


2007

# Taking Victims Seriously: A Dworkinian Theory of Punishment

Luis E. Chiesa

*Pace Law School*, [lchiesa@law.pace.edu](mailto:lchiesa@law.pace.edu)

Follow this and additional works at: <http://digitalcommons.pace.edu/lawfaculty>

 Part of the [Criminal Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), and the [Legal History Commons](#)

---

## Recommended Citation

Chiesa, Luis E., "Taking Victims Seriously: A Dworkinian Theory of Punishment" (2007). *Pace Law Faculty Publications*. Paper 561.  
<http://digitalcommons.pace.edu/lawfaculty/561>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [cpittson@law.pace.edu](mailto:cpittson@law.pace.edu).

**TAKING VICTIMS SERIOUSLY:  
A DWORKINIAN THEORY OF PUNISHMENT**

**ESSAY**

LUIS ERNESTO CHIESA APONTE\*

Introduction	117
I. Punishment as an Imprecise Criterial Concept	118
II. Sociological Theories of Punishment vs. Normative Theories of Punishment	121
III. A Victim-oriented Theory of Punishment	123
A. Vindicating Norms or vindicating Victims?	123
B. Justifying Violence	124
C. Punishment as a Way of reasserting the Fundamental Importance of the Principle of Self-Determination and the Principle of Equality	125
IV. What would happen if We take Victims Seriously?	126
Conclusion	128

**INTRODUCTION**

**R**ONALD DWORKIN IS ONE OF THE MOST PROLIFIC AND INFLUENTIAL LEGAL theorists in recent history. For more than thirty years, Dworkin has taken rights, political and moral philosophy, constitutional law, statutory interpretation, euthanasia, abortion, and a host of other topics “seriously.” During the span of his distinguished career, however, he has never paid much attention to the problems of crime and punishment. More surprisingly, even though literature on the theory and justification of punishment is copious, few scholars have attempted to make sense of criminal law by examining it from a *dworkinian* perspective.<sup>1</sup>

In light of the monumental importance that Dworkin’s ideas have for political and moral theory, I am perplexed by the lack of literature exploring the implications of his theory of “law as integrity” on criminal law. As George Fletcher rightly asserted several decades ago, “criminal law is a species of political and moral philosophy.”<sup>2</sup> If it is true, as I think it is, that criminal law is a species of

---

\* Associate Professor of Law, Pace University Law School, White Plains, New York (All translations, unless otherwise noted, were done by the author.)

<sup>1</sup> For one of the few well-reasoned attempts to flesh out the implications of adopting a *dworkinian* approach to criminal law, see Kyron Huigens, *The Jurisprudence of Punishment*, 48 WM. & MARY L. REV. 1793 (2007).

<sup>2</sup> GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* xix (2000).

the more general genus of politics and morality, then those who theorize about crime and punishment have much to learn from Dworkin. Accordingly, in this Essay, I describe how a *dworkinian* theory of criminal law may change our approach to the subject. I will do so in four Parts.

First, I will endeavor to show that ascertaining the proper purpose or justification of state sanctioned punishment by engaging in a conceptual analysis of the concept of punishing is ill advised. Even though there appears to be some kind of logical link between punishment and retribution, this nexus is not strong enough to render a non-retributive theory of the justification of punishment incoherent.<sup>3</sup> Thus, appealing to conventions or definitional maneuvers does not help us determine the aim of criminal law. Ultimately, the question regarding the justification of punishment is one of political, not analytical philosophy.

In Part II, I will distinguish between sociological and normative theories of punishment. This distinction is crucial because the problem concerning the appropriate justification of punishment is eminently normative by nature. Justifying the practice of blaming and punishing requires us to appeal to principles of a higher order that fit our past practice while presenting it in its best light. A merely descriptive account of why we punish will not do. A theory of the justification of punishment must also explain why the defended theory is preferable to alternate accounts also fitting the practice.

Such is the theory that I will advance in Part III. I will defend this theory's appeal by showing how it fits with two basic principles of political philosophy that, as Dworkin correctly pointed out in his latest book, most members of our society share: the principle of self-determination and the principle of equality.<sup>4</sup> This is what I call the "*dworkinian* theory of punishment."

Finally, in Part IV, I discuss the far-reaching implications that would follow from embracing such a theory of the justification of punishment. Taken seriously, this account of our institutions of blaming and punishing would cast doubt over some features of our current corpus of substantive criminal law, such as the legitimacy of punishing offenders for committing victimless crimes and the limited exculpatory role of the consent defense.

## 1. PUNISHMENT AS AN IMPRECISE CRITERIAL CONCEPT

Punishment is an inherently hazy concept. There are no precise rules that we can appeal to in order to non-arbitrarily settle disputes when considering

---

<sup>3</sup> With regards to the conceptual link between punishment and retribution, see Luis Ernesto Chiesa Aponte, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 *NEW CRIM. L. REV.* 102 (2007).

<sup>4</sup> RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE? PRINCIPLES FOR A NEW POLITICAL DEBATE* 9-11 (2006). Dworkin speaks of the principle of "personal responsibility" and of the principle of "intrinsic value." I prefer to refer to the principle of personal responsibility as the principle of "self-determination" and to the principle of "intrinsic value" as the principle of "equality."

whether a particular act should be counted as an instance of punishment. Take, for example, the case of a mother who grounds her daughter because she disrespected her father. Is the daughter being “punished”?

In a recent work, Leo Zaibert suggested that if the mother did not believe that the suffering she inflicts somehow “offsets” the wrong committed by her daughter, this example should not count as a case of punishment.<sup>5</sup> If the mother did not believe that grounding her child in some way “negates” the harm inflicted by her daughter, Zaibert argues, she would only be disciplining her instead of punishing her. This distinction strikes me as artificial. Reasonable people could conclude the mother is punishing her daughter even if she does not think her act “offsets” anything.

In fact, many consequentialist criminal law theorists believe the idea that punishment can correct the harm wreaked by the commission of an offense is nothing more than pure fiction. Take as an example the position espoused by Claus Roxin, a leading German criminal law theorist. For him, asserting that the act of punishing negates the injury caused by the perpetrator amounts to a metaphysical abstraction.<sup>6</sup> Could it be that Roxin failed to grasp the essence of the concept of punishment? I think not. To me, stating that a correct understanding of punishment presupposes that punishing offsets wrongdoing is as mistaken as claiming that a proper comprehension of the concept of marriage necessarily involves the wedding of a man and a woman.

The reason for this is that punishment, like marriage, is an inherently imprecise criterial concept. Criterial concepts are imprecise when, in light of their very nature, it is impossible for us to agree on the necessary and sufficient conditions that set forth the criteria for the correct application and use of the term or phrase.<sup>7</sup> We know, for example, that marriage involves some sort of union between two people. However, we could reasonably argue about whether a union between same sex couples counts as a marriage or whether true marriage is forever or whether it does not make sense to talk about marriage if the man or woman to be wed are unable to conceive.

In the same way, we know that punishment involves the infliction of some kind of pain or suffering. We can reasonably debate, however, whether we can intentionally punish the innocent or whether a non-purposeful infliction of pain should qualify as an instance of punishment or whether, as H.L.A. Hart appeared to suggest, only actions “administered by human beings other than the offender” count as punishment.<sup>8</sup>

---

5 LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 33 (2006).

6 CLAUS ROXIN, DERECHO PENAL 84 (Luzón Peña, et al. trans., 1997).

7 RONALD DWORKIN, JUSTICE IN ROBES 9 (2006).

8 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4-5 (1968). If Hart's accounts of punishment were true, it would follow that self-punishment is not really an instance of punishment after all. This is debatable. Recently, Leo Zaibert advanced powerful arguments

In light of the fact that punishment is an imprecise criterial concept, appealing to definitional maneuvers in order to determine what is the proper purpose of punishment is injudicious. To do so would be tantamount to resolving a complex normative issue, the question about the justification of punishment, by merely defining a concept. In my opinion, this would be a mistake because the normative question regarding the justification of punishment can only be resolved by engaging in an examination of moral and political considerations. In spite of this, some scholars have tried to develop a theory about the justification of punishment by appealing to a logical analysis of the concept.

This is not to say, however, that one should avoid the definitional task altogether. As I have attempted to demonstrate, it is possible to highlight some features that must exist in order for something to qualify as a “marriage” or as an act of “punishment.” Claiming that marriage does not necessarily involve the wedding of two people is a conceptual mistake in much the same manner as it would be mistaken to claim that someone who is married is a bachelor. Similarly, it would be a conceptual mistake to assert that punishment inevitably does not involve attempting to make the person punished suffer or experience something unpleasant.

Clearly, there is some value in trying to elucidate the elements that, by definition, are logically related to a given concept. In the context of punishment, an examination of the elements logically linked to the concept helps us rule out the possibility that a certain act might count as punishment. Imagine, for example, that Pat gave John one hundred dollars for slapping Howie’s face. Obviously, Pat’s act cannot count as an instance of punishment. The reason for this is conceptual in nature. Since punishment logically entails attempting to inflict pain, it would be incoherent to claim that someone who makes the supposed offender experience pleasant consequences is imposing punishment. Consequently, it would be a conceptual error to assert that Pat punished John.<sup>9</sup>

It would be a mistake, however, to overstate the importance of definitional endeavors such as this one. Imprecise criterial concepts should not be confused with natural-kind or ontological concepts such as animals or substances. It is certainly possible to determine whether an odorless and colorless substance is liquid nitrogen or water by appealing to conventionally accepted criteria. Examining the liquid’s chemical composition would suffice. Since “liquid nitrogen” and “water” are natural-kind concepts, it makes sense to claim to have discovered their true essence.<sup>10</sup> Contrarily, since imprecise criterial concepts such as marriage or punishment cannot be defined categorically by appealing to uncon-

---

in favor of the proposition that self-punishment is in fact a type of punishment. See ZAIBERT, *supra* note 5.

<sup>9</sup> In a recent article, I suggested that an analysis of the concept of punishment reveals that an act counts as an instance of punishment only when it is carried out in response to the perceived or actual commission of a wrongful act. See Chiesa Aponte, *supra* note 3.

<sup>10</sup> DWORKIN, *supra* note 7, at 10.

troversial agreed-upon criteria, trying to establish the true essence of these concepts is futile. Hence, there is no objective way of determining whether a particular definition of punishment is superior to others.<sup>11</sup> This is why, contrary to what some scholars suggest, clarifying the definition of punishment does not shed much light on the problem regarding the justification of punishment.<sup>12</sup>

## II. SOCIOLOGICAL THEORIES OF PUNISHMENT VS. NORMATIVE THEORIES OF PUNISHMENT

True theories regarding the justification of punishment are normative, not sociological. Sociological theories primarily aim at explaining the practice of punishing. On the other hand, normative theories mainly seek to elucidate what the purposes of criminal law *should be* and not at providing a descriptive account of our institutions of punishment. Duff's "communicative" theory of punishment constitutes a chief example, for when he states that the aim of punishment is primarily to establish a moral dialogue between the offender and the community, he is attempting to justify our practices of blaming and punishment, not explain them.<sup>13</sup>

Problems arise when theorists confuse the descriptive and normative features of their theories of punishment. Feinberg's expressivist account of punishment constitutes one such example.<sup>14</sup> When Feinberg states that the essence of the criminal sanction is that it communicates condemnation, he seems to be making a descriptive claim about how punishment functions in our society. In other passages, however, Feinberg appears to suggest that his theory intends to justify punishment, not merely describe it. This is an infelicitous proposition, for, as Professor Zaibert has lucidly argued, it "conflat[es] the problem of the definition of punishment with the problem of its justification."<sup>15</sup>

The conceptual confusion generated by the expressivist conflation can be illustrated by the positions defended by Dan Kahan in his oft-cited article about

---

11 Of course, stipulating a more refined or precise definition of punishment might prove to be useful within a certain context. No one can deny, for example, that defining punishment in a precise way is extremely important for determining the scope of the Eighth Amendment's prohibition of "cruel and unusual punishments." Establishing a definition of punishment is useful in this context because it promotes consistency in the application of the law and makes it easier for lower courts to determine whether a particular act violates the Eighth Amendment. It would be a mistake, however, to believe that this more refined definition comes closer to capturing the true essence of the concept of punishment than other definitions. While such a definition might be more convenient than others in this context might, it is by no means more "true" or "accurate" than alternate definitions.

12 ZAIBERT, *supra* note 5.

13 R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in *CRIME AND JUSTICE: A REVIEW OF RESEARCH* (M. Tonry, ed., 1998).

14 Joel Feinberg, *The Expressive Nature of Punishment*, in *DOING AND DESERVING* 95-118 (1970).

15 ZAIBERT, *supra* note 5, at 116.

the meaning of alternative sanctions.<sup>16</sup> Kahan's argument can be summarized as follows: (1) by definition, punishment is meant to express moral condemnation; (2) some alternative sanctions, such as shaming penalties, unambiguously express moral condemnation, while other alternative sanctions, such as community service or fines, do not unambiguously express such condemnation; (3) therefore, shaming penalties are a politically acceptable alternative to imprisonment while other alternative sanctions, such as community service or fines, are not.

Once one understands that theories of punishment can be sociological or normative, it is easy to realize that Kahan's conclusion is either trivially true or false. If Kahan is merely making the descriptive claim that shaming penalties express moral condemnation more unambiguously than fines or community service, his conclusion is trivially and uncontroversially true. No one would disagree with the proposition that, in our society, shaming penalties express more condemnation than most other alternative sanctions.

Of course, the aforementioned sociological claim in no way helps us determine whether the State can justifiably inflict shaming sanctions. Even if, for the sake of argument, we accept that punishment inevitably expresses moral condemnation and that shaming penalties express condemnation more unambiguously than other alternative sanctions, it does not follow that inflicting shaming sanctions is justified morally or politically. The reason for this is that one cannot justify a normative conclusion solely by appealing to a descriptive claim.

This can be illustrated by using as an example the case of *Plessy v. Ferguson*.<sup>17</sup> Even if we could prove that, at the time the Supreme Court decided the case, desegregation would have been, from a sociological point of view, a "politically unacceptable" option for the community, it does not follow that segregation is justified or that it constitutes an "acceptable solution" to the problem of racism. This move from a descriptive to a normative claim is incoherent.

This explains why Kahan cannot justify the infliction of shaming sanctions by pointing out that they are one of the few types of alternative penalties that adequately and unambiguously express moral condemnation. As I attempted to show at the beginning of this Part, expressive theories of punishment such as Feinberg's or Kahan's are partially or entirely descriptive in nature. They tend to *describe* our practices of punishing, not *justify* them. This is why stating that shaming penalties express condemnation does not justify their use in much the same manner as asserting that punishment is expressive does not justify its infliction.

The stage is now set for me to put forth what I call my "*dworkinian theory of punishment*." It is important to bear in mind that this *dworkinian* theory of punishment is *normative* in nature. Therefore, the theory's main objective is to legitimize our institutions of punishment, not to explain them. In addition, the

---

16 Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 653 (1996).

17 163 U.S. 537 (1896) (holding that segregation laws did not violate equal protection).

theory that I will espouse is not about the definition of punishment. I am unconcerned about definitional quibbles regarding whether a particular act counts as punishment. I assume that punishment, like marriage, is an imprecise criterial concept whose conventional meaning, even though inherently hazy at the edges, is clear enough for us to have consequential discussions about the subject.

### III. A VICTIM-ORIENTED THEORY OF PUNISHMENT

#### A. *Vindicating Norms or vindicating Victims?*

Should we punish people because they disobeyed the rules or should we punish them because they caused harm? The answer to this question depends on whether we think that the principal purpose of criminal law is to ensure allegiance to governmental institutions or whether its aim is to protect and assert victim's rights. It makes sense to punish people for mere disobedience if we believe that the primary aim of our system of criminal justice is to guarantee conformity with the law. Instead, if we believe, as I do, that the most important objective of criminal law is to safeguard the rights of persons,<sup>18</sup> it would make sense to punish people only when they harm others by unjustifiably interfering with their rights.<sup>19</sup>

Stating that people should be punished merely because they disobeyed the rules is not normatively appealing because norms can be utterly unjust and arbitrary. During the Nazi regime, for example, there was a rule prohibiting a non-Aryan from engaging in sexual intercourse with a member of the Aryan race. Violators of this norm were subjected to severe penalties.<sup>20</sup> Most would agree those who engaged in the act criminalized by the aforementioned rule should not have been punished, because no sound reasons exist for prohibiting such conduct. This position, however, is difficult to support if one defends the proposition that people should be punished merely for disobeying norms.

In fact, it might be claimed that those who do not interfere with the rights of others are sometimes punished merely for disobeying rules. Drug offenses constitute prime examples. Usually, the person who possesses a small quantity of marijuana for personal use is not committing an act that violates the rights of others. Thus, the person who engages in this conduct is not punished for causing harm to a victim. He is penalized solely because he failed to obey the rules. This

---

<sup>18</sup> Note that, as I have stated elsewhere, the term "person" is not equivalent to "human being." As the case of corporations demonstrates, an entity can be considered a "person" even if it is not a member of the *Homo sapiens* species. Thus, I believe the legal term "person" should be read broadly to encompass non-human beings such as animals and corporations. For a more detailed discussion of these issues, see Luis Ernesto Chiesa Aponte, *Of Persons and the Criminal Law: (Second Tier) Personhood as a Prerequisite for Victimhood*, 29 PACE L. REV. (forthcoming 2008).

<sup>19</sup> MARKUS DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 152 (2002).

<sup>20</sup> FRANCISCO MUÑOZ CONDE, EDMUND MEZGER Y EL DERECHO PENAL DE SU TIEMPO (2003).



example proves that, from a sociological point of view, people occasionally are punished only because they disobeyed the law. It would be a mistake, however, to conclude from this sociological observation that punishing disobedience of the law is normatively justified. In the same way that one cannot justify punishing a non-Aryan for engaging in sexual intercourse with an Aryan simply by pointing out that there was a rule prohibiting the conduct, one cannot justify the infliction of punishment merely by pointing out that the defendant violated a norm. In order to justify someone's punishment, the State needs to demonstrate that a rule was infringed and that sufficient sound reasons exist for criminalizing the conduct prohibited by the rule.<sup>21</sup> Mere demonstration of the fact that the alleged offender disobeyed the norm is not enough.

In the past, many argued that people deserved punishment when their conduct showed contempt for the king or for the government.<sup>22</sup> This was consistent with an authoritarian and paternalistic conception of the State. As time passed and societies became more democratic and governments less authoritarian, this theory of the justification of punishment has proved unsatisfying. The focus of criminal law has now shifted from safeguarding the State to the protection of persons. In our society, "crimes do not disturb the king's peace and thereby offend him; they interfere with the rights of persons."<sup>23</sup> Hence, "the essence of crime is not the violation of one's duty of loyalty and obedience to the sovereign but the violation of one person's [interests]."<sup>24</sup> This is why, in our political community, our institutions of punishment are better understood as a vehicle for vindicating the rights of the victim and not as a mechanism for vindicating norms that have been violated.

### B. Justifying Violence

Anyone positing a theory about the justification of state-inflicted punishment must necessarily engage in fundamental questions of political philosophy. What is the purpose of the State? What is the relationship between government and its citizens? Which rights have citizens reserved for themselves and which rights have they ceded to the State? Why and when can government justifiably use violence to interfere with the rights of its citizens?

As an eminent Spanish criminal law scholar has observed, "to talk about the criminal law is always, in one way or another, to talk about violence. . . . violent are the cases that generally concern criminal law (robbery, murder, rape, rebellion), [and] violent is the way in which criminal law responds to these cases

---

21 See Chiesa Aponte, *supra* note 3.

22 DUBBER, *supra* note 19, at 151-52.

23 *Id.* at 152.

24 *Id.*

(prison, mental institutions, suspension and deprivation of rights).<sup>25</sup> If punishment and criminal law represent a type of state-sanctioned aggression against individuals, then a theory justifying our institutions of punishment is essentially a theory about legitimatizing the State's so-called monopoly over violence.

In order to justify the State's use of violence, we need to demonstrate how this form of governmental interference with fundamental rights can fit together with the basic principles shared by most members of our political community. According to Dworkin, citizens in most democratic communities share a commitment to two fundamental principles. The first of these principles is the principle of self-determination, which holds that "each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him."<sup>26</sup> This entails we should "not subordinate ourselves to the will of other human beings" and that we have no reason to "accept the right of anyone else to force us [to make fundamental decisions in our lives] that but for that coercion we would not choose."<sup>27</sup> The second of these principles, the principle of equality, entails "the recognition of the equal objective importance of all human lives."<sup>28</sup> Respect for this principle compels us not to "act in a way that denies the intrinsic importance of any human life."<sup>29</sup>

I believe that the legitimacy of our political institutions hinges primarily on whether they can be shown to vindicate these two fundamental principles. Our state-sponsored practices of punishment are no exception. In the remainder of this Part, I will attempt to show how governmental infliction of punishment can be interpreted in a way that is compatible with the vindication of said principles.

### C. *Punishment as a Way of reasserting the Fundamental Importance of the Principle of Self-Determination and the Principle of Equality*

At its core, a crime is an act in which two persons, victim and offender, interact. Because of this interaction, the perpetrator advances his interests at the expense of the victim's rights. In the case of rape, for example, the offender seeks pleasure by violating the victim's fundamental right to decide how and when she wants to engage in sexual intercourse. By engaging in non-consensual sexual intercourse, the offender is forcing the victim to participate in an intimate act that, but for that coercion, would not have occurred. This constitutes a violation of the principle of self-determination. It also constitutes an infringement of the principle of equality because with his act the perpetrator demonstrates that the

---

25 FRANCISCO MUÑOZ CONDE, DERECHO PENAL Y CONTROL SOCIAL 14 (1985).

26 DWORKIN, *supra* note 4, at 9.

27 *Id.* at 17.

28 *Id.* at 16.

29 *Id.*

life and wishes of the victim are of less importance to him than his private interests are.

Citizens in a liberal political community expect that their government will protect them from acts that impinge on their autonomy in an unwarranted manner. As a result, when someone commits a criminal act that infringes the basic principles of self-determination and equality, the expectations that citizens have about their State as protector of their rights—shielding them from unjustified attacks that interfere with those rights—is frustrated. Punishment represents the reaction to this frustrated expectation. By punishing the perpetrator, the State reasserts the fundamental importance of the principles of self-determination and equality and, thus, reinforces the expectation that law-abiding citizens have: that government will do its best to protect their basic rights. When viewed in this manner, punishment represents the way in which government vindicates individual rights by expressing solidarity with the victim and rejecting the offender's harmful act.<sup>30</sup>

#### IV. WHAT WOULD HAPPEN IF WE TAKE VICTIMS SERIOUSLY?

The theory of punishment sketched in the last Part has, at the very least, two important implications. First, it casts doubt over the legitimacy of punishing people for the commission of so-called victimless crimes. Second, it suggests that the victim's consent should be a defense to every crime, including murder.

If the chief purpose of punishment is to reassert the fundamental importance of the principles of self-determination and equality, the legitimacy of punishing someone for committing a victimless crime would not be unclear. These principles are violated when a person denies the intrinsic importance of the value of another person's life by unjustifiably interfering with his autonomy. In the context of criminal law, the person who infringes these principles is the offender and the person whose rights are violated by the offender's action is the victim. Hence, if there is no victim, there is no infringement of the principles of self-determination and equality that needs to be remedied by punishing the offender.

Most drug-possession offenses represent paradigmatic cases of the type of victimless crimes whose commission does not justify the infliction of punishment. Take the act of possessing marijuana for personal consumption as an example. This conduct does not interfere with another person's autonomy. The person who commits this offense has not denied the value of someone else's life, nor has he interfered with the rights of others. There is no victim whose right to self-determination or equality needs to be vindicated by punishing the offender. While it cannot be denied that, in these cases, the perpetrator has violated a norm, punishment cannot be justified merely by showing that a rule was dis-

---

<sup>30</sup> The relationship between punishing and expressing solidarity with the victim has been discussed in detail by George Fletcher. See, e.g., GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* (1998).

obeyed. Thus, as a rule, punishment should be inflicted only when the violation of the norm caused harm to a victim.<sup>31</sup> Nonetheless, since the person who possesses marijuana for personal consumption has harmed no one, the legitimacy of punishing him for such an infraction is doubtful.

A victim-oriented theory of punishment also has implications for the doctrine of consent. The principle of self-determination is violated only when someone forces us to do something that we do not wish to do. Hence, there is no violation of the aforementioned principle when the person consents to the act that the other person wanted him to perform. The consent of the victim changes what initially appears as an unjustifiable act of forceful subjugation into a permissible act of self-determination.<sup>32</sup> As Professor Dubber aptly points out:

By consenting, the apparent victim rebuts the presumption of victimhood. He indicates that another's act that facially satisfies the elements of a crime does no harm to his autonomy in fact. In light of the consent, an apparent act of heteronomy is revealed as an act of autonomy.<sup>33</sup>

The alleged victim who consents to the act is making a conscious decision about the types of acts that make his life worthwhile. Therefore, the consenting victim is not suffering any interference with his rights that need to be vindicated by the infliction of punishment.<sup>34</sup>

Upon closer inspection, it turns out that punishing someone for performing an act to which the alleged victim consented is tantamount to punishing someone for committing a victimless crime. The reason for this is that, if the victim consents to the act, he is not really a victim at all. Consequently, punishing the supposed offender for engaging in the consented act is as objectionable as inflicting punishment on a person who committed an act that did not cause harm to a victim. In this regard, interpreting the doctrine of consent along these lines has sweeping consequences. For example, one dramatic implication of the vic-

<sup>31</sup> I should stress accepting my claim that the chief purpose of our criminal justice system should be to vindicate victims does not entail it is illegitimate to criminalize conduct that does not cause harm to a person. As I have stated elsewhere:

[P]rohibiting conduct that does not cause harm to a victim is [not] necessarily illegitimate. No one seriously believes, for example, that criminalizing the act of driving while intoxicated is injudicious or unjustifiable. Although such conduct does not entail an interference with the interests of others, the undeniable dangerousness of the act seems to provide a more than adequate reason for its prohibition. Nevertheless, in the absence of compelling reasons that point to the contrary, victimless crimes are generally considered to be at least *prima facie* or presumptively illegitimate.

Luis Ernesto Chiesa Aponte, *Why is it a Crime to Stomp on a Goldfish—Harm, Victimhood and the Structure of Anti-Cruelty Offenses*, 78 MISS. L.J. (forthcoming 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1104494](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104494).

<sup>32</sup> DUBBER, *supra* note 19, at 264.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

tim-centered view of consent elaborated here is that punishing someone for assisting another person to commit suicide would be difficult to justify. The person who consents to being assisted in suicide is consciously making the important decision that his life is one not worth living anymore. Someone who assists this person in committing suicide is helping him exercise his right to self-determination. Thus, punishing the supposed offender in cases such as this one would violate the victim's rights, not vindicate them.

## CONCLUSION

Justifying governmental institutions of blaming and punishing is a challenging endeavor because it involves tackling the difficult task of justifying the use of state violence. I believe that we need to venture into the realm of political theory in order to come to grips with these issues. Ascertaining whether the State can justifiably punish offenders is not a definitional or sociological problem. The question regarding the justification of punishment is a normative one and, as such, it begs for a normative answer.

In light of the fact that the problem of justifying our practices of punishing requires us to delve deep into the doctrines of political philosophy, it is surprising that scholars have mostly ignored studying the implications that Dworkin's ideas might have for criminal law. In this Essay, I tried to contribute to filling that gap by outlining what a *dworkinian* theory of punishment would look like. Taking this theory seriously would lead us to call into question the legitimacy of punishing people who commit victimless crimes or crimes to which the victim has consented. Some might find these implications surprising and counterintuitive. I, on the other hand, find them normatively appealing.