



‘Remarks on the Functions and Justifications of Criminal Law and Punishment’ [*Bemerkungen zu den Funktionen und Rechtfertigungen von Strafrecht und Strafe*’]

by John Gardner
Professor of Jurisprudence
University of Oxford
<http://users.ox.ac.uk/~lawf0081>

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Remarks on the Functions and Justifications of Criminal Law and Punishment

JOHN GARDNER*

I

Andrew Ashworth's contribution to this volume confronts us with a puzzle. According to Ashworth, Positive General Prevention represents an important *function* of both criminal law and criminal punishment and yet does not make an important contribution to the *justification* of either criminal law or criminal punishment.¹ How can this be? What else could justify a social practice but its functions? What further justificatory presence could serve to reduce an important function to justificatory unimportance? What indeed could count as 'importance' in the realm of functioning if not justificatory importance? True, some social scientists give an excessively instrumentalist reading to the word 'function', with the result that those ideals and practices which are not justified in largely instrumental terms may be classed as not having a 'functional' justification.² This means that their most important 'functions' will not necessarily show up as important elements of their justification. But Ashworth does not seem to share in this rather technical and *recherché* use of the word

* Reader in Legal Philosophy, School of Law, King's College London.

¹ Ashworth, 'What is PGP? A Brief Response', this volume.

² For an example of this usage, see John Gray, *Mill On Liberty: A Defence*, S. 151 ff.

‘function’. He gives no hint of departing from the ordinary sense in which it may be said that social practices have e.g. expressive and constitutive functions as well as instrumental ones. So I will assume here that Ashworth means to drive some different wedge between functional importance and justificatory importance.

One possibility is that Ashworth is thinking primarily of what we may call the ‘subjective’ dimension of justification. Justification has both objective and subjective dimensions, in the sense that whether an action (or belief) is justified depends both on whether there are undefeated reasons for performing it (or holding it) and on whether the agent acts (or believes) for one or other of those reasons.³ In the case of social practices, which are complexes of actions, the functions of each practice supply the reasons for that practice to be nurtured and maintained, as well as the reasons for particular people to join in with it by performing actions recognisably forming part of its complex. But the fact that *some* of these practice-supporting reasons may be undefeated, so that joining in with the practice can in principle be justified, does not mean that all the reasons in favour of joining in are undefeated. Some may be defeated by being excluded from consideration, so that while one should still do as they recommend, one should not do so because they recommend it.⁴ Most employers in Europe today should employ far more black staff than they do, but (barring special circumstances) they should not employ them because they are black. That it helps one to get over a bereavement is a strong reason in favour of starting a new relationship, but one should not start the new relationship in order to get over the bereavement. These are cases where certain people should not act on certain reasons even though they are reasons for their doing as they do. Likewise there are many reasons in favour of criminalisation and criminal punishment on

³ See my ‘Justifications and Reasons’ in: Smith/Simester (Hrsg.), *Harm and Culpability*, S. 103.

⁴ The idea of an ‘exclusionary reason’, i.e. a reason not to act on a reason in favour of what one does, comes from Raz, *Practical Reasons and Norms*, S. 35ff.

which certain officials in the criminal justice process should not act. Legislators, justice ministers, trial judges, jurors, appeal judges, probation officers, prison governors etc. all have their own role to play in the social practices of criminal law and criminal punishment and these roles are demarcated not only by a repertoire of actions which incumbents may in principle be justified in performing but also by a repertoire of reasons on which incumbents must act if their actions are to be justified. So it is possible that what Ashworth wants to say is this: that the function of Positive General Prevention, important though it may be in making a case for criminal law and criminal punishment, should not figure, or should not figure centrally, in the case which certain officials themselves make for the invocations of those social practices which lie within their official powers. If that is what he means, I cannot dissent. It may be that, for example, sentencing judges should give relatively little weight, or even no weight at all, to Positive General Prevention factors. I suppose one might try to convey this point by saying that Positive General Prevention is important as a function of sentencing but unimportant as an element of its justification. But of course in saying that, one is obscuring the crucial possibility that, were it not for the important function of Positive General Prevention, the sentencing of criminals by judges, rightly remaining blind to considerations of Positive General Prevention, might be quite impossible to justify. The justification for judges doing as they do may depend on considerations with which the judges themselves can have no truck, and so the justificatory importance of Positive General Prevention need not equate to the justificatory importance which certain officials, for example judges or legislators, may properly give it in their work.

Some of Ashworth's remarks support this interpretation of what he is saying.⁵ Others point to a somewhat different

⁵ For instance, Ashworth's issue (d) [page 3 of typescript] is an issue which arises centrally for judges, and his concern here may be that judges will give

interpretation according to which Positive General Prevention factors are justificatorily unimportant because they are justificatorily *insufficient*.⁶ Of course, Ashworth is quite right to think that, by themselves, Positive General Prevention factors do not add up to a complete case for criminalising or punishing anyone. In that sense they do not 'justify' criminal law and punishment. But, in that sense, does *anything* justify criminal law and punishment? I very much doubt it. Given that criminalising and criminally punishing people commits the state to the *prima facie* barbarity of deliberately damaging those people's lives, I cannot see that any one of the multifarious lines of argument that exist for doing such things could ever provide one with sufficient justification by itself. One needs to pray in aid all of the valuable functions of criminalising and punishing people in order even to get close to an adequate justification. Some people have resisted such cumulative justification on the ground that it tends to lead to persistent conflict among the multifarious considerations. How can one live with an arrangement in which (for example) both deterrence and retribution form part of the justification for criminalising and punishing people, since deterrence plainly points to criminalising certain actions where retribution points the other way, deterrence advises long sentences of imprisonment in some cases in which retribution points to short ones, and so forth? The answer to this challenge has already been outlined. The fact that all the arguments in favour of punishing must be marshalled on the objective side of the justification does not entail that all must figure on the subjective side as well. Judges need never face some of the underlying conflicts since some of the conflicting considerations are not considerations on which they, as judges, should act. But it does not mean that these considerations are justificatorily unimportant. On the contrary,

Positive General Prevention weight when it is not their business, or not their primary business, to do so.

⁶ For instance: Positive General Prevention 'fails to supply a sufficiently weighty justification for such a system' [typescript page 4].

since criminalisation and criminal punishment are *prima facie* such abhorrent practices, they need all the justificatory support they can get, and any valuable function they may have, however modest, may under some conditions make all the difference between the justifiability and the unjustifiability of the practices. It is particularly hard to see how what is admitted by Ashworth to be an *important* function of criminalisation and criminal punishment could even become, by this route, justificatorily unimportant. Defenders of these practices may have a little room for justificatory manoeuvre, so that genuinely trivial functions of criminal law and punishment can be disregarded, but they certainly do not have so much room for manoeuvre that they can put admittedly important functions on one side as surplus to justificatory requirements, even if they can manage to find logical space for a notion of importance which is not itself cashed out in purely justificatory terms.⁷

II

It is hinted by Ashworth⁸ and stressed by some other contributors to this volume⁹ that the insufficiency of Positive General

⁷ For completeness, I should just mention that there is a third possible interpretation of what Ashworth is saying, which is also supported by some of his remarks [e.g. typescript pages 2 and 4]. He may be saying that while criminal law and punishment do much to serve Positive General Prevention, Positive General Prevention can equally or better be served by other, less abominable, means than criminal law and punishment. I agree but believe this to be irrelevant to the importance of Positive General Prevention in justifying criminal law and punishment. We do not, as Ashworth's remarks on this point presuppose, have *pro tanto* reason to do whatever will be *necessary* to do whatever we have reason to do. Rather, we have *pro tanto* reason to do whatever will be *sufficient* to do whatever we have reason to do. See Kenny, 'Practical Inference', *Analysis* 1966, 65.

⁸ Positive General Prevention 'rid[es] on the coat-tails of negative general prevention or of desert' [typescript, page 2].

Prevention as a justification for criminalisation and criminal punishment is insufficiency of a peculiar, and allegedly peculiarly damaging, sort. It is insufficiency which comes of the fact that Positive General Prevention arguments are *logically parasitic*. The problem is not merely that a full justification for criminalisation and criminal punishment requires Positive General Prevention to be supplemented with other considerations – for that, surely, is no problem at all. The problem, rather, is that Positive General Prevention itself, by its own logic, requires Positive General Prevention to be supplemented with other considerations. The thought is that instilling in people the disposition to respect or obey norms, the project which lies at the heart of the Positive General Prevention argument, is warranted only if those norms are sound. Logically speaking, then, the norms of the criminal law have to be sound before considerations of Positive General Prevention can even begin to bite in defence of criminalisation and criminal punishment. It follows, according to this line of thought, that Positive General Prevention can only be a logically secondary aspect of the arguments for criminalisation and criminal punishment. It can never sit, so to speak, in the logical driving seat.

This line of thought is fallacious in several respects. Most obviously, it is true of all arguments for punishment, criminal or otherwise, that punishment is warranted under those arguments only on condition that the norm violated is, on other grounds, a sound one. Those who believe otherwise betray a lingering affection for the long-since discredited ‘sanction theory of duty’, according to which whether one is under a duty to do such-and-such depends on whether one can rightfully be punished for doing such-and-such.¹⁰ In fact the question of whether one is

⁹ For example, Schünemann, ‘Zur Kritik an der Theorie der positiven Generalprävention’, this volume, citing Hörnle/von Hirsch, ‘Positive Generalprävention und Tadel’, *GA* 1995, 267.

¹⁰ Hacker, ‘Sanction Theories of Duty’ in Simpson (Hrsg), *Oxford Essays in Jurisprudence, Second Series*, S. 160.

under a duty is logically prior to the question of whether one can rightfully be punished for its breach, because the fact that one was under a duty which one breached is a reason for the punishment, and what is more a reason which must be present and acted upon as a condition of one's punishment being rightful. Thus no theory of punishment can affect whether murder is wrong. It affects only whether, given that murder is wrong, murderers or certain murderers ought to be punished. The same is true, incidentally, of a theory of criminalisation. A theory of criminalisation does not (and should not aspire to) tell us whether murder is wrong. It can only tell us whether, given that murder is wrong, it is also a candidate for criminalisation. So being logically parasitic in the sense just encountered doesn't seem to be a characteristic of Positive General Prevention alone, but equally of deterrence, retribution, rehabilitation and all other penological lines of argument. It should also be pointed out that countless sound arguments are logically parasitic in the relevant sense, with no obvious resulting lack of credibility or justificatory importance. If I promise to do x, my duty to keep my promise turns partly on whether x is something I should ever have promised to do in the first place. But it does not follow that, when promising to do x is alright, my having promised to do it was not a condition of my having the duty to do x now. Nor does it make the arguments for keeping one's promises any the less significant or pivotal. The view that *pacta sunt servanda* is not even slightly weakened by the discovery that its application and force depends to some extent upon an independent evaluation of the actions which the promisor promised to perform. This is a closely analogous case to the case of Positive General Prevention, in which the value of instilling in people the disposition to obey norms obviously depends to some extent upon an independent evaluation of the norms which, as a consequence of this process of instilling, people are meant to be disposed to obey.

But all of this is in any case beside the point, because the so-called 'objection' that Positive General Prevention is logically

parasitic only applies to what Michael Baurmann calls ‘narrow’ Positive General Prevention,¹¹ which is the doctrine that criminalisation and criminal punishment should serve to instil in people a disposition to obey or respect *the norms of the criminal law*, i.e. to be law-abiding people. Under this doctrine the norms which one is supposed to become more disposed to obey are the very same norms of the criminal law to the justification of which considerations of Positive General Prevention are supposed to contribute. But as Baurmann says, there is a broader (and to my way of thinking infinitely more attractive¹²) version of the Positive General Prevention doctrine according to which criminalisation and criminal punishment should serve to instil in people a disposition to avoid wrongdoing. One may have a disposition to avoid wrongdoing without having any disposition to be obedient or faithful to law, or even to avoid the particular actions which the criminal law picks out as wrongful. The conscientious anarchist does not necessarily commit more wrongs merely because he or she has no disposition to accede to the law’s authority. And there is no reason to believe that the Positive General Prevention argument could not apply in the case of the conscientious anarchist, i.e. that her disposition to avoid wrongdoing could not be reinforced by the message sent out by some or all criminal trials and punishments, even as she doubts the legitimacy of those very trials and punishments. Couldn’t that message, for example, make her ever more disposed to affirm her (*arguendo* sound) anarchist convictions, and ever more inclined to avoid the wrongs of complicity with an (*arguendo* illegitimate) system? In that case we would have an admittedly unusual (because somewhat convoluted) example of Positive General Prevention in action. But Positive General Prevention in the broader sense this would certainly be, and so

¹¹ Baurmann, ‘Theorien der Generalprävention’, this volume.

¹² More attractive because the stricter version has moral appeal only if people in general have a prima facie moral obligation to obey the law, which, in my opinion, they do not have.

far as I can see there is no vestige here of the logical parasitism which was supposed to be a pitfall of Positive General Prevention. So even if I could understand, as I fear I cannot, what kind of weakness or disability is supposed to be inflicted on Positive General Prevention by its supposed logical parasitism, I cannot see how the broader and more plausible version of Positive General Prevention suffers from that weakness.

III

In its broader version, as far as I can make out, the Positive General Prevention argument contains just three major, or normative, premisses. These are:

1. *Ceteris paribus*, it's a good thing if people do no wrong;
2. *Ceteris paribus*, it's a better thing still if people have no disposition to do wrong;
3. *Ceteris paribus*, prevention is better than cure.

These three major premisses combine with a minor, or informational, premiss, namely:

4. Criminalisation and criminal punishment can both help to prevent people from forming or maintaining the disposition to do wrong.

All of which leads to the conclusion:

5. *Ceteris paribus*, criminalisation and criminal punishment are good things.

And there we have the whole Positive General Prevention argument, in plain and simple terms. Of course the minor or informational premiss (4) may be questioned by people with empirical research at their fingertips.¹³ That is not my domain; as a theorist I can speak at best to the soundness of the major or normative premisses (1–3) and the logic leading to conclusion (5). But so far as these matters are concerned, I am at a loss to see what could possibly be wrong with them. Premiss (1) is analytically true, i.e. it is part of the very concept of a wrong that it is a good thing if people do not commit wrongs; the ‘*ceteris paribus*’ in this premiss is needed simply to remind us that the avoidance of wrongdoing is not the only good thing in the world. Premiss (2) strikes me as impeccable in view of two considerations. Firstly, because having no disposition to do wrong makes doing no wrong less painful for those who do no wrong, since they do not have to struggle with themselves whenever opportunities to do wrong arise. Secondly, because people with dispositions to do wrong are (again, analytically) less admirable in point of character than those with no such dispositions, and the world is (analytically) a better place if inhabited by admirable beings. Premiss (3), meanwhile, is convincing on the simple ground that what is cured has already been suffered, whereas what is prevented has not. From these three premisses it follows straightforwardly that in its broad version Positive General Prevention is worth attaining through the criminal law and criminal punishment. What is more the argument gives Positive General Prevention the *prima facie* moral edge over Negative General Prevention (or deterrence), which rests on premisses (1) and (3) but has no truck with premiss (2). It also gives Positive General Prevention the *prima facie* moral edge over Positive Special Prevention (or rehabilitation) which rests on premisses (1) and (2) but makes no allowances for (3). Of

¹³ For consideration of premiss (4), see Schumann, ‘Empirische Beweisbarkeit der Grundannahmen von positiver Generalprävention’, in this volume.

course it does not follow from this that we should invest more energy in arranging our criminal justice system to serve the ends of Positive General Prevention than the ends of Negative General Prevention or Positive Special Prevention. By (2) and (3), that would only be true *ceteris paribus*, i.e. on the assumption (*inter alia*) that there are no differences of feasibility as between these ends. Again empirical studies may show us that, for example, Negative General Prevention is easier to achieve than Positive, in which case the *ceteris paribus* moral advantages of Positive General Prevention are diluted, perhaps to a very large degree, by the difficulties of making it work. The strength of any argument is, of course, a function of the combined strength of its major and minor premisses, and not of its major premisses alone.

But the qualification '*ceteris paribus*' which recurs throughout the Positive General Prevention argument does not only serve to remind us that the argument as a whole may be weakened by difficulties of achieving the results advertised in (4). It also alerts us to the possibility that the individual premisses (1–3) are open to collateral moral challenge, i.e. that in spite of their strong *prima facie* moral appeal there might be independent moral objections to reliance upon these premisses as part of the case for criminalisation and criminal punishment. Of course there are many fearsome moral attacks to be made on criminalisation and criminal punishment *tout court*. I already conceded a *prima facie* abhorrence of these practices, and I am not about to go over that point again. At this stage, rather, I want to mention moral objections which are specific to the premisses of the Positive General Prevention argument. I will mention two of them which seem to me to underlie much of the hostility which is felt, in some quarters, towards this argument.

In the first place, it may be objected that premiss (2) tends to license state manipulation. It is one thing to coerce us into changing our behaviour, as, for example, the Negative General Preventionists want the state to do. That is surely bad enough. But it may be thought that, on the part of a liberal government,

manipulation is worse still because it is a condition of its success that it is opaque to those who are subjected to it. Manipulation does not confront but bypasses our rationality; it does not override what we want to do with something we want very much to avoid but rather makes us believe that we wanted to do something different in the first place. That kind of surreptitious approach to its people the liberal state should prefer to avoid. It may even be suggested that it is a condition of legitimacy of the liberal state, captured in the famous Rawlsian requirement of 'free public reason',¹⁴ that the state should not bypass our rationality. For myself I think there may well be some truth in this suggestion. But it does not, so far as I can see, affect premiss (2) of the Positive General Prevention argument one jot. The mistake in thinking that it does comes of the assumption that the only way to affect people's dispositions is to manipulate people. But that is simply not true. Even though there are many borderline and difficult cases, it is palpably not true of *all* encouragement, discouragement, praise, criticism, advice, warning, explanation, education, advertising, argument, and persuasion that it is manipulative. And yet all of these things may have an effect, intended or unintended, on our dispositions. Our dispositions listen to reason too; our reason need not be side-stepped in order to get them to change. And thus the criminal justice system may alter our dispositions without manipulating us. Antony Duff's argument that the criminal trial is a communicative process, which speaks to defendants as rational beings, is but one memorable example of an argument which relies on the non-manipulative but also non-coercive power of the criminal law, its ability to speak to us in a way which changes how we think about things and how we are inclined to react to them.¹⁵ Again there may be empirical doubts about the feasibility of Duff's project, but as far as its moral acceptability is concerned

¹⁴ See Rawls, *Political Liberalism*, S. 212ff.

¹⁵ Duff, *Trials and Punishments*, e.g. S. 233 ff.

there is surely no reason to doubt it, and no reason, moreover, to doubt the possibility of its extension beyond the defence of Positive Special Prevention (getting the defendant to recognise the error of her ways by reasoning with her) to the larger aim of Positive General Prevention (getting people in general to think of certain ways as erroneous by reasoning with them). For as I said already, Positive Special Prevention and Positive General Prevention share their reliance on premiss (2).

But even as we come to grant premiss (2), our critical attention shifts to premiss (3). Isn't this subject to a separate objection, to which the same premiss in the classic Negative General Prevention argument has also been subjected, namely that it seems to allow people to be used as means rather than ends? After all, for all its innocent charm, premiss (3) is already envisaging that the prevention of wrongdoing will take place by criminalisation and criminal punishment, i.e. that some people will be criminalised and criminally punished in order to send out a generally preventative message to others which will affect their dispositions. We are not merely talking about public information films or citizen education classes here, but about deliberately inflicted violence and deprivation *pour encourager les autres*. Given this fact, is it still true that prevention is better than cure? Or isn't it the case (as many retributivists argue) that cure (meaning in this context *ex post facto* intervention in wrongdoing) is the only morally acceptable option for punishers given that people should be treated as ends rather than means? Again we may be distracted here by thought of a manipulative paradigm, a paradigm of 'using' people by circumventing their rationality. But once that distraction is stripped out – as it should be, since the objection to using people as means is quite different from the objection to manipulating them – we are left with the question of whether and if so in what sense it is wrong to treat people as means. Given the depth and difficulty of this problem, here I confine myself to a couple of brief remarks. First, much of the force of the claim that people should not be treated as means comes of

the more plausible (and more authentically Kantian) maxim that people shouldn't be treated *merely* as means, i.e. as means and nothing else.¹⁶ These two maxims come to the same thing in the present context for anyone who thinks that we need a singular sufficient justification for criminalisation and punishment. But for those of us who believe that criminalisation and criminal punishment call for cumulative justification, in which the Positive General Prevention argument is just one of several that build up to provide the justification of these practices, the two maxims have quite different implications. The maxim that people shouldn't be treated as means rules out premiss (3) of our argument whereas the maxim that people shouldn't be used merely as means is compatible with premiss (3) so long as we only hold punishment and criminalisation to be justified where supported by other arguments which do not contain this premiss, i.e. which do not treat the trial and sentencing of criminal offenders as means to crime prevention. Secondly, the question arises of who is going to be doing the treating. If, as I argued before, the subjective dimension of justification need not completely mirror its objective dimension, then premiss (3) need not figure in the reasoning of anybody who is actually criminalising or punishing criminals, but only the reasoning of people like us (i.e. theorists) who are bound to step back and consider the whole rational picture. The maxims 'do not treat people as means' and 'do not treat people *merely* as means' differ not in the actions which they forbid (both, for example, forbid criminal conviction and punishment of the innocent if either of them does) but in the reasons on which they permit people to act. It follows that there is only an objection to their inclusion in an argument for criminalising or punishing if the argument in question is going to be relied upon by some criminalising or punishing official. But the mere fact that Positive General Prevention does its fair share in justifying criminalisation and

¹⁶ Kant, *Groundwork of the Metaphysics of Morals*, S. 429.

criminal punishment does not mean that any official should rely on it, i.e. that it should form part of that official's reasoning. Thus the objection to premiss (3) turns out to be chimerical, whether we read 'merely' into its maxim or not.