JRCD

MacLeod, Adam J. 2025. "Public Right and Humane Punishment." *Journal of Religion, Culture & Democracy*, February. https://doi.org/10.54669/001c.128063.

ARTICLES

Public Right and Humane Punishment

Adam J. MacLeod[1]

[1] School of Law, St. Mary's University

Keywords: retribution, public rights, humane punishment, natural law, mens rea, strict-liability offenses

https://doi.org/10.54669/001c.128063

Journal of Religion, Culture & Democracy

Retribution is the strategic lynchpin for securing justice and the presumption of innocence. It is the justification that takes the criminal defendant to be a human being rather than a mere instrument of social engineering and political control. By contrast, modern, results-oriented theories of punishment—deterrence, incapacitation, and rehabilitation—have made our institutions of criminal justice less humane in important ways. Gerard Bradley's contemporary, detailed account of the old idea of retribution can be cashed out in legal doctrines that secure the presumption of innocence and limit the corrosive effects of strict-liability offenses. This new articulation of an old juristic concept provides a conceptual basis to roll back overcriminalization and build a humane culture of criminal punishment.

Introduction

"Retribution is not revenge" (Bradley 1999, 114). Indeed, retribution is the humane justification for criminal punishment. It is the justification that takes the criminal defendant to be a human being rather than a mere instrument of social engineering and political control. And it is the only justification that can make punishment just. As C. S. Lewis explained many decades ago, the supposedly "humanitarian" theories of punishment that replaced retribution in the twentieth century erased the concept of desert. And "the concept of Desert is the only connecting link between punishment and justice" (Lewis 1970, 288).

Retribution is the strategic lynchpin for securing justice and the presumption of innocence. When legal scholars in Britain and the United States abandoned retribution in favor of results-oriented theories of punishment—deterrence, incapacitation, and rehabilitation—our institutions of criminal justice became less humane in important ways. The American Law Institute's official embrace of modern, consequentialist penal theories, and its proposals for codification of those theories in the Model Penal Code, coincided with an erosion of the presumption of innocence, the rise of overcriminalization, and the advent of mass incarceration. We have sound reasons to believe that this was not a mere coincidence. Insofar as we have abandoned retribution and reformed our institutions of public justice to achieve collective ends, we now use criminal defendants as means.

To return to a criminal justice apparatus founded on retribution is unlikely to solve most of our problems. But it might solve some of them. To explain why, this article connects retribution with a more rational and humane approach to criminal punishment than we now have. Part 1 locates retribution in the jurisprudence and history of the common law of crimes, which imposes criminal sanctions on persons who act with a vicious will, an intent to commit a public wrong by infringing a public right. This jurisprudential principle yields two fundamental legal doctrines that together secure the presumption of innocence: the requirement of a culpable *mens rea* and the distinction between private and public rights.

Social engineers began to chip away at those doctrines in the late nineteenth century, and legal scholars laid down the jurisprudential predicates for their abandonment in the twentieth century. Part 2 connects this abandonment of retribution to the rise of overcriminalization. The consequentialist theories of punishment made *mens rea* a contingent element of crimes and erased the distinction between private and public rights. By eradicating the doctrinal securities for the presumption of innocence and expanding the categories of actions for which a person could be criminally prosecuted, the American Law Institute and other proponents of consequentialist, strict-liability crimes cleared the jurisprudential ground for overcriminalization. Yet the common-law concept of crime as a culpable wrong remains codified throughout our law alongside those modern innovations.

Part 3 considers retribution as a humane alternative to the modern theories. It briefly describes the natural-law theory of legal authority in which retribution makes sense, and in which retribution can be seen as a humane theory of punishment. The article then examines the clearest and most defensible contemporary account of retribution, which is found in the scholarship of Gerard Bradley. It concludes by considering whether Bradley's theory of retribution can be cashed out in legal doctrines and heuristics of legal interpretation that might ameliorate the problem of overcriminalization.

Retribution and Innocence in Common-Law Jurisprudence

Retribution and the Presumption of Innocence

The courts of England were not always friendly toward criminal defendants. But since the abolition of the star chamber and promulgation of the English Bill of Rights in the seventeenth century, the common law has inclined away from unjustified convictions. The modern common law's reticence to convict absent proof of culpability is famously expressed in William Blackstone's maxim "that it is better that ten guilty persons escape than that one innocent suffer" (Blackstone 2016, 4:231). Neither the idea nor the maxim was original to Blackstone. What we now know as the presumption of innocence was taught to Blackstone (and through Blackstone to American jurists) by Matthew Hale. Hale grounded the maxim in Jewish and Christian

theology, especially the idea that God can dispense justice to a guilty person who has escaped punishment, but the "loss of the life of an innocent" cannot be undone (Sytsma 2017, 178).

Hale taught that criminal sanction is the satisfaction of a debt by a criminal to the governor of a society, owed because the criminal breached his obligation to obey the law. Every member of the society has an obligation to obey its true laws, "and by the Act of Disobedience there grows a kind of forfeiture to the Governor from the Govern'd." What was done cannot be undone, so the criminal sanction substitutes "as the compensation or retribution thereof in point of Justice." An innocent person owes no such debt to the governor, of course, and so has no compensation or retribution to make (Hale 2015, 25–26).

Common-Law Securities for the Innocent

Though it took several centuries for common-law jurists to articulate the immunity of the innocent as a jurisprudential ideal, the principle was built into the structure of the common law much earlier (Pollock and Maitland [1898] 2010, 2:470–584). Setting aside trial by jury and other common-law institutions that secure the rights of accused defendants, two architectonic features of common-law jurisprudence stand between an innocent person and a criminal conviction. The first is the legal requirement of *mens rea*, a culpable state of mind. The second is the boundary between private rights and public rights.

The requirement of culpable intent. The *mens rea* required to commit a common-law crime is known as the "vicious will." Blackstone explained that only the concurrence of a person's will can render a person's action "either praiseworthy or culpable," and the will cannot concur in what the mind does not understand and choose (Blackstone 2016, 4:13). For this reason, an involuntary act cannot induce any guilt.

Just what "act" must be willed is not always clear. But though ignorance of the law is no excuse, the jurists have long insisted that a person is not guilty unless he understood all of the facts that comprised the wrongdoing. Criminal culpability entails acting contrary to public, legal right. That means, at least, that a person knew it would be a wrong against the members of his community to perform an act and that he performed the act on purpose.

For example, a man took a thing (a horse, a bag of grain, a book) that he reasonably believed had been abandoned by the original owner. He intended to take possession of the thing but did not intend to take a thing that belonged to someone else. He did not understand his act to be wrong because he did not think he was infringing any legal rights. Has he committed a criminal larceny? The common law answers no. He is innocent because

he lacked the intention to deprive a person permanently of his property and convert it to his own use (*Johnson v. State*, 36 Tex. 375, 377 [1871]; *Fetkenhaur v. State*, 88 N.W. 294, 296 [Wisc. 1901]).

The distinction between private and public rights. That rule of innocent conversion, by which a man is innocent if he takes a thing without a culpable intention, is the doctrine of public rights and public wrongs at common law, even though the same man could be held liable for the same act in a trespass or trover action filed by the owner to enforce the owner's *private* rights in the thing. In the action for a remedy predicated on the *private* wrong, it does not matter whether the taker intended the conversion. He can be held liable for conversion even if he acted with a good-faith belief that he had the right to possess or use the thing (*Gilmore v. Newton*, 91 Mass. 171, 171–72 [1864]; *Smith v. Colby*, 67 Me. 169, 171 [1878]).

As this example illustrates, the common law considers public rights and private rights to be very different rights, even when the same act by the same person against the same person implicates both. Larceny, a public wrong, and conversion, a private wrong, are different wrongs because they infringe different rights, even when the act is performed on the same object of personal property. This distinction between public rights and private rights is architectonic in common-law jurisprudence (MacLeod 2020, 1293–1304). It determines the duty that the defendant is alleged to have breached, who has authority to abrogate the duty, the elements that a state or plaintiff must prove, the available defenses, the possible remedy or sanction, who has standing to initiate an action for a sanction or remedy, in which tribunal the action must be tried, and, sometimes, whether either party is entitled to a jury trial (MacLeod 2020, 1298–1314).

Most significantly for present purposes, the line between private and public rights determines the line between private and public wrongs. Blackstone taught this doctrine to American lawyers and constitutional framers (Blackstone 2016, 3:1–2; 4:1–4). Like much else, Blackstone obtained it from Hale (Finnis 2011b, 4:189–210). In the jurisprudence of Blackstone and Hale, a private wrong just is the infringement of a private right. It can be remedied either by self-help or by a private "suit or action in courts," which is brought by the person injured (Blackstone 2016, 3:2, 179–214). A public wrong—a crime or misdemeanor—infringes a public right. Public wrongs "affect the whole community, considered as a community" and "are a breach and violation of the public rights and duties, due to the whole community" (Blackstone 2016, 1:1; 4:3).

The entrenched divide between public and private rights protects defendants from both directions. Public wrongs can be sanctioned only in criminal proceedings initiated by an executive official of the state. A criminal defendant benefits from the rigorous protections of criminal procedure during the investigation phase (e.g., warrant and probable cause

requirements) and during the prosecution phase (e.g., the right to counsel). The prosecution must pass through the institutions of due process, especially the grand jury and petit jury and, modernly, hearings to exclude unlawfully acquired evidence. And, because the resources of governments are usually limited, prosecutors may exercise their discretion not to prosecute where the evidence of culpability is flimsy.

On the side of private right, an alleged wrongdoer is protected by the requirement of injury. To wrong a person is not to expose oneself to civil liability unless the act caused an injury to that person. Also, only the person injured may initiate an action for a remedy. The common-law doctrine of *jus tertii* forbids anyone to assert rights on others' behalf. As a result, we all enjoy immunity from freestanding lawsuits by would-be do-gooders and indignant virtue-enforcers who have nothing at stake in an act of alleged wrongdoing.

The common law's sharp distinction between private and public wrongs also benefits the whole community. It is an improvement over the more personal justice regimes of primitive societies. By replacing blood debts, the geld, the wergild, and the *lex talionis* with a jurisprudence of *public* rights and wrongs, the common-law jurists depersonalized the criminal law. Retribution replaced vengeance, which made it possible to put an end to retaliation. The point of punishment is no longer to vindicate a personal interest but instead to restore legal justice in the community as a whole.

The Fall of Innocence and the Rise of Criminalization

The Seeds of Overcriminalization in the Common Law

In tension with these architectonic securities for the innocent, the common law has always contained standing threats to the quietude of the innocent. One is the *qui tam* or relator action, which authorizes private persons to vindicate some public rights (Blackstone 2016, 3:108; 4:199). This procedure enlarges the pool of potential prosecutors. Nevertheless, before the twentieth century, relator actions were generally tied to inherently public rights, such as letters patent and the state's right not to be defrauded.

Another, more potent source of threat in common-law jurisprudence is the so-called *malum prohibitum* offense. Some criminal offenses are *mala in se*, inherently wrongful, such as "murder, theft, and perjury" (Blackstone 2016, 1:43). These are actions that one must never be willing to do because they are contrary to direct prohibitions of the natural law. But most crimes are not inherently wrongful. They are wrongful because a legislature decided to make them so as part of a legislative scheme to ameliorate some public harm or to secure some public good. Absent a positive law or other human convention prohibiting them, they are matters of indifference (Aristotle 1908, 5.7; Blackstone 2016, 1:43). Once enacted, these *mala prohibitum* offenses impose real legal obligations and carry threats of meaningful sanctions.

At least in theory, the category of *mala prohibitum* offenses is as expansive as the legislative imagination. They "become either right or wrong, just or unjust, duties or misdemesnors, according as the municipal legislator sees proper, for promoting the welfare of the society, and more effectually carrying on the purposes of civil life" (Blackstone 2016, 1:43). The power of a legislature to make inherently innocuous conduct into criminally culpable conduct by declaring it *malum prohibitum* carries the potential to turn all private interests into public rights and therefore to sweep away a structural protection for the innocent. And insofar as legislatures can craft rules in a nearly infinite variety of ways, they can authorize liability on persons without any requirement of culpable intention or a vicious will.

Zealous lawmakers have occasionally engaged in fits of overcriminalization throughout the history of the common law. For example, after the Norman Conquest, kings used forest laws to expand their monopoly on commons resources (Cox 1905, 3–5). And elites in England and colonial New England occasionally used anti-almsgiving and anti-vagrancy laws between the fourteenth and seventeenth centuries to deal with a variety of social ills from labor shortages after the Black Death to destitute beggars displaced by Henry VIII's closure of the monasteries and hospitals to migratory immigrants in colonial New England (Leonard 1900, *passim*; Foote 1956, 615–17; Trattner 1999, 19). But these instances were exceptional and usually were repealed or fell into desuetude within a generation or two.

Some legislatures prior to the modern era also enacted criminal laws dispensing with a requirement of culpable intention where the stakes of injury were very high. These include statutory rape laws under which ignorance of a minor's minority is no defense and laws imposing criminal sanctions on tavern keepers for serving inebriated patrons. These laws were exceptional. Justice Cooley provided the canonical explanation for these departures from the common law's basic principles. "Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible" (*People v. Roby*, 18 N.W. 365, 366 [Mich. 1884]).

Overcriminalization in the Modern Era

As those examples show, the use of strict-liability offenses to control segments of society or to avoid certain, serious harms was not new in the twentieth century. But this old trick became a mainstream tool of aspiring social engineers in the modern era. After Reconstruction, Southern states used the black codes to control the conduct of former slaves. Those laws often lacked *mens rea* requirements and criminalized innocuous conduct (Stewart 1998, 2257–63). Then, around the turn of the twentieth century, the common-law concept of crimes and misdemeanors came under sustained pressure as states used their criminal codes to pursue progressive policy goals by enacting

so-called "health and safety" offenses. These laws were characterized by their relaxation of the *mens rea* requirement and their sweep of all rights into the public domain.

Throughout the history of Anglo-American law, aspiring social engineers had sometimes expanded the category of *malum prohibitum* offenses beyond what seems just. Now the social engineers dispensed with the *malum*. So-called "public welfare offenses" proliferated. Justice Jackson famously described the phenomenon in his landmark opinion in *Morissette v. United States*, 342 U.S. 246 (1952), where he noted "a century-old but accelerating tendency, discernible both here and in England, to call into existence new duties and crimes which disregard any ingredient of intent." Modern dangers to health and safety persuaded legislatures of the need for strict-liability crimes, "which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare" (*Morissette v. United States* 1952, 253, 254).

It was a jurisprudential innovation that transformed overcriminalization from an occasional overreach into a mainstream legislative agenda. The innovation was the use of utilitarian jurisprudence to justify it as a valid employment of public law. That utilitarian jurisprudence came to dominate the American legal academy with the rise of American Legal Realism, and in 1962 the American Law Institute endorsed it with the publication of the Model Penal Code. It is now firmly entrenched in American jurisprudence.

Nevertheless, the older concept of crime as an intentional act of public wrongdoing persists alongside the modern, consequentialist notion, because common-law crimes are still defined by concepts of culpable intention and public right. And, as Jackson ruled in *Morissette*, positive laws that describe crimes using common-law terms of art must be interpreted to declare and incorporate common-law limitations on criminal liability. It is in the nature of public wrongs to be intentional and culpable, Jackson taught. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" (*Morissette v. United States* 1952, 250).

As legislatures codify common-law crimes, courts have assumed "that intent was so inherent in the idea of the offense that it required no statutory affirmation" (*Morissette v. United States* 1952, 252). Judges have a continuing duty to employ this interpretive heuristic unless express language in a statute directs them to convict without evidence of a culpable intention (*Elonis v. United States*, 575 U.S. 723, 734 [2015]). Thus, we have the resources in our existing law to restore the connection between criminal punishment and desert and also the legal securities for innocence that are entailed in that connection.

Retribution as a Humane Alternative

Authority and the Common Good

To see why retributive punishment treats persons more humanely than consequentialist theories of punishment, it is helpful first to understand the concept of legal authority within which retribution is nested, which makes retribution make sense. This concept of authority can be traced back to the ancient Greeks but enjoys its fullest articulation in contemporary jurisprudence. It is known as either "natural justice" or "natural law" in the writings of its most influential proponents: Aristotle, Cicero, Justinian, Thomas Aquinas, Matthew Hale, and John Finnis.

Natural law justifies and explains legal authority without the necessary aid of the consent of the governed. Though a rational consensus of a government's legitimacy and the resultant assent of a majority of a society's members certainly strengthens authority in practice, a lack of consent does not alone defeat the legitimacy of a public authority in principle. This matters for criminal punishment for two reasons. First, a natural law account of authority and justified punishment transcends modern, Western democracy. It explains why and to what extent criminal sanction is justified whether or not a society's constitutional regime is predicated on popular sovereignty. Second, it requires no demonstration that persons have a natural right to punish each other in a state of nature or in the case of society's breakdown (Bradley 2012, 3–4). Whether or not people have such a natural right, the authority of the political community as a whole can stand on its own justification.

According to natural law theorists, the true grounding of justifiable authority is something called the common good (Finnis 2011a, 134–60). The common good is complex, and the concept of a common good is contested. But its least controversial attribute is that it is shared by the members of a community. This sharing of the common good entails that each and every member of the community has strong reasons—sometimes conclusive and exceptionless reasons—to act for the good of the community in the ways required by the community, often at the expense of individual interests (Finnis 2011a, 245–59).

A community often determines how its members will cooperate to achieve the common good by promulgating rules, rendering judgments, and imposing legal obligations by other means. Once the community has settled the particular rules needed to ensure cooperation of the community's members, each member of the community has an obligation to obey those rules. The reason for this obligation is the benefit that all of the members enjoy—participation in the common good—which would be destroyed if each member of the community were free to decide for himself or herself what goals to pursue and how best to pursue them.

The common good can be as complex as national security during a time of war or as simple as the purchase of a ham sandwich at the local deli. To take a simple example, imagine a group of law students who gather each week to study property law. The members of this study group have subsumed some parts of their individual plans and actions within a common good: the shared value of the knowledge of property law. To realize this great good, the students must contribute or sacrifice time, effort, sociability, and understanding that they might otherwise expend elsewhere on other projects. It makes sense for them to make those sacrifices because within the group they can obtain a fuller measure of the good they all seek than any of them can obtain alone. This good that they seek is good for each and all of them. Its realization is not a zero-sum gain but rather a shared, increased gain.

Once the group's members have committed to the group's goal and to the rules chosen to achieve the goal (whether those rules are express or implicit), each member of the group has a conclusive reason to satisfy the expectation of each other member that he will participate according to the rules. The study group cannot achieve its goal of understanding possessory estates and future interests if its individual members do not show up at the appointed time each week. It may fail to attain the full understanding of subjacent support rights and the duties of a bailee if its individual members do not share their case briefs and class notes with each other. Once the group has settled on the time, place, and means of cooperation, each member of the group is bound to all the other members as a matter of justice to act for the reasons settled by the group.

A political community, such as a state or nation, is obviously far more complex than a study group. But the same principles are at work. To take a well-worn example, to achieve the common good of safe travel on the roads, the state must require everyone to drive on the same side. The choice of a side is morally arbitrary. Neither right nor left is a strict requirement of reason or natural justice. But once the state has chosen the right (or left) side and promulgated that choice as a rule of law, everyone now has an obligation of *legal* justice to drive on that side of the road. To disobey the rule is to act contrary to the common good, a good in which each person participates and from which each person benefits.

So, laws are instrumentally necessary to achieve the common good. And everyone has good reasons to obey the laws. There are only two ways to determine the rules of law that make the common good possible—either unanimous consent or authority. In large, complex communities, unanimity is always impossible. So, communities stipulate some authority to decide what the law shall say. Once the authority is exercised to make a legal determination, such as a rule of law or judgment, that determination binds the community's members in justice.

Gerard Bradley's Theory of Retribution

Within that theory of authority, retribution makes sense. And, in turn, retribution makes sense of norms and institutions that have long governed our exercise of penal power. Gerard Bradley explains why retribution must be the central purpose of any justifiable criminal sanction. If it is not, then privations inflicted upon a person may be a system of social control, attempts to improve the person's mental health, or an act of collective scapegoating, but they cannot be justified acts of punishment (Bradley 1999, 105). "Scapegoating the innocent is immoral, for it cannot be understood by those doing the scapegoating as punishment at all, for by hypothesis they know that the individual being sacrificed has done nothing wrong" (Bradley 2003, 28–29). If a society is to deprive a person of his life, liberty, or property *as a person*—a rational, moral agent—and not merely as a means to some collective end, then the punishment must be deserved and proportionate to the offense.

Bradley's argument picks up where the natural-law argument for authority leaves off. To participate in society is to accept the terms of cooperation within that society. Where some valid authority has been exercised to specify the rules and obligations necessary for the society's members to get along, each member of the society who remains forfeits his freedom to act upon his own "judgments about what is required for successful cooperation" (Bradley 1999, 106). We all benefit from the authoritative specifications of the rules because those rules make it possible for us to cooperate, either negatively by avoiding harm to each other, or positively by achieving common goods that we could not achieve alone, such as national security and civic education.

Whatever else it is, a criminal act is always a usurpation of liberty contrary to the boundaries that are settled in our laws. It is an exercise of one's own judgment about what is reasonable to do, notwithstanding that none of us has the freedom to render such judgments contrary to the law. So, a criminal has, in a sense, cheated. He has accepted the benefits of societal cooperation without accepting the burdens of living under the law. The purpose of a criminal sanction is to deprive him of his ill-gotten gains and to restore the equilibrium of will that pertains between law-abiding persons in community (Bradley 1999, 106–7; 2003, 23).

How can that be accomplished? If we think exclusively in terms of tangible losses to individual victims, retribution will remain mysterious. Only some crimes involve theft of tangible goods or property whose loss can be compensated in money. It makes no sense to think of taking an assault away from a perpetrator, or removing a sale of narcotics from a drug dealer. And, though some public laws authorize judges to order restitution to victims, there is no sense in which restitution makes the victim whole or restores the *status quo ante*.

Retribution serves its purpose by putting the criminal's will back in its proper place, under the law. The criminal usurped the liberty of the community by asserting his own will contrary to the settled laws. This is why a crime is an infringement of a *public* right, a right held in common by all, whether or not the wrongful act deprives any person of his private rights. What makes the criminal's conduct wrong and worthy of punishment is his "unilateral grab of more liberty than he is due. This is the morally reprehensible preference for one's own will over the prescribed legal course and at the expense of the common good" (Bradley 2012, 8).

To achieve its purpose, the criminal sanction must be symmetrical to the usurpation. It must take away the extra measure of personal autonomy that the criminal arrogated to himself. "The essence of punishment ... is imposing upon the criminal's will, to make him suffer some deprivation of liberty to do as he pleases, to be entirely the author of his own actions" (Bradley 1999, 107).

The same account works to justify punishment for *mala in se* offenses, though for different reasons. No exercise of political authority makes assault (for example) wrongful; it is wrong in and of itself. So, no one has sacrificed any liberty to exercise his own rational judgment when he refrains from punching someone in the face. But Bradley explains how an unpunished *malum in se* offense nevertheless harms the law-abiding members of the community. If "there were no recognized or effective punishing authority, persons would justifiably take steps to protect themselves against threatened assaults, and thus act directly for the common good by punishing criminals" (Bradley 1999, 108). Instead, we have all ceded that liberty and power to the public authority. To allow an assault to go unpunished is to breach this public trust.

Unpunished crimes also undermine respect for the rule of law. This too harms not only crime victims but also everyone else. Thus, so-called victimless crimes also harm the public. If a community prohibits public intoxication, for example, then to get drunk in public is to exercise one's own discretion about what the common good requires or forbids, contrary to the settled determinations of the community. "The essential injustice of criminal acts—the unfair usurpation of liberty—is the same" whether or not any individual member is victimized (Bradley 1999, 108).

By contrast to retribution, the modern theories of punishment that C. S. Lewis ably criticized cannot explain why we should not punish the innocent. A utilitarian justification, such as deterrence, may at any time require us to sacrifice an innocent person for the greater good of the greatest number. A rehabilitative theory may require us to impose unwanted treatment or reeducation upon those who do not exhibit the correct attitudes or opinions. We may discover motivations to incapacitate a person though he has done

nothing culpable. None of the modern theories necessarily connects punishment to the deprived person's act of will, nor to any sense in which we could say that the privation is deserved.

Nevertheless, retribution makes sense even of the modern theories. Retribution has room for deterrence, rehabilitation, and incapacitation as secondary justifications for punishment, so long as the person upon whom we inflict a penal privation deserves it, in the sense required by retributive theory (Bradley 2003, 19–20). "A system of punishment determined solely by retributive aims would not serve the common good of society." The common good may in many cases require consideration of punishment's secondary aims of deterrence, rehabilitation, and incapacitation (Bradley 1999, 123).

It is generally unjust to inflict treatment on a person without his informed consent, especially if that treatment deprives him of his liberty. But rehabilitation is not unjust if it is a secondary aim of punishment. A state that undertakes to deprive convicted criminals of their liberty has a paternalistic responsibility toward them during their period of confinement. A prisoner's welfare remains part of the common good while he is a prisoner (Bradley 1999, 115). Therefore, it is not only justified but also right for the state to make efforts to help free him from addictions and to address other conditions that may contribute to his antisocial behavior.

Likewise, deterrence and incapacitation are not by themselves sufficient justifications to imprison a person. To deprive a person of his liberty in order to achieve a collective sense of safety is to treat a human being as a mere means rather than an end in himself. Warehousing people who are deemed too dangerous, just as such, is not punishment at all. But it is not unjust to take incapacitation and deterrence into account when determining the punishment of a person who deserves to be punished. "The *central* point of sentencing criminals is to restore the order of justice, disturbed to the extent of the criminal's unfair appropriation of liberty" (Bradley 1999, 118). If a criminal sentence is aimed at that objective, then it may reasonably be adjusted to achieve secondary aims as well (Bradley 1999, 116–22). Bradley argues that deterrence may be a good reason to enhance a sentence that is already justified on retributive grounds as long as the enhanced sentence involves no intentional harm to the criminal's life or health (Bradley 1999, 120).

When justified criminal punishment restores the order of justice between the perpetrator and the community as a whole, it can also restore the order of justice between perpetrator and victim. Like deterrence, rehabilitation, and incapacitation, restoring the victim's loss is not by itself a sufficient justification for criminal punishment. Making victims whole is why we have doctrines and remedies of private law. And we do not want retribution to devolve into vengeance, nor the coercive powers of the state to be bent toward private ends. But restitution can be an auxiliary aspect of criminal

justice insofar as restorative justice can be a secondary aim of retributive punishment. If restitution to the victim is part of the punishment, and the punishment is justified on retributive grounds, then restoration of justice between perpetrator and victim can be an intrinsic aspect of the punishment and not merely an end for which the perpetrator is punished as a mere instrument. Punishment can be an "instrument of restoration" as long as it is not used solely as an instrument (Ballor 2008, 489).

Doctrinal Implications

Preserve the presumption of innocence. Retribution explains the presumption of innocence in our fundamental law. Indeed, if the theory of retribution is correct, then justice requires an exceptionless prohibition against intentionally punishing the innocent and strong legal safeguards against unintentionally punishing the innocent. This is "an implication of the retributive justification for the punishment of *anyone*" (Bradley 1999, 109). Where no one has usurped his liberty under the law—where no one has undermined the rule of law or placed himself above his fellow citizens—there is "no order of justice to be restored" (Bradley 1999, 109). To impose a privation on an innocent person is not to punish him. It is not to restore the equilibrium that pertains in a community ruled by law. It is instead to act contrary to the good of that person on purpose, which is wrong.

Punishing the innocent is unjust in other ways as well. To impose criminal sanction on a person whose conduct was innocuous is either to stigmatize as morally deficient a person who is not guilty or to dilute the moral opprobrium that justly attaches to a rightly convicted criminal (or, in some measure, both) (Bradley 2012, 7–8). The first is a direct injustice to the convict. The second undermines confidence in and respect for public law. Bradley gives the example of "overtime parking, a trivial violation of the motor vehicle code that probably everyone who has ever driven has committed at some time." To overcriminalize that offense would be to sever the "connection between a moral defect and a criminal offense," which resides in the minds of the community's members and which does a lot of work in sustaining law and order (Bradley 2012, 8).

Restore the requirement of culpable intent. Retribution also explains the requirement of a criminal intention or vicious will and the correlative prohibition against punishing a person who lacked *mens rea*. In particular, it provides a strong reason for legislatures not to enact laws imposing strict criminal liability. A person who did not choose to violate the law, either because he did not intend his action or because he did not know underlying facts that rendered his conduct contrary to another's right, has not performed the conduct that predicates just punishment. Because a person who lacked culpable intent "never chose to commit a morally blameworthy act, society should not punish him with a device (the criminal justice system) that

operates best, from a moral perspective, when its application is limited to parties who have grabbed for more gusto than their share allows" (Bradley 2012, 8).

A "mirror image" of the concern for criminal defendants who lack a culpable will is the concern for everyone else, who will fail to be encouraged in their lawfulness if public law overreaches (Bradley 2012, 8–9). The entire apparatus of criminal law, prosecution, due process, and punishment is in place partly to send the message "that crime does not pay and that, by observing the law, the rest of society is not made into hapless losers" (Bradley 2012, 8). We cannot secure the continuing cooperation of our law-abiding neighbors if they conclude that to obey the law is to be a chump or sucker (Bradley 2012, 8–9; Finnis 2011a, 262). When a person is convicted for violating a strict-liability offense, the defendant cannot be described as a usurper and no one else can be described as a chump. No one was given the choice whether to obey the law or not.

Bradley acknowledges the maxim that ignorance of the law is no excuse. But he argues that overcriminalization is a policy issue "not a court-room issue" (Bradley 2012, 8). In part *because* we hold people criminally liable even when they were not aware that public law forbade their conduct, public law should not forbid more naturally innocuous conduct than is strictly necessary to secure the common good. The possibility that a person could be punished without ever having "chosen selfishly to prefer their own will is a very good reason *not* to enact proposed strict liability criminal laws" (Bradley 2012, 8).

Keep private rights private. Finally, retribution gives us reason to preserve the fundamental distinction between public rights and private rights and the correlative distinction between public wrongs and private wrongs. On the retributivist account, criminal punishment is required and justified to restore the balance between the usurper and the rest of the political community: the *public*. Whether or not the criminal has caused harm to any victim—whether or not, for example, he has perpetrated larceny against a private property owner or instead an act of public intoxication against no one in particular—he is culpable, to the extent that he is, and deserves punishment, to the extent that he does, for infringing a *public* right. He must be afforded the due process required to convict a person of a crime.

Retribution by itself does not provide a reason to insist upon inherent differences between public rights and private rights. Legislatures may, in the exercise of their judgment, criminalize all sorts of conduct for the common good. And the theory of retribution, standing alone, does not give us a principled reason to object. Indeed, it takes as given that a legislature has enacted laws containing criminal sanctions, that those laws are enacted for the common good, and that every member of the community has an obligation

to obey. That a member of the community believes that prohibited conduct should have been left to the domain of private law is not a sufficient reason to disobey the criminal law. That would be a usurpation of liberty.

However, we do have reasons to maintain a bright line between public and private and to leave most practical problems to private law. Such reasons are found in other areas of jurisprudence. Private-law theorists argue that the bilateral structure of most private rights is radically different from the multital structure of public rights (Weinrib 2012). Unlike the internal morality of public law, the internal logic of private law does not lend itself to social engineering or control of society as a whole (Zipursky 2013). And, while private groups and associations are organized around basic, common goods, such as knowledge (schools and universities) and children (the family), the common good of the political community as a whole is inherently instrumental (Finnis 1998, 225–27). This means that individual persons and groups and associations of persons within a state have private goods and virtues that are not subsumed or accounted for within the political common good. This limitation on the common good of the political community entails principled limitations on the justifiable scope of public legislation where private rights are in place to secure the basic goods of a society's plural institutions (MacLeod 2021).

The theory of retribution strengthens those reasons to preserve the independent domain of private rights and to limit the prosecutions of private remedy and public sanction to their respective jurisprudential domains. It teaches that a wrong suffered by a crime victim is not the wrong that justifies any criminal sanction. So, criminal sanctions should not be used to remedy private rights *as such*. The move in the last century to collapse the distinction between private and public wrongs was, far from a progression, actually a regression to the primitive, premodern regime of personal vindictiveness. Contemporary, victim-centric criminal enforcement looks similar to the laws of restitution and vengeance that one finds in Hammurabi's Code and the Levitical laws of the ancient Hebrews (MacLeod 2008).

Our common law neither makes victims the arbiters of public justice nor requires any victim before requiring that public justice be done. Some crimes have no victims; they infringe only public rights. Other crimes are double wrongs. As Blackstone correctly insisted, where a perpetrator injures a victim, he has infringed two different rights, one private and one public, and therefore has committed two different wrongs by his wrongful act (Blackstone 2016, 4:3–4). The two wrongs should not be conflated in the same action.

The existence of remedies for private wrongs takes pressure off our institutions of public justice. That a person has infringed another person's private right does not alone justify resort to public sanction. Where civil

actions are in place to remedy private wrongs (e.g., nuisance, waste, defamation), legislatures have sound reasons not to expand the category of crimes to encompass those wrongs.

Legislatures may have reasons to impose criminal sanctions for conduct that the law deems a private right for other reasons, namely, reasons of the common good. For example, an act of private nuisance may also be an act of public nuisance, such as pollution of a river. But it is not enough to justify a criminal, health-and-safety regulation that someone would be harmed by the prohibited conduct. And where the law contains both remedy and sanction for the same conduct, as in the case of conversion and larceny, the criminal sanction should apply only to intentional, culpable conduct. And the civil remedy for the private wrong should be pursued according to the internal logic and justifications of private law, while the criminal sanction for the public wrong must be pursued according to the internal logic and justifications of public law, primarily retribution. Civil proceedings should not be used to justify criminal punishment. And public officials should not prosecute civil actions on behalf of private persons who have not suffered any injury. To understand retribution is to understand the soundness of the doctrine of *jus tertii* in private law and the necessity of criminal procedures in public prosecutions.

Conclusion

In common-law jurisprudence, the purpose of criminal sanction is to enable a criminal to pay his debt, incurred when he infringed a public right. Criminal punishment is limited to that purpose, and the structure and institutions of the common law are set up to immunize the innocent. In the modern era, legislatures expanded the category of *mala prohibitum* offenses as a way to engineer society. They eliminated the requirement of a culpable intention from entire categories of crimes. And legal theorists reconceptualized criminal punishment on consequentialist grounds. Overcriminalization became a pervasive problem.

Gerard Bradley offers a more detailed account of the old idea of retribution. That account can be cashed out in legal doctrines that secure the presumption of innocence and limit the corrosive effects of strict-liability criminal offenses. This new articulation of an old juristic concept provides a conceptual basis to roll back overcriminalization and build a humane culture of criminal punishment.

Submitted: April 15, 2024 EST. Accepted: September 17, 2024 EST. Published: February 20, 2025 EST.

REFERENCES

Aristotle. 1908. *Nicomachean Ethics*. Translated by W. D. Ross. Oxford: Clarendon.

Ballor, Jordan J. 2008. "To Reform or to Abolish: Christian Perspectives on Punishment, Prison, and Restorative Justice." *Ave Maria Law Review* 6:481–511.

Blackstone, William. 2016. *Commentaries on the Laws of England*. Edited by Ruth Paley. 4 vols. Oxford: Oxford University Press.

Bradley, Gerard V. 1999. "Retribution and the Secondary Aims of Punishment." *American Journal of Jurisprudence* 44:105–24. https://doi.org/10.1093/ajj/44.1.105.

———. 2003. "Retribution: The Central Aim of Punishment." *Harvard Journal of Law & Public Policy* 27:19–31.

———. 2012. "Retribution and Overcriminalization." *The Heritage Foundation Legal Memorandum* 77:1–9.

Cox, J. Charles. 1905. *The Royal Forests of England*. London: Methuen. https://doi.org/10.5962/bhl.title.27555.

Finnis, John. 1998. *Aquinas: Moral, Political, and Legal Theory*. Oxford: Oxford University Press.

———. 2011a. *Natural Law and Natural Rights*. 2nd ed. Oxford: Oxford University Press.

———. 2011b. *Philosophy of Law*. Vol. 4 of *Collected Essays*. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199580088.001.0001.

Foote, Caleb. 1956. "Vagrancy-Type Law and Its Administration." *University of Pennsylvania Law Review* 104:603–50. https://doi.org/10.2307/3309853.

Hale, Matthew. 2015. *Of the Law of Nature*. Edited by David S. Sytsma. Grand Rapids: CLP Academic.

Leonard, E. M. 1900. *The Early History of English Poor Relief*. Cambridge: Cambridge University Press.

Lewis, C. S. 1970. *God in the Dock*. Grand Rapids: Eerdmans.

MacLeod, Adam J. 2008. "All for One: A Review of Victim-Centric Justifications for Criminal Punishment." *Berkeley Journal of Criminal Law* 13:31–64. https://www.bjcl.org/assets/files/13_1-BerkeleyJCrimL31.pdf.

———. 2020. "Public Rights after *Oil States Energy*." *Notre Dame Law Review* 95:1281–1337. https://ndlawreview.org/wp-content/uploads/2020/03/7.-MacLeod.pdf.

———. 2021. "The Boundaries of Dominion." In *Christianity and Private Law*, edited by Robert F. Cochran Jr. and Michael P. Moreland, 109–25. London: Routledge.

Pollock, Frederick, and Frederic William Maitland. (1898) 2010. *The History of English Law before the Time of Edward I*. 2nd ed. 2 vols. Indianapolis: Liberty Fund.

Stewart, Gary. 1998. "Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions." *Yale Law Journal* 107:2249–79. https://doi.org/10.2307/797421.

Sytsma, David S. 2017. "Matthew Hale as Theologian and Natural Law Theorist." In *Great Christian Jurists in English History*, edited by Mark Hill and R. H. Helmholz, 163–85. Cambridge: Cambridge University Press. https://doi.org/10.1017/9781108125901.010.

Trattner, Walter I. 1999. *From Poor Law to Welfare State: A History of Social Welfare in America*. 6th ed. New York: The Free Press.

Weinrib, Ernest J. 2012. *The Idea of Private Law*. Oxford: Oxford University Press. https://doi.org/10.1093/acprof:oso/9780199665815.001.0001.

Zipursky, Benjamin C. 2013. "The Inner Morality of Private Law." *American Journal of Jurisprudence* 58:27–44. https://doi.org/10.1093/ajj/aut002.