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# **Introduction to the Special Issue on The Problem of Punishment: Renewing Critique**

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*This introduction presents a collection of papers by Alan Norrie, Craig Reeves, Susanne Karstedt, Tiffany Bergin, Michael Koch, Mary Bosworth, Anastasia Chamberlen, Henrique Carvalho and Anita Dockley. It briefly discusses the origins of this collaborative research project, and outlines the theme, aims and format of the special issue, which calls for an interdisciplinary, theoretically informed and conceptually and practically critical examination of punishment today. It then provides a summary of the approach and argument of each of the contributions to the issue and offers a few reflections on ways forward.*

Today, more than ever, we legal scholars, criminologists, philosophers and sociologists, should be re-examining punishment. As the world at large experiences a series of social, political and economic ‘crises’, and these interact with shifts and transformations in notions of security, belonging, justice and social order, the many different established consensuses of the late nineties and early noughties in relation to punishment theory and practice find themselves on insecure ground and in need of reassessment. On the one hand, we can observe that punishment, as idea, institution and practice, occupies a solid and undisputed presence in criminal justice systems and in a range of public policies and public discourses. For instance, prison building and expansion continues to increase in many parts of the Anglophone world, and new technologies and the involvement of the private sector in the delivery of policing and punishment have now established our communities as perpetually insecure and in need of austere protection and punitive and ‘tough’ interventions. At the same time, challenges brought forth by economic crises and austerity, by burgeoning prison populations, and by rising ‘global’ challenges such as terrorism and mass mobility, among others, have not only influenced the way in which punishment is practiced and discussed, but also exposed limitations in how punishment is theorised and understood.

With this special issue, we want to suggest that our troubling contemporary moment may provide us, punishment scholars, with a unique opportunity to inquire into the foundations of our field and to renew our engagement with it. The collection of articles in this issue comprises a collaborative effort to re-examine and critique some of punishment’s contemporary conceptualisations and applications, but also an attempt to return to some of the basics about punishment theory and scholarship. It emerged out of a series of research seminars on the theme of ‘The Problem of Punishment’ in 2016, which aimed to pursue a trans-disciplinary examination of the role of punishment that bridges gaps between philosophical, legal, psychosocial, sociological and political understandings of punishment; it sought to raise awareness of, and to challenge, the way in which punishment is predominantly practiced, promoted, and taken for granted in contemporary public discourse. These dialogues served to highlight how the problem of punishment expresses broader aspects, contradictions and transformations in contemporary Anglophone societies, so that it is

intrinsically linked to issues of social and political identity that have remained relatively under-recognised in recent scholarship.

Though espousing different perspectives, all the articles in this issue approach punishment as a social phenomenon, concept and institution that serves a range of functions, but is also infused with trepidations and contradictions. The proposed starting point for each paper was to see punishment itself as a social problem in need of more comprehensive questioning and critique, and as an intellectual device in need of a more thorough, ideally transdisciplinary examination. All the contributors to this collection were asked to offer their reflections on this theme, by actively engaging in their contributions with at least one of the following questions:

- a) What is the relation between punishment (as idea, institution, process, and/or phenomenon) and new problems and developments in society, politics, law and criminal justice?*
- b) What kinds of theoretical / empirical / methodological tools could be used and developed for us to properly engage with the problems that punishment poses today?*
- c) What should punishment scholarship today be about, and what should it endeavour to become? More specifically, how do we, as punishment scholars, renew and advance critique on and around punishment?*

The result, we are pleased to say, brought forth provocative interventions which identify and examine problems in how punishment is understood and conceptualised; in how it has been justified and integrated into our social lives and political environments; in who it targets and consequently excludes; in how it is practiced and diversely applied in different contexts; and also in what it expresses, in how we feel about it and how we identify with it. In the following section, we briefly draw out some of the special issue's main themes, and summarise the arguments advanced in the individual contributions. Then, in the final section, we reflect on how some of these insights can be taken forward.

### **How can the problem of punishment be understood, studied and expressed?**

The articles in this special issue, although in many ways sharing a similar approach to the problem of punishment, which can be characterised as socio-legal, draw upon different kinds of theoretical and methodological inspiration, reflecting the issue's call for an actively critical and trans-disciplinary examination of the problem of punishment. Although, geographically, the discussions in this issue are predominantly limited to Anglo-American debates and scholarship, within these limits they cover a variety of contexts, ranging from rhetoric, policy and practices around sentencing and prisons, to migration detention and control, transitional justice, and the nature, shape and language of punishment and criminal justice more broadly. These concepts are also explored from a variety of perspectives, which include quantitative and qualitative methodologies, and a critical engagement with philosophical, psycho-analytical, psycho-social, sociological, criminological and legal scholarship.

In his contribution, 'Love in Law's Shadow: Political Theory, Moral Psychology and Young Hegel's Critique of Punishment', Alan Norrie begins by reflecting on a gap within existing critiques of punishment, which he argues can be examined by looking at the relationship

between the appeal and limits of the formalistic juridical expression of punishment on the one hand, and lessons gathered from alternative, more concrete pursuits of justice, such as restorative and transitional justice, on the other. For Norrie, the attraction in punishment is related to its conceptual structure, which he calls its 'moral grammar', linked to ideas of blame and violation. This moral grammar has been placed at the core of the juridical understanding of punishment, but in an abstract, rationalised manner; at the same time, these concepts still retain a deeper, moral psychological meaning. Norrie's argument, then, is that de-coupling blame from the state apparatus, from political theory and from its function of social control, enables us to understand the other psychological forces necessary for blame to work, such as love. It also helps us better understand punishment, since punishment continues to rely on, at the same time as it reduces and distorts, this moral grammar.

Norrie pursues this argument primarily through a critical exploration of Hegel's early work, which Norrie argues can help us 'deepen our critique of law and punishment, by understanding what is at stake in a moral grammar of violation, and how modern state practices both suppress and are legitimized by it' (this issue, p. 17). This theoretical discussion is applied in the article to contexts such as Colombia's recent 'plebiscite for peace', and the Forgiveness Project, engaging with 'the voice of victims whose real moral experience makes them aware of law's limits' (this issue, p. 17).

Norrie's paper hints at a deeper study of moral psychology as a potential pathway to properly understanding the problem of punishment, and moving beyond it. This intuition is directly addressed, and explored in detail, by Craig Reeves's article, 'What Punishment Expresses', which draws on psychoanalytic and philosophical scholarship to examine and illustrate the expressive function of punishment. According to Reeves, philosophical accounts of punishment usually presume or promote a moralising psychology, rather than offering a genuine psychological account of the moral categories on which it relies. The latter is important, Reeves argues, because it exposes the limitations and detrimental consequences of punishment, thus allowing for a more concrete, and experientially grounded, normative critique of punishment, and especially of retributive thinking. To pursue this line of argumentation, Reeves engages with the work of 'object relations' scholars within the British psychoanalytic tradition, such as Donald Winnicott and, especially, Melanie Klein's work on the depressive and persecutory positions. Reeves's argument, in a nutshell, is that 'Punishment plays out politically the paranoid and split phantasy of a persecutory, hostile world that has always been at the core of liberal modernity's self-image' (this issue, p. 13). This persecutory worldview, which sees objects as either predominantly good or predominantly bad, therefore prevents us from recognising the complexity and ambiguity of human relations and society, and thus from achieving a more fulfilling and emancipatory, if difficult, engagement with others.

In their paper 'Critical Junctures and Conditions of Change: Exploring the Fall of Prison Populations in US States', Susanne Karstedt, Tiffany Bergin and Michael Koch deploy a quantitative approach through comparative case analyses and multivariate analyses to examine legal changes and transformations in penal policy in the US. Approaching the question of the decline in US prison populations between 2009 and 2015, as well as shifts in sentencing and legal practice, they argue that policy processes, rather than structural conditions, are the main drivers of penal change. Looking at the roles of a range of penal

actors, they scrutinise the links between shifts in penal attitudes, shifts in law, and decreases in some prison populations: they suggest that sometimes the path to penal reform can be complex and contradictory, and argue that a combination of the financial and criminal justice crises worked together to create a 'critical juncture' that enabled 'a sense of emergency among policy actors and the public, and instigated new coalitions for change and shaped an environment for change' (this issue, p. 16). With this analysis, the authors conclude that the punitiveness of a criminal justice system can drive but also hinder legal change. Meanwhile, legal change itself can be inhibited from within the system even when promoted by a liberal citizenry. This is so because it appears that judges who were elected in previous periods can act as 'the spoilers of some types of changes', meaning that the 'justice system itself has a certain level of path dependency and inertia' (this issue, p. 16). The authors also confirm the relationship between politics and penal policy: they find that a key indicator for penal change is the influence of political elites, but unlike in previous periods, they find that the public is no longer influencing penal policy.

With this in mind, the authors warn against grand narratives in punishment research and call for a more nuanced examination of sentencing and penal practice. The paper critiques dominant criminological and political economy perspectives that attempt to overly synthesize the problem of punishment into macro-narratives, and suggests that important trends in penal change as well as broader shifts in social sentiments on punishment will be overlooked if we remain 'locked into punitive world views' (this issue, p. 17) that are not attentive to the local micro-dynamics of penal policy and reform.

Also using an empirical perspective, but this time focused on qualitative analysis, Mary Bosworth's 'Immigration Detention, Punishment and the Transformation of Justice' uses first-hand accounts of staff and detainees in immigration removal centres in the United Kingdom to raise questions about the 'co-constitution' of border and criminal justice control. Bosworth adopts a critical perspective driven by sociological, criminological and legal scholarship to reconsider the role of punishment in our age of mass mobility, and suggests that the penal realm has expanded into, and become co-constitutive with, immigration control, broadening its span and raising questions about its social function. As lack of citizenship status is impacting and increasingly burdening foreign people in relation to a range of administrative and criminal penalties, she argues that key features of modern punishment and justice, such as due process, are now challenged, and that these developments have therefore transformed access to justice. This expansion of punishment, and its differential treatment of foreign people, have put its liberal foundations into question.

By drawing together these links between border control and criminal justice control, Bosworth highlights the discriminatory, unequal and politically motivated nature of immigration detention, and considers whether immigration detention should be understood as punishment. The merging of immigration and criminal law, and key features of immigration detention, including its experienced uncertainty, have significant painful consequences for staff and for detainees, who often feel it to be 'deliberately punitive' (this issue, p. 2). Bosworth concludes that it is no longer helpful to see criminal justice, immigration policy and deportation as separate matters. Indeed, she argues, immigration detention and deportation 'reflect a broader trend towards exclusion' (this issue, p. 12) that has changed social and economic policies and has also had significant impact on criminal justice practice. For scholars

of punishment this is especially important, for when immigration control and criminal justice 'converge, their effects and rationales mingle' (this issue, p. 12), thus changing the nature, function and practice of contemporary punishment.

Picking up another feature of the social function of punishment as institution, its regular tendency to find itself in cycles of so-called 'crises' and 'reforms', the paper by Anastasia Chamberlen and Henrique Carvalho, 'The Thrill of the Chase: Punishment, Hostility, and the Prison Crisis', looks at what has been termed the current prison crisis in England and Wales. Examining recent policy and political discourses, the paper discusses features of this most recent crisis, including aspects of the deterioration of prison conditions, cuts in prison staff, and increases in self-harm and suicides among prisoners. Chamberlen and Carvalho then explore the relationship between current political rhetoric, recent policy proposals for penal reform, and theoretical critiques of the prison to ultimately unpack the links between the purpose of punishment and the role of reform within this purpose. In so doing, they not only question the nature and function of punishment, but also challenge the underlying motivations for the perpetual but continuously unfulfilled political promises for prison reform. The authors argue that, as part of punishment's ascribed utility and inevitability, on a symbolic level, its institutions, like the prison, will always seek to act out features of progress and reform, at the same time as they need to preserve their inherently violent and problematic aspects. Using a social theoretical critique that draws on the works of Foucault and Durkheim as well as a range of contemporary critical criminologists, the paper suggests that these efforts toward reform are linked to an illusory but emotionally appealing sense of utility ascribed to punishment, examined through the concept of hostile solidarity, which is maintained even in periods of crisis.

While all the previous papers in this issue illustrate the importance of methodologically rich and disciplinarily and conceptually open investigations into contemporary punishment, engagement with the problem of punishment is not something that only happens within academic scholarship. Indeed, the troubling and devastating effects of punishment have long been at the core of significant campaigns and activism, and are also shaping much of an emerging, public voice that wants to provide an alternative to populist punitive mantras. In 'A Chance to Reimagine Punishment and Penalty?', Anita Dockley, Research Director of the Howard League for Penal Reform, considers whether the current state of punishment and criminal justice provide us with an opportunity to rethink these fields. Her paper offers a valuable contribution to this question, that speaks to the necessity of adopting creative interdisciplinary research in promoting practical and viable change in criminal justice. Dockley identifies two areas that provide particularly fertile terrain for where such research can develop. The first relates to the current crisis in the legitimacy of punishment, which to her is linked to the diminishing public trust in established political elites. Rethinking the legitimacy of punishment, she argues, invites us to develop strategies to increase and repair civic trust among marginalised populations, and among those individuals and communities affected by punishment; this both implies and requires efforts to democratise criminal justice. Dockley also makes the case for a new language around punishment, one that can potentially offer a new sociological imagination in this area, and divorce the idea of justice from the idea of penal harm, thus acting as a transformative driver for a new, less harmful justice system.

**Ways forward: renewing critique on punishment scholarship**

Looking ahead, perhaps the main insight that can be taken from the discussions undertaken in this special issue is that we must remain attentive and inquisitive in relation to the ways in which punishment is and has been studied. We need to avoid allowing the problematic nature of punishment to spill into a problematic form of punishment scholarship, which is blind to important issues, narrow in its focus, and which sustains an impasse between theoretical, empirical and other, non-legal and criminological perspectives. The recent 'crises' in punishment and the broader manifestations of its logic evidence the need for punishment scholarship to remain 'unsettled', constantly re-examining its foundations and renewing its efforts to engage with broader contexts and perspectives.

In this regard, there are a few areas which the contributions to this issue have already identified as particularly fertile ground for such unsettling and renewal. When challenging existing narratives and theoretical perspectives around punishment, we must be attentive to the dispersed nature of penal practices, acknowledging the complexity, dynamicity and pervasiveness of the penal realm, which goes beyond the institutional confines of criminal justice, and is intimately interconnected with broader tendencies and transformations in society. To properly understand and scrutinise these interconnections, we must also analyse the different dimensions of punishment: its social and political functions, its moral and discursive character, and its symbolic and emotional underpinnings and manifestations. And, to analyse these different dimensions, we must not only continue to critically revisit previous studies and theories of punishment, but also pay attention to the public discourses and debates around punishment, the perspectives of practitioners, officials and activists on the ground, and to the experiences both of those who express and promote punishment, and of those who suffer its harmful consequences.