**conventions and convictions: THe valuative theory of punishmENt**

Daniel Maggen[[1]](#footnote-2)†

# Introduction

During a town hall meeting held in Green Bay on May 2016, Donald Trump, then a contender in the Republican primary elections, had made a statement that was met with considerable astonishment. Pressed by moderator Chris Matthews, Mr. Trump conceded that if abortion is outlawed—something that he would presumably seek to do as a President—then women performing it would be subject to punishment. This statement provoked immediate rebuke from Democrats and Republicans alike, quickly prompting Mr. Trump to backtrack its penal conclusion.[[2]](#footnote-3) But what is it was it about the idea that a candidate who professed to be “pro-life” would seek to criminalize and consequently penalize the act of abortion that drew such ire? Much of the answer no doubt concerns election dynamics and the profound moral, philosophical, and political questions that surround the topic of abortion, but part of it also comes from the failure of legal theory to clearly ascertain the nature of the connection of crime to punishment. Rather than seek to elucidate the makeup of this elusive connection, this Article will argue that the futile attempt to do so is the reason we currently lack a satisfactory theory of punishment.[[3]](#footnote-4) Instead, the Article will establish the way in which punishment could be justified without necessarily being linked to crime. This theory of punishment, I will argue, not only succeeds where others fail but also helps explain the peculiarity of the response to Mr. Trump.

Punishment, we are often told, is an actual or potential evil that could only be practiced when it is used to prevent crime or as a deserved response to past wrongdoing. There is an undeniable truth to this idea, in the sense that any theory of punishment that fails to account for the connection between crime and punishment fails to provide us with a justification of punishment. Yet beyond this intuitive image of punishment we can also observe a tendency—implicit in Mr. Trump’s syllogism—to suggest that the connection between crime and punishment is *absolutely necessary*, meaning that for punishment to be justified we must be capable of demonstrating how it forms this link. This is most apparent with regard to the expressive theory of punishment, which despite its strengths is often rejected for its inability to assert that the condemnatory link it draws from punishment to crime is a necessary one.[[4]](#footnote-5)As it now stands, the expressive theory of punishment is regarded by its critics, and even some of its proponents, as an accurate description of the practice of punishment which is devoid of justificatory strength.[[5]](#footnote-6) As Dan Kahan admits of his writing: “I don't intend my discussion to be a complete theoretical defense of the expressive position. Indeed, I want to defend the expressive view without recourse to deep theorizing. I will ultimately seek to demonstrate the utility of the expressive view not by establishing its conceptual coherence in the abstract, but rather by using it.”[[6]](#footnote-7)

Filling this void, this Article will suggest an expressive theory of punishment that is premised on the *conventionality* of punishment, *including the conventionality of the reprobative response to crime*. This theory, to which I will refer as a *valuative* theory of punishment, will suggest that the justification of punishment must be viewed as part of the general attempt to support the ability of individuals to assert their personhood through the communication of values.[[7]](#footnote-8) Law, the Article will suggest, promotes this purpose by giving voice to the values shared by the community, proclaiming the ways in which they are commonly interpreted, and reacting—through punishment—to incidents that hinder communication.

The argument will proceed in several steps. *First*, in part I the Article will outline the origin and meaning of the demand the punishment exhibits a necessary connection to crime. Distinguishing between *general* and *special* forms of justification, the Article will suggest that the latter see the failure of the former as reason to detach the philosophical investigation into the justification of punishment from the general attempt to justify state action, insisting that unlike state action in general punishment could *only* be justified as a response to crime. Cabining the question of punishment, it will be argued, places the onus of justification on the ability to clearly demarcate the unique evil of crime, which the special approaches cannot do given their detachment from the moral principles animating the general approaches.

*Second*, Part II of Article will suggest that the general principle that animates the expressive theory of punishment is the idea that the purpose of punishment is the expression of values. After exploring some of the ways in which expressive theories fail to flesh out the justificatory power of values, it will be suggested that several prominent expressive theories turn in vain to the special route in search for justification, only to find it in a theory of value that is informed by Hegelian dialectic. While this direction helps bring to light some of the essential features of the expressive argument, the Hegelian foundation takes these theories too far beyond the purview of liberal theory by making the individual overly dependent on the values of the community she is part of.

What expressive theory lacks, it will be argued, is a theory of value capable of justifying punishment, which will be offered in the *third* stage of the article. Against the common conception of punishment as the expression of values, Part III will present a theory of punishment that is based on the capacity of *valuation*, as the ability to assert one’s creative personhood by communicating, *via* values, with others. Drawing inspiration from Immanuel Kant’s theory of *judgment*, the article will present the necessary conditions for successful valuative self-assertion.

In the *fourth* and final stage of the argument, Part IV will explore the ways in which criminal law can be viewed through the lens of valuation. It will be argued that law serves three main functions that facilitate valuative communication, including the enumeration of values shared by members of the community, the specification of the common interpretations of various forms of behavior with regard to the affirmation or denial of valuation, and the reaffirmation of values and valuation in the face of criminal behavior that undermined them. This presentation of punishment, it will be argued, is capable of overcoming the criticism commonly aimed at the expressive theory in light of its ability to drive a wedge between crime and the justification of punishment.

To supplement the argument, Part V of the Article will implement the proffered argument on the question of abortion. Following the Supreme Court’s opinion in Roe v. Wade, the Article will suggest that the values that commonly inform the prohibition of abortion can only justify the imposition of punishment when they abide by the proposed framework so that the prohibition is justified as a way of supporting valuation. In addition, it will be argued that even when the prohibition of abortion is justifiable, the same is not necessarily true of the *penal condemnation* of the women who perform it, given the distinct functions served by criminalization and condemnation.

# General and Special Justification

Justification means different things for different theories of punishment. As their shared point of departure, theories of justification generally assume that there is some *prima facie* cause for concern about punishment—a reason for which it stands in need of justification—but they often disagree on how the path of justification ought to proceed from that point.[[8]](#footnote-9) Several parameters account for the ways in which various approaches differ. Mitchell Berman, for instance, suggests that we can distinguish between penal theories that address the “demand basis” of punishment by demonstrating that there considerations that override it and theories that do so by arguing that the act of punishment does not, upon reflection, give rise to the demand basis in question.[[9]](#footnote-10) David Dolinko suggests another helpful distinction, differentiating between theories that practice ‘rational justification’ by articulating the logic of punishment and theories that purport to offer a ‘moral justification’ of punishment by explaining why it is morally permissible or desirable to engage in punishment.[[10]](#footnote-11) A third distinction is inspired by H.L.A Hart’s suggestion that we can differentiate between the distribution of punishment and its imposition, so that we can distinguish between theories that follow Hart in separating the justification of punishment from the proclamation of culpability and those theories that oppose him by insisting that any justification of punishment must also explain the connection between these two components of criminal law.[[11]](#footnote-12)

Another distinction I wish to pursue in this Article, touching upon the previous three, is between *general* and *special* modes of justification. I will suggest that for those theories that take the general approach to justification, the demand basis of punishment is no different from the one raised by state action in general, at least not categorically so. In the pages below I will sketch a general outline of how Utilitarian and Kantian justifications of punishment, or at least some ideal types of them, can be read as general modes of justification. Against the common critiques of these general approaches I will suggest that their weakness lies not in their general form of justification but their incongruence with a common intuitive image of criminal law.

These criticisms, I will suggest, often give way to the creation of *special* modes of justification, seeking to solve the deficiencies of the general justifications by limiting the scope of inquiry to the question of punishment. For these theories, punishment involves a *unique* evil, surpassing the demand basis presented by state action. The exceptionality of this demand for justification, these theories argue, entails that punishment *could only be justified* when (1) there are no other means by which the purpose it serves could be achieved, and (2) it is designed to be a *response* to crime, either as a forward-looking form of crime prevention or as backward-looking retribution. The common thread uniting these two conditions is the belief that crime and punishment are somehow *exceptional* forms of behavior, sharing some Janus-faced quality—a unique kind of *violence*—that distinguishes them from all the other ways in which people can negatively affect the life and wellbeing of others. [[12]](#footnote-13)

The exceptional, *sui generis* view of crime and punishment is planted deep within the intuitive image of criminal law. “The deep intuition that a punishment should follow a crime, and should be limited by the offender's subjective malice,” Linda Ross Meyer observes, “is a grounding principle of both criminal law and everyday morality.”[[13]](#footnote-14) The special approaches take this intuition to be a mark of *objective necessity*, manifesting an unbreakable link between crime and punishment so that the latter is *only* acceptable when it is properly motivated by this connection. It is not enough, on this view, that punishment *logically* follows crime and culpability, it must follow it with perfect necessity, as the only possible response to the exceptional evil of crime. Hence, at the inception of modern penology, Cesare Beccaria insisted that punishment could *only* be justified when it derives from “absolute necessity,” Subsequently arguing that such necessity could only be reached when punishment is used to prevent future crime.[[14]](#footnote-15) In various forms, this idea is with us still animating the special approach to the justification of punishment.

Why is it that the justification of punishment could be thought to involve such exceptionality? Various special theories provide different explanations, based on their different conceptions of the exceptional wickedness of wrongdoing.[[15]](#footnote-16) A more functional answer, however, comes from René Girard’s seminal portrayal of “sacred violence,” suggesting that the *belief* in the exceptionality of crime and punishment serves an important social and psychological function of differentiation.[[16]](#footnote-17)As Girard’s brilliant analysis suggests, the ritualistic linking of crime and punishment has served throughout history as a way of alleviating the pressures caused by mimetic desire, doing so by creating and reaffirming the distinction between the sacred and the profane. Famously describing the “scapegoating mechanism” animating punishment, Girard demonstrates how society is founded on the ability to sublimate such volatile desires into moments of “sacred,” i.e., *exceptional* violence, first attributed to the wrongdoer and then to the communal response expunging and sanctifying it. As he observes, the exceptionality of crime and punishment is not a corollary of some hidden quality they share but is the *purpose* they serve, as an affirmation of order against the threat of blurring social boundaries.[[17]](#footnote-18)

Girard’s analysis is not meant to dissuade us from assigning exceptionality to crime and punishment but rather to cations us against the dangers of believing that there is some inherent truth to it. Marking crime and punishment as phenomena outside the general sphere of human behavior is one of the foundations of successful social life, but it also has the potential of making punishment a self-perpetuating instrument of differentiation and violence, separating the righteousness of law-abiding citizens from the monstrous wickedness of wrongdoers by sacrificing the latter to the Moloch of community building.[[18]](#footnote-19)

## Utilitarianism and Crime Prevention

The distinction between the special and general modes of justification can traced by two familiar forms of utilitarian justifications of punishment. Closer in his writing to the general state of mind, Jeremy Bentham thus subsumes the justification of punishment under the general justificatory framework of the state. In contrast, for J.S. Mill, writing from the special perspective, punishment is only justifiable as a way of preventing the distinct category of criminal wrongdoing.[[19]](#footnote-20) Below we will see, in general details, how this affects their conception of the connection between crime and punishment. Needless to say, their actual theories are much more complex and nuanced than the ideas presented here, used as ideal types rather than as thoroughgoing analyses of their writing.

1. **General Utilitarianism**

As a general theory, utilitarianism’s treatment of punishment reflects two facets—both addressed according to the general principle of utility. Punishment, for this theory, is primarily an expression of governance, demanding justification for its interruption with the choices and preferences of those subject to it; if it is to be justified, such imposition must show itself to be motivated by objectively valid considerations. “The immediate principle end of punishment,” Bentham writes, “is to control action.”[[20]](#footnote-21) Accordingly, “[t]he business of government is to promote the happiness of the society, by punishing and rewarding.”[[21]](#footnote-22)

Punishment, the general approach tells us, manages to overcome its demand basis in this view when it conforms to the objective considerations legitimizing state authority in general. Punishment, however, also has an obvious distinct feature, separating it from rewards and compounding its demand basis—that it seeks to control action *through the production of suffering*. “All punishment is mischief,” Bentham writes, “all punishment in itself is evil.”[[22]](#footnote-23) The justifiability of punishment despite this added mischievousness again depends on its accordance with the general felicific calculus: “[u]pon the principle of utility, if it ought at all be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”[[23]](#footnote-24) Since, as a means of control, punishment’s justification is contingent on its conformity with the principle of utility, the fact that it produces suffering implies that it could be justified only when and if this suffering is offset by the other benefits it creates.

How does the ideal type of general utilitarianism measure up to the intuitive image of punishment? Some say that very poorly, often viewing its *generality* as license given to disregard culpability’s *necessary* role in the justification of punishment. Utilitarianism, its critics often argue, is willing to take into account various consideration beside the wrongdoer’s guilt, so that in principle there may very well be occasions in which the general utilitarian commends punishment even in its absence.

Although there is a kernel of truth to this objection, utilitarianism’s generality is also, however, a substantial factor weighing *against* disregarding culpability. As a means of control, punishment’s success depends on the kind of *fear* it induces, ideally the fear of would-be wrongdoers that they would be subjected to hard treatment. The intentional infliction of pain on the innocent— “telishment,” as John Rawls terms it—not only needlessly amplifies the suffering caused by punishment by spreading it to those who are not would-be criminals, but also diminishes the effectiveness of the threat aimed at those who are.[[24]](#footnote-25) Of course, the adverse effects of telishment are contingent on the public knowing that innocent people are being telished, but any utilitarian contemplating it must contend with the inevitable possibility of the telishment becoming publicly known.[[25]](#footnote-26) Given the wide variety of means of control at the general utilitarian’s disposal, including punishments and rewards alike, it seems highly unlikely that she would opt for the risky practice of telishment. Unlike those who understand punishment in special terms, the general utilitarian does not limit her calculation to the prevention of crime but more generally sees the task of punishment in the broader framework of state control; as such, the criticism opposing it for its potential use of telishment seems misdirected.

Viewed as a general justification of punishment, the Benthamian approach hangs on the correlation between its fundamental conception of the individual and the state’s relation towards her. Here, the general utilitarian approach is susceptible to scathing critics for its suggestion that government operates by way of *controlling* its citizenry.[[26]](#footnote-27) A familiar Kantian criticism that runs along these lines objects to utilitarianism by claiming that in using punishment for the promotion of aggregate happiness the state would be violating the categorical imperative by using the punishee as a means for the furtherance of ulterior ends.[[27]](#footnote-28) A more penetrating critique, however, grows out of G. W. F. Hegel’s complaint that in using punishment as a threat to would-be wrongdoers the state is treating its citizenry no differently than one treats a dog that is shown the whip to make it better behaved.[[28]](#footnote-29) *Controlling* individuals through the use of punishment and reward robs them of their humanity, both objections complain, denying them the respect they are due as free beings.

Although these objections are planted in 18th-century idealism, their spirit is still with us today. From Michel Foucault’s analysis of Bentham’s transformation from punishment to *discipline to* Malcolm Feely and Jonathan Simon’s depiction of ‘the new penology,’ even today the equation of punishment with social control seems not so much a justification of punishment as it is—for better or for worse—its substitution with something entirely different.[[29]](#footnote-30)

1. **Deterrence**

One of the most familiar variants of the *special* mode of utilitarian justification comes from the combination of the harm principle with the idea of deterrence, amounting to the suggesting that punishment is to justifiable solely when it is used to *prevent crime*. As a special counterpart to general utilitarianism, deterrence responds to the above criticism by infusing utilitarianism with an appreciation of *liberty*, reducing the purview of punishment so that state control does not interfere with it.[[30]](#footnote-31) In this vein, Mill, who strove to put a more humane face on his godfather’s utilitarianism, contended that not all pleasures are cut from the same cloth and that the contribution of some higher forms of pleasure to one’s overall happiness is incommensurate with that of lower pleasures.[[31]](#footnote-32) Paramount to these pleasures is the exercise of personal liberty, for it represents pleasure *of a uniquely human form*, transcending the immediate brutishness of pleasure and pain: “He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties.”[[32]](#footnote-33)

For Mill and his contemporary followers, the idealization of the human capacity for freedom translates into a view of punishment as a form of interference that is *uniquely* capable of undermining freedom.[[33]](#footnote-34) As Joel Feinberg maintains, this is an expression of punishment’s *coerciveness*, so profoundly connected to liberty that the former’s absence is that which defines the latter:

Not all forms of constraint and compulsion are of equal interest to the social and political philosopher. If there is a special kind of freedom that deserves to be called “political freedom” or “liberty,” it must consist in the absence of that one special kind of constraint called *coercion*, which is the deliberate forceful interference in the affairs of human beings by other human beings.[[34]](#footnote-35)

On this view, characteristic of the special approach, both crime and punishment are *exceptional* phenomena, for unlike all other constraints that limit the individual’s ability to satisfy her wants, from natural laws to social constraints, crime and punishment represent *coercive* limitations of liberty.[[35]](#footnote-36) If punishment is to be justified despite this *unique* mischievousness, this could *only* be so since it is meant to prevent the similarly exceptional wickedness of crime.[[36]](#footnote-37)

The *unique* evil of coercion, defined by Mill’s harm principle as a distinct category of interferences with the affairs of another, is the main point of divergence between the general route of utilitarianism and the special approach of deterrence. Against Bentham’s general applicability of the felicific calculus, the Millian theory of punishment suggests that its reign ought to be truncated by the special domain of crime and punishment, regulated by its own considerations. The state, Mill argues, is free to exercise control over the individual in order to promote utilitarian ends, but only as long as it does not do so coercively, through punishment: “[t]hese are good reasons for reasoning with him, or persuading him, or entreating him, but not compelling him, or visiting him with any evil in case he do otherwise.”[[37]](#footnote-38) Against Bentham’s more general approach to punishment, the special approach contends that there is something categorically different about punishment *qua* coercion, distinguishing it from other forms of social control. For this reason, punishment is arguably only justifiable when it is aimed at preventing the comparable evil of crime.[[38]](#footnote-39)

In seeking to solve the problems of the general approach, the special version of the utilitarian justification, however, creates serious difficulties of its own, starting with the most obvious challenge faced by any special theory—the explanation and demarcation of the unique features that separate punishment from other negative influences. Despite its dependence on the claim that there is some distinct quality to coercive violence, it is not at all clear that the special approach is capable of explicating its nature. As is often noted, the harm principle, criminalizing harm to others, is hardly capable of differentiating self- from other-related behavior. Likewise, many authors have noted that any attempt to delineate harm *qua* coercion ultimately results in an appeal to social mores and conventions. Nothing, so it seems, is *inherently* different about punishment and crime, their exceptional treatment as much a matter of convention as it is the product of some moral necessity.[[39]](#footnote-40)

Even more concerning, however, is that in insisting that punishment could *only* be justified as a form of crime prevention this special approach becomes disturbingly receptive of telishment. Compared with the more expressly metaphysical conceptions of crime and punishment invoked by theories that follow the idealization of liberty all the way through, the Millian attempt to single out coercion is rather halfhearted, unsure whether liberty and coercion are truly distinct categories insulated from the general felicific calculus.[[40]](#footnote-41) Accordingly, the Millian primarily identifies the good of liberty with the pleasure individuals draw from *knowing* that they are capable of pursuing their desires without coercive restraints.[[41]](#footnote-42) Combining this instrumental notion of liberty with the special mode of justification means that punishment is *only justified when it creates the appearance of liberty-maximization*. In holding these two ideas together, the special utilitarian creates an incentive for the state to pursue the purpose of punishment by creating the appearance of responding to crime when doing so truthfully would require excessive resources.[[42]](#footnote-43) Ironically, the effort to make utilitarianism more humane by limiting its scope may result in just the opposite.

## Kant and Deserved Punishment

Many today find in Kant an answer to utilitarianism’s inability to adequately articulate punishment’s relation to freedom, although it is not always clear whether they do so *generally*, informed by Kant’s conception of the individual, as it informs his moral theory, or *specially*, in light of some narrower points he made with regard to the retributive nature of just punishment.[[43]](#footnote-44) “The primary question, which examination of penal theory unavoidably raises and which must be faced,” Robert Pugsley asserts “belongs to moral philosophy and political theory: What is there about society worth protecting by criminal punishment? Certainly, at base, it is the dignity and worth of each individual person—the touchstone of Immanuel Kant’s retributive concept of punishment.”[[44]](#footnote-45) Alas, there is significant tension between the kind of retributivism attributed to Kant and his theorizing on the nature of freedom, often overlooked by those who declare their allegiance to his ideas.[[45]](#footnote-46) Below I will examine Kant’s general theory of punishment as an outgrowth of his theory of the legal state, and how the special route of retributivism attempts—and fails—to overcome the ineptitude of the general account.

1. **General Kantianism**

Like utilitarianism, Kantian theory begins with a basic conception of human nature, developed to a considerable extent as a response to the empiricism of the utilitarians. For Bentham, “[n]ature has placed mankind under the governance of two sovereign masters, pain and pleasure.”[[46]](#footnote-47) Kant, in contrast, believed that in addition to the sensory experience of the world human beings also possess the power of *reason*, expressed in the ability to create *ideas*, meaning reason-based inferences that transcend our worldly experience. Accordingly, freedom for Kant did not relate, as it did for Bentham or Mill, to the kind of stimuli that affect one’s decisions—he scornfully rejected this thought as the freedom of a turnspit—but to the innate ability to act *spontaneously*, free of *any* external influences. Such freedom, also referred to by Kant as *autonomy*, is the ability to base one’s decisions on the *idea of law* rather than being determined by the laws of nature.

Building on this foundation, the general Kantian turns her attention to the question of state authority and the ostensible contradiction between freedom and the dominion of some individuals over others.[[47]](#footnote-48) As was the case for Bentham, Kant’s solution to this contradiction accords with his overarching conception of the individual, but for that very same reason it ultimately seems incongruent with the intuitive image of punishment. For Kant, political authority is justified in light of the vast gulf that separates the earthly legal apparatus and the transcendentality of freedom. Unfortunatley, his far-reaching justification, exculpating *any* state action, also pulls the rug from under the attempt to offer a theory of punishment that has any resemblance to the way in which it is commonly understood.

As even his earliest critics noted, Kant’s notion of freedom as an expression of reason is of utmost *moral* gravity but of little earthly meaning. As Karl Ameriks succinctly puts it, “for Kant what is most important about us is too momentous to be watered down but also too mysterious to be presumed to allow of direct evidence in any ordinary sense.”[[48]](#footnote-49) As a defining feature of humanity, freedom becomes an ability residing well beyond the reach of earthly influences, at least short of those influences that end one’s life. As Kant puts it at some point, even when one is stretched on the torturer’s wheel she does not lose one iota of her freedom—for if that were the case then it would render her less worthy of respect for it.[[49]](#footnote-50) No behavior can disrespect or encroach on an individual’s freedom, no more than it could deny the laws of nature by “ignoring” them. As such, no form of behavior could be deemed “uniquely wrong,” be it coercive government or a crime against another, for all are equal in their superficial, a-moral influence on the individual.

From this point of departure, Kant’s general theory, as well as those theories that accept his conception of the individual, mostly ignore the special question of punishment and deal with the general conditions of “just” governance, searching for the logical conditions that would conform to a principle of *external* freedom.[[50]](#footnote-51) For neo-Kantians such as Rawls, a theory of law is meant to outline the general political institutions of a “well-ordered society,” and much less so to establish the “wrongness” of disorder or crime.[[51]](#footnote-52) This route leads Kantian theory to an account of state authority that is remarkably similar to the Hobbesian model of the social contract.[[52]](#footnote-53) Law on this account represents a formal agreement on the rights of individuals so that they are secure from interference in their earthly endeavors;[[53]](#footnote-54) punishment is to be applied as a way of underscoring the pronouncement of the rights that ensue from this agreement.[[54]](#footnote-55)

Once again, the problem with this account is not its reluctance to distinguish the justification of punishment from the general justification of the state, but rather its failure to truly justify either of them. Kant’s legal theory primarily seeks to explain why it is not *immoral* to follow law’s edicts despite the fact that in doing so the individual’s will is informed by something other than the *idea* of law-giving reason.[[55]](#footnote-56) In responding to this concern, Kant affirms the separation between legal and moral consideration and proceeds to demonstrate how a legal system based on the *idea* of external freedom might look like—without really explaining what harm could come from a law that does not ground itself in this idea.[[56]](#footnote-57) Kant, in other words, tells us why law, in general, is not bad, but he is reluctant to tell us that it might be justifiable in a positive sense, distinguishing a good law from a bad one. Of course, this reluctance is only natural, for any such positive benefit would only undermine the separation between law and morality on which the negative justification of law is based. Nevertheless, without a clear conception of wrongdoing, punishment simply becomes the “business end” of legal rules, justified as far as the rules themselves are justified.[[57]](#footnote-58)

1. **Retributivism**

Notwithstanding its ancient roots in the talionic principle, modern retributivism often draws support from Kant’s moral theory, at times making specific reference to several passing comments he made in favor of the special retributive approach.[[58]](#footnote-59) These references are generally used by retributivists in arguing that the wickedness of wrongdoing represents the wrongdoer’s *willful* violation of the moral laws, and that like it punishment is in need of special justification for the *intentional* treatment of the wrongdoer in ways that risk disrespecting her intrinsic worth. In this sense, rather than a single theory, retributivism is a family of justifications united by the idea that punishment’s unique threat to freedom, mirroring that of crime, could *only* be cleared if it is a backward-looking response to crime. Some retributive theories take this connection a step further by insisting that there is also a duty to punish crime, but for the moment it is enough to note the retributive insistence that penalizing the wrongdoer could be justifiable only when it is motivated by her guilt of the crime for which she is being punished.

More often than not, the unbreakable link retributivists see between punishment and crime is buttressed by the kind of deviant willing they involve. Criminality, in this view, is constituted by *culpability*, the wrongdoer’s *willful* mistreatment of another; punishment is in need of justification for being an *intentional* imposition of suffering on an individual for ends that do not directly concern her autonomy.[[59]](#footnote-60) If it is to be justified, punishment must, therefore, distinguish itself from crime by showing itself to be properly motivated. This, the retributivist argues, could only be so if the infliction of *deserved* suffering, i.e., suffering that mirrors the wrongdoer’s own wicked act, is an intrinsically valuable moral end.[[60]](#footnote-61) Retributivism, unfortunately, rarely goes beyond merely *asserting* the necessary connection between the evil of crime and the justification of punishment—an avoidance for which critics such as Hart complain that it is either “a mysterious piece of moral alchemy” or “the abandonment of any serious attempt to provide a moral justification for punishment.”[[61]](#footnote-62)

What retributivism lacks the most is a clear conception of the unique evil that links wrongdoing and punishment. Despite the resemblance of retributivism’s notion of “bad willing” to the general Kantian argument, and despite the fact that Kant himself occasionally makes similar suggestions, we must remember that Kantian theory insists that only actions that are motivated by reason can be free; *willfully* doing wrong is, therefore, a Kantian oxymoron.[[62]](#footnote-63) The idea of “radical evil,” as intentional wrongdoing is commonly referred to, is mostly incoherent for Kant’s reason-based morality; the distinction between *uniquely evil* forms of behavior and other, *benign* immoralities simply has no room in it. That is not to say that there is no difference between murder and breaking one’s promise, only that there is no *categorical* difference between the two, of the kind that could support the claim that *only* uniquely wicked behavior such as murder might make punishment deserved.[[63]](#footnote-64)

In an effort to reinterpret the evil of wrongdoing so it better explains the necessary connection between punishment and crime, some retributivists have gone on to argue that it does not represent *bad* but rather *excessive* willing.[[64]](#footnote-65) On this view, exemplified by the early writings of Herbert Morris and Jeffrie Murphey, the legal order represents a contractually fair distribution of benefits and burdens, in which contracting individuals agree to curb their wills in return for the shared benefits that come out of such curtailment.[[65]](#footnote-66) Criminals, this view argues, are those who disregard the agreed-upon limitations on willing, enjoying *extended freedom* as well as the benefits shared by all. Punishment, they accordingly suggest, responds to such freeriding by imposing limitations on the wrongdoer’s ability to exercise her will, thus putting her back on par with other members of society.[[66]](#footnote-67)

As many critics of this idea have noted—ultimately leading Morris and Murphy to abandon this approach—we rarely think of wrongdoing in terms of *excessive* freedom. When we think about the worst kinds of crimes—murder, rape, assault—surely it is incorrect to say that they are uniquely evil because in performing them the criminal allows herself to act in ways that others desire but refrain from due to some burden-sharing agreement.[[67]](#footnote-68) Even with respect to more mundane crimes, it is far from clear what benefit wrongdoers presumably gain from the excessive exercise of their will, for in committing crimes the wrongdoer does not appropriate to herself something others do not already possess, and nor does she somehow enlarge her freedom relative to its prior condition.[[68]](#footnote-69)

Ultimately, it often seems that retributivism asserts both the unique evil of crime and its resulting necessary connection to punishment by way of moral fiat. “In the end” as Morris Cohen observes, rather than explain the derivation of punishment from crime Kant, and the retributivists who follow him, fall back on “the assumption that just as our moral conscience tells us that ‘Thou shalt not kill’ is an absolute duty for the individual, so is ‘You shall kill the murderer’ an equally absolute duty for the community.”[[69]](#footnote-70)

This is not to say that the intuitive thought that punishment ought to respond to crime is unfounded, or that the general approaches of utilitarianism and Kantianism are not satisfactory for their inability to account for it. But it is nonetheless a mistake to ask of this connection to be capable of leading us from crime to punishment *with absolute and exclusive necessity*. This insistence sends retributivism and deterrence off on a quest for an untrainable solution for a nonexistent problem. In the next part of the Article we will see how the same misconception sends the expressive theory on a similar wild goose chase, leading it to base the connection between crime and punishment on ideas that cannot be supported by liberal theory.

# Punishment as Expression

As their shared label suggests, expressive theories maintain that punishment must be understood and justified as a communicative act, or, as Joel Feinberg influentially described it, “a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.”[[70]](#footnote-71) Despite its name, however, the heavy lifting of this account is not done by the expressivity of punishment as such—as the critics of expressivism note, expressivity is to a large extent already subsumed by the traditional approaches[[71]](#footnote-72)—but by the *values* punishment is meant to express. As Dan Kahan observes, the suggestion that punishment expresses values is that which, for better or for worse, sets it apart from other theories of punishment: “[d]eterrence justifies punishment to prevent harm to others; retributivism confines it to those who voluntarily choose to inflict such harm. The expressive theory, by contrast, appears to emphasize neither consequences nor choices, but rather the enforcement of society's moral values.”[[72]](#footnote-73) Indeed, rather than *necessarily* linking punishment to crime, expressive theories, at least of the general sort, emphasize the connection between punishment’s condemnatory function and the expression of values, taking the quintessential feature of punishment to be its ability to speak “on behalf of the nation's basic principles and commitments,”[[73]](#footnote-74) signaling “society's commitment to the values that the wrongdoer's act denies.”[[74]](#footnote-75)

The fact that punishment can express the community’s values does not, however, mean that it is *morally justified* in doing so. “‘Expression’ itself,” as A.J. Skillen rightly notes, “is no adequate ethic, any more than is sincerity. Some of the worst deeds have been, no doubt, sincere expressions.”[[75]](#footnote-76) To be able to provide a *moral* justification of punishment, the expressive theory must also be capable of providing *a theory of values*, answering “the (old) question: which values should have acceptance and priority and therefore be expressed.”[[76]](#footnote-77) Naturally, this broader question exceeds the domain of punishment, for the expression of values might turn out to be valuable regardless of whether it is expressed punitively or in response to the criminal’s flouting of the community’s values. In this sense, the expressive account is largely a *general* approach to justification, locating the justification of punishment within a broader explanation of the good of values. Below I will explore how some general expressive theories frame this good in utilitarian or Kantian terms, focusing on either the beneficial consequences produced by the empowerment of communal values or understanding values in universal terms, respectively.

As we shall see, as reiterations of the traditional approaches these general expressive theories bear the flawed theoretical genes that ail these theories.[[77]](#footnote-78) As is the case with the traditional approaches, this failure leads to the attempt to frame the justification of punishment in special terms, viewing the good of values through the narrow prism of punishment. As I will argue, this approach, which centers on the educational function of punishment, makes a compelling argument in favor of the special understanding of punishment, yet it does so at the expense of adopting metaphysical premises that are fundamentally hostile to liberal morality.

## The Utility of Expressing Values

For some authors, the benefits provided by the penal expression of values are primarily factors to be considered when deciding whether the projected beneficial consequences of punishment outweigh the expenses and suffering it is likely to produce. On this view, the expression of values could have various beneficial implications: it can increase social cohesion, facilitate collaboration, decrease—or enliven—social conflicts, and the like.[[78]](#footnote-79) Feinberg thus argues that “the condemnatory aspect of punishmnet [serves] a soccially useful purpose,” which for him includes authoritative disavowal, symbolic non-acquiescence, vindication of the law, and absolution of others.[[79]](#footnote-80) Although many authors often remain ambivalent whether these considerations in fact *justify* the use of punishment, they correctly note that without understanding the expressive ways in which criminal law and punishment operate any attempt to use them in order to produce desirable results would likely miss its target.[[80]](#footnote-81)

By turning the question of justification back to the general utilitarian account, this form of expressivism inevitably gives in to the same deficiencies that afflicted it. As we recall, although utilitarianism provides an internally coherent account of punishment, its general portrayal of the state’s relation to its citizenry as that of control makes it too morally impoverished to fit the conventional image of punishment. Likewise, the idea that the support that punishment lends to communal values is beneficial for consequential reasons seems to stray too far in the direction of moral-relativism to fit the intuitive image of *just* punishment. As Skillen forcefully argues, “by justifying punitive sanctions, not as deserts or as deterrents but as ‘vehicles for public condemnation’, Feinberg puts forward a social-relativist view that adjusts proper punishment to the temperature of ‘public opinion’, or the most powerful pretenders to speak in its name. Would you rather get what you deserve or what ‘public opinion’ ‘cries out for’? How do their feelings justify your persecution?”[[81]](#footnote-82)

## The Expression of Equal Worth

In response to the concern of moral relativism, some authors suggest that punishment is justified as the expression of *universal* values, commonly put in Kantian terms;[[82]](#footnote-83) specifically, these authors often frame crime and punishment in terms of their relation to the value of *equality*.[[83]](#footnote-84) Jean Hampton, for instance, writes that punishment “is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.”[[84]](#footnote-85)

Essential to this approach is the idea that the evil of wrongdoer’s deeds lies in her denial of her equality to the victim, effectively diminishing the victim’s worth to elevate her own. Crimes in this view are evil due to their negative effect on the victim’s social estimation, which, Hampton suggests, is translatable to a moral harm: “a person is morally injured when she is the target of behavior whose meaning, appropriately understood by members of the cultural community in which the behavior occurs, represents her value as less than the value she should be accorded.”[[85]](#footnote-86) Punishment, she argues, reinstates equality by expressively denying “what the wrongdoer's events have attempted to establish, thereby lowering the wrongdoer, elevating the victim, and annulling the act of diminishment.”[[86]](#footnote-87) In reinstating the value of equality, punishment is justified as an expressive cure to the victim’s diminished moral stature in the eyes of others:

If the point of punishment is to convey to the criminal (and others) that the criminal wronged the victim, then punishment is implicitly recognizing the victim's plight, and honoring the moral claims of that individual. Punishment affirms as a fact that the victim has been wronged, and as a fact that he is owed a certain kind of treatment from others. Hence, on this view, it is natural for the victim to demand punishment because it is a way for the community to restore his moral status after it has been damaged by his assailant.[[87]](#footnote-88)

The evil of crime in this view is not the immediate harm it causes to the victim or the community but the denial of equality that is conveyed by the act; it is this evil that punishment aims to annul. “A criminal act,” George Fletcher argues, “establishes a particular relationship” between the wrongdoer and the victim, in which the offender “gains a form of dominance that continues after the crime has supposedly occurred.”[[88]](#footnote-89) Punishment, on this view, is meant “to overcome this dominance and reestablish the equality of victim and offender.”[[89]](#footnote-90) Likewise, John Kleinig contends that

What punishment does is to defeat the presumption implicit in wrongdoing. It brings the wrongdoer low. It negates or cancels the claim implicit in wrongdoing, that the interests of others are not all that important, that the wrongdoer is superior to others -or at least may determine how others are to be treated. It says: “In acting in this way you have placed your interests, your preferences and desires, over those of others, and you had no justification for doing so. Your presumption must be overthrown.”[[90]](#footnote-91)

There is, however, a critical difficulty with this line of argument, anticipated by the general Kantian approach. As Kant realized, an impenetrable defense of the equal worth of all individuals is only made possible by postulating it as an undeniable fact of reason. If, as the proponents of this brand of expressivism suggest, the value of equality is indeed objectively valid, then how could it be that the wrongdoer so effectively damages it? If, to use Kant’s example, the torturer succeeds in diminishing the worth of her victim, then it would appear that the intrinsic worth of human beings is not as undefeatable as the value of equality maintains; if, in contrast, the victim’s worth remains intact even when she is being tortured, then in what way could it be said that the torturer’s actions are evil for denying their equality?

If the expression of values is justified by virtue of their universal validity, then this only seems to eliminate the need to correct the blatantly erroneous meaning of the wrongdoer’s deeds, rendering crimes an irrational falsity to be easily refuted rather than an evil to be punished. As Christopher Ciocchetti reminds us, “[f]alse moral messages just are not the kind of thing that the criminal law punishes;” “true moral messages, while potentially useful, are, by themselves, not sufficiently morally important to justify punishment.”[[91]](#footnote-92) If punishment merely expresses the undeniable rationality of equality, why should it not be responded to, as Anthony Duff ask, with “a public and formal declaration, or the imposition of a purely symbolic punishment,” to “make it clear to everyone that we do deny the demeaning message implicit in the crime?”[[92]](#footnote-93)

## Moral Betterment and Reconnection to Values

The inability of the Kantian theory of value to elucidate what kind of work is done by punishment leads expressive theory in the direction of the special mode of justification, in search for the *necessary* connection between crime and punishment.[[93]](#footnote-94) Hampton thus eventually argues that in addition to the general purpose of punishment, educating “the larger community about those values in the name of which the state is punishing,” punishment also fulfills a *special* function with regard to the wrongdoer:

Those who are guilty of a criminal offense have a moral problem. In particular, they do not accept that in view of the way their action was morally offensive, it should not have occurred. Hence, it is this last problem that punishment is meant to address. To quote one advocate of this theory, the criminal’s “soul is in jeopardy as his victim’s is not.” The theory therefore, views punishment as a way of benefitting the criminal, and through this benefit, it hopes ultimately to deter the criminal from committing such a crime again by causing him to reflect in a way that will lead to a renewal of his allegiance to the values of the society precluding that crime.[[94]](#footnote-95)

Punishment, in this view, is converted from an instrument for the propagation of moral knowledge to a unique cure for the wrongdoer’s painful loss of “allegiance to the values of society,” administered in the form of *moral education*.[[95]](#footnote-96) Unlike the Kantian form of expressivism, which views punishment as a way of reassuring the validity of universal values, the special form of expressivism believes that the penal message has *a moral effect* on its recipients, *only* *by virtue of which* punishment is justifiable.[[96]](#footnote-97)

At times it might seem like the special expressive approach simply reiterates the abstract Kantian language of the general approach in more suggestive terms. For Robert Nozick, for instance, one of the first to justify punishment along these lines, the purpose of punishment is to “(a) connect the wrongdoer to value qua value (b) so that value qua value has a significant effect in his life, as significant as his own flouting of correct values.”[[97]](#footnote-98) To explain the “significant effect” of punishment, Nozick argues that “when [the wrongdoer] undergoes punishment these correct values are not totally without effect in his life (even though he does not follow them), because we hit him over the head with them.”[[98]](#footnote-99) Certainly, punishment hits the wrongdoer over the head, physically or figuratively, but why is doing so a meaningful and effective way of “connecting” her to “correct values?”

I suggest that the answer to this question is to be found in the Hegelian inspiration of the special mode of expressivism.[[99]](#footnote-100) Hegel is often mentioned in penal scholarship with reference to his peculiar yet influential suggestions that punishment “annuls” crime and that the wrongdoer “wills” her punishment.[[100]](#footnote-101) These ideas, however, are only specific aspects of Hegel’s overarching theme of *actualization,* by which he means the progress of the individual from insular and abstract consciousness to *objectively* *true* knowledge, achieved through her convergence with *Geist*—the unified mindfulness of the world.[[101]](#footnote-102) On the Hegelian worldview, the individual can only exist apart from the community in the abstract, *alienated* from herself and the world. By reconnecting with the community—which for Hegel manifests the *Geist* in its progress through history—the wrongdoer is uplifted from her wretched insular existence and *brought closer to meaningful existence*.[[102]](#footnote-103)

When authors such as Duff, Hampton, and Nozick speak of the beneficial moral effect punishment produces *by connecting the wrongdoer to the communal values she abandoned*, this idea could only have non-metaphorical sense if we read it in light of the political community’s role in Hegelian teleology as a *necessary* conduit between the individual and objective truth. Punishment*, as the forced realignment between the wrongdoer and society’s values*, is justified in this Hegelian fashion as a unique remedy to the wrongdoer’s horrid meaninglessness:

A person can find well-being only within a community which is, necessarily, structured by certain shared values and concerns, and within the kinds of relationships which such a community makes possible. A criminal who flouts the just laws of her community thereby injures herself: she separates herself from the values on which the community and her own well-being depend; she damages or destroys her relationships with other members of the community, and separates herself from them. she may not in fact be made consciously unhappy by her crime (especially if she avoids punishment); she may attain the ends which she actually pursues, and lead the kind of life she enjoys; and her crime may in fact be consistent with her actual relationships with others (she has no concern for those whom she robs or attacks; her family and friends share her criminal attitudes and goals). But this shows only that she, and those with whom she lives, have turned away from the values which should concern them; that they fail or refuse to see how such criminal pursuits are inconsistent with the existence of a community within which any worthwhile human life is possible; and that their relationships are themselves corrupted by false values. If she would only recognize the moral truth about her criminal attitudes and activities, she would see how they are injurious to her true well-being.[[103]](#footnote-104)

If we are to understand these words as something other than sheer platitudes we must acknowledge their embeddedness in the Hegelian conception of the individual.[[104]](#footnote-105) Although Hegel accepts the fundamental Kantian ideal of equality, his teleological philosophy insists that the individual’s existence becomes *more meaningful*, *more actual*, in her encounter with others, *en route* to the final convergence with *Geist*.[[105]](#footnote-106) This encounter, Hegel tells us, is initially perceived as the *violent* threat of *self*-destruction, leading to what he describes as the *life and death struggle for recognition*, only to result, as his master/slave dialectic tells us, in a mutually-dependent recognition that brings with it the ascent to a greater level of self-consciousness.[[106]](#footnote-107) From this moment onward individuals—now parts of society—constantly further their self-actualization *against the forceful imposition of the community’s values*, moving from the inner realm of essence to the external realm of *concrete* existence.[[107]](#footnote-108)

Animated by this teleological understanding of values, the special expressive approach argues that by committing a crime, by alienating herself from the community’s values, the wrongdoer *wrongs herself* by making her moral existence *less meaningful*, as the recognition she receives from others diminishes.[[108]](#footnote-109) As Morris, who eventually adopts a similar view of punishment argues,

[the] attachment to the values underlying [the rules defining wrongdoing] partly defines one’s identity as a moral being and as a member of a moral community, […] it gives one a sense of who one is and provides some meaning to one's life, and […] the price paid for unconcern is some rupture in relationships, a separation from others, a feeling ill at ease with oneself, and some inevitable loss of emotional sustenance and sense of identity.[[109]](#footnote-110)

When this approach speaks of the evil suffered by the wrongdoer for her crimes, it speaks not of some psychological or metaphorical aches but of the “pain” of losing meaning, affecting the wrongdoer whether she is conscious of it or not: “the immoral person thinks he is getting away with something, he thinks his immoral behavior costs him nothing. But that is not true; he pays the cost of having a less valuable existence. He pays that penalty, though he doesn't feel it or care about it. Not all penalties are felt.”[[110]](#footnote-111) Punishment, so the special expressive theory argues, repairs this evil by *reconnecting* the wrongdoer to the community, restoring her diminished moral status by once again *violently* imposing on her the community’s values.[[111]](#footnote-112)

But how exactly does punishment eradicate the alienation of crime? Duff speaks of the three R’s punishment aims to bring about: repentance, reform, and reconciliation; but what benefit is there in *coerced* repentance? Even more so, how could doing so be justified as a way of making the wrongdoer’s existence more meaningful?**[[112]](#footnote-113)** All too often these questions are answered by explanations that border on metaphor: the wrongdoer, we are told, is “hit over the head” with the community’s values, “woken up” by punishment, and the like.[[113]](#footnote-114) Detached from their Hegelian roots, such explanations cannot but be seen as a denial of the need to justify punishment.[[114]](#footnote-115) Hegelian dialectics, however, purports to give these words non-metaphorical meaning by suggesting that the healing power of punishment represents the kind of superior access to true knowledge the community provides, imprinted on the individual in the form of *external force*.[[115]](#footnote-116)

Admittedly, the proponents of the special expressive justification seldom make the appeal to Hegelian dialectics explicit, yet they are nonetheless ensnared by its thorny metaphysical assumptions. In insisting that punishment could *only* be justified as an *absolutely necessary* response to crime, the special expressivist present the moral education of the wrongdoer—her realignment with the community’s values—as the *sole* way in which she could overcome the pains of alienation.[[116]](#footnote-117) In insisting on the *necessary* connection between punishment and crime the proponents of this approach suggest that there is some *inherent* therapeutic truth to *communal* values, *unavailable* to the individual who distances herself from them; this truth, they argue, does not represent some universal moral laws or consequential benefits but is rather the manifestation of the *inherent metaphysical importance of communal life*.[[117]](#footnote-118)

In turning to Hegelian theory as a way of overcoming the shortcoming of the general Kantian theory expressivism of the special sort inevitably inherits Hegel’s elevation of the *particular* community, attributing to the community the *exclusive* ability to propel the individual towards a more meaningful existence, even against her (wretched) will.[[118]](#footnote-119) This, as Duff admits, represents a substantial departure from those liberal theories that emphasize the separate and distinct identity of each individual, allocating her “an extensive private sphere which includes her moral beliefs and attitudes.”[[119]](#footnote-120) Still, as Charles Taylor notes, what is most troubling about this worldview is not so much the extravagant metaphysical assumptions it makes but the unadulterated *optimism* with which it makes them, putting immense, almost unlimited, trust in politics and its presumed progressivism.[[120]](#footnote-121) To hold such views is to have faith that despite its occasional errors, the community’s interaction with the individual and the imposition of its values is *fundamentally beneficial*. Surely, this view asks too much of us. To say that the runaway slave is somehow being *bettered* by her penal reunification with the communal value of slavery seems to give too much credit to the inherent truthfulness of communal values, despite Hegel’s best dialectical attempts to claim otherwise.

If the traditional Kantian approach fails for giving the political too little moral meaning, the Hegelian philosophy informing the special expressive approach fails for giving it *too much* meaning, at the expense of the individual’s ability to scrutinize and rebel against communal values that do her wrong.[[121]](#footnote-122) Admittedly, without insisting on the inherent importance of values, expressive theories are incapable of asserting that punishment, as the expression of communal values, is a *necessary* response to the evil of crime; however, this is not an undesirable outcome. By turning our attention to the value-supporting function of punishment, expressive theory follows the Girardian path in unearthing the psychological purpose of punishment; in insisting that there is, in fact, *truth* to the supposed connection between crime and punishment expressivism, however, risks falling prey to the dangerous dynamic he describes. As John Steele notes, “[t]he archaic, flesh-devouring, scapegoating mechanism still lurks at the heart of expressive punishment. Historically, that mechanism’s survival has depended upon lies of justification.”[[122]](#footnote-123) Avoiding this risk requires a theory of value that is capable of explaining the reasons for which it is desirable to express, through punishment, communal values, but without going as far as suggesting that this entails some kind of unique and irreplaceable connection between the evil of crime and the benefit of punishment. This is the direction in which the rest of the Article will take us.

# Valuing and Conventionality

Expressivism justifies punishment as the expression of values, either for their beneficial consequences, their pronouncement of the intrinsic worth of persons, or as necessary instruments of moral education. Values, however, seem to either over- of under-justify punishment: they are either too abstract, disconnected from the actual practice of punishment, or too particular, justifying the imposition of prevailing social norms with too little scrutiny.

In order to clear this hurdle, we need to return to Feinberg’s original plotting of the expressive course and his description of punishment as “a *conventional* device for the expression of attitudes of resentment and indignation.”[[123]](#footnote-124) For Feinberg, the conventionality of punishment primarily refers to the *means* through which the penal message is conveyed. As he puts it,

[t]o say that the very physical treatment itself expresses condemnation is to say simply that certain forms of hard treatment have become the conventional symbols of public reprobation. This is neither more nor less paradoxical than to say that certain words have become conventional vehicles in our language for the expression of certain attitudes, or that champagne is the alcoholic beverage traditionally used in celebration of great events, or that black is the color of mourning.[[124]](#footnote-125)

I will return to this idea in Part IV, as part of the discussion on the problem of hard treatment. Expressivism, however, is also conventional in two other important and interdependent senses, concerning the impetus of punishment and the values it expresses. This, I will argue, facilitates a shift from the expression of values as such to an assurance of *valuation*.

As Skillen notes, Feinberg’s analogy seems to misrepresent the conventionality of punishment, for “punishment surely stands to indignant reprobation more as mourning stands to grief than as wearing black stands to grief.”[[125]](#footnote-126) A theory of punishment must answer not only why certain means of punishment are legitimately used for reprobation but also why it is legitimate to respond to crime with punishment at all. Skillen assumes that such explanation requires establishing a *necessary* connection between the two, similar in kind to the relationship between death and mourning.[[126]](#footnote-127) The analogy Skillen makes can also, however, be turned on its head, suggesting that the conventionality of punishment mirrors the conventionality of a mournful response to death—both, it can be said, are conventional ways of asserting the meaning of life.

As is the case with mourning, responding to wrongdoing with reprobation is a conventional expression of self-assurance. One might respond to death and wrongdoing in other expressive ways, including celebration or stoic contemplation. If we are to understand the significance of punishment we must, therefore, understand the importance of *having a disposition towards wrongdoing* (or death) in itself, *detached from the conventional form this disposition takes*; in other words, we need to understand the significance of *valuing*.

The seeds for this idea can already be found in Émile Durkheim’s—one of the precursors to the expressive approach—suggestion that the nature of punishment is to be located by divorcing it from its connection to crime and seeing it as “only the palpable symbol through which an inner state is represented; it is a notation, a language, through which is expressed the feeling inspired by the disapproved behaviour.”[[127]](#footnote-128) The same idea can be read as animating one of Hampton’s original descriptions of the expressive creed, writing of the conventionality of punishment that

Punishments are like electrified fences. At the very least they teach a person, via pain, that there is a “barrier” to the action she wants to do, and so, at the very least, they aim to deter. But because punishment “fences” are marking moral boundaries, the pain which these “fences” administer (or threaten to administer) conveys a larger message to beings who are able to reflect on the reasons for these barriers' existence: they convey that there is a barrier to these actions because they are morally wrong.[[128]](#footnote-129)

As is the case with Feinberg, Hampton’s notion of conventionality primarily refers to the means of punishment and the values delineated by its fences. But at the heart of her description stands the idea that punishment expresses a conception of individuals as “beings who are able to reflect on reasons,” meaning beings who can read through the means of punishment, through the values they protect, and even through the reprobative response itself to see punishment as *an insistence that human beings are rational creatures, capable of reflection*. Most importantly, this notion largely animates the oft-noted Hegelian idea that punishment represents the insistence on the wrongdoer’s rationality. As we have seen, the Hegelian errs in needlessly viewing values as *inherent* to the development of rationality. Instead, as I will argue below, we must see them as merely *conventional*.

## Valuation as Self-Assertion

Why are values valuable? Some values, call them universal, claim to hold intrinsic value, often associated with the Kantian derivation of universal moral principles from practical reason. Other, communal, values are linked to the contingent history of the particular political community, valuable for those who belong to it. Values of the latter kind are much broader in scope, encompassing, as Richard Greenstein suggests “what we care about”, and including “goals, interests, policies, principles, and so forth; moreover, what we care about can touch on economic, moral, political, aesthetic, religious, and other concerns.”[[129]](#footnote-130) Values in this broad sense are what the conventional strand of expressivism speaks of; but how can we understand the value of such values in terms that are not entirely relativistic?

The answer begins with the modern threat of meaninglessness.[[130]](#footnote-131) Modernity has bequeathed us an invigorated sense of self-worth, but it has also burdened us with the existential doubts that follow the realization that all we believe in—including our understanding of meaningful selfhood—are prone to be but figments of our imagination.[[131]](#footnote-132) “The most terrifying feature of human life,” as Ronal Dworkin writes, is that “we have lives to lead, and death to face, with no evident reason to think that our living, still less how we live, makes any genuine difference at all.”[[132]](#footnote-133) Yet from this bleakest of realizations also grows the existential *decision to view ourselves as persons*, not as an assertion of fact but as an *attestation* of *belief*.[[133]](#footnote-134)

One of the first to suggest this alteration of the philosophical viewpoint was Edmund Husserl, later to be followed by the German and French existentialists in suggesting that instead of wasting our energy on the fool’s errand of *factually* rebuking the threat of meaninglessness we ought to focus on the *attitude* implied by the initial decision to view ourselves as *persons*, i.e., as free and temporarily enduring begins, “continuously constituting [ourselves] as existing […] not only as flowing life but also as I, who live this and that subjective process, who live through this and that cogito, *as the same I*.”.[[134]](#footnote-135) *Belief*, as an attitude one holds toward her *possible* personhood is the most intense manifestation of individuality that could be arrived at given our cognitive limitations; when we speak of the intrinsic worth of individuals, the *belief* in this worth is the closest we can come to saying anything about its worldly manifestation.[[135]](#footnote-136) Even if one is indifferent to the looming threat of existential anxiety, our being is *defined* by the active and ongoing decision to view ourselves as persons; as Jean-Paul Sartre puts it in his characteristically convoluted language, “our being is precisely [this] original choice, the consciousness (of) the choice is identical with the self-consciousness which we have. One must be conscious in order to choose, and one must choose in order to be conscious.”[[136]](#footnote-137)

Taking the leap of faith involved with viewing ourselves as persons does not, however, mean that we are forever free of “the most terrifying feature of human life.” Existential anxiety is enduring, rearing its ugly head whenever life treats us as if we were nothing but lifeless objects manipulated by the irresistible currents of the world, our limited choices seemingly dictated by forces beyond our control.[[137]](#footnote-138) There are various psychological mechanisms meant to strengthen one’s resolve in maintaining a positive disposition toward her personhood—elsewhere I argue that science and morality are central mechanisms of this sort.[[138]](#footnote-139) One such mechanism, more accessible than the previous two, is *valuation*. As Samuel Scheffler observes, *caring* for the values we subscribe to considerably assists us in treating ourselves as free continuous beings, providing “continuity amid the flux and contingency of daily life experience” as they “help to stabilize our selves.” [[139]](#footnote-140) These insights, I will now argue, form the foundations to the justification of punishment as the expression of communal values, seeing it as a way of ameliorating the injury caused by acts that prevent values from fulfilling their self-assuring function.

## Valuing and Judgment

Viewing values in functional terms moves the burden of justifying punishment from the values themselves to the valuative attitude held towards them. I believe that Kant’s thought-provoking exploration of the nature of judgment—viewed by some as his theory of the political—is of great aid in understanding this crucial shift and its implications.[[140]](#footnote-141)

In most of his critical writing, Kant explores the *a-priori* conditions of human experience in terms of the *objective* lawfulness that guides it. In science, Kant observes, we believe in the principle of sufficient reason, dictating that all things are necessarily explainable as outcomes of the things that caused them. In a not entirely different fashion, Kant suggests, talk of morality assumes the determinative authority of the objective laws of reason. When we claim that water boils at 212℉ or that it is wrong to murder the innocent, we are making a statement that we consider to be valid *independently of our belief in it*. Despite our inability to even come close to cognizing the “laws” that necessitate our scientific and moral convictions, such objective statements betray *a lawful disposition towards the world*, an expression of the belief that our experience of it is ultimately and unequivocally amenable to reason.[[141]](#footnote-142)

In his *Critique of Judgement* Kant, however, notes that this is not true of all judgments; most notably, he suggests that this lawful disposition is inapplicable when we make what he refers to as judgments of *taste*, as *subjective* preferences.[[142]](#footnote-143) When I express my love of oatmeal I am making an entirely contingent and “lawless” statement; at most I can regard it as an objectively true description of my feelings at the moment. But alongside judgments of taste Kant also notes a familiar stance—one which he identifies with aesthetics—of holding something to be of non-subjective value even though it is not objectively necessary. Although we talk of such things *as if* they have meaning apart from our personal attachment to them, we are well aware of their contingency—an attitude Kant describes as “lawfulness without a law.”[[143]](#footnote-144)

Kant primarily deals in this category with judgments of beauty and sublimity, but by this he broadly refers to judgments that stand in a *symbolic* relationship to objective value. The phenomenon Kant describes is applicable with no loss of precision to the disposition of valuation in general, meaning our treatment of contingent and particular objects as if their meaning surpasses our personal preferences, objects ranging from our physical bodies to our attachment to the political community we are part of. In this manner we may say that a piece of art is beautiful, but also that there is value in genetic connections, in serving turkey for Thanksgiving, or in a national border; we treat all of these not as mere preferences but as somehow inherently important, even though our modern sensibilities force us to recognize that such value could only come from our own valuation of them.[[144]](#footnote-145) Nothing about these kinds of attachments is *necessarily* true—we could have been born in different bodies, families, places, and traditions; all are subject to change—we can immigrate, lose an arm and renounce our families and past attachments. Despite this profound contingency, we treat these objects as things of immense value. Instead of fruitlessly trying to affirm or deny the “actual” value of these objects, Kant, as Husserl and the existentialists after him, suggests that we instead focus on our attitude toward them.

This, Kant maintains, entails recognizing valuation as a site of immense freedom, the most significant place in which one can affirm herself as a self-determining person.[[145]](#footnote-146) What enables this unique form of self-affirmation—and Husserl makes this point more explicitly that Kant—is its dependence on *others* for its validation. Judging something to be valuable despite its lack of objective necessity involves making a potentially, if not necessarily, *refutable claim*. In making this clime one makes herself vulnerable to the possibility of rebuff and ridicule, for the most rational response to such groundless claims would be that of bewilderment.[[146]](#footnote-147) By nonetheless *expecting* others to acknowledge the validity of her absurd claims she thus trusts the other to mirror her belief in her *creativity*, meaning her ability to mix her personhood into random and otherwise meaningless objects and present them to others as a thing of value.

Our values, in other words, are only meaningful as far as they can be seen as expressions of belief in the ability to create meaning *ex nihilo*. Even though we often speak of values as things of inherent value, what matters in this description is not whether we are correct in doing so but our *willingness* to hold them as valuable and to engage with others based on this attitude.[[147]](#footnote-148) The subject matter of which we speak—the substance of our values—is but a placeholder for our assertion of creativity; the *medium* of valuation is *itself the message*, to borrow Marshall McLuhan’s phrasing. Furthermore, in *continuously* committing to our values, rather than expressing our creativity by constantly changing our values, we affirm our connection to our past and future selves; in asking others to join us in the communal and ongoing commitment to values we ask and expect them to mirror and affirm our belief in our *enduring* creativity, in our existence as *persons* rather than mere a-temporal agents.[[148]](#footnote-149)

## The Conditions of Judgment

Accepting the proposed functional description of values contains within it the possibility of *scrutinizing* our values *according to their aptness in fulfilling their function*, their ability to serve as instruments of self-affirmation. When it comes to promoting this function the substance of the value is, of course, immaterial; what determines the aptness of values is the disposition they exhibit. The measurements for the aptness of values can be described in terms Kant referred to as *the maxims of judgment*, the conditions that must be met for a valuative judgment to be capable of accomplishing its purpose. For Kant, these maxims stand for the individual’s ability to (i) think for herself, (ii) think from the standpoint of everyone else, and (iii) think consistently.[[149]](#footnote-150) For our discussion here I will focus on the first two maxims, referring to them as the conditions of creativity and communicability.[[150]](#footnote-151)

1. **Creativity**

If one is to treat her valuations as signs of her creative personhood, she must first and foremost be able to view her values as her own makings rather than something externally imposed on her.[[151]](#footnote-152)In contrast to the Kantian notion of *moral* autonomy, this does not mean, however, that one must see herself as the *sole* creator of her values. As claims aimed at others, the formulation of values, even of one’s most personal and intimate ones, is an inherently collaborative process based in social conventions and hermeneutics, determining the language in which one puts her attachments to things of this world.[[152]](#footnote-153) Still, the influence of others on the formulation of one’s values must be limited to the language and terms in which the individual’s claim to valuation is voiced and not to her ability to make the claim in itself. As Charles Larmore puts it, “being fully ourselves does not require us to free ourselves from the imprint of social conventions—which is impossible, anyway—but only that we stop seeking our bearings from what we believe or imagine another might expect from us.”[[153]](#footnote-154) What this means, in other words, is that values must be understood as purely *conventional*, subjective creations—fetishisms of a sort—intended to serve those who participate in their production rather than the other way around.[[154]](#footnote-155)

1. **Communicability**

The second condition, and the one most pertinent to our discussion, concerns the kind of claim one is making by presenting her valuation to another’s approval. Kant describes this in terms of the judgment’s *communicability*—the ability of the individual to *believe* that another would accept her valuation as valid despite its subjectivity, out of recognition of her creativity.[[155]](#footnote-156)

To be communicable judgments *must first present themselves as an impossibility*, so that if they are indeed accepted, it is solely out of recognition of the communicator’s creativity. [[156]](#footnote-157) This, as the first conditions already mandate, requires that the communicated value must be without any pretense of objective validity, presenting itself as the communicator’s own product. To this, the condition of communicability adds that the absence of objectivity must also be true *of the* *reasons for which the addressee is expected to acknowledge the communication as valid*.

The ability of values to assert the creative personhood of those involved in their creation depends on the shared belief of the communicating parties that if it were not for the involvement of creativity communication would be impossible, for otherwise the communication would merely reiterate the validity of whatever objective considerations are involved in the communication.[[157]](#footnote-158) If an individual argues that a particular value is inherently compelling—as scientific and moral laws are presumed to be—then its acknowledgment as such by others would bring with it little assertion of her own creativity. Likewise, if she makes the statement while waving a gun, acceptance of her claim would only be a sign of the objective validity of the material considerations her gesture is alluding to.

Obviously, it is impossible to predict exactly how and for what reasons another could or would accept one’s claims; for a judgment to be communicable, however, is not required that the other actually acknowledges the claim or does so for the “proper” reasons. What matters for successful communicability is the individual’s ability to maintain the belief that communication is potentially possible. As is the case with the substance of values, their actual communication is only a mantel on which the belief in the communicability of values is hanged. Denying either the subject matter of the value or is its communication in practice, as will be discussed below, is a potential injury to communicability, not for the denial itself but only and to the degree to which the denial affects the ability of individuals to go on believing that their valuations are *potentially* communicable.[[158]](#footnote-159)

## The Evil of Wrongdoing

Wrongdoing, understood in valuative terms, is not evil for its physical effects on the victim or society, or for the wrongdoer’s disrespect or denial of some universal moral principles, but for its detrimental effect on the ability of others to valuatively assert their personhood. This can be either in actions that threaten the ability of the victim to believe in her creativity, or more generally by denying the communicability of the individual’s or society’s values.

According to the valuative argument presented here, the evil of the wrongdoing is in the statement made by the action, not the action itself, its motivation or material consequences. Hegel’s theory of punishment suggests that the evil of this statement is found in its meaning *for the wrongdoer*, making “an assertion, by a person living in a world of persons, that persons do not exist,” signaling her alienation from the truth.[[159]](#footnote-160) This might be so, but it must be added that the reason why such behavior justifies punishment is the potential effect this statement has on its recipients. By acting in ways that denote the wrongdoer’s denial of the victim’s ability to mix her personhood into objects of value the wrongdoer threatens to undermine *the victim’s ability to believe in herself as a person*.[[160]](#footnote-161) As Hampton accurately notes, albeit in *moral* Kantian terms, “[f]ear that we are worth less than we wish (or perhaps less than others think we are worth) is a common human phenomenon, particularly in societies in which non-Kantian inegalitarian theories of worth have gained currency. A value-denying act can therefore be frightening to the victim (and others like him), insofar as it plays into those fears.”[[161]](#footnote-162)

Dolinko rejects this view, arguing that “[a] rapist deserves punishment not because he has communicated his belief that he is of greater value than his victim but because he has done so by raping her.”[[162]](#footnote-163) Objections of this sort, however, incorrectly assume that we know the act in question to be wrong prior to condemning it as such. This is obviously untrue of many crimes, even those we usually think of as *mala in se.[[163]](#footnote-164)* Rape is obviously a terrible wrong, but only by deeming various forms of nonconsensual sex ‘rape’ we declare them to be punishable offenses. Before we recognize the rapist’s act to be rape, we need to know what is the evil that makes certain acts condemnable as ‘rape.’ “Pain,” as Barbara Herman reminds us, “does not speak until it is a social fact, and it is as a social fact that it enters moral colloquy.” [[164]](#footnote-165) To understand the painful effect of acts such as rape is to understand the way in which the victim—and others vicariously through her—*interprets it as an attack on those things she values*—her bodily integrity and sexual autonomy—and through it as an attack against her ability to conceive of herself as a valuative person.[[165]](#footnote-166)

Although the evil of wrongdoing concerns its potential effect on the victim’s psyche, affecting her long after the act has been committed, its meaning for criminal law is *objective*, concerning the way in which the act is interpreted according to societal conventions. Even though a crime often involves a particular person, *all of society is victimized by it*, as all those who are exposed to its personhood-denying message are potentially discouraged by it.[[166]](#footnote-167) It is not, therefore, material whether the wrongdoer intended for her actions to convey this message, nor whether any specific victims were moved by the act to doubt their ability to believe in their personhood—criminal law’s protection of valuation operates through the conventions that facilitate it, not by analyzing the moral psychology of any particular individual.[[167]](#footnote-168) When law seeks to intervene with such messages it is not to retroactively annul them or to inform the wrongdoer or the victim of its falsity; rather, it aims to counter the lasting outcomes of the message, namely its effect on the general conditions of valuation.[[168]](#footnote-169)

The evil of wrongdoing can thus take the form of an attack on valuation even in so-called ‘victimless crimes,” *by way of undermining the values that facilitate valuation*.[[169]](#footnote-170) In acting in ways that contradict the belief in the communicability of values, the wrongdoer indirectly assaults the valuative personhood of all those who rely on them for this purpose. As Scheffler puts it:

Given that our normative and evaluative convictions serve these functions, it is not surprising that being prevented from acting in accordance with values one regards as authoritative, or being constrained to act in accordance with values that one rejects, should be perceived as a grave injury. By attacking the deliberative and motivational nexus via which our values are translated into actions, these forms of interference and constraint amount to a kind of assault on the self. [[170]](#footnote-171)

We must, however, be cautious not to conflate the protection of valuation with the protection of values. Although the wrongdoer’s actions are interpreted objectively, it is nonetheless an interpretation of the wrongdoer’s attitude towards valuation, not whether she accepts the values she is presented with. To say that the very flouting of another’s values is tantamount to denying her personhood is to deny the gap between values and valuation on which both are premised. The destructive statement of wrongdoing may be learned from the wrongdoer’s actions, but it is only damaging if it can be correctly attributed to her *negative* *disposition* towards the possibility of valuation. Sometimes her actions can be weighed against her even if she subjectively does not intend to deny the possibility of valuative self-expression, such as when she ignores the conditions of judgment. The wrongdoer could, therefore, intend to express her belief in valuation in general while denying that her interlocutor is capable of it, but doing so would be a denial of the reciprocal foundations on which valuation is based. Conversely, it would be incoherent to assert that there is evil to be found in the flouting of values on which no valuation could be based—such as the value of slavery—or in modes of behavior that are essentially not communicative, such as one’s thoughts or things she does without the involvement of anyone that might be negatively affected by it.

# Valuation and the Law

The purpose of punishment, the valuative theory tells us, is to reinforce communal values by condemning those who disregard them; it does so, as Part III suggests, not to support the values themselves but the valuative self-assertion they allow. As a *general form of justification*, the valuative theory does not indicate that punishment is *uniquely* suited to respond to the evil of crime; instead, it views punishment as part of the broader legal enterprise.

In this view, law, in general, supports the ability of individuals to affirm their personhood by valuatively interacting with others. We can distinguish between three functions served by criminal law in promoting this end: (i) establishing a valuative language surrounding a shared depository of values; (ii) instructing individuals on the common hermeneutics surrounding the conditions of judgment; and (iii) countering, through punishment, the adverse effects of wrongdoing.[[171]](#footnote-172)

Although the justification of punishment primarily concerns the last function, so that when an individual acts in a way that undermines the belief in this ability—either by denying the meaning of valuation or by undermining the effectiveness of the values that symbolize it—the state is tasked with responding in a way that reaffirms it. However, if it is to be justifiable, any imposition of punishment must also express the proper disposition in the stages prior to punishment itself, including the declaration of values and criminalization. Admittedly, even when all these conditions are met it cannot be said that the state is *compelled* to respond to wrongdoing with punishment—but neither will it be inappropriate for it to do so.

## Pronouncing Communal Values

Law, on the valuative expressive account, concerns itself, among other things, with the proclamation of the community’s values, the objects which are collectively regards as valuable.[[172]](#footnote-173) Obviously, this does not imply that the state, as a collective of individuals, is capable of the kind of valuation discussed here; instead, the community acts as an *aggregate* of values, amassing the individual valuations that comprise it.[[173]](#footnote-174) Such aggregation assures individuals that they can communicate their values not only amongst themselves but also on a larger scale, encompassing the entire community—or at least large parts of it—thus magnifying the probative self-assuring effects of successful communication.[[174]](#footnote-175) Law, in this sense, is a catalog of those things toward which the state’s citizenry currently holds a valuative disposition.[[175]](#footnote-176) This catalog usually contains general values, such as the value of bodily integrity, private property, and the family, in addition to values that are specific to the community and its institutions, including the value of particular traditions, state symbols and common conceptions of the good life.[[176]](#footnote-177)

By pronouncing the community’s catalog of values, law does more than just demonstrate the feasibility of successful communication. In making publicly known what values members of the community institutionally agree upon law can help minimize breakdowns in communication, allowing people to transcend valuative disagreements by seeing them against a broader context of agreement on valuation.[[177]](#footnote-178) People can, for instance, disagree about the particular ways in which private property is allocated or about the extent of the protection of bodily integrity, but the law can help them better realize that they ultimately share the same fundamental form of valuation despite their different interpretations of it.[[178]](#footnote-179)

Enacting a particular value into law does not necessarily deny the importance of other values in society, particularly those of minority groups. Given the heterogeneity of modern societies, it is only natural that those values that are recognized by law reflect only a subset of available values.[[179]](#footnote-180) There is no necessary fault to this partiality, but only as long as law does not claim that there is some unique or exhaustive truth to the enacted values—which it could not do while still purporting to support valuation as a general human faculty. For the same reason law is by no means the exclusive mode of expressing values: some values, say the value of fraternity, are quite dominant in culture even when law remains mostly indifferent to them, yet they remain important avenues for self-assurance.

When properly aimed at the support of valuation, the legal cataloging of values can assist the valuative efforts of those who share them but also of those who do not, presenting either of them with successful examples of communicative valuation. The more support these examples enjoy the greater the power of assurance, even when one does not find her place with those who agree on these values.[[180]](#footnote-181)

As the conditions of judgment instruct, if law is to serve its valuative function, it must be understood as an example of creative valuation and communication—not a statement of fidelity to the inherent importance of the values themselves. This, for instance, entails that the enactment of values cannot exclude parts of the community from participating in the ongoing creation of the enacted values. Exclusionary values, tainted by racism, sexism, or other forms of bigotry, cannot be coherently included in the catalog of values acknowledged by the state. Likewise, values that have entered the legal inventory in ways that do not reflect free valuation or are admitted to it without the possibility of ouster cannot be considered legitimate parts of it.[[181]](#footnote-182)

## Criminalization

If law in general aids individuals by presenting them with successfully shared values, *criminalization* provides them with specific instruction on how these values influence the translation of various forms of behavior into statements of assertion or denial of valuation. Whether criminal law is aimed at the “bad man,” as Oliver Wendell Holmes maintained[[182]](#footnote-183), or aimed at the “‘puzzled man’ or ‘ignorant man’ who is willing to do what is required, if only he can be told what it is,” as H.L.A. replied,[[183]](#footnote-184) it specifies the ways in which reasonable people in a given society will usually interpret external expressions as indication of the actor’s disposition toward valuation. Even without the threat of punishment, prohibition is a warning sign that certain actions will be perceived as denials of the possibility of valuation, potentially undermining the ability of others to assert their personhood.[[184]](#footnote-185)

As an instrument in the service of communicability, law informs individuals how their actions will probably be interpreted, in light of the prevailing hermeneutical conventions, so that they may better conduct their interpretive efforts. “Expressive theories of action tell us to express certain attitudes adequately. The standard of adequacy is not met simply by intending to express those attitudes, or by thinking that one's actions do express those attitudes. Rather, the standard of adequacy is public, set by objective criteria for determining the meanings of action.”[[185]](#footnote-186) Criminal law, in this sense, is less interested in the actual convictions of individuals as it is with the potential effect of their actions on the convictions of others.

An individual’s belief in the communicability of her actions is a matter of personal conviction, but it is also responsive to the kind of experience she has in interacting with others, strengthened in her resolve when others are receptive to her communicative efforts and disheartened by their rejection. However, not all failures to communicate are necessarily denials of communicability. Given the subjectivity of values, even those who are generally inclined to accept another’s valuative assertion of personhood might find themselves disagreeing on the subject-matter of the communicated values. An individual might, for instance, take the avoidance of certain foods to be of religious value while another takes it to be a matter of personal taste or objective medicinal reasons. It might be that the other is categorically unwilling to acknowledge the kind of claims made through valuation, but it also might be the case that she simply fails to recognize them as instances of religious valuation. Such misalignment is only natural, and in most cases it need not negatively affect the individual’s ability to sustain her belief in communicability.

In specifying which courses of action are prohibited with respect to various values criminal law tells the parties where the margins of error lie, beyond which others will likely take disagreements to heart, weakening their conviction in the decision to view themselves as persons. Hence, by prohibiting work on certain religious holidays, the state informs employers that requiring workers to work on these days will effectively *interfere* with their ability to assert themselves—not because of some metaphysical qualities of such demands but because of the way in which they will be interpreted by those affected by them. Conversely, by addressing the issue in contractual terms the state signals that any disagreements will generally held to be benign, worked out through the details of the communication. Likewise, law can reflect the common value assigned to private property, expressing the belief that individuals can regard their possessive relation to random material objects as a sign of personhood; by prohibiting theft and trespass but allowing other forms of transaction law indicates what types of behavior will be interpreted as a denial of the probative meaning of the proprietary relation.[[186]](#footnote-187)

Law not only directs people on how their interactions with others will be understood but also how and whether others will be negatively affected by the more general flouting of communal values. [[187]](#footnote-188) Law can, for instance, prohibit expressions of racism, pornography, or cruelty toward animals, even when they involve no direct adverse effect on another individual, for their perceived negative impact on valuation. In discussing this idea, Cass Sunstein notes the clearly expressive motivation behind the proposal to ban flag-burning. Any such ban is obviously not aimed at eliminating the threat of flag-burning itself or its immediate effect but is meant to clarify that burning the national flag would be obnoxious to the majority of members of the community.[[188]](#footnote-189) Such prohibitions, however, risk conflating *values* with *valuation*. In guiding individuals on how they ought to respect the valuative claims of others, criminal law cannot go as far as reifying these values themselves, for doing so would only defeat their valuative purpose.

An act of flag-burning could have various meanings. To burn a national flag in protest of that nation’s disrespect of individuals might be offensive to the members of that nation but it is, in fact, an *affirmation* of the importance of valuative personhood. To ban such protests is to forget that the flag’s value only derives from the support it lends to the ability of *all* individuals to assert themselves; burning the flag to protest the mistreatment of minorities is an *affirmation* of this conception of the flag, an expression of disappointment with the particular flag’s failure to fulfill its purpose. The situation would be reversed, for instance, with regard to burning a gay pride flag, when the act is meant not as a protest against mistreatment (say of certain members within the LGBTQ community) but as a protest against equality and inclusion. To ban the burning of a gay pride flag is to signal that people will generally see the act not as an internal argument within the confines of valuation, but as a denial of the ability of certain individuals to express their personhood.

Context is of utmost importance here, and the criminal law must tread lightly if it is to refrain from stifling communication rather than encourage it. Conflict and disagreement are almost inherent to valuation, and certainly do not express, in themselves, its denial. As the conditions of judgment dictate, to make a valuative claim is to open oneself up to the possibility of rebuff, and ruling out all possibility of denial would only undercut the probative value of successful communication.[[189]](#footnote-190) A denial of another’s valuation might be a cause for anxiety, but as such it is not different from the fundamental crisis of meaning that prompts her to assert her personhood to begin with. Rather than contradict itself by seeking to eliminate such anxiety, prohibition must be limited to those instances in which one individual *interferes* with another’s attempt at valuative self-assertion, denying her this route of dealing with this anxiety.[[190]](#footnote-191)

## Punishment

Criminal law, as we have seen, can aid individuals in asserting their personhood via valuative communication by presenting them with a shared vocabulary of values and by supplying them with the hermeneutical guidelines that could help them interpret the actions of others and predict how their own actions are likely to be interpreted. Despite this support, there will always be those who choose to reject the conditions of judgment and act in ways that disrupt the ability of others to valuatively assert their personhood—by treating them as objects, denying their power of valuation, or by undermining the values they subscribe to. Being treated in such ways or observing such behavior toward others diminishes the ability of individuals to believe that there is truth to their belief in communicability, presenting them with what appears to be evidence that human beings are incapable of engaging one another in intersubjective valuation. By inflicting punishment on the wrongdoer, the state sends out a resolute *countermessage*, intended to reassure the belief of all members of the community in the possibility of communicability. [[191]](#footnote-192)

Punishment, thus understood, operates by *example*, and it must take care not to set the wrong one. By penalizing the wrongdoer, the state signals the community’s continued commitment to the idea of communicability, assertively suppressing the damage done by the wrongful act by countering the loss of faith it had produced. The purpose of such communication is not to *convince* its recipients of the truth of personhood or on the possibility of valuation—any attempt to do so would be futile, if not counterproductive—only to *offset* the force with which the wrongdoer imposed her nihilism on the victim and society at large.

There is, as was suggested throughout the Article, no *necessary* reason for which the state must perform such reassurance by way of punitively addressing the wrong; as the critics of the special form of expressivism insist, there may indeed be far more effective ways of doing so.[[192]](#footnote-193) However, contrary to the conclusion these critics draw from this observation, the discretion the state has does not undermine the justificatory force of the expressive account as a *general* mode of justification.

As any general form of justification, the valuative form of expressivism whole-heartedly admits that the good which punishment produces is not categorically different from the good produces by other state actions.[[193]](#footnote-194) Those who criticize expressivism on this point, noting its failure to explain why the response to crime takes the form of hard treatment, themselves assume, against the general approach, that there is some unique quality binding together crime and punishment so that punishment could only be justified if it is an *absolutely necessary* response to crime. To make this point these critics often cite the external resemblance between punishment and crime as a sign of the latter’s unique mischievousness, in need of a heightened degree of justification that could only be met if punishment is the *only* possible means of bringing about the benefit it purports to produce.[[194]](#footnote-195) However, despite their external resemblance crime and punishment are worlds apart when it comes to their effect on valuation. The evil of wrongdoing is not in the suffering it brings or in the intention to cause suffering but rather in its denial of the valuative route to the assertion of personhood. In contrast, even if punishment involves the intent to cause suffering it does so *with the aim of assuring personhood*. [[195]](#footnote-196) As such, to be justified punishment only needs to be shown to be adequately motivated by this purpose.

In order to advance its valuation-assuring purpose, the message conveyed by punishment must be expressed according to the conventions that regulate the meaning of such expressions. As expressivists generally note, in practice this commonly necessitates appealing to various forms of hard treatment, which are the conventionally accepted as the proper means for conveying condemnatory messages; of these, the punisher must choose those means that will be the most effective in getting the message across.[[196]](#footnote-197)

As was already suggested, the conventionality of punishment extends not only to the methods of punishment themselves but also to the condemnatory response itself. Kahan partially makes this point by observing that “just as it would be irrational for a person who wishes to express respect and affection for a friend to offer her money rather than shared experiences, so would it be irrational for society to attempt to condemn a wrongdoer by imposing an affliction that does not signify condemnation within that society.”[[197]](#footnote-198) This is undoubtedly true, but the point could be taken further, for condemnation itself has only a conventional relation to the pro-valuative message punishment is meant to convey, just as friendliness is only conventionally related to affection and respect. Punishment is a condemnatory reaction to crime since condemnation is commonly believed to be the most appropriate way of reassuring valuation after its criminal denial; there is nothing inherent about this convention, and there is certainly room to improve it so it more closely fits its purpose.[[198]](#footnote-199)

The thorough conventionality of punishment entails that when forcing the wrongdoer to be part of its expressive undertaking the state must take care not to ignore her own claim to personhood in the process.[[199]](#footnote-200) This significantly limits the availability of various forms of punishment, even if they could effectively communicate condemnation.[[200]](#footnote-201) As Kahan advises, effective punishment requires a strong fit between the use of punitive means and the message punishment aims to convey; identifying the condemnatory function of punishment can lead us in some cases, he argues, to opt for so-called “shaming” sanctions over more traditional forms of hard treatment.[[201]](#footnote-202) However, while shaming sanctions can indeed be more effective forms of condemnation, their utility must be weighed against their effect on the more general purpose of supporting the belief in personhood, for otherwise it would fail as an example. As James Whiteman responds to Kahan, shaming punishments risk undermining the purpose of punishment, not because the shaming means might be inappropriate but because they risk expressing the wrong kind of disposition.[[202]](#footnote-203) “Speaking of shame sanctions as ‘condemnation,’” he observes, “does not do justice to our intuitive sense of their peculiar kind of brutality and terror.”[[203]](#footnote-204) “Shaming,” in this context, may be an appropriate expression of condemnation, but it risks distorting the meaning of condemnation so it becomes synonymous with retaliation and vengeance, connecting crime and punishment so closely so it blinds itself to the more fundamental purpose of assisting individuals in asserting their personhood.

# Some Thought on the Criminalization of Abortion

I have argued above that through the valuative theory we can better understand the justification of punishment, and with it come to recognize the limits to its justifiability as an expressive instrument. In the following pages I want to briefly explore some ways in which these limits could present themselves in the case of the possible criminalization and punishment of abortion. In doing so I do not intend to make substantive arguments for or against the permissibility or appropriateness of abortion. A large part of the debate on abortion concerns the specific meanings assigned to the various values it invokes and the moral and scientific determinations to be made regarding the status of the fetus, and nothing in the Article would be of any real contribution to these aspects of the discussion. I do, however, believe that acknowledging the valuative function of punishment could help clarify the general framework in which such justifications can justifiably operate.

To help illuminate the points in which the suggested paradigm would be the most pertinent I will confine the question of abortion to the way in which it was framed by the Supreme Court’s opinion in Roe v. Wade.[[204]](#footnote-205) The Court’s opinion was informed by four factors: the moment during which the fetus becomes a person; the State’s interests in regulating abortion; the changes in relative weight of these interests as the pregnancy progresses; and the woman's privacy. These factors, we shall see, can be made to perfectly align with the valuative framework proposed above, suggesting the extent to which they can be drawn by those who would disagree with the way in which they played out in the Court’s opinion.

1. **Abortion and Personhood**

As the Roe Court interpreted it, the legal proscription of abortion could have in mind three potential "victims”: the fetus, the woman, and the state’s interests; of these, the Court primarily dealt with the effects of abortion on the third.[[205]](#footnote-206) Given the nature of the proceeding before it—a case brought by a woman against the state’s prohibition of abortion—it is hardly surprising that the Court has mostly avoided the possible victimization of women by abortion.[[206]](#footnote-207) But the Court was also reluctant to consider the fetus a potential victim of abortion—a stance to be shared by the following discussion.

The Court reached this decision primarily by considering the moment at which the claim to personhood materializes as a matter of *legal convention*.[[207]](#footnote-208) Distancing itself from any pretense of making a scientific, moral, or philosophical statement of fact, the Court surveyed the ways in which the term “person” was used by common law, concluding that it was not commonly understood to include the unborn.[[208]](#footnote-209) Although I see no reason to object to this conclusion I want to make a general note on how the question might be treated by the valuative theory.

Unlike the general Kantian theory, for the valuative approach respect for another’s personhood is mandated by its part in the agent’s assurance of her own personhood. Unless the agent views others as persons—and interacts with them accordingly—there could be no probative value to their willingness to recognize her valuations. As such, one’s personification of another is itself a matter of *belief*—one can be no more certain of another’s personhood than she is of her own.

Consequently, when the individual seeks to determine whether valuative communication with another is possible, she asks not whether the other will reply positively, and not even whether the other is *capable* of communicating, but instead whether it is possible for her to *envision* the other as communicatively recognizing her claim.[[209]](#footnote-210) When one asks herself how another would reply to her claim, she has in mind an *image* of the other’s personhood, an imaginative construction with which she is engaging. The actual other could be unavailable for communication—she can be far away, asleep, or unconscious, but she can also be incapable of actual communication, being an infant, mentally impaired, an unborn fetus, or even an animal.[[210]](#footnote-211)  The question who or what is potentially a person, and who “we,” as a community, can envision as such primarily concerns the limits of our valuative imagination, although it too is subject to conventions.[[211]](#footnote-212)

Nevertheless, I believe that a persuasive case can be made in favor of viewing the moment in which we meet the *eyes* of another human being as the moment in which we begin to perceive them as potential partners in communication. As Sartre notes, it is in the imagined *gaze* of another that we are constantly made aware of the possibility of our own personhood.[[212]](#footnote-213) Although we can bear with us the thought of another’s gaze even though we have never set eyes upon them nor they on us, philosophers from Aristotle to Levinas have noted the unique meaning to the *actual* *sight* of another, in encountering them *vis-à-vis*.[[213]](#footnote-214)

1. **The Values Protected by Abortion Prohibition**

When law prohibits a certain behavior, it will not always be clear what values the prohibition serves. In such cases, it is up to the court deciding on the justifiability of the prohibition to determine which values inform the law and whether their enactment into law conforms with the expressive-valuative purpose of the prohibition.

Three sets of values are noted by the Roe Court as potentially informing the prohibition of abortion: the value of ‘proper’ sexual conduct, the safety of medical procedures, and potential life.[[214]](#footnote-215) The first of these values was promptly taken off the list since the state did not purport to justify the prohibition by reference to it.[[215]](#footnote-216) The valuative theory suggests that this omission might have been too hasty. Whether the state’s proclaimed intention in enacting the prohibition necessarily determines its meaning exceeds our discussion; nevertheless, given the conventional nature of values, it is clear that their enactment into law cannot sever them from the broad cultural context that animates them and gives them concrete meaning.[[216]](#footnote-217) Accordingly, the values *implicitly* promoted by the prohibition of abortion—sexuality, womanhood, procreation, maternity, and the like—can have a profound impact on how the protection of the more explicit values is interpreted.[[217]](#footnote-218) Although the involvement of such values does not necessarily disqualify any prohibition that is informed by them, we must be cautious not to admit values that fail to advance the purpose of valuation. Values that circumscribes the creativity of women to certain aspects of their physiology at the expense of their ability to be perceived as full-blown *political* agents, capable of shaping communal values, can only be regarded as values in a very narrow sense, incongruent with the purpose of valuation.[[218]](#footnote-219) As far as these “values” inform the prohibition of abortion it cannot but lack justification.

Similar consideration apply to the value of bodily integrity as it appears in the regulation of medical procedures; although there is no doubt of it being a legitimate value it must be enacted in a way that does not reflect differently with regard to men and women so as to delimit the concern for the bodily integrity of women their reproductive abilities.[[219]](#footnote-220) Certainly, there are good reasons for the state to seek to prohibit *needlessly* dangerous medical procedures, meaning procedures that might be made less hazardous. The Court, however, went on to accept the prohibition of *excessively* dangerous abortions, meaning those procedures in which the predicted risk to the women’s bodily integrity from the abortion is higher than the risk posed by the continuance of the pregnancy. While there is nothing inherently biased about this degree of care for the bodily integrity of patients, no such excessive caution is taken with regard to many other medical procedures that are riskier than the condition they seek to eliminate, from elective surgeries to various procedures meant to promote fertility and conception, at times at significant risk to women. Such forms of partiality raise doubt whether the connection between the prohibition of abortion and the general concern with physical wellbeing is earnest, raising the possibility that it might be informed by considerations that diminish rather than strengthen the general belief in personhood.

The third and final value involved with the prohibition of abortion—that of potential life—is the one with the most evident connection to the prohibition. It must, however, be kept in mind that in talking of the protection of potential life we are *not* discussing the protection of the fetus *qua* potential person but rather of the communal *value* assigned to biological *objects* that have the potential of *transforming into* persons.[[220]](#footnote-221) The fact that the fetus is an object of biological humanity means that unlike infants or the comatose we do not consider it to be a potential partner in communication; this does not, however, suggest that the value of biological life is meaningless for the valuations of people in the community. “A community,” as Dworkin writes, “has an interest in protecting the sanctity of life—in protecting the community’s sense that human life in any form has enormous intrinsic value—by requiring its members to acknowledge that intrinsic value in their individual decisions.”[[221]](#footnote-222)

Dworkin, however, errs in suggesting that there is “intrinsic” value to biological life; rather, as he notes, the value assigned to it represents the “community’s sense” that a biological connection to the human race makes certain objects unique. However, as Reva Siegel points out, there are good reasons to suspect that the prohibition of abortion does not, in fact, have this form of valuation in mind but is instead informed by values that concern female reproduction.[[222]](#footnote-223) As Siegel notes, while many legislatures claim to anchor the prohibition of abortion in the value of biological humanity, if this was their true intent you would expect that they “would bend over backwards to provide material support for the women who are required to bear—too often alone—the awesome physical, emotional, and financial costs of pregnancy, childbirth, and childrearing,” which they often fail to do.[[223]](#footnote-224)

1. **Prohibiting Abortion**

Despite the fact that the Texas statute at the center of the Roe litigation was primarily aimed against the physician performing the procedure, the Court largely ignored the physician’s role and charted the limits of the prohibition in light of the relation between the woman’s right to privacy and the state’s interest in securing the abovementioned values.[[224]](#footnote-225) As the valuative theory tells us, the question to be asked in order to determine the boundaries of this relation is which forms of behavior not only deny the meaning assigned to these values but do so in a way that pierces through them so they become a denial of *valuation itself* and the claim to personhood that hangs on it.

For the Roe Court, this question was to be answered by juxtaposing the woman’s right to privacy and the values threatened by the act of abortion, suggesting that the weight assigned to the latter increases as the pregnancy progresses. This juxtaposition struck the dissenting Justice Rehnquist as odd, and not without good reason:

I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the *Fourth Amendment to the Constitution*, which the Court has referred to as embodying a right to privacy. *Katz v. United States, 389 U.S. 347 (1967)*. If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the *Fourteenth Amendment*, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty.[[225]](#footnote-226)

To overcome this puzzlement, we must understand the meaning of privacy within the context of valuative communication. Prohibition, as was discussed in Part IV, is meant to specify the forms of behavior that are likely to be interpreted as a denial of the general possibility of communication. Abortion is in this sense *private* as long as it is regarded as a *non-communicative* behavior, meaning a form of behavior that is not commonly understood to take place between two (or more) individuals. In invoking the notion of privacy, the Court recognized that despite the involvement of the physician, abortion is considered to be self-referential, given the meaning generally assigned to doctor-patient relations. What makes the act of abortion private is not its reproductive subject-matter or its participation in those decisions that shape one’s family life but the fact that it is not understood to convey a message.

As the Court notes, the interpretation of the act may change as the pregnancy progresses; abortion might in this sense become a *public* matter if its denial of the protected value is so severe that it cannot but be seen by the community as a denial of valuation itself. An abortion performed a minute prior to birth becomes in this sense communicative even though the fetus is not yet regarded as a person, for the proximity to the moment in which the claim to personhood materializes makes it a form of behavior people throughout the community cannot disregard. Deciding on the exact moment in which the act enters the public domain is a matter of convention, evaluated in light of the principles governing valuation.[[226]](#footnote-227)

1. **Punishing Abortion**

The criminalization of abortion, the Court found, could be justifiable in view of the message it sends, expressing support for the values of biological humanity and medical safety. In prohibiting acts that contradict the communal valuation of these values, the law both signals its support of valuation and instructs people how to express similar support. These purposes can be promoted independently of the *response* to wrongdoing.[[227]](#footnote-228) Although in most cases the lack of a condemnatory response to criminal wrongdoing would be seen as diminishing or even excoriating the state’s expression of commitment towards the protected values, there can certainly be cases in which the connection between the legislative declaration of support and the penal expression of condemnation is not as immediate.[[228]](#footnote-229)

The case of abortion can be seen as one such instance. Even though there may be good reasons to accept certain aspects of the prohibition of abortion—particularly those concerning its effect on the value of biological humanity at the later stages of the pregnancy—there may be reason to believe that that they do not necessitate supplanting them with a condemnatory message if abortions do take place despite their prohibition. One of the benefits of the valuative approach is that it enables us to drive a wedge between prohibition and condemnation. For the traditional theories, particularly of the special kind, all these reasons seem to be but external considerations, secondary to the necessary connection between the wrong of abortion and punishment. Once we realize that the reasons for condemning wrongdoing may be separated from the reasons for criminalization, we can begin recognizing the broader considerations that can shape the response to wrongdoing, particularly in those cases in which the wrong in question is not aimed against another person but more generally against the values protected by law, and when condemnation borders on diminishing the wrongdoer’s own claim to personhood.

Several other considerations inform the determination whether penal condemnation is a justifiable countermessage to the wrongful act. One of these considerations concerns the intensity of communal support behind the protected values.[[229]](#footnote-230) Enacting values into law has, as we have seen, an overall positive effect on valuation, even in the face of disagreement. However, while disagreement does not necessarily reflect badly on the penal protection of controversial values, sending an affirmative condemnatory message against those who have disobeyed the law might contradict the valuative function of law. Valuation, as we have seen, is based in part on the possibility of disagreement; insisting on condemning those who commit controversially illegal acts risks appearing as the attempt to eliminate the possibility of dispute. Although this does not pave the way to the disregard of law, it makes law more appreciative of the possibility of dissent and less condemnatory in its reply to it.

This is particularly so, when, as is the case with abortion, condemnation would only exacerbate an already existing difficulty with the protected values. As Siegel suggests,

(1) whatever the asserted fetal-protective rationale, in actual practice legal restrictions on abortion have reflected and entrenched customary, gender-differentiated norms concerning sexual expression and parenting; (2) they have conscripted the lives of poor and vulnerable women without similarly constraining the privileged; (3) they have punished women for sexual activity without holding men commensurately responsible; and (4) they have used law to coerce, but not o support, women in childbearing.[[230]](#footnote-231)

Despite the importance of the values the prohibition of abortion is intended to express, the condemnation of the act of abortion cannot be considered apart from the profound, at times life-changing implications that performing, or not performing it carry with them.[[231]](#footnote-232) Even when we can attribute to this act the wrongness associated with flouting the community’s values, we cannot disregard the fact the heeding these values involves an immense incursion into the lives of individuals, particularly of women, and that the prohibition is often unaccompanied with meaningful provisions that might offset the price it extracts. While these considerations might fall short of upending the justifiability of the prohibition, they carry much more weight when it comes to the justification of the condemnatory response. Given the alternative ways in which the value of biological humanity might be affirmed, particularly those that would obviate the need for abortion, such as contraceptives and sexual education, a policy that ignores the latter while focusing on condemnation seems to betray the kind of dishonesty that might undermine the state’s expression of allegiance to valuation.

# ​Conclusion

The valuative theory of punishment tells us that punishment is justified for its contribution to the general legal purpose of assisting individuals in their valuative self-assurance. The individual, it argues, is driven by an existential interest in believing that she is a person, enduring, creative, and distinct from the world. To promote this interest the individual, among other ways, seeks to endow inconsequential objects with meaning and communicate it to others so that they can affirm her claim to personhood by acknowledging her valuative claim. Law, it is argued, promotes this interest in three main ways: creating an inventory of agreed-upon values; providing hermeneutic guidelines for the interpretation of the relation of various forms of behavior to these values; and sending a countermessage to offset the effects of those forms of behavior that set back the interest in self-assurance.

As was illustrated, this theory does not contend that there is some inherent value to the values it supports, nor that there is some necessary connection between crime and punishment. Punishment, it argues, is a response to crime, but there is nothing unique or obligatory about this response. The state contributes in various ways to the valuative interest, and punishment is one of them. That punishment serves to express condemnation of wrongdoing is essential to its understanding, but condemnation itself is only a *conventional* response, which, like the other conventional components of criminal law, is just an instrument in the service of the *conviction* that human beings are persons.

The key to understanding this idea lies with its *ironical* stance, taking the conventions and convictions it deals with with a grain of salt without disparaging them.[[232]](#footnote-233) The irony of the valuative approach is the recognition that the meaning we assign to the things we hold dear—even to our own personhood—is of our own making. This does not mean that they are any less meaningful for that, only that we must find the source of their meaningfulness in our interest in treating them as such, injecting it with a healthy dose of modesty and moderation.[[233]](#footnote-234) As Thomas Nagel pointedly puts it, philosophical skepticism does not cause us to abandon our ordinary beliefs, but it lends them a peculiar flavor. After acknowledging that their truth is incompatible with possibilities that we have no grounds for believing do not obtain -- apart from grounds in those very beliefs which we have called into question -- we return to our familiar convictions with a certain irony and resignation. Unable to abandon the natural responses on which they depend, we take them back, like a spouse who has run off with someone else and then decided to return; but we regard them differently (not that the new attitude is necessarily inferior to the old, in either case). The same situation obtains after we have put in question the seriousness with which we take our lives and human life in general and have looked at ourselves without presuppositions. We then return to our lives, as we must, but our seriousness is laced with irony.[[234]](#footnote-235)

The irony of the valuative approach does not mean that it is relativistic in its promotion of values or flippant in the use of punishment against those who undermine the interest in valuation. The evil of criminal wrongdoing, it tells us, is concrete, but it is ultimately a matter of perception, not of essence. Correcting the damage done by wrongdoing is not in any way unique to punishment, but as long as punishment is genuinely aimed at the affirmation of valuation it needs no further justification—but we must also consider whether, in any given case, it is the most appropriate and effective way of reaffirming the meaning assigned to the flouted values.[[235]](#footnote-236)

1. † JSD Candidate, Yale Law School [↑](#footnote-ref-2)
2. <https://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html?_r=0>; <http://www.cnn.com/2016/03/30/politics/donald-trump-abortion-town-hall/> for the text http://www.politifact.com/wisconsin/article/2016/mar/30/context-transcript-donald-trump-punishing-women-ab/ [↑](#footnote-ref-3)
3. See, e.g.,; Goldman, The paradox of Punishment; Mackie, morality and the retributive emotions 1982 at 3; Blumoff justifying punishment 2001 at 162; George Kateb, Punishment and the Spirit of Democracy, Social Research, 269; Michael S. Moore, *Justifying Retributivism*, 27 Isr. L. Rev. 15, 17 (1993); Pearl 1982 276. Also generally see Deirdre Golash, The case against punishment: retribution, crime prevention, and the law (2005). [↑](#footnote-ref-4)
4. The problem of hard treatment [↑](#footnote-ref-5)
5. See, e.g., JOHN TASIOULAS, Punishment and Repentance Adler expressive 2000; Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 Utah L. Rev. 205, 218-19 (2003). [↑](#footnote-ref-6)
6. Kahan 1996 alternative 597 [↑](#footnote-ref-7)
7. There is some resemblance between this suggestion and Jürgen Habermas’ communicative theory, although Habermas views communication in dialectical terms, mediating between the individual and the community, while I see it as a more immediate instrument of self-assertion. Jürgen Habermas, The theory of communicative action 17-19 (1984); Jürgen Habermas, Knowledge and human interests 157 (2nd [English] ed. 1978). Jürgen Habermas, Moral consciousness and communicative action 65-66 (1990) [↑](#footnote-ref-8)
8. *See*, *e.g.*, Mitchell N. Berman, *Punishment and justification* 118 Ethics 258, 265 (2008). [↑](#footnote-ref-9)
9. Berman correctly adds that defeating the demand basis does not necessarily entail that the action is justified for all intents and purposes, only that “it imposes no further obligation” on its proponent. “This,” as he suggests, “is not to say that the practice is thereby rendered justified, or even justifiable, all things considered. Maybe it is, maybe not. The more modest (yet significant) upshot is only that the practice no longer stands, embarrassedly, ‘in need of justification.’” Id. Similarly *see* David Dolinko, *Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment* 16 Law & Phil., 507, 521 (1997). [↑](#footnote-ref-10)
10. David Dolinko, *Some Thoughts About Retributivism,* 101 Ethics 537, 539 (1991). [↑](#footnote-ref-11)
11. *See* H.L.A. Hart, Punishment and Responsibility 9 (1968). [↑](#footnote-ref-12)
12. *See*, *e.g.*, Christopher Ciocchetti, *Wrongdoing and Relationships: An Expressive Justification of Punishment,* 29 Soc. Theory & Prac. 65, 68 (2003); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 Buff. Crim. L. Rev. 307, 310 (2004); Jeffrie G. Murphy, *Introduction*, *in* Punishment and Rehabilitation 1, 1 (Jeffrie G. Murphy ed., 3d ed. 1995); Anthony Duff & David Garland, *Introduction: Thinking about Punishment*, *in* A Reader on Punishment 1, 2 (Antony Duff & David Garland eds., 1994). [↑](#footnote-ref-13)
13. Linda Ross Meyer, *Herbert Morris and Punishment*, 22 QLR 109, 109 (2003). [↑](#footnote-ref-14)
14. Cesare Beccaria, On Crimes and Punishments 8 (David Young trans., 1986) (1764). [↑](#footnote-ref-15)
15. *See*, *e.g.*, Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 Chi.-Kent L. Rev. 1215 (2004). [↑](#footnote-ref-16)
16. Girard, Scared Violence [↑](#footnote-ref-17)
17. Girard; Kennedy monstrous 2000 832. [↑](#footnote-ref-18)
18. John Steele, A Seal Pressed in the Hot Wax of Vengeance, 16 J. L & Relig. 35, 67 (2001); Rainer Forst, *Tolerance as a Virtue of Justice*, 4 Philos. Explor. 193, 194 (2001). Richard Rorty, *The Priority of Democracy to Philosophy*, *in* The Virginia Statute of Religious Freedom 257, 267 (Merrill D. Peterson & Robert C. Vaughan eds., 1988). [↑](#footnote-ref-19)
19. Although other forms of utilitarian justifications, such as rehabilitation and incapacitation, fall under this category as well, deterrence is the most prominent way of making this argument. [↑](#footnote-ref-20)
20. Bentham 74. [↑](#footnote-ref-21)
21. Bentham 74. [↑](#footnote-ref-22)
22. Bentham 158, [↑](#footnote-ref-23)
23. Bentham 158. [↑](#footnote-ref-24)
24. John Rawls, Two Concepts of Rules, 64 Phil. Rev. 3 (1955); George Schedler, Can retributivists Support Legal Punishment? 63 Monist 185, 186 (1980); Guyora Binder & Nicholas J. Smith, Framed: Utilitarianism and Punishment of the Innocent, 32 Rutgers L.J. 115 (2000); William Lyons, Deterent Theory and Punishment of the Innocent, 84 Ethics 346 (1974).21 Another objection concerns the feasibility of the comprehensive calculations required by utilitarianism. See, e.g., Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 Utah L. Rev. 205, 210 (2003); R.A. Duff, In Defense of One Type of Retributivism, 24 MELB. U. L. REV. 411, 422 (2000); Bernard E. Harcourt, Reflecting on the Subject, 97 Mich. L. Rev. 291 (1998); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. Law Rev. 413, 427-28 (1999). Neal Kumar Katyal, Deterrence’s difficulty, 95 Mich. L. Rev. 2385 (1997). [↑](#footnote-ref-25)
25. See, e.g., Leon Pearl, A Case against the Kantian Retributivist Theory of Punishment, 11 Hofstra L. Rev. 273, 280-86 (1982) [↑](#footnote-ref-26)
26. See, e.g., Igor Primorac, Utilitarianism and Self-Sacrifice of the Innocent, 38 Analysis 194, 194 (1978); S. I. Benn, *An Approach to the Problems of Punishment*, 33 Philosophy 325, 331 (1958); R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 Crime Justice 1 (1996); Igor Primoratz, *Punishment as Language*, 64 Philosophy 187, 187-88 (1989). [↑](#footnote-ref-27)
27. See, e.g., Von Hirsch, 54-57; matravers 23-44; Dubber theories of crime and punishment in German law: 700-701. [↑](#footnote-ref-28)
28. See Dubber theories of crime and punishment in German law 700-701 Duff paper 13-14; Matt Matravers, Justice and punishment: the rationale of coercion 23-44 (2000) [↑](#footnote-ref-29)
29. Foucault, disciple and punish; Feely and Simon, The new penology [↑](#footnote-ref-30)
30. John Stuart Mill, *On Liberty*, *in* On liberty and The subjection of women (Alan Ryan ed., 2006). 65-66; Halliday, R. J. Halliday, John Stuart Mill 29-56 (2004). Also see John N. Gray, *John Stuart Mill: Traditional and Revisionist Interpretations*, 2 Lit. Lib. 7 (1979); [↑](#footnote-ref-31)
31. it is better, Mill argues, to be a “Socrates dissatisfied than a fool satisfied.” John Stuart Mill, Utilitarianism 14 (2 ed. 1864). [↑](#footnote-ref-32)
32. Mill, On liberty **Error! Bookmark not defined.** at 67-68. Also see Isaiah Berlin, *John Stuart Mill and the Ends of Life*, *in* Four Essays on Liberty 179, 192 (1969); Mendus, *supra* note 2, at 51-55. [↑](#footnote-ref-33)
33. John Stuart Mill, *On Liberty*, *in* On Liberty and The Subjection of Women 1, 18 (Alan Ryan ed., 2006).Isaiah Berlin, *John Stuart Mill and the Ends of Life*, *in* Four Essays on Liberty 179, 192 (1969); Mendus, *supra* note 2, [↑](#footnote-ref-34)
34. Feinberg, Social Philosophy, *supra* note **Error! Bookmark not defined.**, at 7. [↑](#footnote-ref-35)
35. Mill, *supra* note **Error! Bookmark not defined.** at 18, 22-63; *also* *see* David Edwards, *Toleration and Mill’s Liberty of Thought and Discussion*, *in* Justifying toleration 87 (Susan Mendus ed., 1988). [↑](#footnote-ref-36)
36. on liberty 17 [↑](#footnote-ref-37)
37. 16. [↑](#footnote-ref-38)
38. Mill, at 17; *See* Joel Feinberg, Harm to Others 35, 116 (1990)(*hereinafter* Feinberg, Harm to Others); Feinberg, Harm to Self, *supra* note **Error! Bookmark not defined.**, at 28-30. [↑](#footnote-ref-39)
39. For Mill this demarcation involves no more than a feigned difficulty, easily undone by common sense. Mill, *supra* note **Error! Bookmark not defined.**, at 95. Others, however, concede that this challenge can hardly be shrugged. As Feinberg ultimately admits, the definition of coerciveness “absolutely require[s] the help of supplementary principles, some of which represent controversial moral decisions and maxims of justice.” Feinberg, *The Interest in Liberty on the Scales*, *supra* note **Error! Bookmark not defined.**, at 30. See also Feinberg, Social Philosophy, *supra* note **Error! Bookmark not defined.**, at 9; Feinberg, *Legal Paternalism*, *supra* note **Error! Bookmark not defined.**, at 123-25. Feinberg, Harm to Others, *supra* note **Error! Bookmark not defined.**, at 52. Similarly see John Horton John Horton, *Toleration, morality and harm*, in Aspects of Toleration 113, 115 (John Horton & Susan Mendus eds., 1985); Alan Wertheimer, Coercion 204-211(1987); Flathman, *supra* note **Error! Bookmark not defined.**, at 62; gert 33; Raz, *supra* note **Error! Bookmark not defined.**, at 373 [↑](#footnote-ref-40)
40. *see* John N. Gray, *John Stuart Mill: Traditional and Revisionist Interpretations*, 2 Lit. Lib. 7 (1979); R. J. Halliday, John Stuart Mill 29-56 (2004). [↑](#footnote-ref-41)
41. For the discussion of the value of liberty as the benefit individuals draw from knowing that they are free see Feinberg social philosophy 6-7 [↑](#footnote-ref-42)
42. see Making sense of retributivism 2001: 83; Duff paper 5-6 [↑](#footnote-ref-43)
43. Blumoff justifying punishment 2001, 168; Von Hirsh 1992 59-61; making sense of retributivism 2001; Falls retribution 1987 39 [↑](#footnote-ref-44)
44. 1979 Pugsley 397 [↑](#footnote-ref-45)
45. Berman, *supra* note 18, at 265; Fletcher 2000, 695-697 the tendency of criminal theory to misuse Kant; Murphy does Kant 1987, 512-518 Admits that Kant’s “official” theory of punishment, found in the Rechtslehre, is radically inconsistent with the rest of his writing. Hill Kant on wrongdoing 409 1999 [↑](#footnote-ref-46)
46. Reference Bentham [↑](#footnote-ref-47)
47. [what is enlightenment?] Thomas Nagel, *Moral Conflict and Political Legitimacy*, 16 Philos. Public Aff. 215, 224 (1987). [↑](#footnote-ref-48)
48. Ameriks 21-22;Kant footnote; Murphy moral epistemology 1999 157-159 [↑](#footnote-ref-49)
49. Lectures, Allison semi critical 105 Onora S. O’Neill, *Agency and Anthropology in Kant’s Groundwork*, *in* Kant’s Practical Philosophy Reconsidered 63, 74 (Yirmiyahu Yovel ed., 1989). [↑](#footnote-ref-50)
50. Murphy does Kant 1987, 516-518, 521 Tunick is Kant a retributivist 1996; Is Retributivism Analytic? -Author(s): Igor Primorac, Source: Philosophy, Vol. 56, No. 216 (Apr., 1981), pp. 203-211, 203 [↑](#footnote-ref-51)
51. See, e.g., John Rawls, Kantian Constructivism in Moral Theory, 77 J. PHILOS. 515, 520 (1980). John Rawls, The Idea of an Overlapping Consensus, 7 OXF. J. LEG. STUD. 1, 2 (1987). JOHN RAWLS, POLITICAL LIBERALISM, 441, 472 (Expanded ed ed. 2005). Nagel impartiality 33. Onora O’Neill, Political Liberalism and Public Reason: A Critical Notice of John Rawls, Political Liberalism, 106 PHILOS. REV. 411, 422 (1997).Nagel impartiality 161, Raz 373 Seyla Benhabib, Liberal Dialogue versus a Critical Theatre of Discursive Communication, in LIBERALISM AND THE MORAL LIFE 149 (Nancy L. Rosenblum ed. 1989) Greiff deliberative democracy 2002 [↑](#footnote-ref-52)
52. Tom sorell book punishment and political theory, 22-23 xxxxJohn Rawls, A theory of justice 252 (Original ed ed. 2005) (252 kantian autonomy as a duty to our nature).Charles Taylor, Sources of the self: the making of the modern identity (1989). [↑](#footnote-ref-53)
53. Rechtsshare; Robert B. Pippin, *Mine and Thine? The Kantian State*, *in* The Cambridge Companion to Kant and Modern Philosophy (Paul Guyer ed. 2006). 368 [↑](#footnote-ref-54)
54. **Byrd** paper180-181; B. Sharon Byrd & Joachim Hruschka, Kant’s Doctrine of right: a commentary, 264 (2010). Arthur Ripstein, Force and freedom: Kant’s legal and political philosophy , 300-324 (2009). Von Hirsch, 51-53 [↑](#footnote-ref-55)
55. Elsewhere Kant refers to law-minded action as a pathological form of a-morality. [↑](#footnote-ref-56)
56. **Brudner** 42 42-45 ; Peter Benson, *External Freedom according to Kant*, 87 Columbia Law Rev. 559 (1987). Hill on Kant 1998, 409; B. Sharon Byrd, *Kant’s Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 Law Philos. 151–200 (1989).; Otfried Höffe, *Kant’s Principle of Justice as Categorical Imperative of Law*, *in* Kant’s Practical Philosophy Reconsidered 149, 153 (Yirmiyahu Yovel ed., 1989). (freedom cannot be protected by law); Arthur Ripstein, Force and freedom: Kant’s legal and political philosophy , 300-324 (2009). Marcus Willaschek, *Why the Doctrine of Right Does not Belong in the Metaphysics of Morals: On Some Basic Distinctions in Kant’s Moral Philosophy*, 5 Jahrb. Für Recht Ethik 205 (1997). the official view relating law to morality and the alternative view separating them; [↑](#footnote-ref-57)
57. Duff 233; For a similar view see Husak’s why punish the deserving 1992, Benn 327 [↑](#footnote-ref-58)
58. Hampton correcting harms1660 [↑](#footnote-ref-59)
59. Falls retribution 1987 Lucas 124-127 Berman, *supra* note 18, at,267 Alan Brudner, Punishment and freedom: a liberal theory of penal justice 5 (2009). [↑](#footnote-ref-60)
60. zilberg [↑](#footnote-ref-61)
61. Hart, *supra* note 21, at 234-35. Matravers justice and punishment 46 Also see John Kleinig, Punishment and Desert 67 (1973); Benn, *supra* note **Error! Bookmark not defined.** at 327; Nathan Hanna, *SAY WHAT? A CRITIQUE OF EXPRESSIVE RETRIBUTIVISM*, 27 Law Philos. 123, 123 (2008). Dolinko, *supra* note 19, at 518-522. [↑](#footnote-ref-62)
62. Categorical imperative, the wilkur. Refer to the problem of radical evil Yirmiyahu Yovel, *Kant’s practical reason as will: interest, recognition, judgment, and choice*, 52 Rev. Metaphys. 267, 281 (1998). (Immorality lies in the choice to act against our reason (religion based on reason alone)) G.A. Cohen, *Reason, humanity, and the moral law*, *in* Sources of Normativity 178-182 (Onora O’Neill ed., 1996). Allen W. Wood, *The Final Form of KAnt’s Practical Philosophy*, *in* Kant’s Metaphysics of Morals: Interprative Essays 1 (Mark Timmons ed., 1997). 9-10 [↑](#footnote-ref-63)
63. Robert Nozick, Philosophical explanations 405 (1981). Hannah, 129-130 Brian Slattery book on retr 33 **Brudner** 47 [↑](#footnote-ref-64)
64. Falls retribution 1987 [↑](#footnote-ref-65)
65. Bedau, Hugo A. 1978. "Retribution and the Theory of Punishment." Journal of Philosophy 75:601-20. [↑](#footnote-ref-66)
66. morris, persons and punishment; Murphy, Kant’s Theory of criminal punishment in retribution, justice and therapy 1978. Similar ideas are offered By JOHN FINNis THE RESTORATION OF RETRIBUTION 1972, cher [↑](#footnote-ref-67)
67. see Dolinko, *supra* note 20, at 545-46. Meyer, *supra* note 23, at 110 Goldman the paradox of punishment 43-44 [↑](#footnote-ref-68)
68. Dolinko, *supra* note 20, at 547-48 , Also Falls, 34; Von Hirsh 1992, 66; Meyer, *supra* note 23, at 111 Fletcher the fall and rise 1998 290 [↑](#footnote-ref-69)
69. Morris R. Cohen, Moral Aspects of the Criminal Law The Yale Law Journal, Vol. 49, No. 6 (1940), pp. 987-1026, 992 ;Pearl 1982 286-293; Murphy does Kant 1987, 523 [↑](#footnote-ref-70)
70. Feinberg 400; Also see eg Lucas 131-32 [↑](#footnote-ref-71)
71. Adler expressive 2000 1357-58 1414; Skillen 511 [↑](#footnote-ref-72)
72. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 Univ. Chic. Law Rev. 591, 596 (1996). Punishment and Repentance JOHN TASIOULAS 296 ;Markel are shaming punishments 2001 2206-2215 [↑](#footnote-ref-73)
73. Cass R. Sunstein, *On The Expressive Function of Law*, 144 Univ. Pa. Law Rev. 2021, 2028 (1996). [↑](#footnote-ref-74)
74. Kahan secret 420 [↑](#footnote-ref-75)
75. Skillen Things with walls, 521 [↑](#footnote-ref-76)
76. id [↑](#footnote-ref-77)
77. Davis 319; Skillen 511; Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 Utah L. Rev. 205 (2003) 218-219; Primoraz punishment as language 1989 202 [↑](#footnote-ref-78)
78. Kahan secret, 485-92; Sunstein 2029-30 [↑](#footnote-ref-79)
79. 420 [↑](#footnote-ref-80)
80. Kahan 1996 alternative. Also see Kahan secret Feinberg 404-408 Sunstein 2029-30. also see Anderson and pildes expressive theories a general restatement of 2000 1516 [↑](#footnote-ref-81)
81. Skillen Things with walls, 519. Kahan, *supra* note **Error! Bookmark not defined.**, at 599; Andrew von Hirsch, Past or Future Crimes 56 (1987). CHRISTOPHER BENNETT, THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OFPUNISHMENT (2008) 290 [↑](#footnote-ref-82)
82. Given their affinity to the Kantian theory, it is not uncommon for authors who share these ideas to present themselves as retributivists rather than expressivists Kantian expressivism examples. Hampton correcting harms 1666-68 [↑](#footnote-ref-83)
83. Jaime Malamud Goti, Equality, Punishment, and Self-Respect, 5 BUFF. CRIM. L. REV. 497, 504 (2002) Guyora Binder, Victims and the Significance of Causing Harm, 28 PACE L. REV. 713, 715 (2008) [↑](#footnote-ref-84)
84. Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA Law Rev. 1659, 1674 (1992). 1686 [↑](#footnote-ref-85)
85. 1670 [↑](#footnote-ref-86)
86. Jean Hampton, *Correcting Harms versus Righting Wrongs: The Goal of Retribution*, 39 UCLA Law Rev. 1659, 1674 (1992). 1686-87 [↑](#footnote-ref-87)
87. Jean Hampton, *The Moral Education Theory of Punishment*, 13 Philos. Public Aff. 208, 217 (1984). Meyer, *supra* note 23, at 119; Bennett, *supra* note **Error! Bookmark not defined.**, at 191;Ciocchetti, *supra* note 22, at 66 23Duff paper 36-37 [↑](#footnote-ref-88)
88. 105 George P. Fletcher, The Place of Victims in the Theory of Retribution, 3 BUFF. CRIM. L. REV. 51, 57 (1999). [↑](#footnote-ref-89)
89. id [↑](#footnote-ref-90)
90. Kleing isr 418 [↑](#footnote-ref-91)
91. Ciocchetti, *supra* note 22, at 70; Dolinko 1991 551 Deirdre Golash, The case against punishment: retribution, crime prevention, and the law 52-60 (2005). Brian Slattery book on retr 33 [↑](#footnote-ref-92)
92. Duff paper, 40 [↑](#footnote-ref-93)
93. Hampton correcting harms, 1678. But Hampton correcting harms 1671-1671 Duff paper 36-37 [↑](#footnote-ref-94)
94. Hampton 1998 Punishment feminism 40 [↑](#footnote-ref-95)
95. Garvey can shaming punishment 1998, 739-743; Dolinko 1991 at 549; Anderson and pildes expressive theories a general restatement of 2000 at 1508; Duff paper, 32-33. [↑](#footnote-ref-96)
96. Duff 233 (236) Duff paper 33-35 [↑](#footnote-ref-97)
97. Nozick 376 [↑](#footnote-ref-98)
98. Nozick 375, Von Hirsch, *supra* note **Error! Bookmark not defined.**, at 59; Brian Slattery, *The Myth of Retributive Justice*, *in* Retributivism and Its Critics 27, 33 (Wesley Cragg ed., 1992). [↑](#footnote-ref-99)
99. Jean Hampton, The Retributive Idea, in Forgiveness and Mercy 115, 131, 142 (Jeffrie Murphy & Jean Hampton eds., 1988); **Hampton education** 208; Greiff deliberative democracy 2002, 390; Hegelian Punishment 157-158 ; Meyer, *supra* note 23, at 119; Skillen Things with walls, 511 [↑](#footnote-ref-100)
100. see Dubber the right to be punished 1998 117-119; Ekow N. Yankah, Good Guys and Bad Guys: Punishing 1060-1062 Tunick (p. 3). G abortion 112 But Ameriks chpt 7 [↑](#footnote-ref-101)
101. Relatively concise pronunciations of Hegel’s teleological dialectics can be found in G. W. F. Hegel, Phenomenology of spirit 11, 51(A. V. Miller tran., Reprint. ed. 2013). For clarification of these ideas see Taylor 47. [↑](#footnote-ref-102)
102. Garvey can shaming punishment 1998,742 .Brudner in defense of 93-94;also see Dubber rediscovering Hegel’s 1994 40-42 [↑](#footnote-ref-103)
103. 256-57 also see Duff paper 48 Duff 1993, pp. 371-80) [↑](#footnote-ref-104)
104. Duff book on community 48-56; Matravers 194; Antony Duff, Trials and punishments (1986)258-259; Henrique Carvalho, Terrorism, Punishment, and Recognition, 15 New Crim. L. Rev. 345 (2012) [↑](#footnote-ref-105)
105. This leads to an atomized, Lockean society, one in which there is seemingly room for toleration: 290 (477)The universal being thus split up into a mere multiplicity of individuals, this lifeless Spirit is an equality, in which all count the same, i.e. as persons." In which, what counts as absolute essential being is "self-consciousness as the sheer empty unit of the person" (291 (480)) Allen W. Wood, *THE EMPTINESS OF THE MORAL WILL*, 72 The Monist 454–483 462 hegel actualization (1989). Ameriks 21-22 [↑](#footnote-ref-106)
106. Hegel phenomenology 116-119; Punishment “in the realm of finite things”: 7 20 See Patten 1999, pp. 130-133, 144 ff. Patten, Alan 1999. Hegel’s Idea of Freedom. Oxford: Oxford University Press. Punishment “in the realm of finite things”: 13-14; Stern Hegel 78 113-14 [↑](#footnote-ref-107)
107. (PR, § 211) The encyclopedia logic 211 (141-142); The absolute spirit arising from the need for certainty and intersubjectivity: 409. Also see houlgate freedom truth and history 78-82; Charles Taylor, Hegel and modern society (1979).1-14 [↑](#footnote-ref-108)
108. JOHN TASIOULAS, Punishment and Repentance 294 Falls retribution 1987 40-41; Brudner describes 313-9 [↑](#footnote-ref-109)
109. 265 [↑](#footnote-ref-110)
110. Robert Nozick, Philosophical explanations 409 (1981). Likewise see Duff paper 49-48 [↑](#footnote-ref-111)
111. Meyer, *supra* note 23, at 119; Nozick 379; Matravers, *supra* note **Error! Bookmark not defined.**, at 251. Matravers 247-251; Dubber rediscovering Hegel’s 1994 1583 [↑](#footnote-ref-112)
112. Antony Duff, Trials and punishments 243-44 (1986).Jean Hampton, *The Moral Education Theory of Punishment*, 13 Philos. Public Aff. 208 233-34 (1984).22Garvey can shaming punishment 1998 769-770; Matravers 89-91 [↑](#footnote-ref-113)
113. Garvey can shaming punishment 1998 763 “the state punishes the offender in order to "wake him up," to get him to recognize and understand why what he has done was wrong, and ideally, to repent. “ Brian Slattery book on retr The connection between the symbolic act of wronging and the symbolic act of punishment can only be mythical, unexplainable by reason, that must usually depend on metaphor. Von Hirsch, *supra* note **Error! Bookmark not defined.**, at 59; Brian Slattery, *The Myth of Retributive Justice*, *in* Retributivism and Its Critics 27, 33 (Wesley Cragg ed., 1992). [↑](#footnote-ref-114)
114. Dubber rediscovering Hegel’s 1994 1585 [↑](#footnote-ref-115)
115. Charles Taylor, Hegel and modern society (1979).11 [↑](#footnote-ref-116)
116. Garvey can shaming punishment 1998 766 [↑](#footnote-ref-117)
117. duff CHOICE, CHARACTER, AND CRIMINAL LIABILITY 382-383; Duff book on community 51-52; Duff book on punishment and political 57-58; Matravers 190 –194; Murphy retributivism, moral education 1985 8-9; CHRISTOPHER BENNETT, THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OFPUNISHMENT (2008):290; Meyer, *supra* note 23, at 120 [↑](#footnote-ref-118)
118. Hegel and the justification of real-world penal sanctions\* Antje du Bois-Pedain 5 the Philosophy of Right (PR)13 aspires to understand how human freedom becomes a reality in the progressive development of our social and political structures. Hegel 1821/1991. Hegel, G.W.F. 1821/1991. Elements of the Philosophy of Right. Ed. A. Wood. Transl. by H.B. Nisbet. Cambridge: Cambridge University Press; Robert Nozick, Philosophical explanations 410 (1981). For Hegel the ethical life of the group isn't accidental but essential, and ethical behavior consists of holding on to the group's values: 271-62 (437). Sean Sayers, "The Actual Is the Rational," in Hegel and Modem Philosophy, ed. David Lamb (London: Croom Helm, 1987),147-8; Andrew Arato, "A Reconstruction of Hegel's Theory of Civil Society," Cardozo Law Review 10, no. 5 (1989) Ameriks 313-317 [↑](#footnote-ref-119)
119. Duff book on punishment and political, 56 [↑](#footnote-ref-120)
120. Taylor Hegel 135 [↑](#footnote-ref-121)
121. Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 Philos. Q. 127, 132 (1987). Matravers 92 Ivison; Garvey can shaming punishment 1998 774; Dolovich, *supra* note 22: 313 [↑](#footnote-ref-122)
122. Steele a seal pressed in hot wax 2001. Duff book on punishment and political 60 [↑](#footnote-ref-123)
123. Feinberg 400 (emphasis added) [↑](#footnote-ref-124)
124. Feinberg 402 [↑](#footnote-ref-125)
125. Skillen 516 [↑](#footnote-ref-126)
126. ID. [↑](#footnote-ref-127)
127. Durkheim moral education 176. Also see Division of Labor on mechanic solidarity. Indeed, it might be more fitting to refer to this approach as a symbolic justification of punishment. Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 DUKE L.J. 1, 74-76 (1997). [↑](#footnote-ref-128)
128. Jean Hampton, *The Moral Education Theory of Punishment*, 13 Philos. Public Aff. 208, 212 (1984). [↑](#footnote-ref-129)
129. Richard K. Greenstein, Toward a Jurisprudence of Social Values 4-5 [↑](#footnote-ref-130)
130. MacIntyre, Taylor. [↑](#footnote-ref-131)
131. Macintyre, **Habermas Knowledge,** 13,40 [↑](#footnote-ref-132)
132. Dworkin 414 [↑](#footnote-ref-133)
133. Existentialism is humanism; Paul Ricœur, Oneself as another 21 (Kathleen Blamey tran., 1995). Also see 299-302. [↑](#footnote-ref-134)
134. Husserl, *supra* note **Error! Bookmark not defined.**, at, at 66. The roots of this view can be traced back to Husserl, Edmund Husserl, Cartesian Meditations (1970).at 13/54 22/61-62 For Sartre, “Human reality may be defined as a being such that in its being its freedom is at stake because human reality perpetually tries to refuse to recognize its freedom.” Sartre, *supra* note **Error! Bookmark not defined.**, at 567 “consciousness is a being, the nature of which is to be conscious of the nothingness of its being” Sartre, *supra* note **Error! Bookmark not defined.**, at 863. Also see there at 24. In this he follows Heidegger, who maintains that “Dasein is an entity which does not just occur among other entities. Rather it is ontologically distinguished by the fact that, in its very Being, that Being is an *issue* for it. But in that case, this is a constitutive state of Dasein’s Being, and this implies that Dasein, in its Being, has a relationship towards that Being—a relationship which itself is one of Being.” Martin Heidegger, Being and time 32 (1988). As Levinas puts is—“Freedom consists in knowing that freedom is in peril.” Emmanuel Levinas, Totality and infinity 35 (Alphonso Lingis tran., 2007). The roots of this view can be traced back to Husserl, Edmund Husserl, Cartesian Meditations (1970).at 13/54 22/61-62 [↑](#footnote-ref-135)
135. References strawson, larmore [↑](#footnote-ref-136)
136. Sartre, supra note 12, at 595 [↑](#footnote-ref-137)
137. Yirmiyahu Yovel, *Kant’s practical reason as will: interest, recognition, judgment, and choice*, 52 Rev. Metaphys. 267 274-75 (1998).Hampton, Correcting Harms versus Righting Wrongs: The Goal of Re- tribution." UCLA Law Review 39:201 220, 225-26 [↑](#footnote-ref-138)
138. Reference dissertation. Similarly, Shapiro 120-129 [↑](#footnote-ref-139)
139. Samuel Scheffler, Equality and tradition: questions of value in moral and political theory (2010). 325 [↑](#footnote-ref-140)
140. See Hannah Arendt, Lectures on Kant’s political philosophy 14 (Ronald Beiner ed., 1989). [↑](#footnote-ref-141)
141. Ameriks 69-70 (and paper) [↑](#footnote-ref-142)
142. Barbara Herman, *Pluralism and the Community of Moral Judgment*, *in* Toleration: an elusive virtue 60 (David Heyd ed., 1996). 63-64 [↑](#footnote-ref-143)
143. Jennifer Nedelsky, *Judgment, Diversity, and Relational Autonomy*, *in* Judgment, imagination, and politics: themes from Kant and Arendt 103 (Ronald Beiner & Jennifer Nedelsky eds., 2001). Seeman if the elephant could speak 2003 161 [↑](#footnote-ref-144)
144. Makkreel, *supra* note **Error! Bookmark not defined.**, at 64 [↑](#footnote-ref-145)
145. This kind of claims, Kant notes, exceed even the claim to freedom made by moral judgments COJ section 35; Makkreel, supra note **Error! Bookmark not defined.**, at 55. Yirmiyahu Yovel, *Kant’s practical reason as will: interest, recognition, judgment, and choice*, 52 Rev. Metaphys. 267 (1998). 279 [↑](#footnote-ref-146)
146. See Samuel Scheffler, *Valuing*, *in* Equality and tradition 15 (2010); Niko Kolodny, *Love as Valuing a Relationship*, 112 Philos. Rev. 135–189 (2003). [↑](#footnote-ref-147)
147. Husserl uses the term cultural objects Husserl, *supra* note **Error! Bookmark not defined.**, at 92 [↑](#footnote-ref-148)
148. As Samuel Scheffler puts it, “through the repetitive performance of acts that express our distinctive values and desires, we mark the world with continuities that are expressive of ourselves. In so doing, we confirm our sense of ourselves as persistent creatures, manufacturing, as it were, evidence to support our confidence in our persistence.” Samuel Scheffler, *The Normativity of Tradition*, *in* Equality and tradition 287, 299 (2010). Richard Rorty makes a similar point, while emphasizing the fetishistic nature of such constructs. Richard Rorty, Philosophy and the mirror of nature 344-45 (1980). For similar views see Larmore, *supra* note **Error! Bookmark not defined.**, at 87; Williams, *supra* note **Error! Bookmark not defined.**, at 151; *see* *supra* note **Error! Bookmark not defined.**, at 12 [↑](#footnote-ref-149)
149. COJ 160 [↑](#footnote-ref-150)
150. The third maxim Kant mentions, that of consistency, seems to be somewhat redundant, adding little to the first two conditions. This is for instance O’Neill’s view in O’Neill, *supra* note **Error! Bookmark not defined.**, at 47. However, I believe that the element of consistency can be understood to represent the condition of *commitment*, as the formation of communication over a temporal axis spanning the parties’ past and future valuations, as I elaborate in my dissertation. [↑](#footnote-ref-151)
151. COJ 79 [↑](#footnote-ref-152)
152. See Hannah Arendt, Lectures on Kant’s political philosophy 14 (Ronald Beiner ed., 1989). Charles Taylor, Sources of the self: the making of the modern identity (1989). 31 [↑](#footnote-ref-153)
153. Larmore, *supra* note **Error! Bookmark not defined.**, at xiii. [↑](#footnote-ref-154)
154. Luke’s reference. **Error! Bookmark not defined.**, O’Neill, *supra* note **Error! Bookmark not defined.**, at 46; For Kant, however, this is a condition that is much more in line with the dictates of morality. COJ 146 [↑](#footnote-ref-155)
155. COJ 144 [↑](#footnote-ref-156)
156. Habermas*, supra* note **Error! Bookmark not defined.***,* at 164; also see O’Neill, *supra* note **Error! Bookmark not defined.**, at 42-48. [↑](#footnote-ref-157)
157. O’Neill, *supra* note **Error! Bookmark not defined.**, at 39-42 [↑](#footnote-ref-158)
158. Onora O’Neill, Constructions of reason: explorations of Kant’s practical philosophy 44-46 (1989). [↑](#footnote-ref-159)
159. Stillman, Peter 1976. Hegel’s idea of punishment. Journal of the History of Philosophy 14: 169-183 [↑](#footnote-ref-160)
160. O’neil 44 [↑](#footnote-ref-161)
161. Hampton correcting harms, 1678. Similarly see Korsgaard the sources of normativity 143 [↑](#footnote-ref-162)
162. Dolinko, *supra* note 20, at 552 [↑](#footnote-ref-163)
163. Von Hirsch 56 [↑](#footnote-ref-164)
164. Barbara Herman, *Pluralism and the Community of Moral Judgment*, *in* Toleration: an elusive virtue 60 (David Heyd ed., 1996). [↑](#footnote-ref-165)
165. Ripstein response to humiliation 62 [↑](#footnote-ref-166)
166. Adam J. MacLeod, All for One: A Review of Victim-Centric Justifications for Criminal Punishment, 13 Berkeley J. Crim. L. 31 (2008) [↑](#footnote-ref-167)
167. Hannah 140; Matravers 76-77 [↑](#footnote-ref-168)
168. Ciocchetti, *supra* note 22, at 75 [↑](#footnote-ref-169)
169. The intriguing example of virtual and victimless “child abuse” is discussed along similar lines in Burke Criminalization of virtual child 1997 466-469 [↑](#footnote-ref-170)
170. Samuel Scheffler, *The Good of Toleration*, *in* Equality and tradition: questions of value in moral and political theory 312, 326 (2010). [↑](#footnote-ref-171)
171. see Scott Shapiro, Legality 175-76 (2011). Dworking 408-409, Habermas postscript

 Scott Shapiro, Legality (2011). [↑](#footnote-ref-172)
172. Margaret Gilbert, A theory of political obligation (2008); Bill Wringe, An Expressive Theory of Punishment 62-64 (2016). Anderson and pildes expressive theories a general restatement of 2000 Richard K. Greenstein, Toward a Jurisprudence of Social Values 4-5; Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 DUKE L.J. 1, 74-76 (1997) Clark the courage of our convictions 1999 2389 –2397; gilbert m 2006 a theory of political obligation law is a declaration of commitments, not moral obligations. [↑](#footnote-ref-173)
173. Anderson and pildes expressive theories a general restatement of 2000; 1514-1520; Seyla Benhabib, The claims of culture: equality and diversity in the global era (2002). ix [↑](#footnote-ref-174)
174. Richard K. Greenstein, Toward a Jurisprudence of Social Values 7 [↑](#footnote-ref-175)
175. Richard K. Greenstein, Toward a Jurisprudence of Social Values 2” [↑](#footnote-ref-176)
176. Richard K. Greenstein, Toward a Jurisprudence of Social Values 4-5 [↑](#footnote-ref-177)
177. Samuel Scheffler, *The Normativity of Tradition*, *in* Equality and tradition 287, 291-95 (2010); Habermas, supra note **Error! Bookmark not defined.**, at 157. [↑](#footnote-ref-178)
178. Shapiro [↑](#footnote-ref-179)
179. Richard K. Greenstein, Toward a Jurisprudence of Social Values 6-9 [↑](#footnote-ref-180)
180. Cass R. Sunstein, What Did Lawrence Hold - Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 Sup. Ct. Rev. 27, 30 (2003) [↑](#footnote-ref-181)
181. Macintyre, 206 [↑](#footnote-ref-182)
182. The path of the law [↑](#footnote-ref-183)
183. The concept of law [↑](#footnote-ref-184)
184. Anderson and pildes expressive theories a general restatement of 2000 1511 [↑](#footnote-ref-185)
185. 1512 [↑](#footnote-ref-186)
186. see Habermas, *supra* note **Error! Bookmark not defined.**, at 176. Also see Hannah, *supra* note **Error! Bookmark not defined.**, at 140; Matravers, *supra* note **Error! Bookmark not defined.**, at 76-77. [↑](#footnote-ref-187)
187. How law works, Nadler 70-71 [↑](#footnote-ref-188)
188. 2023-24 [↑](#footnote-ref-189)
189. O’Neill, *supra* note **Error! Bookmark not defined.**, at 21-24; Onora O’Neill, Constructions of reason: explorations of Kant’s practical philosophy 21-24 (1989). Hampton *supra* note **Error! Bookmark not defined.**, at 1686-87 [↑](#footnote-ref-190)
190. For the view see COJ 86; O’Neill, *supra* note **Error! Bookmark not defined.**, at 30-32 I leave to a later time the discussion of the pore precise details of this distinction. [↑](#footnote-ref-191)
191. *see* Kenworthey Bilz, *Testing the Expressive Theory of Punishment*, 13 J. Empir. Leg. Stud. 358 (2016). [↑](#footnote-ref-192)
192. Dolinko 1991 551; B. Williams, 'Moral Responsibility and Political Freedom', Cambridge Law Journal 56 (1997), 100. .' H.L.A. Hart, Law, Liberty, and Morality, (Oxford: OUP, 1963), 66 [↑](#footnote-ref-193)
193. Jack Lively, *Paternalism*, 15 R. Inst. Philos. Suppl. 147–165 (1983). 150 [↑](#footnote-ref-194)
194. Punishment: The Relationship between Hard Treatment and Amends Ambrose YK Lee 220; Hannah 124, 134; Meyer, *supra* note 23, at 118 See John Kleinig, Punishment and Moral Seriousness, 25 Israel L Rev 401, 417 (1992); Primoratz, 64 Phil at 198-202 (cited in note 36) ;Punishment and Repentance JOHN TASIOULAS, 296 [↑](#footnote-ref-195)
195. Must Punishment Be Intended to Cause Suffering? Author(s): Bill Wringe, Source: Ethical Theory and Moral Practice, Vol. 16, No. 4, Special Issue: Recognition (August Published by: Springer 866; Garvey can shaming punishment 1998, 768 Lucas, 134, 135-36 [↑](#footnote-ref-196)
196. Kahan Punishment commensurability 1998, 696 Kahan *supra* note **Error! Bookmark not defined.**, at 600; Lucas *supra* note **Error! Bookmark not defined.**, at 134-36; Leora; Feinberg, *supra* note 246, at 100; Tim Dare, *Retributivism, Punishment, and Public Values*, *in* Retributivism and Its Critics 35, 36-37 (Wesley Cragg ed., 1992); Primoratz, *supra* note **Error! Bookmark not defined.**, at 236.; Feinberg 402 [↑](#footnote-ref-197)
197. Also see Kahan 1996 alternative 600 [↑](#footnote-ref-198)
198. Matravers Duff on hard treatment 76-77; Donald Braman, Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America, 53 UCLA L. Rev. 1143 (2006); The Expressivist Account of Punishment 1038 [↑](#footnote-ref-199)
199. Hill on Kant 1998 439 [↑](#footnote-ref-200)
200. Meyer, *supra* note 23, at 118; The Expressivist Account of Punishment 1044 [↑](#footnote-ref-201)
201. Kahan shaming [↑](#footnote-ref-202)
202. Whitman shaming sanctions [↑](#footnote-ref-203)
203. Whitman shaming sanctions 1062 [↑](#footnote-ref-204)
204. Roe v. Wade [↑](#footnote-ref-205)
205. Tushnet and seidman [↑](#footnote-ref-206)
206. This of course excludes the two other cases with which the court refrained from dealing. [↑](#footnote-ref-207)
207. Roe. Court (159-162) **Wertheimer** 86 Baker philosophy and abortion Hare 1975 204-206 [↑](#footnote-ref-208)
208. 158 [↑](#footnote-ref-209)
209. As was noted above, the validity of any valuative claim is determined by its communicability, as the ability of the individual to believe that it is possible, and not by success in communication. [↑](#footnote-ref-210)
210. This is not to be confused with the way in which the potential for personhood is often used in the abortion debate. see Tooley – the problem with the potentiality argument. Potentiality here is meant to reflect the purely perceptional nature of subjecthood. Potentiality references. See Wertheimer 78-79; **philoppa foot** (19) [↑](#footnote-ref-211)
211. For a similar view see Ely 927 [↑](#footnote-ref-212)
212. Reference Sartre [↑](#footnote-ref-213)
213. REferense Aristotle, sight, Levinas vis-à-vis [↑](#footnote-ref-214)
214. 147-151 [↑](#footnote-ref-215)
215. 148 [↑](#footnote-ref-216)
216. Alice Ristroph, State Intentions and the Law of Punishment, 98 J. Crim. L. & Criminology 1353 (2008) [↑](#footnote-ref-217)
217. siegel [↑](#footnote-ref-218)
218. Siegel 163 [↑](#footnote-ref-219)
219. Much of the debate today concerns regulation of the medical procedure of abortion, although this discourse must be understood within the general struggle of the antiabortion movement to ban abortion altogether so im not talking about it (Siegel 2008, 1706-1712) [↑](#footnote-ref-220)
220. See, e.g., Tate v. Munson 201 N.W. 2d. 123, 127 (S.D. 1972); Crossen v. Attorney General, 344 F. Supp. 587, 591 (E.D. Ky. 1972); d. Moller Abortion and moral risk [↑](#footnote-ref-221)
221. Dworkin 408 [↑](#footnote-ref-222)
222. Siegel Equality arguments for abortion rights 2013 162-63 [↑](#footnote-ref-223)
223. Siegel 163-64; Siegel, reasoning from the body [↑](#footnote-ref-224)
224. Beyond the procedural reasons for this neglect it is patently that treating the prohibition of abortion as aimed at the physician and not the woman would only contribute to the disastrous rise in self-abortions. see is self abortion a right? [↑](#footnote-ref-225)
225. Justice Rehnquist, dissenting 172 [↑](#footnote-ref-226)
226. Science Disputes in Abortion Law 1850; Herman Creation Ethics 310 [↑](#footnote-ref-227)
227. Leslie 2000 creating criminals; Avlana Eisenberg, Expressive Enforcement, 61 UCLA L. Rev. 858 (2014). [↑](#footnote-ref-228)
228. As Duff puts it "To mean what we say when we say that certain kinds of conduct are seriously wrong is to be ready to censure such conduct: someone who declared that rape was a serious wrong, but who was not prepared to condemn clear cases of rape, would find his sincerity doubted." Duff *supra* note **Error! Bookmark not defined.**, at 35. Duff, however, also devotes substantial discussion to the expressive function of prepenal stages, including criminalization and conviction. Trials and punishment 74-143. Primoraz punishment as language 1989

197 not having a criminal law would logically lead to the conclusion that rights are meaningless

Also see von Hirsch, *supra* note **Error! Bookmark not defined.**, Ch. 2; Joel Feinberg, *The Expressive Function of Punishment*, *in* Doing & Deserving 95, 12-103 (1970). [↑](#footnote-ref-229)
229. See Dworkin 411-415; Sunstein [↑](#footnote-ref-230)
230. **Siegel sex equality 821** [↑](#footnote-ref-231)
231. Kupelman, [↑](#footnote-ref-232)
232. Rorty contingency, irony, and solidarity Xv, 83 [↑](#footnote-ref-233)
233. Charles Taylor, Sources of the self: the making of the modern identity 8-17 (1989). [↑](#footnote-ref-234)
234. Nagel, mortal questions 19-20. [↑](#footnote-ref-235)
235. For similar approaches see Murphy (why have a law at all); Donald Braman, Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America, 53 UCLA L. Rev. 1143 (2006) [↑](#footnote-ref-236)