

PROPORTIONATE SENTENCING AND THE RULE OF LAW

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It is no easy thing to maintain a clear focus on both the forest and the trees. In the study of criminal justice, most writers restrict themselves either to the study of the detailed operation of particular systems or to a theoretical engagement with the foundational issues in the field. But over a career of many years, Andrew Ashworth has been a leader in criminal justice studies of both sorts. Indeed, it is a hallmark of Ashworth's scholarship that even in his treatment of the most apparently narrow and technical topic, he makes clear the deep issues of principle that are at stake and how those principles ought to guide our thinking on the issue at hand.

In this chapter, I focus my attention on two of Ashworth's most cherished principles of criminal justice: first, what Michael Tonry calls the "strong proportionality principle"¹ and second, what I call the "state monopoly principle." I argue that, taken together, these two principles set out a *jurisdictional* conception of criminal sentencing. That is, unlike most of his contemporaries who have jumped immediately to the question of how best to justify the punishment of criminal offenders, Ashworth has seen (correctly, in my view) that such questions may only be asked meaningfully once we have settled two conceptually prior questions: (1) who has jurisdiction to impose criminal punishment? and (2) what, specifically, do criminal punishers have the jurisdiction to do? That is, rather than jumping directly to the abstract question "what do criminal

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¹ Michael Tonry, "Proportionality, Parsimony and Interchangeability of Punishments" in *Penal Theory and Practice* ed. R.A. Duff, S.E. Marshall, R.E. Dobash, and R.P. Dobash (Manchester University Press, 1994).

wrongdoers deserve?” he begins with the question “what role may the state legitimately play in setting and enforcing criminal norms within a legitimate constitutional order under the rule of law?” Stated in this fashion, Ashworth’s position might not seem to be a startlingly novel approach to criminal justice. But as I shall endeavour to show in this chapter, it holds a deep and important lesson and it is one that most of Ashworth’s contemporaries have ignored.

1. The Two Principles Stated

(a) The Strong Proportionality Principle

Andrew Ashworth² has long been a champion of what Tonry calls the “strong proportionality principle” in criminal punishment. This is a considerably more subtle and nuanced principle than is sometimes recognised. First, it is to be distinguished from the ancient idea of *lex talionis* that the harm visited on the offender should be the same (in kind or in degree) as the harm he visited on his victim. Indeed, Ashworth has always consistently opposed such a view, insisting that it is up to each system of criminal justice to determine absolute levels of punitiveness based on a variety of local factors. “There seems to be no crime,” Ashworth writes, “for which one can readily perceive a specific quantum of punishment as the uniquely deserved one.”³ Ashworth’s concern is not to ensure that offenders suffer punishment that is *the same as* the harm they impose on others; rather, it is to ensure that the punishment they suffer is *proportionate to* the wrong for which they are being punished. Ashworth’s focus is on the relative treatment of offenders across a system of criminal justice. As a matter of justice among offenders, Ashworth insists, each offender should receive an equally severe sentence as those who

² In many of my references to Andrew Ashworth, I am actually referring to works co-authored with others – usually Andreas von Hirsch but sometimes others, as well. I indicate co-authorship in footnotes where appropriate.

³ Andrew Ashworth and Andrew von Hirsch, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) at 142. They add (at 143) that there are strong reasons to favour reductions in overall severity so that “lengthy prison terms would be reserved only for the most serious violent offences.”

committed offences of equal seriousness (the principle of parity); it should be more severe than those who committed less serious offences and less severe than those who committed more serious offences (the principle of rank ordering); and it should be more or less severe than other sentences in proportion to the degree of seriousness of the offence (the principle of spacing).⁴

Second, Ashworth's "strong proportionality principle" is not even the idea that proportionality must be the only factor the sentencing judge considers when determining the appropriate severity of sentence. Although Ashworth has done more than most to show the relevance of a great variety of factors to individual desert, he has also made clear in his recent work that sentencing judges may deviate from the proportionate sentence by as much as 15% for reasons other than individual desert.⁵ With the addition of this wrinkle, it becomes clear that Ashworth's conception of criminal sentencing is not as different in the outcomes generated from its main rival, limiting retributivism, as one might have thought at first.⁶ For whereas Ashworth insists that sentencing judges must determine the precisely proportionate sentence and then may deviate from it by up to 15% for non-desert-based reasons, limiting retributivism holds that proportionality only sets upper and lower limits to the range of acceptable sentences and the choice within that range may be determined by reference to non-desert-based reasons. So why does Ashworth insist so strongly on the superiority of his own "strong proportionality" principle to the theory of limiting retributivism? The main reason, I believe, is not primarily the difference in outcomes (for these may quite often be the same); rather, the superiority of Ashworth's model lies principally in the way that it ties the structure of

⁴ Ashworth and von Hirsch (2005) at 139.

⁵ For detailed description of the changes in Ashworth's arguments on this topic, see: Malcolm Thorburn and Allan Manson, "The Sentencing Theory Debate: Convergence in Outcomes, Divergence in Reasoning" 10 *New Criminal Law Review* 278 (2007).

⁶ Norval Morris, Michael Tonry, Richard Frase and others have pursued the "limiting retributivist" line of argument for many years. For more on the differences (and similarities) between their view and Ashworth's "strong proportionality" view, see Malcolm Thorburn and Allan Manson (2007).

judicial reasoning in the process of determining criminal sentences to the grounds of the state's role in imposing criminal punishment.

It is perhaps most fruitful to think of the distinction between Ashworth's strong proportionality principle and Tonry's limiting retributivism as answers to two quite different questions. Michael Tonry, like most writers of his generation, is concerned with generating defensible sentencing *outcomes*. On this score, it is not implausible to say that sentences that are not severely disproportionate and that are also designed to do some good (through rehabilitation, deterrence, etc.) are justifiable. By contrast, Ashworth's project is squarely focused on the sentencing judge's obligation to provide the right sort of justification for the sentence she imposes in the particular case. Her first obligation is to determine what justice requires by way of a proportionate sentence, for it is a matter of "common-sense notions of justice, that how severely a person is punished should depend on the degree of blameworthiness of his conduct."⁷ Once the judge has determined precisely what this just sentence must be, she may then consider whether there are any grounds upon which to justify deviating from the deserved sentence. And, of course, insofar as she deviates from the proportionate sentence, it is up to the sentencing judge to articulate her reasons for deviation quite clearly to the offender and to the polity more generally. Although there might be some (very limited) room for sentencing judges to consider other factors, they must give proportionality what Rawls calls "lexical priority"⁸ and any deviation from it must be underwritten by strong and clearly articulated justification.

But why? Why couldn't it be open to the sentencing judge to consider a variety of important factors all together in her response to the offender's wrongdoing? As John Gardner reminds us, justice is but one of many virtues that the law (or institutions or

⁷ Ashworth and von Hirsch (2005) at 4.

⁸ John Rawls made this expression famous in *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

individuals) can have; to say that something is a requirement of justice is not necessarily to say that it must be given priority over all other considerations. “Naturally the law should be just,” Gardner writes, “but it should also be honest, humane, considerate, charitable, courageous, prudent, temperate, trustworthy, and so on...”⁹ What gives questions of justice this lexical priority in criminal sentencing?

In this respect, it seems that Ashworth thinks of criminal sentencing as different in kind from punishment in the private realm, where there is no strict division between matters of individual desert and other factors. Take the case of a parent who is punishing her child. Although proportionality should probably play some role in her thinking when determining the appropriate punishment, this seems to be just one element in the mix. We normally think that the parent’s choice of appropriate punishment should involve a consideration of a wide variety of factors right from the start: Will the punishment strengthen or undermine the child’s relationship with his parents? Will it reinforce or distract the child from other lessons that the parent is trying to instill? Will non-punitive measures be more effective in providing for the child’s moral education? And so on. Why should we think that criminal sentencing is any different? Before looking any further here, let us now turn to the second jurisdictional principle in Ashworth’s account of criminal sentencing: the state monopoly principle. For on my account, at least, these two principles stand or fall together.

(b) The State Monopoly Principle

As we have just seen, the strong proportionality principle seems to be at work on only one side of a fairly sharp distinction between sentencing judges (who are required to respect this principle) and private citizens (who are not). In this way, the argument for the strong proportionality principle is closely connected to Ashworth’s “state monopoly principle.” This is the claim that the administration of criminal justice should be

⁹ “The Virtue of Justice and the Character of Law” 53 *Current Legal Problems* 1 (2000)), at 29

controlled exclusively by state officials and should never be outsourced to private parties. It is on this basis that Ashworth has argued vigorously and repeatedly against the claims of restorative justice that the parties themselves should be in charge of the process through which the offender's sentence is determined.

Ashworth's version of the state monopoly principle is a considerably stronger one than that which is invoked by most other criminal law writers today. His view is not merely that the state should monopolize the administration of criminal justice because it is a superior instrument for punishing wrongdoers (because of the considerable expertise of judges in matters of criminal sentencing or because the state is bigger and better resourced than private actors and can therefore provide a more predictable and systematic response to crime). Rather, he argues that irrespective of the relative abilities of state and private parties to administer criminal justice, only the state has the standing to do so. "Although the list of failures of state justice is a lengthy one," he writes, "the state must, as the primary political authority, retain control over criminal justice and its administration."¹⁰ Clearly Ashworth is not just making an empirical claim about the state's ability to do the job best; he is insisting that such questions are simply beside the point because it is not even open to us to consider handing over the job of administering criminal justice to a private party.

2. The Jurisdiction of Sentencing Judges

Taken together, Ashworth's two principles articulate what I call a *jurisdictional* account of criminal sentencing. By this, I mean to say a good deal more than just that Ashworth takes account of questions of jurisdiction in his account of criminal sentencing. Of course, virtually any account of sentencing must take account of jurisdictional questions at some point: no matter what we might like sentencing judges to

¹⁰ Andrew Ashworth, "Responsibilities, Rights, and Restorative Justice" 42 *British Journal of Criminology* (2002) 578 at 581.

do, it is clear that as a matter of positive law they do not have the legal jurisdiction to do whatever we might like them to. I call Ashworth's account a jurisdictional one because it gives conceptual pride of place to matters of jurisdiction in a way that most of his contemporaries do not. The state monopoly principle (which determines who has the jurisdiction to administer criminal justice) and the strong proportionality principle (that sets important constraints on the jurisdiction of officials in the administration of criminal justice) are the starting-points for Ashworth's account of criminal sentencing. They do not merely recognise *ex post facto* constraints on our pursuit of independently valuable objectives in criminal sentencing; rather, these principles of jurisdiction frame our inquiry into what sentencing judges have reason to do in the first place. The very idea of criminal punishment, on Ashworth's account, is an expression of what state officials have the jurisdiction to carry out. This is an important contrast, but it is also perhaps a rather obscure one. In order to make clear what makes Ashworth's account of criminal justice "jurisdictional," it might be helpful to set it in contrast to what has become the standard view on this question – a view that Alon Harel calls "state instrumentalism."¹¹

(a) State Instrumentalism and the State Monopoly Principle

State instrumentalism about punishment, Harel says, is the view that "punishment serves important societal goals that could in principle be realized by other nonstate agents."¹² According to this doctrine, the fundamental questions of punishment theory are set out in the passive voice: who should be punished and how much should they be punished? Only after these questions have been answered do state instrumentalists then turn to the secondary question of "policy instrument choice": that is, the choice of who is best placed to carry out a pre-determined task. The status of the punishing agent as a public official is assumed to be (as a matter of principle, at least)

¹¹ Alon Harel, "The Vices of State Instrumentalism" 42 *Israel Law Review* 464 (2009). For a fuller treatment of state instrumentalism in punishment theory, see Alon Harel, "Why Only the State May Punish: Against Privately Inflicted Criminal Sanctions" 14 *Legal Theory* 113 (2008).

¹² Harel (2008) at 118.

neither here nor there.¹³ All three of the dominant theories of punishment today – utilitarian, retributivist and communicative – proceed in this two-step way, treating the question of who should carry out the punishment as a secondary and quite separate one to be answered simply by reference to considerations of expedience. John Gardner captures this idea neatly in the following terms:

What we face here is... mainly a question of the efficient use of rational energy. It may not be my place (my role) to extract justifications and excuses [or to punish]. It may be the law's place, or the place of the person who was wronged, or the place of the wrongdoer's friends and family, etc. But where this is so, this is mainly (not only, but mainly) because and to the extent that this person with *locus standi* is the one who is best placed to do the extracting, i.e. who will do the best job of conforming to the reason that we all have in common to see to it that the wrongdoer answers for her wrongs.¹⁴

Harel calls this position “state instrumentalism” because it treats the state as just one possible instrument through which offenders may be held accountable and suffer the appropriate punishment. There is nothing in the nature of criminal punishment, in this view, that requires that it be state officials who administer it. If some private actors (whether they are corporate prison-operators and security firms, or just particularly thoughtful victims in a restorative justice process) are able to carry out the task more cheaply and more effectively, then state instrumentalists are generally quite open to the possibility of giving them the job of administering some aspect of the criminal process.

Utilitarian accounts of punishment adopt the state instrumentalist position quite naturally. For them, we may determine when it is appropriate to impose punishment fairly straightforwardly by comparing costs and benefits: if punishment is able to prevent more societal harm than it causes (whether through the mechanism of deterrence,

¹³ John Gardner makes this claim explicit – and broadens it to cover all of criminal justice – insisting that “it is... true that occasionally people have additional legal powers by virtue of being public officials... But although these additional powers are the powers of public officials, nothing turns, for the criminal law, on the fact that they are the powers of public officials.” “Justification under Authority” 23 *Canadian Journal of Law and Jurisprudence* 71 (2010) at 97.

¹⁴ Gardner (2007) at 278.

offender rehabilitation, incapacitation or otherwise), then it is justified.¹⁵ Who should carry out the punishment is (in principle) quite immaterial to the question of whether it should be carried out.¹⁶ Of course, there might be pragmatic reasons to prefer the state as enforcer of the criminal law (say, because its *ex ante* threats of punishment are more credible than those of individuals or small private organizations or because it is better able to coordinate the activities of people across the society) but there is no reason in principle why utilitarians should insist on state control of the criminal justice system. Utilitarianism tells us simply to prefer whichever punishment provider can effectively minimize socially undesirable conduct at minimum cost.

It is somewhat more surprising to find that the same is also true of most modern retributive accounts of criminal punishment. According to Michael Moore's influential brand of retributivism, for instance, the central questions of punishment theory are once again posed in the passive voice: who should be punished and how much? Moore sets out his answer in agent-neutral terms: it is moral wrongdoers who should be punished, and they should be punished in proportion to their wrongdoing.¹⁷ There are important differences between Moore's retributivism and utilitarian accounts of punishment, of course: whereas utilitarians take punishment to be a necessary evil – causing harm in the hopes of maximizing aggregate welfare – Moore takes the punishment of wrongdoers to be an intrinsic good to be pursued for its own sake. But on the question of state instrumentalism, they are *ad idem*: we can decide who should be punished and how severely they should be punished prior to any consideration of who should carry out the punishment. So long as *someone* brings about this good (and, presumably, does it

¹⁵ Paul Robinson is perhaps the best-known contemporary exponent of this view. See: Paul Robinson, "A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability" 23 *UCLA Law Review* 266 (1975).

¹⁶ As Bernard Williams pointed out many years ago, this instrumentalist attitude toward is a pervasive aspect of utilitarianism generally. Williams argued that utilitarianism views each moral agent merely as "a janitor of [its] system of values." Bernard Williams, 'Critique of Utilitarianism' in J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973) 116-117.

¹⁷ Michael S. Moore *Placing Blame: A General Theory of the Criminal Law* (Oxford: Oxford University Press, 1997) at 153ff.

effectively and efficiently), it is a matter of indifference to both utilitarians and retributivists who that someone might be. Moore seems to favour state control of the criminal justice system for reasons of efficiency, but others who are committed to retributivism need not share this view. Indeed, some writers such as Doug Husak suggest that there might be good reason to prefer non-state actors to administer punishment in at least some cases.¹⁸

Finally, many “expressive”¹⁹ or “communicative”²⁰ accounts of criminal punishment also embrace state instrumentalism. According to these accounts of criminal justice, punishment is best understood as a communicative act by the punisher conveying moral censure of the wrongdoer for his wrongdoing. Even though the “grammar”²¹ of communication is necessarily relational (for there must be both someone to communicate the message and someone to whom it is communicated), most communicative theories of punishment are also indifferent (on the level of principle) as to the identity of the party communicating the moral censure. Although *someone* must communicate censure to the wrongdoer, there is no principled reason why it must be one party rather than another. As John Gardner points out, “We each have reason to see to it that people in general answer for their wrongs...”²² Although the law typically identifies someone as the person who has the legal standing to administer communicative punishment, that legal standing is allocated for reasons of practical efficiency and not for reasons of principle.

¹⁸ Douglas N. Husak, “Why Punish the Deserving?” 26 *Nous* 447 (1992).

¹⁹ Joel Feinberg, “The Expressive Function of Punishment” 49 *The Monist* 397 (1965).

²⁰ John Gardner (2007). By contrast, although Antony Duff is one of the best-known exponents of a communicative theory of punishment, he does not fall prey to state instrumentalism in the same way. He makes this clear as follows: “An essential dimension of a political theory that is going to make sense of punishment is the matter of agency: when an offender is punished, by whom is he punished? If we begin, as theorists and preachers often seem to begin, with an impersonal demand from heaven or from justice that ‘the guilty must be punished’ (the passive voice is significant), we must still ask who, if anyone, has the standing to meet that demand.” R.A. Duff, “Retrieving Retributivism” in *Retributivism: Essays in Theory and Policy* ed. Mark D. White (Oxford: Oxford University Press, 2011) at 6.

²¹ I use the term “grammar” here in the technical sense introduced by Ludwig Wittgenstein in *Philosophical Investigations*, 4th ed., P.M.S. Hacker and Joachim Schulte (eds. and trans.), (Oxford: Wiley-Blackwell 2009).

²² Gardner (2007) at 278.

Once we set Ashworth's state monopoly principle in contrast to state instrumentalist accounts, the depth of Ashworth's commitment to the state monopoly over criminal justice becomes apparent. He does not think of the state's jurisdiction over the administration of criminal justice to be a question merely about the "efficient use of rational energy" (as John Gardner calls it); rather, it is a matter of principle – a fixed point in his account of criminal sentencing. There is something in the nature of criminal sentencing that requires that it be administered by state officials and not by private actors. Although we have not yet identified the grounds for Ashworth's deep commitment to the state monopoly principle, it is clear that his reasons are quite distinct from the instrumental considerations that guide most of his contemporaries.

(b) The Analogy to Parental Discipline and the Strong Proportionality Principle

The state monopoly principle is only one half of what I am calling Ashworth's jurisdictional account of criminal sentencing. The other half – the strong proportionality principle – is an equally important part of the story. Ashworth's account is not merely that state officials are the only ones with the jurisdiction to administer criminal justice; he goes further and insists that the terms of their jurisdiction impose further limits on how they may act when administering criminal punishment. To see the significance of this second move, it is useful once again to contrast Ashworth's view with those of some of his contemporaries.

Among those who recognise the state monopoly principle, most theorists assume that the job of administering criminal justice can be understood fairly well by appeal to our extra-legal moral intuitions. The job of the sentencing judge, they often assume, can be understood best by way of analogy to the punishment of children by their parents. Accounts built on this analogy usually recognise (as state instrumentalist arguments do not) that punishment is legitimate only within the context of an ongoing relationship of

authority:²³ just as we might insist that parents (and only parents) are the ones to discipline their children, even if they do not have as much expertise or effective power as a stranger, so we can insist that it is the state (and only the state) that is entitled to punish criminal wrongdoers even if some well-run corporation or thoughtful victim might do it more cheaply and more effectively. Writers such as Neil MacCormick, Anthony Bottoms and Alon Harel, for instance, seem ready to recognise that only those with the appropriate standing are entitled to administer punishment, criminal or otherwise. Insofar as a non-parent is entitled to punish a child at all, it is only insofar as he is acting *in loco parentis* – either officially sanctioned by the parent or taking on the role in circumstances of emergency.

The analogy of criminal punishment to parental discipline of children is both helpful and misleading. It is helpful because (unlike the state instrumentalist view), it makes clear that one must have the proper standing to punish – it is not enough just to be the most effective policy instrument for the job. But the analogy is also misleading, for there are dynamics at work in the state-citizen relationship that do not exist in the parent-child relationship. Neil MacCormick insists that parents and children are no less paradigmatic of the punisher-punished relationship than are states and citizens – they are both equally significant examples of the same basic phenomenon.²⁴ And Anthony Bottoms argues that any account of punishment must be able to explain the structure of

²³ This is contrast to those who, like John Gardner, see the possibility of punishment in almost any sort of relationship. In his introduction to the new edition of *Punishment and Responsibility* (Oxford: Oxford University Press, 2008) at 1., he suggests that this is possible within the context of a relationship between equals, such as spouses: “It is very common for one estranged spouse to punish the other, for example, by preventing him or her from spending time with his or her children, fully intending that this should be a terrible experience. I know of no reason to think that such punishment is ‘sub-standard or secondary’ as compared with, say, imprisonment by the courts.”

²⁴ Neil MacCormick and David Garland, “Sovereign States and Vengeful Victims: The Problem of the Right to Punish” in *Fundamentals of Sentencing Theory* ed. Andrew Ashworth and Martin Wasik (Oxford: Oxford University Press, 1998) at 23: “We ought to reflect carefully how deep or essential the differences are [between state punishment and private “punishment”]. For it has become a commonplace in discussions of punishment to treat the panoply of the criminal law, with formal accusations, pre-announced laws, trials by due process of law, formal sentence, and enforced execution of the sentence, as the paradigm for punishment, while every other instance of ‘punishment’ is seen as counting only to whatever degree it appears analogical with the paradigm case. But this may surely be doubted. For there is a kind of natural authority of parents, and more generally of concerned adults, over children...”

punishment in the family context in the same way as it can explain state-administered criminal punishment. He writes:

Inclusion of an actual incident of punishing [of a child by his parent] at an early stage of the argument may therefore serve the dual purpose of first, reminding those of a theoretical bent that their theories need to be translatable to, and make sense in, the real world; and, secondly, reminding penal practitioners that even the most trivial incidents in daily life can produce rich data for theoretical reflection upon what exactly we think we are doing when we punish someone.²⁵

The trouble is that the analogy to parental discipline jumps too quickly to its conclusion: although the parental case and the criminal case might both be examples of punishment²⁶ carried out by a party with the appropriate jurisdiction to do so, it does not necessarily follow that the grounds of their jurisdiction to do so are the same. And if the normative grounds for their jurisdiction are different, we have reason to expect that the scope of that jurisdiction would be different, as well. This is a point that Ashworth – who argues for special jurisdictional constraints of “strong proportionality” on state officials administering criminal punishment but not on parents punishing their children – seems to recognise, but these other writers do not.

3. Jurisdiction, Political Theory, and the Rule of Law

(a) Ashworth’s Wavering Commitments

So far, I have argued that taken together, Ashworth’s two principles form an account of criminal justice that puts matters of jurisdiction front and centre. Unlike state instrumentalists, Ashworth recognises that it is simply not open to us to allocate jurisdiction over the administration²⁷ of criminal justice to whoever might carry out the

²⁵ Anthony Bottoms, “Five Puzzles in von Hirsch’s Theory of Punishment” in Ashworth and Wasik (1998) at 55.

²⁶ Indeed, one might put the point even more strongly and say that parental discipline is not really punishment at all in the sense understood by criminal justice theorists. It is not the infliction of hard treatment against fully responsible agents. Rather, it is the use of coercive force for the education of minors.

²⁷ For the purposes of my argument here, I am focused on the allocation of punishment by courts. I have argued elsewhere that different considerations will apply when we consider the application of punishment: Malcolm Thorburn, ‘Why Only the State May Decide When Sanctions are Appropriate,’ in Robinson, P,

task most efficiently in the circumstances; something deeper is at work here that constrains us in the allocation of jurisdiction from the very beginning. And unlike those who draw a fairly straightforward analogy between parental discipline and criminal sentencing, Ashworth recognises that the normative grounds of the state's jurisdiction to punish criminal offenders is different from the grounds of parents' jurisdiction to discipline their children; this is why the jurisdiction of criminal justice officials to punish offenders is different from that of parents to punish their errant children.

Ashworth's insistence on the strong proportionality principle and the state monopoly principle strongly suggest that he is committed to a particular conception of the role of criminal sentencing within a larger constitutional ordering – and the place of criminal justice officials within a legitimate constitutional order imposes *ex ante* limits on the jurisdiction of criminal justice officials that it is simply not open to us to revisit. Unfortunately, a clear articulation of this underlying political theory of sentencing is very hard to find in Ashworth's writings.²⁸ Instead, when it comes to the foundations of the state's jurisdiction to punish, Ashworth often turns to the writings of criminal law theorists who are not at all sympathetic to the jurisdictional account. Most troublingly, Ashworth has repeatedly invoked John Gardner's "displacement" argument for why the state is in control of criminal justice rather than private actors.²⁹ This is troubling in two ways. First, Gardner's writing is at odds with Ashworth's clear commitment to a non-instrumentalist account of the state's role in the administration of criminal law. Gardner suggests that one of the most important reasons why the state has a role to play in criminal justice is because it is best equipped to do a pre-determined job (displacing the private desire for revenge by being just harsh enough to satisfy the thirst for revenge

Garvey, S and Ferzan, K, eds, *Criminal Law Conversations*, (Oxford: Oxford University Press, 2009), pp. 140-142.

²⁸ The closest he has come is in his recent work on the preventive function of criminal justice. See Andrew Ashworth and Lucia Zedner, "Just Prevention: Preventive Justice and the Limits of the Criminal Law" in *Philosophical Foundations of Criminal Law* ed. Antony Duff and Stuart Green (Oxford: Oxford University Press, 2011).

²⁹ E.g., Ashworth and von Hirsch (2005) at 28 citing Gardner (2007).

while simultaneously civilizing the response by reference to principles of justice and humanity). This argument, which turns on a judgment about who is best qualified to carry out a pre-determined task, is based on the assumption that private parties could carry out the task of punishment if they were better qualified in the appropriate way. That is, it embraces state instrumentalism and undermines Ashworth's claim that "the state must, as the primary political authority, retain control over criminal justice and its administration."³⁰

Secondly, if Ashworth truly endorses Gardner's "displacement" argument, he should also embrace Gardner's instrumentalist argument about the constraints on the reasoning of sentencing judges. Consistent with his state instrumentalism, Gardner argues that Ashworth's strong proportionality principle is just a policy choice we have made (rather than a requirement imposed upon us *ex ante* by our conception of the very foundations of the state's power to punish). He writes:

The just person... artificially blinds herself to some qualities of people and aspects of their lives... It leads to... a remote and sometimes callous disinterest in people's well-being... [T]he courts of law[] should normally keep their distance from us in precisely this way. Courts are law-applying institutions, and it is in the nature of modern law, with its 'Rule of Law' aspiration to apply more or less uniformly to all those who are subject to it, that questions of how people are to be treated relative to one another always come to the fore at the point of its application.³¹

That is, for Gardner, the strong proportionality principle is little more than a stipulation: the law courts must live up to special rule of law demands because that is in the nature of modern law. Gardner himself concedes that, "this line of thinking... of course calls for much more detailed elaboration." But in fact it needs more than that: it requires a normative argument as to why is it appropriate – or perhaps even necessary – for law courts to give this special regard to proportionality in punishment in a way that private actors need not (and indeed *should* not) do. What is this rule of law aspiration Gardner

³⁰ Ashworth (2002) at 581 (emphasis added).

³¹ John Gardner, *Offences and Defences* (Oxford: Oxford University Press, 2007) at 219.

mentions and why does it have such a pull on us? We will need to look elsewhere to find the answers to these questions.

(b) The Rule of Law Foundations of Ashworth's Principles

If we want to explain an intuition such as Ashworth's about matters of jurisdiction – why we insist that only the state may carry out criminal punishment and why the jurisdiction of state officials to administer criminal punishment is constrained in certain crucial ways *ex ante* – it behoves us to look beyond punishment theory to the foundations of the state's authority over its subjects more generally. For the point is that no matter what we might want to do to wrongdoers (because it would promote utility, because it would give them what they deserve, because it would communicate the right message, or for some other reason), there are limits on our jurisdiction to do so that are imposed by our understanding of the state's jurisdiction over its subjects more generally. I take it that Ashworth's jurisdictional account of criminal sentencing is gesturing in the direction of this sort of account of the political foundations of criminal sentencing.

There is an account of the foundations of the state's authority over its subjects that seems to fit quite neatly with Ashworth's conception of criminal sentencing and, indeed, with the structure of much of contemporary criminal law doctrine, as well. As Alan Norrie has recently pointed out, “there is something essentially Kantian about the criminal law, and... it is enshrined in the historical structure of modern legal form...”³² That is, although Norrie is no friend of the liberal legal order established by Kantian political theory, he recognises that as a descriptive matter, at least, our criminal justice system is best understood as the institutional manifestation of Kantian liberal ideals: the best explanation for why criminal justice officials give considerations of proportionality lexical priority comes from the Kantian obsession with the limited jurisdiction of state officials, and the best explanation for the insistence that criminal justice must be

³² Alan Norrie, “Alan Brudner and the Dialectics of Criminal Law” 14 *New Criminal Law Review* 449 (2011) at 451.

administered only by public officials also comes from the Kantian insistence on a firm distinction between public and private. If we mean to understand the workings of the criminal justice system as we know it – whether to criticize it or to vindicate it on its own terms – it behoves us to see it in the context of these political ideals.

What does such a Kantian account tell us about the nature and limits of the state’s legitimate coercive power over its subjects and how might this provide stronger arguments for Ashworth’s two principles? We are getting ahead of ourselves. Before we can answer these questions, we need first to make clear the normative starting-point from which the Kantian liberal account begins. We begin with each person’s claim to freedom simply in virtue of being human. Contrary to some liberal accounts, the sort of freedom that is of interest to Kantians is not something that individuals can enjoy outside of civil society.³³ Freedom as independence is best understood in contrast to slavery: it is the freedom to be one’s own master rather than being subject to the arbitrary will of anyone else. The trouble is that in a state of nature, we are always unfree in this sense, for we are always liable to arbitrary interference from others. And this problem is a good deal deeper than we usually assume. It is not just that as a descriptive matter, we need a powerful state to protect us from interference at the hands of others. Our problem is the normative one that in the state of nature, we have no claim of right against others that they should forbear from interfering with us. For unless others have some assurance that they, too, will be free from domination by others, their unilateral forbearance is simply an act of self-abnegation rather than an obligation of right. In the state of nature, not only are we unable to demand that others refrain from interfering with us and with our things, we are also unjustified in making that demand, as well.

³³ It is typical of Lockean accounts, for example, to talk of individuals “giving up” some of their pre-political freedom in exchange for security and other benefits of civil society. John Locke, *Second Treatise of Government* at XX. This view is also shared by J.S. Mill, Joseph Raz, G.A. Cohen and many others.

The state can allow us to escape this predicament not simply because it has the power necessary to resist those who would try to interfere with us, but (more importantly) because it has the unique moral standing that enables it to change our moral position in such a way that we are entitled to demand that other forbear from interfering with us. Waldron puts the point in the following terms:

The state [is] important from a moral point of view because its presence and operations make a significant difference to ordinary moral reasoning or to our sense of what it is reasonable or right to do. [...] [B]y showing that the state makes a moral difference that no other institution can make, the [Kantian liberal] theory may be able to show that these risks [of abuse of power by the state] are worth taking or – more interesting still – that they are risks we are morally *required* to incur because we are not free to turn our backs on the moral possibilities that the existence of the state opens up.³⁴

The Kantian liberal state's claim to legitimacy is that, unlike all private actors, it has no partisan will of its own. Instead, it exists merely as the servant (or, as I have called it elsewhere, the fiduciary)³⁵ of its subjects and their claims of freedom. The state's legitimate role, on this account, is simply to constitute the institutional framework necessary to ensure the freedom of all its subjects. Once this institutional structure is in place, then our moral position vis-à-vis all others is changed forever: now we are all under a genuine obligation of right to forbear from interfering with others (for we are simply granting the same freedom to others that the law grants to us, as well). This requires institutions to demarcate clear boundaries to each person's claim of freedom, it requires institutions to resolve disputes about the scope of each person's freedom, and it requires institutions that vindicate the state's own claim of supremacy in all these matters. Although the officials who administer the state's affairs will inevitably make mistakes along the way, they deserve deference nonetheless because without the state, we quickly

³⁴ Jeremy Waldron, "Kant's Theory of the State" in *Toward Perpetual Peace and Other Writings on Politics, Peace and History* ed. Pauline Kleingeld (New Haven: Yale University Press, 2006) at 183.

³⁵ See: Malcolm Thorburn, "Justifications, Powers, and Authority" 117 *Yale Law Journal* 1070 and Malcolm Thorburn, "Criminal Law as Public Law" in *Philosophical Foundations of Criminal Law* ed. Antony Duff and Stuart Green (Oxford: Oxford University Press, 2011).

fall into a situation that is morally intolerable – where our very claim of individual freedom is meaningless.

The institutions and the principles according to which they must act constitute the basic requirements of the rule of law. On the side of private right, this means a respect for the independence of each person (as manifest in their rights to bodily integrity, property, contract, and so on) insofar as this is compatible with equal respect for the independence of all others; and on the side of public right, this means that public officials must act in a way that is consistent with the normative grounds for positing the existence of a public power in the first place – acting without partisan interest, refraining from arbitrariness in the exercise of public power, and acting only for the purpose of putting in place the conditions of equal freedom for all its subjects.³⁶

(c) The State Monopoly Principle

Within this Kantian liberal framework, criminal punishment appears as an essential part of the state-citizen relation under the rule of law; and the two features of criminal justice that are so important to Ashworth – strong proportionality and state control – appear as essential features of that institution. A criminal justice system controlled by anyone other than the state would undermine the most basic promise of the liberal state: the guarantee that it will ensure that we are always our own masters, never answerable to any private power. Seen in this way, the reason why criminal justice must remain the state’s monopoly is not merely an instrumental one; rather, it flows from the fact that only the state has the standing to act in the name of the system of rights itself rather than in some narrower, partisan interest.

³⁶ This last claim in particular is liable to be misinterpreted. The Kantian claim is not the libertarian one that the state is limited simply to vindicating private rights in one’s person, property, contract, etc. Most importantly, it also requires the state to set in place institutions that will ensure the empirical conditions of equal freedom for all. Thus, it is not only an option for the state but a requirement that is should put in place public roads, public education, basic health care and other institutions that ensure that everyone can remain independent in the requisite sense. For more on this, see Ernest Weinrib, “Poverty and Property in Kant’s System of Rights” 78 *Notre Dame Law Review* 795 (2002-2003) and Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

Because the Kantian argument is focused on the question of standing, it is able to answer those who suggest that private actors should be allowed to administer some aspect of the criminal justice system so long as they are subject to the same procedural rules as public officials.³⁷ The point is not simply that public officials are, in fact, subject to a great many procedural rules to which private actors are not. The deeper concern is that private actors are *private*: no matter how scrupulously they might observe the requirements of procedural fairness, equal treatment and so on, they remain private, partial actors who can only ever have the standing to act in their own name. Making and enforcing the law are acts of self-government that are legitimate only when undertaken by the state on behalf of the people as a whole. Although it is often a difficult task in practice to draw the line separating state employees who act on behalf of all from independent contractors who merely do what they are paid to do,³⁸ we can still maintain our confidence that the line itself is of great significance.

(d) The Strong Proportionality Principle

We saw earlier that the strong proportionality principle applies to criminal justice officials but not, it seems, to private actors such as parents disciplining their children. What does the Kantian liberal account have to say about this distinction? The crucial difference between the two cases, on this account, is the normative ground of the authority the punisher holds over the punishee. Liberals generally accept that parents are legitimately charged with ensuring the welfare of their children, broadly understood. And they accept that the authority of parents over children is consistent with a liberal respect for individual autonomy because minor children are unable to make meaningful choices

³⁷ Michael Trebilcock and Edward Iacobucci, "Privatization and Accountability" 116 *Harvard Law Review* 1422 (2003) argue that private providers of public services might actually be held accountable more effectively than public officials in many instances. But on the question of standing, this is beside the point.

³⁸ Indeed, there is an enormous literature and even larger jurisprudence on this topic in the United States, Canada and other countries where the significance of the public-private distinction is made explicit. The locus classicus of this discussion is Charles L. Black's 1967 essay "The Supreme Court, 1966 Term – Foreword: 'State Action,' Equal Protection, and California's Proposition 13" 81 *Harvard Law Review* 69 (1967).

about virtually all aspects of their lives. The role of fiduciary exists in order to deal with precisely this sort of problem:³⁹ because minor children are not competent to take charge of their own welfare, we recognise their parents as having standing to make those decisions for them, but only insofar as they take those decisions in the best interests of the children broadly understood. Because parents hold this broad fiduciary power over their children, it is appropriate for them to consider a wide variety of factors related to the children's welfare broadly understood when punishing them. But the situation is rather different when we consider the situation of competent adults – the usual objects of criminal punishment. Criminal offenders generally *are* able to make decisions for themselves about virtually all aspects of their own lives. Accordingly, it would be inappropriate for a liberal state to take over decision-making for such competent adults on all these questions where those adults can decide for themselves.

In an important way, then, the liberal state's legitimate coercive power is different in kind and much narrower in scope than parental power to discipline children, for it is consistent with a liberal respect for individual autonomy in only the narrowest of cases. The state's authority over its subjects is consistent with their autonomy only when it is carrying out a morally necessary task that competent adults cannot carry out on their own: setting out and administering the institutions necessary to establish and vindicate the free and equal moral status of all persons under the rule of law. That is, the liberal state has no business using coercive power to maximize aggregate (or even individual) welfare or to bring about some sort of cosmic retributive justice. Insofar as state officials may deviate from the proportionate sentence at all, it must be for a very narrow set of reasons concerned with the preservation of the system of rights itself. Although these reasons go beyond a narrow consideration of individual desert, they do not include the

³⁹ I set out this fiduciary conception of state authority in greater detail in "Criminal Law as Public Law" in *Philosophical Foundations of Criminal Law* ed. Antony Duff and Stuart Green (Oxford: Oxford University Press, 2011) at 39ff.

pursuit of instrumental objectives such as specific deterrence or rehabilitation for their own sake. It goes beyond the scope of this chapter to determine precisely how this Kantian liberal account narrows the freedom of sentencing judges to consider instrumental factors such as deterrence, rehabilitation, etc. in every case. An example will have to suffice for now. If the sentencing judge were to deviate from the proportionate sentence on grounds of rehabilitation, this could be justified on Kantian liberal grounds if this were part of a larger argument concerning the necessary conditions for ensuring the independence of the offender. Insofar as the state takes coercive measures toward one of its subjects, that action must be taken in such a way as to ensure that the individual is capable of living independently. Like Ashworth himself, the Kantian liberal account is reluctant to admit considerations other than proportionality at all, but it provides a conceptual apparatus within which both to explain that reluctance and yet to allow for limited deviations from proportionality in certain cases.

Conclusion

In this chapter, I have sought to vindicate two of Andrew Ashworth's core claims about the criminal justice process – the “strong proportionality principle” and the “state monopoly principle” – by means of a rather different set of arguments than the ones he deploys in their defence. Given the overwhelming influence of state instrumentalism in criminal justice theory today, it is not surprising that Ashworth has sometimes relied on arguments of this sort in support of his principles from time to time. But his principles are most compelling and their proper normative grounding is clearest when they are set out in the context of a non-instrumentalist account of state authority more generally.