do not take unfair advantage of the compliance of others. Their acts may be condemned on other grounds, but not for lack of civic reciprocity.

Loss of legitimate authority is not the only way that a state's moral standing to condemn crime can be compromised. Such standing can

be vitiated or erased if the state is *complicit* in the crimes it would condemn. Victor Tadros explains the complicity criticism.¹⁷ Such criticism, he argues, depends on the idea that the state participates in or contributes to the wrongdoing it condemns. The key premises in the complicity charge are that the state can foresee the violent consequences of unjust disadvantage and that it has the power and substantive responsibility to prevent these unjust social conditions from forming and persisting. For instance, it is well known that poverty engenders crime and that the state may unjustly contribute to impoverished conditions by failing to maintain a just basic structure. Insofar as violence in ghettos results from resentment toward unjust inequalities or exposure to severely disadvantaged neighborhoods, the state shares blame for the harmful consequences of this violence.¹⁸ Therefore it is not in a moral position to point fingers.¹⁹ And this loss of standing might extend beyond condemning legal defiance to condemning the wrongs themselves.

A state might also lose its standing to condemn a crime because it engages in the same kinds of wrong that it would condemn. This argument is advanced by Duff, who regards a state as lacking the moral standing to condemn an act if the state fails to sufficiently abide by the values it invokes to condemn the act. So if the political community (as represented by the state) is not adequately abiding by a moral rule it is ostensibly committed to (for example, rules against deceit, theft, and unjustified violence), then its standing to condemn those who violate the rule is compromised.

When a state is complicit in the wrongs it punishes or hypocritically punishes wrongs that it engages in, it lacks the moral standing to condemn these wrongs and is therefore rightly criticized for these unjustified expressive acts of condemnation. But does the state also lack the *enforcement right* to punish these wrongs? Tadros and Duff think so, because they believe that if the state lacks the moral standing to *condemn* a crime, then it also lacks the right to hold the criminal offender *accountable* for it (that is, he or she isn't answerable to the state, can't be tried by it, and so on). Tadros, for example, argues that the state cannot act as judge in cases where it bears some responsibility for the crime. Its complicity in these crimes makes it unsuitable to judge those accused of them. Thus, if the state cannot hold offenders accountable for their crimes, it can't permissibly punish them either.²⁰ Similarly, Duff argues that when the state fails to treat persons in accord with its professed

fundamental values, it doesn't have the right to hold them accountable for their alleged failure to abide by those values. And if the state can't hold them accountable, then it can't permissibly punish them. Indeed, Duff thinks that if the state lacks legitimate authority, making it the case that citizens have no obligation to obey the law as such, then the state cannot permissibly punish *any* crimes, not even those that are *mala in se*.

These powerful arguments merit an answer. The Tadros/Duff rejoinder assumes that (1) an agent's right to hold others accountable for wrongs depends on that agent having the moral standing to condemn these wrongs and (2) the moral standing to condemn these wrongs depends on not having been complicit in them and not being guilty of similar wrongs oneself. I think (2) is probably true. But I'm skeptical of (1). Holding someone accountable for a wrong depends, not on having the standing to condemn the wrong, but *on having the standing to be an impartial judge of whether the accused committed the prohibited act*. If, given their complicity or hypocrisy, it is reasonable to regard state officials as biased against the accused or as incompetent to render a fair judgment, then they shouldn't be the ones to determine his or her guilt.

But the criminal justice system in an otherwise unjust society may be reasonably fair, and criminal justice officials may not be the source of the injustices the oppressed face. In that case, I believe the oppressed can be rightly tried and punished if (1) plausible accusations have been made against them that they have unjustly attacked another, (2) adequate efforts have been taken to make them aware that such acts would be penalized, (3) they have an adequate opportunity to publicly defend themselves against charges that they have violated the rights of others against violent attack, and (4) penalties are generally proportionate to offenses. In short, much will depend on whether the criminal justice system operates in a reasonably impartial and fair way, *not on whether the state has the standing to condemn crime*. In particular, enforcement legitimacy will depend on whether there is an independent judiciary with the power to adjudicate disputes between the state and defendants and with no stake in the outcome of these disputes.²¹

In many instances, of course, a society that is deeply unjust in other respects will also fail to maintain a fair criminal justice system. Many states that lack legitimate authority will therefore also lack legitimate enforcement rights. For example, there is compelling evidence that

the criminal justice system in the United States does not treat disadvantaged blacks fairly. These persons currently are subjected to racial profiling and unjustified searches, exposed to gratuitous police violence and harassment, face racially biased juries, receive overly severe sentences, are subject to the arbitrary and excessive power of prosecutors, are not provided adequate legal counsel, and are not allowed to fully reintegrate into the political community after their sentences are served.²²

Even if the criminal justice system does, as a matter of fact, operate in a reasonably fair and impartial way, the oppressed may have good reasons to doubt that it will treat them fairly. Suppose the accused is a poor black person with the justified but (let us assume) false belief that the system is corrupted by racial bias. He would be justified in refusing to submit to the state's efforts to hold him accountable for alleged lawbreaking. In this case the state might nevertheless retain its right of enforcement, but the accused has a right to resist being held accountable. He has no duty to submit to the state's mechanisms of accountability, so we can't blame him if he attempts to evade capture or won't cooperate with law-enforcement officials. But neither can we blame the state if it pursues him and brings him to trial. The coherence of this somewhat paradoxical conclusion can be seen if we view the enforcement right as a liberty right (rather than a claim right). The state has the liberty to hold people accountable for crimes they are justly accused of, in the sense that it has no duty *not* to enforce the criminal law. Yet this is not a claim right, so those who are accused have no duty to cooperate in the state's attempts to hold them accountable. And those who stand in solidarity with the accused have no duty to help law enforcement officials capture and punish the accused.

Let me now turn to a problem faced by Tadros's and Duff's positions but not by the view of punishment under unjust conditions that I've been defending. Both recognize that oppressed persons often commit violent acts against others who are also unjustly disadvantaged. In addition, they note that if the state does not punish those who perpetrate these acts, it would be failing to protect some of the most vulnerable in society against violent wrongdoing, thereby compounding the injustices they confront. Given their premises, the state in an unjust society faces a dilemma. Either it can punish those it has no right to punish or it can fail to protect those it has treated unjustly. So, on Tadros's and Duff's

accounts, no matter which direction the state goes, it will perpetrate *additional* injustices, further weakening its claim to legitimacy.²³

We can avoid this dilemma if we follow my approach, which distinguishes legitimate authority from enforcement rights and separates the ends of punishment from the function of public condemnation. Under conditions of serious injustice, a state's authority to rule and moral standing to condemn crime are indeed compromised, if not undermined. But enforcement legitimacy, and thus the right to punish at least some crimes, may remain intact. Though a state in an unjust society may lack the moral standing to condemn violent crime (due to complicity, hypocrisy, or lack of authority), it may have an enforcement right to penalize such crime in order to deter and contain it. The justification for this is the need to protect the vulnerable from unjustified harm. A state can sometimes be in a position to provide this protection in a way that is justifiable to those who wrongly threaten others.

Though lacking the moral standing to condemn, a state operating under unjust social conditions should punish only those who have done condemnable acts—acts that *merit* strong moral disapproval. These penal sanctions don't express condemnation, and may be applied simply as a crime control measure. If condemnation and punishment were inseparable (or if punishment is merely the vehicle through which we express condemnation for lawbreaking), then punishment under conditions of injustice can't be (fully) justified. Because punishment would just *be* condemnation, then not only would the state lack the moral standing to condemn violent wrongdoing, it would lack the standing to punish and thus prevent it, contrary to the duty to prevent unjustified attacks on others when you can. But if we separate *condemnation* of lawbreaking from *penalties* for lawbreaking (as I have been arguing we should), then we can explain how punishment can be justified even when authority to punish disobedience to law and moral standing to condemn crime have both been lost.

Crime Control and Social Reform

Some might worry that by permitting the state in an unjust society to punish crime, we would be only reinforcing its power to stigmatize the unjustly disadvantaged. This is especially worrisome for the ghetto poor, because there are well-known and long-standing stereotypes

about black criminality and violence, and the state (including the criminal justice system itself) has played a large role in creating and perpetuating these stereotypes.²⁴ But responding to this concern is part of the reason that decoupling condemnation from penalties is so important. We should not assume that those who commit crimes under unjust conditions merit the political community's condemnation, as the state may have no authority to punish disobedience to law as such and may be complicit in their wrongdoing. The state should make it clear that it penalizes, perhaps reluctantly, only to prevent unjust and harmful aggression, recognizing that it may be partly at fault for these wrongs.

Given the risks and costs to disadvantaged communities of permitting a state that lacks legitimate authority to enforce the criminal law (for example, increased exposure to police harassment and brutality), some might insist that we opt for community-based solutions to unjustified aggression under nonideal conditions. Such solutions might be preferable if they are effective in controlling crime, they are fair to the accused, and victims are satisfied with these extra-state means of redress. The state shouldn't interfere with the development of these community-based measures when they meet these requirements, and perhaps it should facilitate them.

But it would be difficult to meet the necessary standards of fairness without the administrative apparatus of the state, particularly its judicial mechanisms. Without police, it would be challenging to identify criminal suspects, effectively search for them, or force them to answer for their alleged wrongful acts. Curbing sexual assault and domestic violence would be difficult without the investigative powers of law enforcement agencies. Moreover, ghettos with serious crime problems typically lack the necessary collective efficacy to reduce crime to tolerable levels.²⁵ So in the absence of effective and fair community-based solutions to violent crime, it would be permissible for the state to intervene to protect the vulnerable from unjustified harm, though this should be done, whenever possible, with community involvement and perhaps community oversight.²⁶

A state with only enforcement rights should also seek to gain full legitimate authority by remedying the injustices in the basic structure of society. If it is to preserve its enforcement legitimacy, it should be making a good-faith effort to warrant and acquire the trust of the oppressed. Thus, it should not deprive ex-offenders of the public benefits

of citizenship (such as income subsidies, housing assistance, grants and loans for education, and unemployment insurance). Given that the terms of political association are not remotely fair to these persons, it would be unreasonable to revoke privileges of citizenship as a form of punishment.

In particular, the unjustly disadvantaged should never be denied the right to vote, not even when they have violated criminal laws. Perhaps under just conditions those who commit violent crimes or repeatedly violate laws against criminal wrongdoing could justifiably have their voting privileges (temporarily) revoked on the grounds that they have committed a grave (and perhaps unforgivable) breach of trust with their fellow citizens and are now relegated to the status of a noncitizen legal resident. However, under seriously unjust conditions, the oppressed cannot be said to be in violation of their civic obligations when they commit crimes and thus cannot be justifiably punished for their failures to respect the law. In addition, many criminal offenders are from or (once released from prison) will return to ghetto neighborhoods, so to deny them the right to vote would (at least potentially) diminish the voting power of these already deeply disadvantaged communities. The members of these communities cannot garner civic engagement and political participation from residents who are prone to political alienation if the state condemns them to civic death. Such civically exiled residents would likely find it enormously difficult to muster the resolve to fight for a more just society when they lack basic civic standing. In the interest of politically empowering the oppressed, and given legitimate concerns about disparate racial impact, felon disenfranchisement as punishment should be abandoned.²⁷

In addition to working to establish a just basic structure, a state with mere enforcement rights should be making efforts to reconcile with, and make amends to, those it has wronged. It should aim to regain legitimacy in their eyes and acknowledge its role in creating the conditions under which the disadvantaged are tempted to turn to crime. To achieve these ends, it not only should enfranchise the imprisoned and ex-offenders but also should institute educational and voluntary rehabilitative programs for those it punishes and should aid former prisoners with reintegration into society (for instance, providing skills training, counseling, employment, and housing assistance). And in the ghettos of America, it is absolutely essential that police officers be trained to

treat residents respectfully, even when they are suspects, and to cultivate relations of mutual trust with members of these communities.

We know that inequality, poverty, ghetto conditions, and low educational attainment are all strongly correlated with (if not causes of) violent crime. So the state needn't—and shouldn't—rely exclusively on punitive responses to crime. Criminal acts among the unjustly disadvantaged could be controlled through the establishment and maintenance of a more just basic structure. The losses this would involve (in taxes and opportunities, for instance) would not be unfair to the affluent, because some of their advantages are ill-gotten gains—they are derived from exploiting a manifestly unfair opportunity structure and taking advantage of liberties that others are unjustly denied. Moreover, the unjustly disadvantaged, as equal citizens, are *due* a fairer opportunity structure and secure constitutional liberties, so they wouldn't be getting anything they aren't already entitled to.