Libertarian perspectives on policing and punishment

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Libertarians are concerned primarily with the use or threat of force. Citizens are subjected to government force most directly through interactions with the criminal justice system. As usual, political reality diverges significantly from what libertarians think justice requires. This chapter offers an overview of libertarian perspectives on the administration of criminal justice.

The essay proceeds in three stages, mirroring the criminal justice system. Section One asks, what is the legitimate scope of criminal law? This is followed in Section Two by its enforcement: how ought police enforce the criminal law? Given the seriously unjust nature of policing, ought policing to be merely reformed or abolished? Arrest is often followed by prosecution. Successful prosecution is followed by punishment, the topic of Section Three.[1] Section Four concludes with some questions generated by failures of realized criminal justice systems. As a disclaimer, note that many of the arguments I will discuss are not *distinctively* libertarian or *constitutive* of the view, though they are closely associated with "hard" libertarian and classical liberal thought.

1. The scope of the criminal law

Libertarianism, like any plausible normative political theory, takes power over another to be burdened by justification. This amounts to a presumptive constraint on the criminal law. There are a variety of foundations for this presumption (see the *Foundations* section of this volume). But how can any kind of police function be consistent with libertarian constraints on political power? The usual answer is that people will consent to the rules of a legal regime, or the law will be constrained to independently enforceable moral rules (Chartier 2013, 242). In this section, we'll look at those libertarian constraints: the parity principle, followed by responses to a number of illiberal arguments for criminal law expansion.

One way to think about the permissible scope is by reflecting on what individuals in their private capacity are permitted to do to others. State agents are permitted to do no more than that, and typically quite a bit less. This is the "parity" or "symmetry" principle. The parity principle shows up early in the history of libertarian thought. John Locke is an early proponent of the view. In a discussion of conquest, Locke states that "[t]he injury and the crime is equal, whether committed by the wearer of a crown, or some petty villain" (Locke 1980 [1690], §176, 91). The principle shows up in more recent work as well (Rothbard 1998, 82; Brennan 2012, 53; Huemer 2013, 4; Brennan 2019).

The parity thesis is not the only important libertarian commitment. A proponent of coercive paternalism could endorse parity as well as a massively intrusive coercively paternalistic government. Libertarians will take very few private interferences in the lives of

[1] Because of space constraints, I ignore procedural rights constraining arrest and prosecution.

others to be justified. Here too there are a number of normative foundations: harm, non-aggression, self-ownership, equality, and separateness of persons principles are all on the menu.

The libertarian perspective on the criminal law endorses criminal restrictions on violence, theft, and fraud, but not putatively vicious activity like recreational drug use or sex work, nor laws against gay sex, wearing sagging pants, "cross dressing," and so on. Whether "public order" laws, like those against loitering or drinking in public, would be part of libertarian criminal law is a matter of dispute.[2]

There are a variety of normative challenges to the limited scope of criminal law in libertarian thought. These include majoritarian democratic decision-making, perfectionism, "social" welfarism, and paternalism. Let's turn to these challenges.

As has been made abundantly clear, many people want to exercise more control over others. Democracies are often supportive of moralistic and paternalistic criminal law. Libertarians, however, tend to be skeptical of majoritarian democratic decision-making (Hayek 1998, 128; Brennan 2017; Caplan 2008; Somin 2013). For this reason, libertarians will tend to think that democratic decision-making procedures are ill-suited to justify interferences in the private lives of others or to undermine the parity principle.

Perfectionists claim, roughly, that wellbeing consists in perfecting human nature, and that one legitimate purpose of the state is to foster such perfection. "Social" welfarists claim that the state should pursue policies that make everyone better off (Cohen and Glod 2018). Paternalists claim that the state may restrict the activities of people for their own sake. The perfectionists and paternalists think that considerations of an individual's own wellbeing justify interferences in their lives, while the social welfarists think that considerations of general wellbeing justify such interferences.

Paternalists will argue that we must prohibit, say, opioid use, to reduce the chances that one overdoses, contracts hepatitis C or HIV, develops infected injection wounds, and so on. Paternalists will add to this list of self-harm the diminished opportunities for intellectual pursuits or other wellbeing-enhancing achievements. Perfectionists will agree, lamenting the pursuit of "bodily" pleasures over those intellectual pleasures that are distinctive of human persons. Similar arguments can be advanced with respect to sex work or gambling. Social welfarists will also point to the increase in petty larceny that attends widespread drug addiction and the dissatisfaction many have at seeing intoxicated people in public.[3]

These attempts to widen the scope of criminal law are illiberal, not merely illibertarian. There are several responses: appeals to tolerance, equality, perceived legitimacy, proportionality, complexity, and more sophisticated reflections on perfectionism.

We'll start with the core liberal value of tolerance. According to Locke, one reason we may not use force to convert people to a religion is because we're more likely to get it wrong than right. There are many false religions and only one (if any) true religion (Locke 2010 [1689], 8). We can adapt this argument to broader matters of conscience and virtue: we have to be open to the possibility that coercively enforcing what one thinks is virtuous or social welfare-

[2] As we'll see, many libertarians think these would be a matter of tort, not criminal, law.

[3] Kelling and Wilson (1982) argue that police must protect "neighborhoods," not just people.

enhancing lifestyles, by e.g. prohibiting drug consumption and sex work, is an error. These impulses may come from unreliable views about purity or disgust reactions.

Ludwig von Mises makes a different argument from toleration. He argues that "only tolerance can create and preserve the conditions of social peace without which humanity must relapse into the barbarism and penury of centuries long past" (Mises 2005 [1927], 34). Using force to change the way people live is unlikely to succeed and is further likely to undermine the conditions necessary for peace. In contexts of religious disagreement, tolerance is needed to avoid war. In other contexts, it is needed to preserve a cooperative society.

Consider also Mill's defense of experiments in living. Mill famously claims that "as it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living," (2008 [1859], 193). We don't know *a priori* how to live welfare maximizing lives. Perhaps recreational drug use, gambling, or sex work cause a life to be bad. But perhaps not. We not only must tolerate these differences of opinion; we must allow for different lifestyles. The proof is in the living.

Another line of argument comes from the failures of realized institutions and their effect on equality and proportionality. Coercive interference to prevent bad lifestyles is likely to generate substantial inequality. The majority is likely to find their own forms of recreation non-vicious, and their own vices to be minor. But the recreation of minorities is more likely to be found vicious, and their vices to be major. Powder cocaine is illegal, but not as severely punished as crack cocaine. A crack epidemic is a crime problem when the users are mostly Black, but the opioid epidemic is a public health problem when the users are mostly white. These are predictable results of real, majoritarian decision-making systems that appeal to paternalism, social welfarism, and perfectionism. A commitment to our moral equality (Schmidtz 2006, 107), sometimes expressed in terms of "separateness" of persons (Nozick 1974, 33) or equality before the law (Hayek 2011 [1960], 148, 316) cautions against such interferences. It does so not on the grounds that we're always wrong about what makes a life go badly, but that we're highly unlikely to get the law and its enforcement equal and fair. The racial inequities in the U.S. criminal justice system is tragic but decisive evidence in support of this argument.

Related to this argument is an appeal not directly to equality, but to perceived or descriptive legitimacy. Perceived legitimacy would appear to restrict the scope of criminal law: law, "in order to be effective … must be accepted as just by most people," (Hayek 2011 [1960], 318). Hayekians are not at all surprised that the war on drugs has undermined perceived legitimacy in the criminal justice system.

Another consideration that restricts the criminal law is proportionality. Often appealed to in theories of punishment (D'Amico 2015; Rothbard 1998, 85), it also applies to police enforcement itself (Monaghan, forth.) Here again is Hayek:

> [I]t is probably desirable that we should accept only the prevention of more severe coercion as the justification for the use of coercion by government (Hayek 2011 [1960], 211).

A criminal law with wide scope falls afoul of this requirement. This is partly caused by the difficulty of predicting the impact of various laws and enforcement strategies. Society,

especially the criminal justice system, is complex and coupled. Policies will have unintended consequences, and failures in one area are likely to bleed into another. The failures at each stage of the criminal justice system compound in the next. Hayek famously recognized that engineering a society's basic structure to achieve certain outcomes was nearly impossible (1998 [1982], 56). Hayek's view here is typically deployed in discussions of economic systems and theories of distributive justice, but it applies to criminal law.

Criminal law enforcement aimed at eliminating vicious activity is likely to fail to achieve its goals given how complex is the system we are trying to intervene in. Drug and sex work prohibition unsurprisingly not only fails but tends to make matters worse and individuals more vicious. Cohen and Glod (2018) raise arguments in this vein against paternalists and social welfarists. Glod argues that we are unlikely to correctly determine another's good in the first place (2015). When perfectionists, paternalists, and social welfarists leave the armchair, it is painfully obvious that in many cases, their own moral principles count against expanding the scope of criminal law.

Finally, consider the perfectionist libertarian's response to perfectionist justification of vice law. Rasmussen and Den Uyl respond by noting that perfectionism requires a strong presumption of liberty (2016). One cannot be forced to be perfect; it must be voluntary. Just as Locke argued that there is conceptual difficulty in forcing someone to genuinely convert to a religion, it appears nearly impossible to make someone virtuous by force. Refraining from vicious activity like drug use because one is afraid to go to jail does not count as having the virtue of temperance.

Libertarians tend to think that equality generates a strong presumption of liberty. Because we're moral equals, interference in another's life must meet demanding justificatory burdens. As we've seen, most of the attempts to meet such a burden fail on their own terms, leaving the legitimate scope of criminal law quite narrow.

2. Enforcing law

The first question in criminal justice is: which behaviors should be criminalized by law? The second, and the topic of this section, is: how should we enforce those laws? Should policing be provided by public or private agencies? And what does libertarianism say about disputes within police scholarship about law enforcement strategies? As we'll see, libertarian answers to these questions are especially relevant given the calls to "defund" or "abolish" the police as a result of growing frustration with the state of American policing exacerbated by the Minneapolis Police Department's killing of George Floyd. One way to decrease the role that police play in society is to drastically narrow the criminal law (something liberals and libertarians will happily agree on). Another is to make substantial changes to the provision of policing, to which we now turn.

The provision of policing: public or private?

Should policing be publicly or privately provided? This question largely splits the libertarian camp between the anarchists and the minimal state libertarians. Anarcho-libertarians will say that the police function, like everything else, should be provided entirely by private agencies. Minimal state libertarians are likely to say that at least some of the police function may be

publicly provided. Some are skeptical of even the possibility of stable private policing, so we'll start there before considering its desirability.

While policing and criminal justice are at the core of the modern state, states do not arise fully formed. Libertarians argue that this counts as evidence that policing need not be provided by a state. People figure out how to reduce crime and disorder, and only then do states arise and take over those functions (Stringham 2015, 114; Hasnas 2008, 122). Skeptics are likely to reply that (i) policing is much easier in non-urban environments, whereas urbanization requires formal, public police agencies, and that private, competing private police agencies would eventually turn to violent conflict much the way that gangs do now; (ii) that policing is, in the language of public goods, non-excludable, or that (iii) private police agencies will consolidate into a natural monopoly requiring public oversight.

A popular response to the first objection appeals to cost-benefit analysis reasoning. Violent confrontation is expensive. An agency's desire to save money will therefore lead to peaceful resolution through bargaining and compromise. This desire will lead to protection agencies contracting with one another ahead of time to resolve disputes ex ante (Friedman 1989; Huemer 2013). Further, concern about reputation and oversight by a protection agency's insurance company would prevent warring protection agencies. Overly aggressive agencies would lose customers because they would have a bad reputation and become uninsurable (Tannehill and Tannehill 2007 [1970], 110).

If that is correct—and given the scope of institutional transformation involved, that is far from clear—there is still the second objection: how could police agencies charge their customers? Customers might pay a subscription fee. Agencies in one area could contract with agencies in another area to provide service when customers travel. There is good reason for skepticism on this front. Wouldn't agencies have to provide service before confirming that you're "in network"? An agent has to intervene in a mugging or assault to check your customer status, and by then they've already provided the service.

A better option is "bundling." Policing can be excludable and charged for by bundling it with real estate and commerce (Stringham 2015, 129). This happens already. Stores, universities, factories, etc., all pay for security officers or establish private agencies (who employ, in effect, private patrol officers on a small "beat"). This isn't only for small-scale provision. The Duke University Campus Police Department, for example, patrols a larger population than 95% of public police forces (Stringham 2015, 125). Detectives could be employed separately, either via bundling, directly by a crime victim, or perhaps remain mostly publicly provided.

Some libertarians think that even if we can charge for private policing, it is unstable. Robert Nozick famously pushes the third objection that private protection agencies would permissibly turn into a state (1974). His reasoning is complicated, but for a quick gloss: protection agencies would consolidate into a dominant protection agency through an invisible hand process that violates no one's rights, and considerations of risk would morally require the dominant agency to eliminate competing agencies. Once fully consolidated, the protection agency is a minimal state. If this is right, fully private policing is unstable, whether or not it is desirable.

Several libertarians have maintained that Nozick's invisible hand argument fails, either because he's wrong that protection agencies would consolidate (Narveson 2008, 109; Huemer

2013, 254; Friedman 1989, 121; Tannehill and Tannehill 2007 [1970], 115), or because he's wrong that the result is genuinely a state (Narveson 1988, 241). The argument appears more powerful against competing agencies in the same area than against the bundling method. If bundling police services with existing goods and services prevents the kind of competition that gives rise to consolidation and then the permissible elimination of risky competition, perhaps Nozick's argument fails against some modes of police provision. The appeals to bundling do not address Nozick's claim that the dominant protection agency must eliminate competition in order to protect the procedural rights of its clients. If the court system is not privatized alongside the police, however, then Nozick's concerns about procedural rights protection don't arise.

While there is significant public backlash against private prisons, the police function has been extensively privatized without much concern. There are now more private police officers than public police officers in the U.S (Sklansky 1999). Whether the entirety of the police function can be provided privately is a matter of dispute; certainly, a substantial proportion of it can be provided privately. So, even Nozickians would endorse quite a bit of private policing. That this change has occurred without provoking much backlash speaks to the desirability of private policing.

The common objections to the desirability of private police are that they are (i) unfair and unequal, and (ii) provide low quality service. If policing is privatized, perhaps we can no longer guarantee equal protection of law (Sklansky 1999). If policing is unfairly and unequally allocated by market forces, then for many, private police will provide low quality (if any) service. A powerful libertarian response is to point out that these objections make what Brennan has called the "Cohen fallacy": comparing the idealized version of institutions we prefer to the realized versions of the ones we don't (Brennan 2014). Actual public police agencies face these same problems.

The history of policing in the United States features unfair, unequal, and low-quality policing. Never has there been a real guarantee of equal protection of law. The precursors to police departments were ineffective citizen patrols in the north and slave patrols in the south (Dulaney 1996). Once policing became formalized, positions were exchanged for the electoral support of ethnic groups in local politics (Fogelson 1977; Kelling and Moore 1989). The police were a major tool in enforcing Jim Crow segregation and preventing Black people from flourishing (Dulaney 1996). More recently the war on drugs has criminalized behavior enjoyed by minorities and contributed to racially disproportionate incarceration rates and racially disparate treatment by police (Alexander 2012; Butler 2018). Public policing generated more crime by creating black markets, and in turn, organized crime. Some argue that it undermines one's ability to protect one's own rights (cf. Huemer 2003). American police kill around 1,000 people a year, often as a result of bad use of force policies and ineffective accountability mechanisms (Zimring 2017). Because police activity is determined by majoritarian politics minorities receive low quality and unequal policing (Hasnas 2008, 124). In minority neighborhoods low-level crime is overpoliced and violent crime is underpoliced.

On the other hand, private policing is often more sensitive to the needs of consumers and effective than public policing (Stringham 2015). Private police, especially security guards, are easy to hold accountable for their bad behavior, whereas qualified immunity, law officer bills of rights, and other legal precedent makes public police largely unaccountable. Private

police also enable cost internalization: rather than forcing the taxpayers to pay for additional security at Whole Foods, the company can shoulder those costs on their own or pass them on to customers who want such service. Private policing also allows for a wider variety in the kind of order maintained: what counts as order in a grocery store is vastly different from a live music venue (cf. Hayek 1998 [1982], 139). Private policing allows people to seek out places that match their conceptions of order. Further, this arrangement allows for people to genuinely consent to the policing they receive: simply opt into an enforcement regime by entering an area.

Enforcement strategies

Fully privatized policing may be impossible; it is at least a *political* impossibility right now. So, we should ask what libertarians should say about current public policing strategies. These are interesting because they are not laws or bureaucratic regulations, but they are the result of the professional discretion possessed by police agencies. They amount to something like a "nested" political rule (Ostrom 2005, 58). Philosophers tend to ignore the fine details of political power, so we'll have to draw out some implications of libertarian commitments here. The literature on police strategy is large, so I'll focus only on two major, recent issues that emphasize the tension between various libertarian commitments: zero tolerance and broken windows policing. The section concludes with a discussion of police abolition and reform.

Zero tolerance strategies, as the name suggests, aim for full and aggressive law enforcement (Greene 2014). Whereas a typical patrol officer might discard a small amount of illegal drugs instead of making an arrest, zero tolerance strategies prohibit such discretionary non-enforcement. They typically rely on saturating an area with patrol officers and are therefore very expensive. Thus, zero tolerance policing is often short-lived. The default approach to serious, violent crime is zero tolerance (detectives rarely look the other way), so zero tolerance, when specified, is typically associated with low-level disorder, vice, and misdemeanor crime. It is often aimed at deterring crime by communicating that even low-level violations will not be tolerated.

Libertarians disagree about whether police ought to engage in discretionary non-enforcement of unjust laws. Proponents of full enforcement rooted in rule of law considerations are more likely to endorse zero tolerance strategies (more on this in Section Four). But zero tolerance policing, in addition to being expensive, tends to deteriorate perceived legitimacy and run the risk of being not proportional. This generates a dilemma.

Proponents of partial enforcement might not have an advantage here. This is because only some of the laws enforced in zero tolerance strategies are unjust; vice laws are often enforced, but so are laws against public drunkenness, loitering, vagrancy, and panhandling. The latter are not obviously unjust. Libertarian thinking on discretionary non-enforcement doesn't provide an obvious justification for ignoring such behavior. But given libertarian commitments to proportionality and the resultant skepticism of deterrence theories of punishment (more on this in the next section), there are grounds for opposing zero tolerance strategies and living with some low-level rights violations. There is, however, no fleshed out theoretical evaluation of them.

Broken windows policing, though often a motivation for zero tolerance strategies, is a highly discretionary approach. According to this theory, one broken window can result in a criminogenic cascade, so police ought to prevent the first broken window (Kelling and Wilson

1982). In its original formulation, broken windows policing is community, rather than individual, oriented. It rejects decriminalizing actions that harm "the community," and therefore encourages enforcement of many low-level violations including loitering, littering, panhandling, and so on, though only in areas where there is social control to maintain. Broken windows theory was aimed as much at reducing fear as it was reducing crime.

Libertarians have grounds for worrying about the *community* rather than *individual* orientation of broken windows strategies, as well as its skepticism towards decriminalizing things like drug possession or sex work (Cohen and Glod 2018). But there may be libertarian grounds for approving of some aspects of broken windows policing. Nozick argues that individuals have a right against certain actions that cause fear (1974, 65); as Kelling and Wilson point out, loitering in certain circumstances or aggressive panhandling can reasonably have that effect. Many low-level offenses also interfere with an individual's enjoyment of their property or violate property rights directly. Yet again, arrests for low-level violations risk being disproportionate. Here too we see a possible dilemma. Perhaps the solution is to prefer an order maintenance policing that "clears corners" by forcing people to disperse rather than by relying on arrest. For that reason, the anti-gang loitering initiative practiced in Chicago may be more libertarian friendly than the stop-and-frisk policy in New York City (cf. Meares and Kahan 1998).

This tension between proportionality and policing low-level violations should seriously concern libertarians. Some argue that total privatization would eliminate the problems of low-level offenses like vagrancy or aggressive panhandling because (e.g.) sleeping on a park bench is a violation of property rights in a state of full privatization (Tannehill and Tannehill 2007 [1970], 61). Hence, proactive patrol is more likely to arise from market forces than democratic decision-making because prevention is cheaper than punishment (Ibid, 84). The problem is that there's more than a hint of ideal theory here: enforcement is expensive, and while there's an incentive to keep private streets or parks clear of disorder, companies may elect to allocate their resources elsewhere. Further, it is simply implausible that the threat of private enforcement will actually cause vagrants and others to "shape up or ship out" (Ibid 61). Assuming that private enforcement will achieve this goal where public enforcement hasn't commits the Cohen fallacy. If libertarians who imagine that private liability rules will give officers wider latitude for the use of force are right (Rothbard 1998, 82), the problem of disproportionate force is even more serious. The tension is likely to remain in any non-idealized world.

Reform and abolition

Police abolition and reform have been pushed to the forefront of political discourse by Black Lives Matter protests. As a result, (even substantial) reform now appears to be the politically moderate position. Many, especially on the left, call for police abolition, or short of that, for substantially defunding the police. There are good reasons for concern about these positions. Police abolitionists lack a compelling solution to the problem of violent crime. Similarly, defunding the police is attractive only insofar as effective alternatives receive that funding. These policy goals might be inappropriately ideal. For the purposes of this paper, it is worth

thinking about the relationship between libertarian work on police reform (informed by the foregoing discussion) and these new political movements.

One longstanding libertarian goal is the elimination of vice enforcement and other victimless crimes. Doing so would allow police to renew their focus on violent and property crime and reduce the chances of police stops escalating into violence (Miron and Partin 2020). If police (e.g.) don't target the reselling of single cigarettes, then there will be no chance that an officer uses an illegal and ultimately lethal chokehold during the arrest. This reform would also eliminate many of the most pernicious racial inequalities in policing, such as racially biased pretextual traffic stops. Turning traffic enforcement over to a civil agency would also help to achieve these goals. These two reforms would be major steps towards defunding the police and would amount to a targeted kind of police abolition.

Other libertarian reforms involve substantially altering police agencies and the rules that govern them. Eliminating qualified immunity increases police accountability by enabling officers to be more easily sued for misconduct (Schweikert 2020). This would give departments financial incentives to fire brutal and unprofessional officers. Weakening or dissolving police unions is another powerful way to enhance police accountability and eliminate one of the strongest obstacles to other kinds of police reform (Olson 2020). Without police unions making it more difficult to fire bad officers and to enact, for example, new use of force policies, these marginal improvements will be easier to achieve and more widespread.

Demilitarizing the police by ending military asset transfer programs like the 1033 program and attaching strict reporting requirements to the transfers that remain deprive police departments of resources that are often tools of injustice (Burrus 2020). Ending no-knock raids and limiting the use of SWAT teams further constrain the military equipment that's already in circulation. Although those weapons and tactics have some legitimate uses, serving a drug warrant is very clearly not one of them. Making the equipment more expensive and more tightly regulating its use will reduce the frequency with which police resort to them and help to prevent the predictable police shootings (of people and their pets) that occur when suspects defend themselves from unidentified strangers who just broke into a home (Balko 2013).

Assuming that taking vice laws off the books is not an option, eliminating civil asset forfeiture and requiring police to prove criminal activity before seizing assets will reduce police incentives to focus on drug interdiction and pretextual stop strategies (Pilon and Burrus 2017). It will reduce the funds available to police agencies, though without moving it to alternative public services. Perhaps more importantly, even for libertarians, it will reduce police revenue sources that are not democratically authorized.

These are all promising ways to improve the quality of policing and do not require outright police abolition. They would fundamentally reform police agencies though, in terms of the reasons to engage citizens, the tactics used to enforce the narrowed criminal law, and in terms of incentives individual officers and police administrators face. In other words, they are not the small changes that police abolitionists might make them out to be. As we've seen, though, libertarians typically take "night watchman" kinds of policing to be among the most clearly justified role for governments, so they will tend to prefer these reforms to outright abolition (Bernstein 2020).

Some libertarians, however, would embrace outright defunding or abolition. In fact, libertarians would likely be more accepting of likely outcomes of abolition than most others.

Defunding more generally or abolishing the police entirely would hasten the privatization of patrol policing if commercial establishments could not simply call the cops instead of providing their own security. The suburbs would also likely be increasingly patrolled by private security firms paid for with homeowner association or neighborhood association funds. On this point, the abolitionist position looks ineffectual. Less affluent neighborhoods would be forced to take matters into their own hands if, as is likely, programs aimed at "root causes" like poverty relief were unable to completely eliminate crime and disorder (though again, this might not be too far from the status quo). The disagreement about how to allocate the funds taken from police departments will naturally turn on familiar ideological lines.

3. Punishing crime

Criminal law violations are often punished with incarceration. The three primary questions about punishment that have occupied libertarians are (i) how should punishment be provided?, and (ii) what justifies punishment? The issue of justification will determine (iii) how much and what kind of punishment should attend criminal activity.

Mass incarceration and the provision of punishment

Consider question (i): should punishment (here incarceration) be privately provided? Whereas private policing has largely stayed under the radar, private prisons have become a primary focus of criminal justice reform. The United States incarcerates an appalling number of people; the popular narrative places private prisons and the so-called "prison industrial complex" at the center of the causal story. Because libertarians typically like privatization, we'll look at this and related objections to private prisons in this subsection.

Many libertarians are tempted to attribute mass incarceration to the war on drugs rather than privatization. Michelle Alexander (though no libertarian) defends this, calling the racially disproportionate war on drugs "the new Jim Crow" (2012). John Pfaff, on the other hand, disputes the claim, noting that only 15 percent of inmates are incarcerated on drug charges (2017). Surprenant and Brennan, critiquing the libertarian account, argue that financial incentives are a better explanation (2020). While these skeptical responses are largely true, there is something to the original claim. While most people in prison are incarcerated for violent crime, a large proportion of violent crime in the most violent cities is drug related (Moskos 2009). Black markets typically cause violence, so the libertarian explanation might be in better shape than skeptics have thought.

Ultimately, no matter how much of mass incarceration we attribute to the drug war, it remains true that private prisons were initially a *response* to whatever caused the massive spike in incarceration. Private prisons did not cause rising incarceration rates. And they house a minority of prisoners (Pfaff 2017, 79).

If private prisons didn't cause mass incarceration, they might generate an incentive to maintain high incarceration rates and provide an inferior service compared to public prisons. This is often taken to be an indictment of privatization in general. Libertarians tend to offer a public choice response: construing the "profit motive" as something unique to private firms is a mistake. Everyone in the public prison sector is pursuing a profit of their own, so there's no special objection to private prisons.

The California Correctional Peace Officers Association has predictably lobbied for more (public) prison cells and fought marijuana legalization (Knafo 2013; Fang 2016). While the DOJ announced a shift away from private prisons in 2016 because reports found that they are more expensive and lower quality, the Department of Homeland Security (the primary consumer of private prisons) has made no such change in policy (Hall and Mercier 2018, 216). The Federal Bureau of Prisons even renewed private prison contracts after that announcement (Surprenant 2019, 124). For some of the firms that provide private prisons, their contract makes up a small portion of their overall revenue; the political gains from public prisons plausibly provides stronger incentive to maintain incarceration rates than private prison contracts (Pfaff 2017, 79).

In light of this, it is simply naive to object to private prisons on the grounds that the profit motive provides bad incentives. Incentives are determined by rules and institutional form, not just corporate profits. There is no eliminating something like "profit" seeking from government agencies or their members (Surprenant and Brennan 2020).

It is nevertheless true that private prisons have been found to provide lower quality services. Some claim that this is unlikely a result of market forces. Private prison firms are largely isolated from market forces through occupancy rate quotas, and since their customers are bureaus rather than consumers, they are not punished in the market for subpar service. Rather, they earn their contracts through lobbying and campaign donations (Hall and Mercier 2018). One way to make private prisons significantly higher quality is to treat prisoners, not bureaucrats, as the customers. A voucher system would enable prisons to compete for prisoners, thereby generating competition on the basis of quality of life while incarcerated (Surprenant 2019). The quality of private prisons is a *political* problem.

Finally, some object to the very idea of profiting from incarceration. Libertarians will again respond that many people in the private and public sphere make their livings in the criminal justice system. Prison guards and politicians with prisoners in their districts benefit handsomely from public prisons. Objecting to profiting from incarceration only when the facility is private is hard to justify.

Justifications and methods of punishment

The next question we will take up is (ii) what justifies punishment, if anything. This will shed light on (iii) what kind of punishment the criminal justice system ought to rely on. The main justificatory options are typically retribution, restitution, rehabilitation, incapacitation, communication, and deterrence. For libertarians, punishment is nearly always thought to be constrained by a proportionality requirement (Locke 1980 [1690], §8; Nozick 1974, 59; 1983, 363; Rothbard 1998, 85; D'Amico 2015). The harm of retribution must match the harm caused, or the cost of restitution must make victims "whole."

The libertarian commitment to proportionality means that most libertarians will reject deterrence theories of punishment. In §8 of the Second Treatise Locke appears to endorse a proportionality requirement, though in §12 he claims punishment should be strong enough to make rights violations a bad bargain (cf. Hasnas 2018, 27). Others have pointed out that this deterrence theory would justify severe punishments; the mere possibility of avoiding punishment would require the severity of punishment to be increased in order to produce an expected utility calculation that makes crime a bad bargain (Nozick 1974, 60; Rothbard 1998, 83).

Libertarians are also likely to reject rehabilitation justifications of punishment on the grounds that rehabilitation is likely to take a great deal of time. If individuals are to remain incarcerated until they're rehabilitated, then punishment will not be proportional either (Rothbard 1998, 94). Libertarian skepticism of semiotic arguments against commodification (Brennan and Jaworski 2015) suggest that few libertarians find communication theories of punishment satisfactory. This leaves retribution and restitution as the justifications of punishment most conducive to libertarian commitments.

Some libertarians wonder whether retributive punishment is justified in principle, rather than relying on tort-based restitution. If there are options for reducing criminal activity that do not require the state to punish, then punishment may have no place in a libertarian or liberal society (Hasnas 2018). Rather than compensating one's own victim, criminals may also be coercively taxed to provide for a kind of welfare safety net (Otsuka 2003, 43). Others argue that actual prisons in democratic societies like the United States are so awful that they are unjustifiable, suggesting that in practice there is much to prefer in tort-based restitution (Huemer 2018b). If the criminal system were converted entirely to a tort-based system in which defendants who are found guilty must pay monetary damages, private firms would have to monitor "judgement proof" defendants to ensure that they pay their damage (Hasnas 2018, 25). In a similar vein, Rothbard advocates a system of temporary slavery in cases where restitution cannot be afforded (Rothbard 1998, 86). It is anyone's guess what the failures of those institutions would look like.

Tort-based restitutions are only good in cases where one can be appropriately compensated. But there are certain crimes victims of which cannot be made whole (Narveson 1988, 252). Perhaps the criminal law cannot be replaced entirely with a tort system. But the libertarian perspective would push much further in that direction.

Prisons are so awful and incarceration so harmful that another option besides tort-based restitution might even include caning as a more humane alternative (Brennan 2018, 294). At any rate, a libertarian society would surely have much less incarceration on the grounds that the current system of incarceration is "one of the most spectacularly cost-ineffective systems in the history of mankind short of war" (Narveson 1988, 252).

4. When the fallible criminal justice system fails

Libertarians tend to opt for non-ideal over ideal theory. To conclude, then, it is worth thinking about some challenges for libertarian thought that arise from failures of realized criminal justice systems. Three issues stand out: discretionary non-enforcement of certain laws, paying for punishment, and non-ideal libertarian cases for more redistribution in the context of criminal justice.

Discretionary non-enforcement?

The actual criminal code is unjustly expansive, and the penal system is unjustly harsh. This puts the police between a rock and a hard place. May police exercise discretion and decline to enforce laws? Libertarians who are moved by "rule of law" considerations prefer full enforcement, whereas skeptics of political legitimacy who place a premium on moral realism think that police officers must ignore some laws.

Hayek (2011 [1960], 312) and many others take the rule of law to be crucial. Law is for enabling mutually beneficial cooperation. To do that, its enforcement must be predictable and equal. That requires equal enforcement (316). Full and equal enforcement is what allows for government by *law* rather than government by *people*. In a world with perfect law, this sounds correct. But it also seems implausible to say that *unjust* laws ought to be enforced.

Rule of law proponents have a response: if laws apply equally and are enforced equally, then it makes it unlikely that unjust laws will be passed in the first place. Hayek claims that we have no formal criteria of just law other than generality and equality (of application and enforcement) (2011 [1960], 318). But rule of law proponents who have a substantive account of just law can make the same response. Hayek does allow for some discretionary enforcement so long as it is "deducible from the rules of law" and "can be known to the parties concerned" (322).

The actual discretion we see in policing comes not from rational deduction from laws, but from resource scarcity and prosecutorial constraint (Moskos 2009). Universal enforcement is a practical impossibility. And majoritarian decision-making predictably results in unequal laws. The question then becomes, *given that laws do not apply equally and cannot be fully enforced*, is discretionary non-enforcement permissible? The Hayekian response puts quite a bit of pressure on the claim that universal enforcement will eliminate bad laws, and it is not clear that the response can withstand it.

The libertarian case against enforcing unjust laws typically follows from the parity principle (Brennan 2019). Agents of the state have no special permission to act unjustly and there is a strong duty to avoid causing unjust harm (Huemer 2018a). According to this reasoning, police officers should not arrest, say, drug users; rather, they should give them tips on how to avoid arrest by other officers (Huemer 2013, 161).

One difficulty for this view is working out practical guidelines for discretion that can be implemented. Another is that some might charge proponents of this response with ignoring the difficult problem of political philosophy, namely organizing a society characterized by moral disagreement.

There are at least some libertarians who appear sympathetic to the view that it can be permissible to enforce unjust political decisions. In discussions of protection agencies, Nozick relied on *procedural* rights. If we have procedural rights, perhaps officers ought to enforce some unjust laws. This would not be a violation of the parity principle, at least as long as individuals in their private roles would similarly be justified in relying on procedural rights (cf. Estlund 2007). But since procedures can fail, an appeal to procedural rights might not justify as much in the way of unjust law enforcement as it at first seems (Monaghan 2018).

Paying for punishment?

Rothbard suggested temporary slavery to secure restitution from judgement-proof defendants. In a world where we continue to rely on prisons over restitution, some libertarians worry about victims and other taxpayers bearing the costs of running prions. One way to make up some of this cost is by extracting value from prison labor (Benson 1998, 300). This approach looks quite unappealing without first dramatically curtailing the scope of the criminal law and rectifying racial imbalances in arrest rates. Without diminishing the serious injustice of ruining people's lives by incarcerating them on vice charges, there is an additional and significant wrongdoing

associated with also forcing people to engage in labor from which value can be extracted. Some have claimed, with considerable plausibility, that the prison labor used at the Louisiana State Penitentiary, for example, is a new form of slavery. The prison is colloquially referred to as "Angola", named after the Angola slave plantation which preceded it.

Redistribution and criminal justice

Another source of failure in an adversarial legal system is an inability to pay for effective representation. This is exacerbated, of course, by an unjust criminal code and discriminatory law enforcement. If we want a criminal justice system that's libertarian friendly—one that seeks to avoid unjustified punishment, bargaining positions that eliminate the possibility of consensual plea bargaining, and disproportionate sentencing—then there may be a need for social insurance spending on a public defense system. Reparative obligations need not be satisfied voluntarily; funding for public defenders might be a way to discharge the reparative obligations incurred by a fallible criminal justice system.

Insofar as libertarians accept a minimal state funded by taxation, it is hard to see how to object to tax-funded public defenders while one endorses tax-funded police and prosecutors. Surely private protection agencies and courts will be fallible as well, in which case courts will likely have to subsidize or provide for a defense lawyer as well. Given that we know ahead of time that some amount of cases will be decided incorrectly, contributions to a system of "public" defenders may be a cost of maintaining justice.

As Nozick argued, the criminal justice system is redistributive, even if only slightly (Nozick 1974, 25). If libertarians accept a public criminal justice system, they'll have to accept some redistribution. This is relevant to disputes between hard libertarians and classical and high liberals and recalls the issue of defunding the police and transferring those resources to other agencies. *If* we go in for some redistribution, then it is worth thinking about how best to engage in such redistribution. A desire to minimize taxation generates an interest in accomplishing the legitimate goals of the state as efficiently as possible. *If* it turns out that welfare programs reduce crime more cheaply than patrol officers do, and if there is less moral risk associated with such programs, libertarians may have no grounds to insist on less efficient (by hypothesis) "night watchman state" methods of protecting rights.[4] Perhaps, then, the minimal state looks less minimal than originally envisioned.

Libertarians disagree about plenty, including public versus private provision of criminal justice and the proper means of enforcing the law and punishing its violation. Nevertheless, the libertarian perspective on policing and punishment is unified by a preference for less of it. Narrowing the scope of the criminal law eliminates the need for entire police agencies or divisions within them. Reducing arrests on illiberal charges in turn reduces opportunities for bad policing and shrinks the funnel into harsh prisons. Tort-based restitution reduces incarceration. Whereas libertarians are often criticized for ignoring the wellbeing of the least well off in society, shrinking the criminal justice system is likely a major driver of enhancing

[4] See, on this point, the discussion of welfare as a "bribe" that reduces property crime in David Simon and Edward Burn's *The Corner* (1998, 374).

their wellbeing and equality. Libertarians can rightly ask newcomers to criminal justice reform: what took you so long?

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