

Consent and the Legitimacy of Punishment

Response to Brettschneider

Frank Lovett

Washington University, St. Louis, Missouri

In his paper, "The Right of the Guilty," Corey Brettschneider aims to develop and defend a theory of punishment within the framework of a liberal-contractarian conception of political legitimacy. My response argues that this attempt to extend the liberal-contractarian theory reveals, in a particularly clear and striking manner, deep and ultimately insurmountable conceptual difficulties for that theory.

Keywords: *contractarianism; consent; punishment; discursive dilemma*

Under what conditions might a state legitimately punish persons guilty of crimes? In his paper "The Right of the Guilty," Corey Brettschneider aims to develop and defend a theory of punishment within the framework of a liberal-contractarian conception of political legitimacy such as we find in the works of John Rawls and T. M. Scanlon.¹ On this view, in Rawls's words, the "exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse."² What this entails in the context of a theory of punishment, Brettschneider argues, is roughly that the state's use of coercion in punishment must be justifiable to those guilty of crimes. This of course does not mean that each individual found guilty of a crime must *in fact* consent to his or her punishment (few presumably would); rather, it means that *qua reasonable citizen*, the guilty person *would* so consent. A "reasonable citizen" is one who is suitably motivated to reach a universal agreement on appropriate governing rules and procedures with other reasonable citizens, all of whom regard each other as free and equal persons.

In this short response, I do not intend to take issue with Brettschneider's application of liberal contractarianism to the problem of legitimate punishment. Indeed, I believe he carries out this project in more or less the right

Author's Note: I would like to thank Jack Knight for his helpful comments on this reply.

way—that is, as one must for the overall liberal-contractarian theory to hang together. Nor, for that matter, will I take issue with the substantive conclusions he derives from his argument, many of which (especially that prisoners should retain their basic citizenship rights) I emphatically support. What interests me here is instead what this project reveals about liberal contractarianism more generally. Elsewhere I have argued that consent-based theories of justice or legitimacy, of which liberal contractarianism is the leading example, face a deep and ultimately insurmountable conceptual difficulty.³ The attempt to apply liberal contractarianism to the question of legitimate punishment, in my view, exposes this difficulty in a particularly clear and striking manner.

This can be most easily seen in the following hypothetical example. Suppose that some individual C has been duly found guilty of some crime, and the question arises whether and to what extent the state can legitimately punish him. We expect, quite naturally, that C himself will probably reject the actual punishment P proposed by his fellow (reasonable) citizens.⁴ But of course the legitimacy of the state's carrying out punishment P is not supposed to hinge on this fact. Rather, it is supposed to hinge on the hypothetical question of whether some reasonable person R would reject P, if R were placed in C's position and if she were suitably motivated to reach a universal agreement with other reasonable citizens whom she regards as free and equal.⁵ If R would not reject P, then we can say that the state's carrying out P against C is legitimate, whatever C actually happens to say about it. So far, so good.

The question is, on what grounds or for what reasons might we expect R to not reject P? Certainly, we would hope her not rejecting P does not rest on some sort of cognitive error—for example, that she mistakenly believes she will rise from the dead after being executed. This is presumably built in to what it means to be “reasonable” in the required sense. Why else might she reasonably not reject P?

One obvious thought might be that R's not rejecting P is reasonable if and only if P is in fact the morally correct punishment for the criminal act in question. After all, this, or something like it, is probably what most people would themselves offer as their reason for not rejecting P. (Significantly, they would cite the *moral fact itself* as the reason, not merely the fact that they happen to *believe* it to be morally correct—just as the reason I think you should not jump off a tall building is gravity, not my belief in gravity. People would generally hope that, if they turn out to have been mistaken, the morally correct thing was done, not the thing they happened to believe was morally correct.) But of course, from the political philosopher's vantage

point, this answer is not available to us on the liberal-contractarian theory, as Brettschneider correctly points out on a number of occasions in his paper. This is because, by relying on such an answer, the liberal-contractarian theory would collapse into ordinary moral philosophy: R's hypothetical answer to the question would legitimate the state's enforcing P against C only insofar as R actually states the *correct* answer, as supplied by a moral philosophy properly grounded in the correct comprehensive doctrine. On such a scheme of argument, the element of consent is superfluous, and the pluralism of reasonable comprehensive doctrines is ignored or denied. This option is not open to liberal contractarians.⁶

But if we are going to deny that moral philosophy gives us one and only one correct answer to the question "Is the state's carrying out P against C legitimate?" (or, which comes to the same thing, if we are going to exclude references to comprehensive moral philosophies as acceptable grounds for that legitimacy), then why should we expect—*especially* given the fact of reasonable pluralism—that reasonable citizens will agree on a system of punishment to begin with? Are we supposed to count on the fortuitous coincidence that a group of citizens in a particular place and time will happen to have substantially overlapping judgments about right and wrong? This strikes me as naïve. Indeed, were there ever to be such substantially overlapping judgments, we might suspect that there has been insufficient freedom of thought.⁷

On the other hand, once we introduce reasonable differences of judgment, we open the door to familiar social choice aggregation problems. To illustrate, imagine that a group of reasonable citizens who regard each other as free and equal are debating whether or not to punish offensive speech. Some citizens argue that offensive speech constitutes an emotional harm, and that the state ought to regulate emotionally harmful conduct. Another group of citizens agrees that offensive speech constitutes an emotional harm, but rejects the idea that the state ought to regulate such conduct. Finally, a third group of citizens accepts the idea that the state ought to regulate emotionally harmful conduct, but denies that offensive speech as such constitutes a sufficiently serious instance of emotional harm. The respective views of these three groups of citizens are summarized in table 1.

Note that each of these groups holds views that are internally consistent, and that it is not obvious that any are unreasonable on their face. We might further suppose that these are sincerely held (albeit differing) views about the common good, and not merely a reflection of self-interested desire or preference. What are we supposed to conclude with respect to the legitimacy of punishment in this case? On the one hand, a majority of the citizens

Table 1
The Discursive Dilemma

	Is Offensive Speech an Emotional Harm?	Should the State Regulate Emotionally Harmful Conduct?	Should the State Punish Offensive Speech?
Group A	Yes	Yes	Yes
Group B	Yes	No	No
Group C	No	Yes	No
Majority	Yes	Yes	No

endorses the claim that offensive speech constitutes an emotional harm, and a majority also believes that the state ought to regulate emotionally harmful conduct. Perhaps we should respect these beliefs, and punish offensive speech accordingly. But on the other hand, a majority of the citizens rejects precisely this conclusion, and perhaps we should respect *these* beliefs instead.⁸

It is often suggested in discussions of social choice problems like this one that our example assumes individuals' opinions are fixed in advance, when in fact they might be revised in the light of collective deliberation.⁹ But we need not make this assumption. Suppose we allow extensive deliberation among our citizens, in the process of which the participants do indeed revise their beliefs in a responsible way: they critically examine their ideological presuppositions, reconcile inconsistencies, eliminate cognitive errors, drop purely self-interested claims, take into due consideration the interests of all, and so on. What will be the result? If one assumes there is a (single) objectively correct answer to such questions, then it is natural also to believe that a sufficiently lengthy deliberation on fair terms must eventually arrive at it. But liberal-contractarian theories (and consent-based theories generally) are premised on rejecting this very belief, in favor of the assumption of reasonable pluralism. But if we assume reasonable pluralism, how can we be assured that even ideal deliberation would not settle on diverging views such as the ones described above? That being the case, the question stands: when it is impossible to sensibly aggregate the (considered, post-deliberative) judgments of reasonable citizens as to whether some punishment is justified or not, what are we to do?

This is, I think, a serious problem for consent-based theories of justice or legitimacy in general, and for the liberal-contractarian theory in particular. Indeed, I do not think it can ultimately be surmounted. Brettschneider's attempt to apply liberal contractarianism to the question of punishment merely illustrates the problem in a particularly striking way.

Notes

1. See especially John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); T. M. Scanlon, "Contractualism and Utilitarianism," in *Utilitarianism and Beyond*, ed. Amartya Sen and Bernard Williams (Cambridge: Cambridge University Press, 1982); and T. M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998). Other versions of liberal contractarianism can be found in the works of Brian Barry, Thomas Nagel, Samuel Scheffler, and (arguably) Jürgen Habermas.

2. Rawls, *Political Liberalism*, 137.

3. See Frank Lovett, "Can Justice Be Based on Consent?" *Journal of Political Philosophy* 12, no. 1 (2004): 79-101.

4. Following the usual convention, my discussion will be framed in the language of what people would or would not "reasonably reject," rather than what they might reasonably accept, though (*pace* Scanlon and some others) I don't think this matters.

5. Note that the hypothetical nature of the question does not bother me, as it has others: see especially Ronald Dworkin, "The Original Position" (1973), in *Reading Rawls*, ed. Norm Daniels (Stanford, CA: Stanford University Press, 1989). For a reply to Dworkin's famous complaint, see Cynthia Stark, "Hypothetical Consent and Justification," *Journal of Philosophy* 97 (2000): 313-34.

6. Or, at any rate, not unless they are prepared to accept the view that thinking about consent is a mere heuristic device, in which case its value as such should be openly discussed.

7. As Ian Shapiro writes, "[O]ne person's consensus is often another's hegemony." Ian Shapiro, *Democratic Justice* (New Haven, CT: Yale University Press, 1999), 14.

8. This is an instance of what is called the "discursive dilemma," which is itself only one example of the general problem that individually reasonable or rational beliefs do not always aggregate into collectively reasonable or rational beliefs. For a recent review, see Christian List, "The Discursive Dilemma and Public Reason," *Ethics* 116 (2006): 362-402.

9. For example, see Josh Cohen, "Deliberation and Democratic Legitimacy" (1989), in *Deliberative Democracy*, ed. James Bohman and William Rehg (Cambridge, MA: MIT Press, 1997), 81-82.

Frank Lovett is an assistant professor of political science at Washington University in St. Louis.