Crime and Punishment

Abstract

This is a review essay of Lagasnerie, Judge and Punish and Fassin, The Will to Punish. It explores the way that these two books challenge conventional thinking about the relationship between crime and punishment.

Introduction

Crime and punishment go together: there is, in the words of OW Holmes, a "mystic bond" between the two.[1] We take this linkage between the two for granted, such that either a crime without punishment, or the infliction of punishment without a crime having been committed, are seen as exemplary instances of injustice. That punishment must be a response to, and 'fit', the crime is the starting point for most modern theories of criminal law. Beccaria's celebrated book, *On Crimes and Punishments* (1764), laid the foundations for our modern understanding: punishment should be for a crime; and the nature of punishment – the deliberate infliction of pain by the state on an individual – should be subject to a special kind of justification, which should include that crimes be a particular kind of socially harmful act. Just as punishment is defined by crime, so crime is to be shaped by punishment. The two are inextricably locked together, even if the precise nature of the 'mystic bond' resists clarification.

This assumed linkage between crime and punishment has been challenged in two recent short books by non-criminal lawyers. These books bring an outsider's eye to bear on many of the things that criminal lawyers take for granted, and they challenge us to reassess what we think we know about the link between crime and punishment. The first of these is Didier Fassin's *The Will to Punish*, based on his Tanner Foundation Lectures delivered in Berkeley in 2016.[2] Fassin is well known for his ethnographies of policing and prisons, and uses his lectures for an erudite and wide-ranging exploration of the meaning and practice of punishment. The second book, which has received somewhat less attention, is Geoffroy de Lagasnerie's *Judge and Punish. The Penal State on Trial*.[3] Lagasnerie, is a political philosopher and social theorist, who has previously published on the relationship between whistleblowers and democracy. He initially set out to carry out an ethnography of trials in lower French courts but, as he explains, his work gradually became a social theoretical exploration of the processes and meaning of judging and punishing. Both books take their cue from the growth of the 'penal state', broadly understood, focusing on the way that the criminal law is used in contemporary state: the increasing rates of imprisonment; socio-economic and ethnic inequalities in the enforcement of the law; the pervasiveness of state violence, and the seemingly unaccountable use of state power. Criminal justice is thus not primarily understood as a relation between the state and the individual, but as located within a wider system of penal and repressive practices. And it is this that leads to the questioning of the relationship between crime and punishment, as the deployment of penal powers continually exceeds what appears to be licensed by the law. In this essay I shall focus principally on Lagasnerie's work, as Fassin's book has already been reviewed in this journal.[4]

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[1] OW Holmes, *The Common Law* (1881)(London: Macmillan 1968) p.37.

[2] With B Western, R McLennan & D Garland, edited by C Kutz (Oxford: Oxford UP, 2018) (henceforth *WP*).

[3] Stanford: Stanford UP, 2018 (henceforth *J&P*).

[4] AW Norrie, "Beyond Persecutory Impulse and Humanising Trace. On Didier Fassin's *The Will to Punish*".

However, there are clear overlaps between the two arguments and so I shall bring in discussion of Fassin where this is appropriate.[5]

Lagasnerie's book is impressive and frustrating in equal measure. He draws on a wide range of sources (his primary influences being Foucault – as signalled by the title – Durkheim and Bourdieu), and there are moments where this wide-ranging approach offers real insight. However, in places the argument can be difficult to follow, and is not always fully developed. That said, it is also refreshing to read a short critical essay on the criminal law which does not feel the need to painstakingly identify and reference every single prior contribution to the field. The central claim of the book is the identification of two separate logics – judging and punishing – which he argues are distinct and overlapping social processes, rather than the single, conjoined, logic of crime and punishment that is normally taken as a starting point. If this is correct, it presents a radical challenge to criminal law theory which (as I suggested above) normally proceeds from the assumption that the linkage between the two is foundational. In this essay I shall look at first at judging, then punishing before returning to an examination of this claim and its implications.

Judging

The locus of judging is the courtroom and Lagasnerie argues that we must therefore begin with an account of what goes on in courtrooms as people are judged. He stresses that he wants to bring an external, or sociological, view to this study to see this process afresh, rather than viewing it in terms of pre-existing legal categories. That is to say, rather than taking the legal view, which is focused on individual culpability and the legitimacy of the process, he aims to try and see the process of judging sociologically. And, as with many observers of criminal courts before him, what he sees bears little or no relation to his expectations of the majesty, rationality or justice of the law. The accused are mainly from lower socio-economic classes or minority ethnic groups and, lacking the resources to challenge police and prosecution, most are found guilty. The process is mundane and bureaucratic, lacking the intensity or drama that we might expect. What is shocking, though, is that this process takes place without any acknowledgement of the social inequalities that it not only reflects but also reinforces. It rather proceeds *as if* all were in fact equal before the law and *as if* justice is being done in each individual case.

The question that we then face is that of how – and whether – we should reconcile this practice of judging with our ideal of the law. Here Lagasnerie points out that, if we strip away the legal formalities, what is going on in the courtroom is the continual and repeated infliction of violence. The legal process, he argues, has as its objective the causing of pain, and the courtroom accordingly "becomes the scene of an assault".[6] We do not see this for what it is because the language of law and politics always already frames our understanding in ways which obscure this violence. Law and the state are seen as the antitheses of violence – we enter political society to escape the violence of the war of all against all – so what goes on in the criminal courts must be seen either as something else (not violence), or (at best) as the 'legitimate' infliction of violence by a state.[7] Lagasnerie wants us to look beyond these formulations, to argue that the courtroom reveals our condition as subjects of the state, in the sense that we are all ultimately at the disposition of the state:

[5] Although it is worth noting in passing that the final chapter of *Judge and Punish* is an impassioned critique of ethnography as a "non-critical and conservative" method, directed particularly at the work of Fassin. See *J&P*, ch.15.

[6] J&P, pp.37-8.

[7] J&P, ch.6.

> "being a subject of the law does not mean, first of all, being a protected and secure subject. We are first and foremost a subject who can be judged – that is, imprisoned, arrested, and convicted."[8]

We are all vulnerable to the power of the state and to the rule of law in this way because we must always submit to, and be complicit with, the power of the state to judge. We cannot refuse to be judged.[9]

This has implications for how we think about legal subjectivity, and specifically concepts of criminal responsibility. These structure the trial: shaping its logic and making its outcomes appear justifiable. But seeing judging as a form of violence is at odds with legal understandings of responsibility – only those who are legally responsible can legitimately be punished. At this point, then, rather than follow the normal path of critical theory which is to explore how the responsible legal subject is constructed or formed, Lagasnerie argues that we should instead question whether responsibility is in fact "the pivotal point around which our judicial system rotates".[10] He argues that our system of responsibility is in fact parasitical on a construction of reality and a way of perceiving the world where acts are already attributable to authors such that "assigning responsibility appears self-evident".[11] His claim is thus that legal responsibility is secondary to this 'system of perception' which allows us to hold individuals responsible, and that it is in fact this (prior) system of individualisation which is pivotal (because it is this which structures legal conceptions of both responsibility and non-responsibility).[12] His claim is thus that there is no self-evident link between crime and responsibility. It is always a matter of choice to hold some person or some thing responsible for a particular outcome.[13] This means that our understanding of causes and the narratives that support them should in fact be seen as the effect of a prior choice to structure responsibility in a certain way. In modernity we individualise – but crucially this is actually a disavowal or denial of other forms of more collective responsibility.[14]

This then allows us to see the practice of judging in a different light. The focus on individuals and the ignoring of the social causes and consequences of crime is a choice: there is evidence of social processes that shape and influence conduct but the courts ignore these in "a rite of depoliticization, de-historicization, and desocialization".[15] There is a refusal to acknowledge social responsibility for the conduct that comes before the courts, as everything is displaced onto the individual. To be sure, questions are asked of the accused about their character, background and motivations, but the aim of these is not to understand what is really responsible for their conduct but to build a picture of their personality – to ask why this person resorted to crime whole others in their position did not. The criminal act is then linked

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[8] J&P, p.40.

[9] "The specificity of the state comes from the fact that it constitutes a power that strips its subjects of the possibility of renouncing it." J&P, p.41.

[10] J&P, pp.72-3.

[11] J&P, p.77.

[12] His argument is that while criminal codes also deal with situations of 'irresponsibility' (or non-responsibility), the nature of these defences does not flow from the form of responsibility but from the fact that there exists a prior system of meaning by which we distribute responsibility. See J&P, ch.7.

[13] J&P ch.8 esp. at pp.82-91 citing P Fauconnet, *La Responsabilité* (Paris: Alcan, 1920).

[14] J&P, p.90. See also the discussion of Kelsen at pp.80-82. See also Fassin, WP, p.111: "By confronting the individual with his act under the exclusive principle of liability, society absolves itself of its responsibility in the social production and construction of illegalisms". Cf. S Veitch, *Law and Irresponsibility. On the Legitimation of Human Suffering* (Oxford: Hart Publishing, 2007).

[15] J&P, p103. Cf. Fassin, WP, ch.3 arguing that there is a similar disavowal of social responsibility in the distribution of punishment

to a series of individual traits – constructing the personality so as to lead to the crime "as if the crime was always already there" and judging on the basis of these preconceptions.[16]

Punishing

Judgment is followed by punishment: the reaction to the action. Lagasnerie, following Nietzsche, argues that the logic of punishment is founded in the infliction of pain in response to trauma – reflecting an economy of injuries (a relationship between injury and pain) rather than a logic of responsibility.[17] A legal system should offer a more rational response, should be capable of displacing this primal drive; and the question is whether framing a crime as an act against the state, the people or society – sublimating or replacing the psychic impulse to revenge – in fact establishes a more rational order, as has been claimed by philosophers from Kant and Rousseau onwards. His response is that when the state punishes in the name of, or on behalf of, the community or social order, it 'adds' second crime to the original one:

> "When a crime occurs, the state dispossesses the victim … and takes his or her place; the state positions itself as the victim – and even, more precisely, as the primary victim… The penal state creates two crimes where only one existed: one committed against the victim, the other against the state."[18]

There is thus a kind of doubling up in which the seriousness of the wrong increases because it is a wrong not only against the individual but also additionally against the community, nation, or social order.[19] The state displaces the emotional reaction of the victim, only to then express a desire for punishment in the name of the community which "is hard to justify from a rational perspective".[20] Thus, the "the performative construction of crime as a social act" in fact reproduces and escalates the cycle of violence (crime/vengeance), rather than displacing it.[21]

Seeing crime as a social act in this way has two important consequences for how we think about punishment. On the one hand, the very move which is normally viewed as taking the emotion out of punishment (and justifying legal punishment) – namely that it is a collective response, mediated through law, rather than individual vengeance – is to be seen as part of a Nietzschean will to punish. Indeed, both Lagasnerie and Fassin appeal to Nietzsche at this point, seeing something in punishment which "resists being analysed as rational".[22] Punishment represents a drive to make suffer, to cause pain which has been delegated to the institutions which make up the criminal justice system. The excess, though, cannot be rationalised away but is an intrinsic part of the logic of punishing. On the other hand, the response to 'crime' is repressive: a societal reaction to the threat to social cohesion. This draws on Durkheim's account of the logic of repressive punishment, while dismissing Durkheim's (frankly implausible) historical claim that as we move from organic to mechanical solidarity (with the development of the division of labour) punishment becomes less repressive.[23] What is this important is that it is the logic of punishment which is

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[16] J&P, p.115.

[17] "We don't want to punish someone because he or she is seen as being responsible. Rather, we designate someone as responsible because we want to punish and inflict suffering" (J&P, p.147 citing F Nietzsche, *On the Genealogy of Morality* (Cambridge: Cambridge UP, 1994).

[18] J&P, p.148. cf. N Christie, "Conflicts as Property" (1977) 17 *BJ Criminol* 1-15.

[19] As represented by the figure of the prosecutor who defends the interests of society (J&P, pp.143-5).

[20] J&P, p.148.

[21] J&P, p.153.

[22] Fassin, WP, p.81.

[23] J&P, p.151. E Durkheim, *The Division of Labour in Society* (New York: Free Press, 1933) ch.2. Cf. Fassin, WP, p.56 who merely notes that Durkheim's account is at odds with his genealogy of punishment.

repressive – because of the appeal to a collective order – but also that this then facilitates repressive forms of punishment because of the 'doubling' of the crime. He concludes by suggesting that:

> "We could even say that, in a sense, the accused are always, in one way or another, punished for acts that they didn't commit – the nature and meaning of those acts having been created by the state *after the fact and during the trial*."[24]

Two Logics

We can see, then, that there are two logics. The logic of judging is focused on the individual, rejecting forms of totalising rationality; the logic of punishment, by contrast, appeals to the collective, the totalising.[25] While the thrust of Fassin's argument is slightly different, the point he makes, when arguing that there may be crime without punishment and punishment without crime, is a similar one.[26] 'Crimes' do not always require, and are not always met with, punishment, and punishment is not always in response to crime – the social logic of punishment appears to operate independently of the requirement that it be *for* a crime. The 'mystic bond' locking crime and punishment together is, at best, opaque.

It is worth noting that there are indications that Anglophone criminal law theory is already moving in the direction of challenging the link between crime and punishment. For the past forty years, criminal law theory has been dominated by retributive theory – linking the justification of punishment to conceptions of wrongfulness.[27] The theoretical constraint of the requirement of wrongfulness has been seen as a route to the practical constraint of penal institutions. However, the relentless growth of the penal state has raised questions about the capacity of this form of criminal law theory to respond to over-criminalization and mass incarceration. Antony Duff, for example, in his recent work, argues that punishment is a non-definitional aspect of criminal law; this is to say that the justification of punishment should be seen as independent of the aims and function of the criminal law.[28] In his important new book Vincent Chiao argues that a system of just punishment is not be justified solely in terms of its response to individual wrongdoing – that central tenet of retributive theory – but is also a matter of the distribution of social costs and burdens.[29] And in my own work I have argued that the aims of the criminal law cannot be understood solely in terms of the just punishment of individuals, but in terms of securing civil order – that is to say that criminal laws play a wider social role in terms of "the co-ordination of complex modern societies composed of a range of entities or legal persons that are responsible, in a range of different ways, for their own conduct, for the wellbeing of others, and for the maintenance of social institutions".[30] On these accounts the justification of the criminal law and the justification of punishment should be seen as conceptually distinct issues to be addressed in different ways.

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[24] J&P, p.170 (emphasis in original).

[25] To the point that we might reverse the normal order of our understanding and ask not whether it is the state that is defining punishment, but whether it is punishment that is defining the state.

[26] Fassin, WP, Prologue.

[27] Key works were A von Hirsch, *Doing Justice. The Choice of Punishments* (New York: Hill & Wang, 1976) and G Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown Co., 1978).

[28] RA Duff, *The Realm of the Criminal Law* (Oxford: Oxford UP, 2018) p.15: "we should not let criminal punishment dominate our discussion of what criminal law is, or ought to be: its other two dimensions [defining offences and trying crimes] have meanings, and can serve significant purposes, that do not depend on punishment."

[29] V Chiao, *Criminal Law in the Age of the Administrative State* (New York: Oxford UP, 2019) ch.4

[30] *Making the Modern Criminal Law. Criminalization and Civil Orde*r (Oxford: Oxford UP, 2016) p.299. See also ch.1.

Separating crime and punishment in this way opens up new perspectives on criminal law and punishment and their relationship. It is worth noting that this is consistent with the point which has been repeatedly made by criminologists, namely that rates of punishment are largely independent of rates of crime – and do not seem to correlate in any direct way with the creation of new criminal offences or, indeed, with the overall numbers of criminal laws.[31] To be sure, those who are formally punished by the state must have been convicted of a criminal offence, but to focus only on this is to overlook the myriad ways in which individuals and groups are either criminalised or punished either before or after, or indeed, outwith the formal processes of the criminal justice system. Criminalisation, as Lacey has pointed out, is not only a matter of the legislative process of offence creation, but extends to a range of informal processes which include both understanding the way that particular laws are enforced and the policing of particular ethnic or social groups or forms of conduct more broadly – which may be more or less tightly linked to particular norms of criminal law.[32] Criminalisation might be driven in unacknowledged ways by procedural changes which alter or extend conditions of policing or punishment.[33] And whether we call it hidden criminalisation or hidden punishment, it is becoming increasingly clear that the (intended or unintended) consequences of a conviction extend far beyond the formal sentence.[34] It is not obvious then that criminal law – through the 'wrongfulness' constraint and its focus on individual responsibility – can be a constraint on punishment. It is may rather be the case that, as Lagasnerie suggests, responsibility and wrongfulness function as intensifiers – individualising and blaming – drawing attention away from the social causes and consequences of criminal conduct. And the problem of the informal practices of criminalisation, as pointed out by Fassin, is that penal practices do not fall within the legal definition of punishment.

It is necessary at this point to consider the important objection raised by David Garland in his response to Fassin's lectures.[35] Garland points to the role that ideal type definitions of legal punishment have played in shaping our understanding of legitimate responses to crime – and outlawing illegitimate ones. He argues that:

> "the existence of state practices that ignore law's restraints and impose unlawful punishments is not a reason to doubt or deconstruct the conventional definition of legal punishment."[36]

His point is that we should not undercut the legal definition of punishment, but uphold it "in its most rigorously demanding form and use it to criticize any official conduct that deviates from its norms."[37] This is an important point which underlines the way in which rule of law ideals can provide both a legal and cultural point of reference by showing how certain penal practices are inconsistent with the ideal. However, recognition of this point should not prevent critical reflection on how such ideal type definitions have been constructed and whether they are still relevant to address contemporary problems. It is striking that all three of Fassin, Garland and Lagasnerie revert to HLA Hart's famous definition of punishment from

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[31] R Reiner, *Crime. The Mystery of a Common Sense Concept* (Cambridge: Polity, 2016).

[32] "Historicising Criminalisation: Conceptual and Empirical Issues" (2009) 72 *Mod LR* 936-60.

[33] L McNamara et al, "Theorising Criminalisation: The Value of a Modalities Approach" (2018) 7 *IJCJ&SD* 91-121

[34] (2018) 7(3) *IJCJ&SD* Special Issue: Hidden Criminalisation: Punitiveness at the Edges (eds. J Quilter & L McNamara); cf. Z Hoskins, *Beyond Punishment. A Normative Account of the Collateral Legal Consequences of Conviction* (Oxford: Oxford UP, 2019).

[35] D Garland, "The Rule of Law, Representational Struggles and the Will to Punish" in WP, pp.154-67.

[36] Ibid p.163.

[37] Ibid p.164.

1959, a definition which is frequently taken as foundational in contemporary debates about the justification of punishment.[38] Hart's definition has five elements: that punishment should involve pain; that it must be for an offence against legal rules; that it must be of an offender for an offence; that it must be intentionally administered; and that it must be imposed and administered by a legal system. This definition is notably circumspect about smuggling values in through the process of definition, but it is also clear that the definition reflects certain preoccupations from the time he was writing. Hart's primary aim was that of distinguishing punishment from other kinds of rehabilitative practices. There may not have been consensus over the meaning of punishment – his purpose in writing being to establish such consensus through the process of definition – but his targets were primarily forms of individualised punishment which aimed at the treatment of offenders.[39] So, if he was at pains to exclude punishment of persons who were not in fact offenders from his definition, this surely in part reflected the fact that the kinds of penal practices described by Fassin ('punishment without crime') were not perceived to be a problem in the way that they are today. And it is, of course, a notable feature of Hart's definition that it works precisely by asserting the nexus between crime and punishment ('of an offender for an offence') that both Lagasnerie and Fassin are challenging.

There are two important conclusions that should be drawn from this. First, while we should recognise the legal and political role that can be played by ideal-type definitions, it is equally important that there is space for critical reflection on these definitions. We need to ask how they have been arrived at, and whether or not they continue to be adequate to contemporary issues. This critical and analytical work can and should be done without necessarily detracting from the political project. Second, as I noted above, a central feature of Hart's definition is the assertion of the nexus between crime and punishment – something that was important for his attempt to establish a stable meaning for punishment that did not include treatment. However, if we take seriously the claim that criminal law and punishment are distinct, then the route to thinking about constraining penal practices is not necessarily (or exclusively) through linking it to crime, but through reflection on penal practices. One place to start might be Lagasnerie's insight into the totalising logic of punishment – that to punish in the name of the community is to escalate the wrongdoing – not least because the mediating influence of the community is usually understood in penal philosophy as a positive means of limiting the emotional response.[40] To make this argument is not to rule out the possibility of legal constraint. However, rather than seeking to constrain by punishment exclusively by reference to crime, the issue is the broader one of subjecting penal practices to legal regulation.

Rethinking Crime and Punishment

If it is important to challenge the conventional nexus between crime and punishment, it is equally important to recognise that crime and punishment are bound together in the criminal justice system. But rather than taking the assumption that crime and punishment are bound together as the starting point, we need instead to reflect on how the two are in fact bound together in actual criminal justice systems. How should we reconcile the individualising logic of judging and the totalising rationality of punishment?

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[38] HLA Hart, "Prolegomenon to the Principles of Punishment" in *Punishment and Responsibility* (Oxford: Clarendon Press, 1968) at pp.4-5.

[39] Though he does also criticise denunciatory theories for confusing the aims of the criminal law (condemning socially undesirable conduct) with the aims of punishment, ibid pp.7-8.

[40] Lagasnerie provides some powerful examples of generalisation of wrongs from the particular incidents is used to justify the imposition of harsh punishment, J&P, pp.161-70.

One starting point here is the concept of crime. In addressing the totalising logic of punishment, Lagasnerie appeals to the work of Gary Becker as an example of a rejection of "transcendent totalities".[41] For Becker, crimes should be understood purely as 'private' injuries to individuals that might be better addressed by the payment of damages or individual restitution – thus rejecting the claim that there is an additional 'wrong' to the community that requires to be punished.[42] This is a rhetorically important point, and a reminder to reflect on the question of whether criminalisation is a necessary response, but in viewing crime purely in terms of interpersonal wrongdoing it underplays the fact that crimes might be committed against collective goods (the market, the environment) and that the role of criminal law goes beyond the protection of individuals to the securing of collective trust or civil order. A more nuanced account is provided by Reiner who argues that the concept of 'crime', is linked to the emergence of modern institutions such as the criminal law, the police, and prisons that identify, record, and punish criminal conduct. He thus describes crime as a concept that is distinct from moral concepts of wrongdoing and which is "anchored" in modern criminal justice institutions. Any discussion of the meaning of crime must thus be set against this institutional backdrop and the interests that it serves.[43] This serves to remind us then that the relationship between crime and punishment is not direct but is mediated through institutions of law and government.

An account of the relation between crime and punishment must accordingly start from these institutions and their development, and explore the way that crime is defined, and the kind of relation that the institutions construct with punishment. It is striking and perhaps significant, for example, that Lagasnerie's two logics have an institutional counterpart in the common law adversarial trial with the separation between the liability and the sentencing phases of the trial. This is normally regarded as an unremarkable feature of the criminal justice process, but we might look at it afresh as a mechanism by means of which the nexus between the logics of crime and punishment is maintained. Likewise, it is clear that criminal law is central to this relation, though if the functions of criminal law go beyond the definition of crime and punishment it is necessary to be clearer about what these functions are and how they might contribute to, or limit, the growth of the penal state.

The great value of these two books is that they challenge us to think about the relationship between crime and punishment in new ways. There may be bonds between crime and punishment, but they should not be the mystic ones referred to be Holmes. A central task for criminal law theory must be to take up this challenge.

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[41] J&P, pp.173-6. See e.g. G Becker, "Crime and Punishment: An Economic Approach" (1968) 76 *Jnl of Political Economy* 169-217.

[42] There are also striking parallels here with both Christie, "Conflicts as Property" and the belief of some legal moralists that there are 'pre-legal' wrongs.

[43] Reiner, *Crime*, pp.2-4.