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RECONCILING THE RULES OF LAW: RIGHTS AND PUNISHMENT

BENJAMIN L. APT*

ABSTRACT

There is an intractable paradox in the relation between rights and criminal punishment. Criminal punishment frequently conflicts with rights; people typically have identical rights within a legal system, yet the punished are unable to exercise the rights to the same extent as other people. But criminal punishment, in conjunction with criminal laws, also operates to protect rights. To clarify the tension between rights and punishment, I start by analyzing the content and purpose of rights. Next I discuss the nature of rules and the particular types of rules that make up a typical "systems of rules." I then argue that legal systems are a form of a system of rules, and consider how rights and the laws of criminal punishment belong to different categories of rules. Normally these categories of rules complement one another; while this holds true in the case of rights and punishments, they have attributes that inevitably bring them into conflict. I take some time to examine the theory of right forfeiture because it purports to explain away the discrepancy between rights and punishment, but I conclude that the theory essentially misunderstands rights. Finally, I put forward some broad guidelines for reducing the collision between punishment and rights, while acknowledging that these two kinds of laws will never be entirely compatible.

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INTRODUCTION

How can rights and criminal punishment coexist within the same legal system? We are accustomed to the function of law as allowing some behavior and condemning other acts. This is, after all, what law does: it tells us what we can and cannot do and directs the state to be the arbiter and guardian to keep the prescribed order. At first glance, then, the initial question might seem obtuse, for we are accustomed to rights and punishment corresponding comfortably: the law naturally punishes acts that are antagonistic to those acts and interests that it protects.

Yet closer consideration reveals that the coexistence of rights and criminal punishment is not so straightforward. The parent who disciplines his/her child by subjecting the child to a time out usually need not wonder whether the punishment oversteps the child's rights. If it is not excessively cruel, the parent has the right to in how it raises its child. The main considerations behind the punishment, then, are whether it will teach the child to avoid the targeted behavior, without being too overwhelming and hurtful.

The state similarly cannot ignore reacting to acts that are explicitly proscribed by law. But those whom the state punishes because they committed crimes are likewise beneficiaries of legal rights. The punishments that the state may enact under the law will very likely impinge on the rights of the punished. The criminals had rights before they undertook their crimes; hence the law must have some means of accounting for the criminal's transition from normal rights-holder to penalized subject. The relationship between rights and criminal punishment is not clear because there must be a legally consistent explanation for whether punishment may impinge on rights, or, indeed, must. And, if rights may be trumped by state-ordered punishment, then there must be a way to determine what the permissible forms are, to what degree and duration punishments can occur within a legal system that includes rights.

This article therefore examines how the relationship between rights and criminal punishment can surmount their paradoxical coexistence. The theme of delineating the boundaries of punishment is hardly new, but issues around the role of punishment in a context of individual rights remain unresolved.¹ In a previous article, I discussed the epistemological limitations inherent in current theories of punishment. This present piece looks into one subject that we do know about punishment, that punishment

1. See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 159 (2d ed., 1968).

collides with rights even as it serves as the law's method for enforcing rights, and considers whether, and if so, how punishment and rights be reconciled.

The tension between rights and criminal laws is little different from that between rights and any other laws. This relationship is often labeled a "balancing of rights." The phrase is comfortable name for an illusory calculation, however. It is correct to say that rights lend themselves to conflict, for in any society that recognizes rights, each rights-bearer must necessarily restrain his/her exercise of rights for social peace and cooperation. But this adjustment, however indispensable it may be, is not based on an obvious formula. We may speak of a rational weighing of rights, or we might resort to a Utilitarian approach to explain when some people's rights or interests should prevail over others. These are convenient heuristics, but they do not offer irrefutable answers.

The looseness in the joints of rights-balancing arguments becomes apparent in the case of criminal punishment. Crimes, which help define the limits of rights, warrant their own justifications. But it is during the accomplishment of the punishment consequent on the conviction for a crime that questions about the reasons and extent for restricting criminal's rights are the most pressing. It seems logical that punishment follows from criminal laws; if certain acts are outlawed, then surely the authority responsible for enforcing the law must execute sanctions against those who commit crimes. Yet, for all that punishment follows behind the prosecution for crimes, there is no evident "correct" balance between the necessity of punishment and the truncation of specific rights.

This article seeks to clarify the dilemma of rights and punishment through the following process. It begins in Section II with what I understand rights to be, how they become instituted in legal systems, and to what end. In the next section, Section III, in preparation for the explication in Section IV of rights as a type of rule, I first investigate (in Subsection A) the nature of rules, defining the major categories of rules that, combined, are essential to any system of rules. All rules belong within encompassing systems of rules. Rather, all rules necessarily divide into different functional categories within a comprehensive, reticulated web. I delineate the different categories and some of the subcategories of rules and review how they relate to one another. The reason for this brief spelunking expedition into the recesses of the structure of rules is illuminated in Section III, Subsection B, where I outline how legal systems are a kind of rules systems, complete with the three main categories of rules, and their correlate subcategories. Subsection C of Section III gives attention to some of the limitations of rules in general and what I call "compositional rules" in particular, and the ways in which these

limitations become manifest in rights, which is a type of "compositional law." In these respective subsections, I review how rules, and rights, can steer people's behavior, but also where their efficacy peters out, and thus what responsibilities people have when they participate in rules systems.

Section IV tackles rights and punishment as complementary types of laws-as rules. Here we confront the ways in which these two forms of rules function conjointly, yet also, unavoidably, conflict, specifically, why punishment helps to shore up rights, yet infringes on them at the same time.

Section V focuses on the theory of Rights Forfeiture. I diverge into a debate with this particular perspective on rights and punishment for several reasons. First, Rights Forfeiture is one of the few arguments that address the relationship between rights and criminal punishment. Second, although I reject the theory in good part, not least because I believe it mischaracterizes rights, it contains a hard kernel of truth in its account of the effect of criminal punishment on the status of rights and, to this extent, must be taken into account as an alternative position.

Finally, in Section VI, the Conclusion, I offer some suggestions for how rights and punishment can be reconciled. I admit here that I conjure up no neat solution to the paradox of rights and punishment. Nevertheless, the process of the article's argument helps, I hope, to elucidate their uneasy, and necessary, coexistence.

I. A DEFINITION OF RIGHTS

A. *Rights as Strictly Legal Entities*

To understand just how rights and criminal punishment clash, we first must establish what we mean by "rights." This is a tricky task for there is no clear consensus on the definition of this word. It has been interpreted in multifarious ways in different national constitutions and philosophical works. Some would argue that, because the term "rights" has become so inherent in popular parlance, its most worthwhile definition is to be found in common usage: what non-lawyers mean when they use the term.² The problem with this approach is that there is no way to determine just how the word is understood in the general population, or just how many meanings it bears in popular usage. Were we to settle on a common usage of "rights, it is not self-evident that any common usage of the word would be internally consistent.

2. See Rowan Cruft, *Rights: Beyond Interest Theory and Will Theory?*, 23 LAW & PHIL. 347 (2004).

Nearly a hundred years ago, Wesley Hohfield tried to shine light on the “chameleon-hued words” of rights and duties by plotting the jural relationships, both correlative and opposing, of rights and duties, and their ancillary concepts (no-right, privilege, power, immunity, disability and liability).³ While his schema may elucidate the demands and opportunities that rights provide, it does not explain what rights are, why and how they came to be, and how they fit into the larger realm of the law. These questions are critical in order to understand the relationship of state-conducted criminal punishment to rights.

Two competing philosophies of rights have developed in response to Hohfield’s analysis, the Interest Theory and the Will Theory. The definition proposed in this article cuts closer to the former but does not entirely conform to it. While Hohfield’s progeny recognize the function of a legal system in instituting rights, they do not explain just what rights are as legal artifacts. Matthew Kramer, for instance, observes:

Being endowed with a legal right which Hohfield also labelled as a claim consists in being legally protected against someone else’s interference or against someone else’s withholding of assistance or remuneration, in regard to a certain action or a certain state of affairs. . . . A genuine right or claim is enforceable.⁴

Some philosophers have recognized rights as subjective claims on the social institutions that enforce rights.⁵ Yet even these writers tend to highlight the subjective element of the “claim” over the objective role of the state as definer and defender of rights. This emphasis is imbalanced. Rights do not exist apart from a society’s provisions for achieving enforceability.

Political theorists are perhaps more inclined to situate rights within the domain of the state, most commonly, within democracies.⁶ But a focus on the political structure that makes rights feasible risks narrowing the meaning of rights in the other direction. The political theory of rights tends to perceive them as tools that abet democratic governance through common participation. The subjective element of rights consequently gets lost in their practical use as the means by which people exercise self-government. But the origin of rights cannot be explained by the political

3. WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 35–64 (1946).

4. Matthew H. Kramer, *Rights without Trimmings*, in *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES* 9 (Matthew H. Kramer, N.E. Simmonds & Hillel Steiner eds., 1998).

5. See Susan James, *Rights as Enforceable Claims*, 103 *PROC. ARISTOTELIAN SOC’Y* 133, 139–42 (2003); ONORA O’NEILL, *TOWARDS JUSTICE AND VIRTUE: A CONSTRUCTIVE ACCOUNT OF PRACTICAL REASONING* (1996).

6. See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 88–89 (1989).

structure that makes them feasible. Democracy gives rise to only a limited number of rights centered on political participation. It does not account for all the rights that a legal system may incorporate. Rights are not reducible to the functional tenets of a particular political system. Rights are only fully comprehended when both aspects, their subjective value and their legal function, are taken into account.

As I will explore further in this article, there is a natural, or at least a deep-seated, basis in human sentiment for why the law encodes certain rights; but this ought not be confused with the notion that rights themselves are natural. They are a social creation, embodied in the law. People may lay claim to rights because they exist under the law.⁷ Thus rights are not anchored in subjectivity, as proposed by both the Interest Theory and the Will Theory, but rather in a category of legal provisions.⁸ Rights are neither natural nor moral attributes. They are legal creations, the political and legal fruition of particular events and concerns in particular societies at specific times.

Even common usage of the term “rights” recognizes that its ultimate meaning lies in the law. We proclaim that we will see our rights enforced, by which we mean that we will, if necessary, resort to the legal machinery of the state to pursue their fulfillment. Rights, as legal entities, are therefore necessarily judicable and enforceable, whether they are formally codified in a constitution or through statutes, or are judicial formulations of customs, rights are laws and do not exist apart from law. Thus if we are talking about an interest or desire that does not meet the practicable attributes of rights within a legal system, then we are not speaking of rights but instead of some other normative proposition.

While rights may be perceived by their proponents as grounded in universal principles—on a presumption of cross-cultural commonalities—they are, I will argue, inevitably various by society and period. Here is where my definition diverges somewhat from the interest theory. Interest theory describes rights as atemporal: “The interest theory of rights...is an account of the nature of rights as such. Basically, the theory maintains that A’s having a right to something means that there is an aspect of A’s well-being, (i.e., an interest of A) that is important enough to justify imposing a duty on some other person(s) in respect to that interest.”⁹ “Important enough” is a tautology. For whatever reasons, the lawmakers who were

7. Rights as claims have a long heritage. I am not arguing here that it is an erroneous characterization of rights, but is simply incomplete because it ignores both the reason for their existence and their law-dependent function. See, e.g., H.J. McCloskey, *Rights*, 15 PHIL. Q. 115 (1965).

8. See *supra* notes 3–4.

9. Andrei Marmor, *On the Limits of Rights*, 16 LAW & PHIL. 1, 3 (1997) (footnote omitted).

endowed with the power to make rights chose to codify certain human inclinations, wishes, and abilities in these legal protections. Moreover, the “duties” that Marmor mentions here are those that are imposed, not just on other people, but also on the state itself as guarantor of rights.

Rights are effectuated either by state action or by individuals (or members of a group) who call on the laws and legal fora provided by the state to ensure their remediation or fulfillment. Rights are thus not aspirational ideals or natural truths, but rather legal standards. They are humanly-created, historically-situated legal rules. They vary by society, and within each society, they change over time. Rights codify the assortment of capabilities and interests that their creators recognized as “rights-worthy.” Rights are not natural attributes. They are not physical or psychological human characteristics that we can point to, but, rather, are a socially created way of regarding people within a legal system.

A legal system may limit the application of rights to a defined group within the larger society. A familiar example is the distinction between the rights of a country’s citizens as opposed to those of alien residents. Different societies recognize diverse rights. Indeed, the same ostensible right may be understood variously in different societies. While the current German constitution, the Grundgesetz, safeguards freedom of expression, it shields personal honor (*Ehrverletzung*) to a greater degree than does U.S. law.¹⁰ Germany’s legal prohibitions against organized gatherings sympathetic to Nazism, or the display or utterance of pro-Nazi symbols and statements, may also strike Americans as a stark infringement of free expression.¹¹ Such limitations are inevitable—separate political entities set their own rights—yet they are also prone to questionable delineations. Where rights start and stop is not always logically apparent or amenable to clear decisions of enforcement.

With the rise of international political organizations, such as the United Nations or the European Union, has come a corresponding development of a universal definition of human rights. These international agreements are no less historically contingent than the national notions of rights. Human rights treaties have sparked further contention over what qualifies as universal rights, as well as an all too frequent failure of international

10. See Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, Art. 5, § 2 translation available at http://www.gesetze-im-internet.de/englisch_gg/index.html.

11. Restrictions on public assembly and on forms of public expression reflecting Nazi-oriented political views are written into the German criminal code. The Bundesverfassungsgericht reaffirmed this legal exception to the constitutional protections of free expression and the freedom to assemble in 2009. BVerfG, 1 BvR 2150/08. Nov. 4, 2009. See an analysis of the high court’s opinion in Christoph Goerisch, *Das Grundrecht der Meinungsfreiheit im Lichte des Historikerstreits*, in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* [KritV], Heft 2, (2011).

bodies to ensure their effective enforcement. The content of human rights are no different from those of more confined legal bodies, as we will explore in the next section. It is the practicability of a corpus of international human rights that has proven less certain.

B. *The Content of Rights*

The purpose of rights is to safeguard specific human abilities, potentialities, and interests from trespass or deleterious disregard by the state and other people. More precisely, rights are politically instituted safeguards and promises that the state provides to protect human abilities and interests.¹² While the reasons for instituting rights within a legal system lie in a society's norms or moral principles, rights are distinct in that they are legal instantiations of these values. Because rights are established through the legal system, they do not precede the political state. Rights themselves created by law; pace Locke, they do not precede the state but are a creation of the political state.¹³ However, rights function as primary rules of the legal system and, as such, they control the legal actions of the state. Rights can either restrain the state from interference with an individual's exercise of their abilities and the pursuit of their interests, or they may go further, and require the state to intervene by providing support and protection for these activities and interests.¹⁴

This does not mean that all human abilities and interests are necessarily captured in a particular society's corpus of rights. Rights cover only those abilities, including potential abilities that the people who created a particular society's fundamental laws chose to recognize or that legal tradition has come to preserve. Rights as a legal manifestation are therefore a historical creation.¹⁵ This does not mean that they are unalterable. On the contrary, those abilities, potentialities, and interests that have not found their way into a society's express rights could yet be

12. By limiting the definition to human concerns, I am not adamantly precluding the attribution of rights to animals or other entities. However, I do believe that rights are above all modeled around the interests of those beings who create them, that is, humans.

13. See David Alm, Self-Defense, *Punishment and Forfeiture*, 32 CRIM. JUST. ETHICS 91, 93 (2013).

14. H.L.A. Hart, although otherwise doubtful about the existence of natural rights, allowed for one, "the equal right of all men to be free." However, Hart allowed for the existence of "moral rights." How he distinguished between a moral right and a norm that attributes certain values to individuals is not apparent. I argue that he use of "right" in this way confused the meaning of right and moral regard of individuals. See H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 175–76 (1955). Even philosophers who categorically dismiss the possibility of natural rights sometimes speak of "moral rights" as a discrete type of right from "legal" rights. See, e.g., RAYMOND GUESS, *HISTORY AND ILLUSION IN POLITICS* 131–52 (2001).

15. Consequently I do not speak of "legal" rights, because that would be redundant. Rights are by definition legal concepts.

identified and promoted through political advocacy. Rights are not static, but they can change as people perceive new abilities and interests that they wish to include under the legal umbrella of rights. What is constant in the definition of rights is that they are based, not just on norms, but also on human attributes: abilities, potentialities, and interests. Rights are not “supra-temporal.” That is, they do not exist somehow outside of history. Legal systems can incorporate new rights, or deem some rights obsolete.¹⁶

How any given state promotes its population’s rights is determined by its policies, resources, and the political pressure from its constituents and organized interests. Where people have a right to move freely throughout their country, for instance, the state is not bound to construct a specific means of transportation. The state supports that right, rather, by enhancing the means for people’s mobility in balance with the use of its resources for other matters, and with other policies, such as protecting the environment. Similarly, a right to a basic public education is meaningless without sufficient suitable schools and public access to them. In short, rights are not just legal protections of individual interests and abilities, but also entail public endeavors that enable the use of human abilities and interests.

As such, while there are no “natural rights,” rights have a “natural” component. They originate social recognition of human activities and interests. These natural attributes are the rationale behind creation of rights. Through rights, a society’s legal system allows for activities that people can or may wish to do. Still more, rights do not just grant legal “room” for the undertaking of activities; they commit the state, and the population itself, to honoring and even abetting those activities through goods and services. Rights are the conversion of principles and norms into laws for the purpose of binding the state to protect and advance the exercise of abilities and the satisfaction of interests (under which I include needs, such as food, education, the possibility for recreation) that a society values. This is not to say that rights are exhausted in the advancement of only the most exiguous human actions and needs. Rights can incorporate principles that are felt no less deeply for their being abstract. Fairness, just distribution, mercy for the disadvantaged, recognition for effort, access to good nutrition, and medical advances, may be as essential a value in a society as one’s ability to provide for one’s own physical needs.

None of this is to say that all human abilities, interests, needs, and principles are somehow automatically manifested as rights.¹⁷ That might

16. See RAYMOND GEUSS, *PHILOSOPHY AND REAL POLITICS* 64–70 (2008).

17. Thus rights are not limited to roles or just to the current interests and abilities of people, pace Wenar, but, rather, allow for the future exploration and expansion of abilities and interests. See Leif Wenar, *The Nature of Claim Rights*, 123 *ETHICS* 202, 206–11 (2013).

make sense in theory, but rights do not exist in theory; they are legal creations. Rights must be recognized in order to exist. Rights are fundamental “normative compositional laws” that grant a special, foundational status to designated human abilities, interests, and possibilities. These fundamental laws underlie and regulate the remaining corpus of a society’s laws. But not all recognized abilities or interests taken up into rights. Societies leave those activities that are socially undesirable or cruel outside of the plenum of rights.

Rights address abilities, rather than the activities in which they find expression, because abilities are more general and basic, and thus less pre-determined.¹⁸ Rights protect what people might do with their abilities, including how they might develop them. This is why it is crucial that one keep in mind that rights extend to potentialities; in other words, rights encompass the possibility of future abilities that people may acquire or enhance. “Activities” is too restrictive a term to capture satisfactorily the meaning of rights. The term mistakenly limits rights to certain state-sanctioned acts and does not adequately capture the unanticipated human actions and interests that people may wish to exercise. There are exceptions, especially in regard to rights that serve to preserve rights. In countries that have a right for people to assemble in order to petition the government, for example, that right exists because lawmakers deem it critical to the functioning of a fair legal system. For the most part, however, rights are open rather than narrow protections of abilities, potentialities, and interests. The basis of the right to free expression is not limited to its importance for unfettered political communication. Rather, it stems from the human ability to communicate, and humans’ interest in doing so.

The reason for rights is not confined to those abilities that can have social repercussions. The ability for someone simply to move his or her arms may seem too trivial to warrant an explicit legal protection. In itself, this action has no social significance. So, too, is thinking too private an activity, it might appear, to warrant legal protection. Yet people can certainly pressure or influence one another to such a degree that their thinking is hindered by the belief that some thoughts are forbidden. Indeed, being able to move one’s hands or to think free from fear are suitable abilities for the legal protection and support supplied by rights.

18. The definition of rights presented here may seem somewhat reminiscent of the Capabilities Approach developed by Amartya Sen and Martha Nussbaum. However, their argument assumes a normative definition. Despite a generous list of the ten threshold Central Capabilities, they nevertheless promote a limited set of rights. My purpose is here is simply to clarify the concept “rights.” See MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 32–35 (2011).

This is evident in the need for protections for people who are physically or mentally disabled or to counter physical abuse and isolation.

I include “potentialities” here because rights can include the possibility of abilities people have not yet acquired or developed. The word “potentialities” encompasses those abilities that people may develop in the future, whether through personal development or through larger social changes, such as advances in technology. Potentialities are the individual capacities a person can acquire within his or her lifetime no less than they do to capabilities humans develop over the centuries.

Individuals grow into rights as they mature into sovereign, decision-making adults. So, too, can societies develop, through technological changes, through cultural integration brought about by immigration, so as to need new rights or expanded interpretation of existent ones. Children and adults who are in some way psychologically or intellectually disabled have rights because they have abilities and interests, however much they require the help of others to meet those interests, which can change and expand over time. Should this individual gain the ability to move more, the right already stands open to her. Were this not the case, were the person to have to prove her abilities to the state in order to gain the “right” to movement, she would not be enjoying a right at all, but rather a would not be a right at all, but rather an authorized privilege.¹⁹

All children grow into more rights as their abilities, interests, and comprehensions develop. Until people are sufficiently mature—the law typically marks this change with formal thresholds—they have rights, but the advocacy of their rights is invested by proxy in their parents or guardians. Children have fewer immediate rights, but the rights and legal obligations of their care borne by their parents compensate for their immature condition. Moreover, children possess the legal “promissory note” of future rights when they mature into the abilities and interests of adults.

Technology can bear on rights by introducing new abilities. Before the invention of powered flight, there was no reason to push for a right to fly. That technological change to human possibilities produced a new basis for

19. Imagine, in contrast, a society where rights are not universally attributed, but are, rather, available only upon a person’s proof of applicable capability. Only when one demonstrated the ability to use a right may one take advantage of it. Such a parsimonious interpretation of rights would have a chilling effect on the use of rights. People would be unsure about which rights they could legally rely on. They would have to overcome the daunting legal presumption that they were ineligible for specific rights by proving that they can take advantage of them. In a legal dispute involving the infringement of a right, the complainant would first have to convince the court of his or her capacity to use it. Only after overcoming this first test could the complainant proceed to introduce evidence that the defendant had abridged it.

a new right. So, too, can cultural developments produce new grounds for specific rights by introducing new abilities and interests. There was no debate over a right to Internet access until the technology of the internet became, not just available, but an important medium for communication and information.

Including potentialities among the human qualities that serve as the source of rights does not require a legal code of rights to anticipate all potentialities. A society's collection of rights will never recognize every human ability or interest precisely because there is no definitive list, or definition, of what these are.²⁰ This is all the more reason, then, that the very mutability and expansiveness of human abilities and interests must be accounted for in the concept of rights.²¹

"Interests" refers to the motivations, the desires and perceived needs, which are as fundamental as abilities. The term "interests" extends to what are often called "social goods," such as education or affordable housing, which are critical for people to be able to exploit their abilities. In other words, interests are not just motivations. They are also those needs and wishes, the fulfillment of which enables people further to exercise their abilities and potentialities, to survive and thrive. Without adequate nutrition, for instance, people cannot enjoy their ability to act and think. Without legal protection for people's corporal integrity, through laws banning violence and laws those promoting safety, all other abilities and interests are tenuous.

As I noted earlier, a society's corpus of rights is not fixed and unchanging. Just as the activities people do (if not their physical abilities) can fall out of custom, and other new skills and pursuits appear, so, too, are the rights that cover these abilities through redrafting or broader interpretation. Indeed, a right can become obsolete if it has been codified very narrowly and the activity it safeguards falls out of use. There are many reasons why any single activity or interest becomes noticed in the legal consciousness of a society. For example, in a society with a history of religious factionalism or discrimination, the urge to protect religious practices may be paramount. A secular society, or a society with a single religion, on the other hand, may not have a right to religious freedom because it perceives no need for it.

This goes to another aspect of the composition of rights: there is no rule for how general or specific a right must be. However, the more

20. Jack N. Rakove lays out the difficulties of "enumerating" and "textualizing" rights comprehensively in *The Dilemma of Declaring Rights*, in *THE NATURE OF RIGHTS AT THE AMERICAN FOUNDING AND BEYOND* (Barry Alan Shain, ed., 2007).

21. See David A.J. Richards, *Rights, Utility, and Crime*, 3 *CRIME & JUST.* 247, 262–65 (Michael Tonry & Norval Morris, eds., 1981).

general the right, the more adaptable it is. Those abilities, potentialities, and interests that do not find their way into a society's set of recognized rights at any one time are possible sources of additional rights. They may become instituted as rights in the future, whether through express accretion or expanded interpretation of existent rights. Even the most liberal body of rights, one that represents the broadest conceivable range of socially non-iniquitous human activities, potentialities, and interests, cannot recognize or anticipate every human ability and interest. Abilities, potentialities, and interests are inherently unforeseeable and mutable. An ideal "complete" group of rights is unrealizable.

Laws themselves can also influence people's capabilities and interests. A democratic form of government produces the "abilities" for self-government. The ability to vote or otherwise to participate in directing the composition of the ruling government, along with the interest in doing so, is as crucial to a person's wellbeing in a society as the expression of other, more natural abilities. Petitioning the courts for legal redress or voting in elections are rights because these are legally engendered abilities, even though they do not exist outside the particular societies that have established them. Citizens vote to express their interests and preferences and to help mold the laws by which they are governed. (People can elect a dictatorial regime that restricts suffrage and quashes other rights. In short, nothing prevents people from using their abilities against their own interests.)

Because rights are human creations, societies may choose to establish rights as a component of their legal systems or they may not. There is no eternal, pre-existent overarching right to rights. Rights are grounded in abilities, interests and principles, but they result from moral and logical arguments. Rights come into being depending on the success of advocates who campaign to have abilities, interests, and potentialities protected and sustained by law.

With rights come responsibilities. Every legal system that incorporates rights assumes that people are capable of understanding that they live in a society and that they have moral responsibilities to others. Rights consequently contain a paradox. While they are only necessary in social settings, where people ineluctably come into conflict with one another while engaging their abilities and interests, rights must also be restrained within society. One person's enjoyment of her right can easily impinge on another person's rights. The need for balanced restrictions on rights is thus inherent in the existence of rights. As regulative devices for the exercise of abilities and potentialities in society, rights can lead to legal clashes that the state, the enforcer of rights, must mediate. The law thus sets boundaries to people's activities, to their pursuit of the abilities and

interests, which restrict rights. The state accomplishes this control in part through the establishment and enforcement of criminal laws, including criminal punishment.

To summarize, the main elements in the definition of rights are that they are: (1) Legal creations established and often modified by societies; (2) the purpose of which is to shield and promote certain human abilities, potentialities and interests, current as well as conjectured, as the society has historically come to value them and; (3) the preservation, and sometimes the fulfillment, of which is ultimately attributed to the state under law.

II. RULES AND RIGHTS

A. *The Nature of Rules*

Legal systems are systems of rules. The notion that the law is similar to a body of rules is hardly new. J.L. Austin used the model, as did H.L.A. Hart somewhat later. Under the influence of Ludwig Wittgenstein, Hart analyzed the relationship with great perception in *The Concept of Law*.²² Hart distinguishes between “primary” and “secondary” rules. With primary rules, “human beings are required to do or abstain from certain actions, whether they wish to or not.”²³ Hart explains:

Rules of the first [i.e., primary] type impose duties; rules of the second [i.e., secondary] type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligation.²⁴

The discussion about rules here is different from Hart’s approach.²⁵ I argue that rules are comprehensible only within a context of a web of

22. See H.L.A. HART, *THE CONCEPT OF LAW* (Peter Cane, Tony Tony Honoré & Jane Stapleton eds., 2d ed. 1994). Hart drew on his study of the linguistic philosophy of J.L. Austin, as well as his consideration of the later work of Ludwig Wittgenstein and the early writings of John Rawls. See NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 219–20 (2004).

23. HART, *THE CONCEPT OF LAW*, *supra* note 22, at 81. Note that Hart is already assuming a similarity between rules and law; otherwise, he would not write about “humans” and what they are “required” to do were he merely described rules of game.

24. *Id.*

25. There is debate over whether Hart even viewed law as a form of rules. Scott Shapiro argues that Hart, no less than Dworkin, believed that judicial discretion was indispensable because of the inevitable limitations of language. Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed* (Yale Law Sch. Working Paper No. 77, 2007), <http://ssrn.com/abstract=96857>. See also Timothy Endicott, *Are There Any Rules?*, 5 J. ETHICS 199 (2001).

rules, what I term a “rule system.” With this term, I am not speaking of the development of rules within a communal, shared “form of life” in a Wittgensteinian sense.²⁶ Rather, I refer to the way that rules function. Rules are only comprehensible to those who use them within a complex of types of rules. There are different types of rules within any rules system. Below I lay out the three main sub-categories. I will discuss the nature of rules first and then move on to laws, specifically rights.

What follows are not rules about how rules should work. That is, I am not setting out rules for rules. Rather, I propose a description of the multivalent structure of rules systems to explain how rules function to communicate directions for behavior. We may not be aware of each of the sub-categories of rules that identify or of how they work in conjunction with one another. But these different types of rules are, together, necessary for us to think effectively with rules.

Thinking . . . seems to require, like speech, the capacity to follow rules. . . . Deny that there are such things as rules, deny that there is anything that counts strictly as rule-following, and you put in jeopardy some of our most central notions about ourselves. More than that, you also put in jeopardy our notion of the world as requiring us, given our words and concepts, to describe it this way rather than that; you undermine our conception of objective characterization.²⁷

Rules are complex linguistic entities. They are not simply propositions; indeed, they have little in common with assertions of truth or opinion truth assertions. They do not describe or analyze. Rather, they create, when complied with by corresponding behavior, states of actuality. Rules are among the most socially complex of linguistic constructs. Rules assume a complex of social arrangements, among which authority, compliance, perpetual cooperation, are just some of the elements. Without this web of relationships, rules are merely perplexing and ineffectual commands or statements.

The purpose of rules is to be purposive. That is, rules set out an ordered series of actions for a particular activity. They prescribe a set of components and steps for the achievement of an activity. Rules may be derived norms, but they differ from norms in that they specify permitted actions (as well as proscribed actions) rather than indicating which actions ought, or ought not, to be done.

26. See SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 96 (1982).

27. PHILIP PETTIT, *THE REALITY OF RULE-FOLLOWING, IN RULE-FOLLOWING AND MEANING* 192–93 (Alexander Miller & Crispin Wright, eds., 2002).

Not all purposive activities are controlled by rules. For example, building a wooden table from scratch depends on a number of actions, such as milling the legs and the surface. The order of these actions is not strictly rule controlled, but existence of the table depends on the requisite steps for making its pieces and assembling them. Rule-directed activities, in contrast, are dependent on the rules that guide and define them. The successful passage of a proposed bill will only work if the legislature abides by set rules; otherwise, the bill will be deemed illegitimate and will not become law. The legislative process is tied to rules, and that is no less true for the product of that process.

Rules are also distinguishable from commands. Commands are directions to carry out specific tasks, whereas rules are guides to how tasks are to be done. Rules are more generic, less bound to individual situations, than commands. With commands, someone with attributed authority orders other people to do an action; the command may not bother to describe how the action should be done but only its outcome. Conversely, a command may direct the steps, without bothering to mention a purpose or specify an outcome. Moreover, commands exist in the present; they address certain people with the goal of getting an activity done at a certain time. Rules, in contrast, exist beyond the occasion of their initial promulgation or formalization, and their authority is independent of the status of a single person. They involve a range of elements, from the people to whom they apply to the actions these people are to do.

Individual rules do not make sense in isolation. A single rule cannot indicate to whom it applies, or the circumstances under which it should be followed, or the location and other physical elements that are involved. Rules function only within a larger set of rules, what I call a system of rules. I use the term “system of rules” to refer to the internal properties of rules, that is, the multilayer structure that necessarily underlies every body of rules.²⁸ All systems of rules comprise three sub-categories or types of rules. I will refer to the three subcategories as “compositional,” “procedural,” and “consequential” rules. When we think of rules, we most likely conjure up just one: procedural rules. This type of rule specifies the actions to be done in a certain order or manner. However, procedural rules rest on compositional rules and are usually associated with consequential rules governing their completion or violation.

Although compositional rules are essential to any system of rules, they are not always explicit. Compositional rules encompass a large variety of

28. My use of the term “system of rules” therefore differs from the more familiar idea of distinct bodies of rules, with their specific constituencies, as outlined, e.g., in SCOTT J. SHAPIRO, *LEGALITY* 11–12 (2011).

rules. They specify the environment or jurisdiction of the system of rules, that is, where the rules pertain: a checkerboard, a soccer field, a legislative session, a voting booth, a country. They also address to whom the rules apply. The compositional rules in a board game, for instance, dictate the number of players and their qualifications, if any.

In short, compositional rules set out the components of the rules system, from the realm where the rules apply to the participants to all the pieces or equipment to be used, such as dice, cards, an hourglass, a pencil, and a scorecard. Or the officers, the symbols and dress signifying their office, and the tools of their tasks, such as the means to record minutes of gatherings. In a legal system, the compositional “rules” define a range of essential traits. Among these are the legal system’s jurisdiction, to any laws that are considered principle to the legitimacy of any other laws, to the legal processes for creating, amending, and revoking laws, to the basic function of the political order, including the use of a constitution.

Frederick Schauer offers an analysis of rules that falls part way within the orbit of what I’m describing here. His description is useful as a heuristic to elucidate the operation of rules, albeit in a rather different perspective. Schauer writes that “[o]ne part of any rule...specifies the scope of the rule, the factual conditions triggering the application of the rule.”²⁹ He further recognized that rules “contain . . . the consequent, prescribing what is to happen when the condition specified in the factual predicate obtain.” In breaking rules into “parts,” Schauer approaches the structure of multiple rule-types that I refer to as the subcategories composing rule systems. By “scope,” Schauer refers to something akin to, if narrower than, compositional rules, although he blends it with consequential rules. Schauer’s term pertains to those conditions when a certain rule obtains. He uses the example of driving within the legal speed limit: a person who drives over the speed limit is subject to being fined. In doing so, Schauer combines compositional aspects—a person, operating a car, on a public road—with other kinds of rules, such as procedural laws that govern driving in public, and consequential laws determining what happens when another person authorized (under the rules/laws) to enforce the procedural rules in relation to the pertinent compositional rules drives in a manner prohibited by the procedural rules.

Some rule systems are joined voluntarily. One need not play baseball. When one does, however, the usual rules of baseball will obtain—unless the players choose to modify the rules from the traditional or official

29. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 23 (1991).

standards. The tenth person who shows up to play with a team will simply not be able to join in because the rules limit the number of players on the field to nine. Compositional rules thus set boundaries to the attributes of participants covered by the rules system.

In other cases, a person's participation is not voluntary—the rules are imposed on people according to conditions that the rules define. A student must follow certain rules while in school, and has little choice in the matter. So, too, do the rules of any given language apply to all who use the language; even when one purposely takes liberties with these rules, the significance of such play lies in the surprise and provocation of the linguistic violations. One can choose to become subject to a new group of language-rules by learning and using a new language. Membership in the rules system is voluntary, although the rules themselves are mandatory and frequently quite strict. There are exceptions even here: languages that have restricted uses, such as languages that are reserved for religious purposes or that are secret (like codes) are not open to every willing member.

In Schauer's example above, the person who chooses to drive is subject to the laws of the road. These laws prevail, not merely when someone chooses to undertake a rule-controlled activity, but because the person lives in a society governed by laws, among which are laws for operating a car. While the laws for driving are specific to that activity, they are part of a much larger whole, which is the legal system of a society that sets the laws for many activities.

There are different categories of rules within the subcategory of compositional rules. One type of compositional rules concerns, as we have seen, the substantial elements, such as the people who are subject to the rules, the area in which the rules function, and any other objects that are pertinent to the rule-defined activities. Another kind of compositional rule is the "normative compositional rule." These rules incorporate the norms or principles incumbent on the participants in the rules system.

The difference between norms that are adopted as rules and those that are not are that the former have an express, specific role within the rules system, while the latter apply to overall behavior. For example, the norm that lying is bad is a general social norm. Yet it may not be a norm within the particular rules system. An example is the old TV game show, "To Tell the Truth," in which a panel of three people made misleading statements about their characters, and the other players asked them questions to try to suss out the true figure among them. Newspapers supposedly commit themselves to a normative compositional rule of accuracy, which finds expression in the procedural rules of fact checking. In the adversarial trial process, witnesses must testify honestly, but the task of revealing the truth lies with the questioning by the opposing lawyers. A explicit normative compositional rule in the adversarial process

is truthfulness—perjury is a crime— but only in accordance with precise procedural rules, which entails that witnesses give testimony solely in response to the questions posed by the attorneys or judge. The witness is not permitted to offer the truth about the defendant’s alleged acts in the fashion he or she might be impelled to do. Another normative compositional rule is the proper manner of the lawyers. They may not harangue witnesses or reinterpret their testimony. Another is the presumption of innocence.³⁰

Normative compositional rules exist in all systems of rules. A most basic example is the requirement that all participants abide by the rules or, if they wish to alter them, that they pursue changes only in a manner prescribed by procedural rules, perhaps using compositional rules of interpretation. This is not to say that the compositional rules in every rule system contain the same strictures for emendation. Some systems of rules allow for changes more liberally and casually than others. Some may be less strict about conformity to specific rules.

Procedural rules dictate the actions to be undertaken in the system of rules. The procedural rules of a board game, for instance, designate what moves players may make, when they may do them (e.g., taking turns, or continuing after winning a round), with which pieces. They also include proscribed actions, that is, acts that players may not perform, such as playing out of turn, switching pieces, moving in a different direction on the board or field. Where functions or assignments vary among the participants, the roles are indicated by the compositional rules, but the functions, the actions associated with the different roles, are laid out in the procedural rules.

There is good reason that procedural rules are thought of as the core of

30. The “innere Fuehrung Prinzip” is an example of a principle transformed into a law, yet that, as a law, retains much of the character of a principle or basic ethical norm. The soldier serving in the Bundeswehr is not expected to have a sophisticated knowledge of international human rights laws. Rather, he is expected, indeed, required, to rely on his or her personal perception and discretion to decide when an order is so reprehensible or immoral that it cannot be obeyed. Because it is a principle, “innere Fuehrung” does not and cannot specify just which orders must be resisted. This “Prinzip” is an instance in which a principle—the principle that soldiers should act on their deeply held principles—is made available as a legal standard that a soldier can rely on it as a credible legal defense. Yet, as a principle, it remains ambiguous and leaves a great deal of responsibility to the individual soldier to interpret and defend. See *Innere Führung Selbstverständnis und Führungskultur, Zentrale Dienstvorschrift, Bundesministerium der Verteidigung, A-2600/1 and Bundeswehr, available at* https://www.bundeswehr.de/portal/a/bwde/start/streitkraefte/grundlagen/innere_fuehrung!/ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8zinSx8QnyMLI2MQgKcXQw8fY2dnAwDjYwsnE30wwkpiAJKG-AAjgb6wSmp-pFAM8xxmRESaqIfB-IH5WVWJZYoVeQX1SSk1qil5gMcqF-ZEZiXkpOakB-siNEoCA3otyq3FERAFlobJ4!/dz/d5/L2dBISEvZ0FBIS9nQSEh/#Z7_B8LTL2922TPCD0IM3BB1Q22TU4.

what rules are about. As noted above, the reason for rules is to guide activities, and procedural rules are those essential directives. The other two sub-categories define the terms and the realm of efficacy of rules (compositional rules), or assign outcomes when rules are fulfilled or violated (consequential rules). The acts themselves are recorded in procedural rules. The word “procedural” might suggest some ordinal order to actions, but procedural rules are not limited to such regimented steps. The acts that lead a batter to strike out are no less procedural than the rules that define what comes with a successful hit.

Rules differ in their complexity from directions or mechanical operations. Directions, whether advisory or mandatory, are sheerly practical. No norms of behavior come into play. How one assembles an Ikea bookshelf is not a matter of rules—a person may do whatever he or she chooses without committing a violation—but one ignores the directions at one’s peril. On the other hand, if there is more than one way to construct the bookshelf, then so be it. No one route to assembly is favored over, nor is the effort to complete the bookshelf subject to the oversight of an authority. While the “rules of the road” in driving are practical procedural rules/laws, based on empirical concerns about safety, they are rules all the same. Nothing physical keeps a driver within the speed limit. To the contrary, the limits exist because cars can exceed them. In contrast, shifting gears is a mechanical process. It is either done correctly or the vehicle does not function (for long). Transmissions are human designs, and thus are similar to rules. However, they were devised to accomplish a practical task, not to channel behavior, and for this reason their operation is not described as rule-based. Procedural rules concern the steps prescribed for a desired behavior.

The third main sub-category of rules is “consequential rules.” These set out the results of compliance with, and violations of, the procedural and compositional rules. There are three main kinds or levels of consequential rules. The first, one might say, the most immediate, type of consequential rules are those that are closely connected to procedural rules. These are “inherent consequential rules.” They determine the direct consequences of the completion of a single procedural rule. The procedural rule of rolling dice during one’s turn has the inherent consequence of some further action (procedure) in response to the result of the toss. One moves a piece on the board by the number of spaces that corresponds to the number on the upper surface of the dice.

The second type of consequential rule is also linked with procedural rules. These are the “outcome consequential rules.” If one does an action based on the number that appears on the dice, that action then corresponds both to a next move (an imminent consequential rule) and also to a result, or an “outcome consequential rule.” A player in Monopoly throws the dice

and moves her piece according to the number that comes up. That complete act leads to a result; her piece lands on a space and there is a consequence for this event. The player may have to pay someone rent, pick a card that might reward her or send her to jail, or she might earn money for passing “Go.” This type of consequential rule is not part of the chain of procedures, but is, rather, an outcome consequential rule. That is, it is not just a step in the chain of procedures. It has significance apart from the procedures.

Outcome consequential rules take many forms. They often respond to permitted acts or events that are nevertheless not entirely predictable. In baseball, consistently strong hits will get people on base, just as a majority of voters will determine the result of the election. Committing a foul in soccer or basketball has a consequence, to the detriment of the side that caused the foul and the potential benefit of the opposing team. A person who receives a “green card” in the United States becomes eligible for citizenship. While the process to qualify for citizenship may be procedural, the result falls under the compositional rules of membership in the system of rules, here, the domestic laws of the United States. In a game, this may mean that players gain rewards, or pay penalties, when they complete certain rule-prescribed acts. In legal systems, the consequential rules exist more in the background. There are commonly no consequences if one abides by the law other than successful continuation of one’s social activities. Winning or losing a game is defined by the procedural rules in conjunction with the procedurally-imminent consequential rules.

Not every procedure must result in an apparent consequence. Driving correctly produces no awards other than the safe completion of the trip, and the avoidance of a penalty for improper driving. The positive consequence is inherent in the successful completion of the procedural rules; the negative is a ticket or worse. All these consequences are closely tied to the procedural rules because they are not ultimate, determinative outcomes. They may well be negative or positive in their value to the participants, depending on the status—the team membership, say—of the participant. But they all come about within the bounds of the rules system.

The third type of consequential rule is the one we are most concerned with here. The first two types we reviewed are part of the routine operation of the system of rules. The third type, in contrast, defines response to violations of the rules or to acts that are otherwise outside the usual rules. This kind of consequential rule, which I will call consequential rules of violation, or “violation rules” for short, is often disciplinary and punitive. Violation rules themselves break down into two main forms. The milder type is an “adjustment violation rule,” such as a foul or penalty shot in

soccer, or remedies in contract law. These rules redress infractions that occurred in the process of procedural rules. They are punitive to a degree, but their central purpose is to be compensatory. They make up for an improper transgression of a rule by transferring the gain to the injured party that was wrongly obtained by another party.

The other version of violation rules is more pronouncedly punitive. Punitive violation rules are intended to censure an offending party. They may include a corrective element, similar to adjustment violation rules, but their real purpose is the radical extirpation or isolation of the disruptive actor. Punitive violation rules are still contained within a system of rules; what distinguishes them is that they come into play when someone covered by the rules behaves in a manner that crosses the norms of association that govern participants in the rules system.

Punitive violation rules serve to prevent and to deter continued violations. They may, in addition, serve to educate the violators about the rules by impressing on them how important conformity with certain rules is. The more earnest instances of violation rules in sports manifest themselves as responses to cheating or abusive disregard of the compositional and procedural rules. Players are stringently penalized or barred from participation for a period. Sweeping pieces off a chessboard out of anger lies outside the range of the procedural rules of the game and is, furthermore, an offense against the compositional rule of decorous play. Outside of the context of the chess game, the act would not be especially disturbing. Within the world of the game, however, it is destructive. The chess player who destroys the game is likely to be banned from further play with the other participants.

Both forms of violation rules share some functions in systems of rules. Violation rules also fulfill an informational role in relation to both compositional and procedural rules by clarifying the import of those rules. A participant in a rules system may wonder what would happen if he or she deviated from a certain rule or rejected it outright. Consequential rules indicate what the cost is, if any, to ignoring or violating a compositional or procedural rule. Consequential rules indicate the importance of complying with it.³¹

All consequential rules, including violation rules, operate according to their own internal procedural rules. Violations of the rules activate the

31. Crimes imply the laws that should be followed by indicating those acts that a person should not do. This may be obvious, but criminal law does present a twist on the usual notion of procedural rules. One could think that, given the way criminal statutes are typically drafted, one fulfills them by doing the criminal act, and the “reward” for completing the rule is, perversely, punishment. This is a result of the manner in which criminal laws are often drafted—they are independent proscriptions rather than appendices to legal prescriptions of how one should or may legally behave.

consequential rules of enforcement. Rules of enforcement come into effect when a participant in the rule-system transgresses a rule. The most obvious incarnation of consequential rules as laws are criminal laws. Criminal laws define acts that the state has deemed so destructive or offensive as to warrant more active state enforcement and more drastic penalties. The rules of criminal procedure, in turn, set the procedural rules for the enforcement of the consequential criminal laws.

In theory, systems of rules could consist of just the two categories, compositional and procedural rules. These two types tell all one needs to know in order to abide by a rules system. Consequential rules play two crucial roles for rules systems, however. First, they inform all those engaged with the rules about what they should do, or what they will see occur, when anyone violates the rules (whether intentionally or not). Otherwise people would be at a loss when they encountered infractions of rules. Second, consequential rules reinforce the integrity of rules systems. In some rules systems, the consequences of rule violations are mild—trivial to invisible. Disregard of rules may only result in confusion and self-exemption. In the case of language, for example, one either speaks a language according to its rules, or one does not communicate.³² The “offender” isolates himself. In a different kind of rules system, such as a competitive game or sport, a person can gain an unfair, surreptitious advantage if he or she successfully “games” the rules, that is, purposely circumvents or evades them. Rules are, after all, regulators of social behavior, and sometimes people better themselves at the expense of others by scorning the rules. Thus, consequential rules reinforce the authority of the rules systems by prospectively making such efforts costly. They are the porcupine’s quills of the rules systems, impressing on transgressors the importance of cleaving to the rules.

32. An exception, as is often the case in the world of rules, is the rules of language. An organic system of rules does not include an authority. At most, there are overseers who work to standardize and perhaps protect the “integrity” of the language, but they have no enforcement authority over the participants in the rules system. Individual fora, such as publishers of written materials, can control language use, but, again, these are sub-groups. The fundamental rules of language are inherited. (Invented languages are no exception; no one can make someone who uses Esperanto comply with its rules, be they syntactical, semantic, or orthographic.) The only consequential rules of language are incomprehension and the failure to communicate.

B. Rights as Rules

Within a legal system that incorporates rights, rights are one type of normative compositional rules.³³ They are principles that are incorporated into the express compositional rules of the law and they help establish the foundation for procedural and consequential laws. Rights are legal permissions and protections for those who are included under the substantive compositional laws of membership and jurisdiction of a particular legal and political entity. Rights are the legal embodiment of the principles that people ought to be able to exercise certain abilities and potentialities, interests other principles. Rights bind the state and residents to protect and promote those legally acknowledged abilities and interests.

Rights come about when those who have the power to create or to amend the legal system choose to incorporate them among the system's compositional rules. In so doing, they solidify the status of the selected principles (principles favoring the free pursuit of various abilities, interests, and potentialities). Societies establish rights as normative compositional laws to ensure their availability as a legal resource for those to whom they are attributed. People who know that they have rights can turn to those rights to protect their interests. They are not dependent on other authorities, as determined by compositional rules, to determine whether they are protected under particular principles and norms. By incorporating these principles into compositional rules in a legal system, people are less dependent on the interpretative or adjudicative authority of officials designated the same compositional rules.

Rights are an unusual form of compositional rules. Compositional rules either indicate who is eligible to participate or stipulate to whom they apply, regardless whether they are voluntary participants. Rights are a peculiarly self-referential type of compositional rule, for they protect the participants within the rules system, to some extent, from the creation or interpretation of rules that are offensive or biased. In most rules systems, one is either permitted or compelled to play along. Because the law is a one of the most profound forms of rule systems, legal systems often include rules that offer an enhanced regard to the affected population.

Hence the people who live under a rights-incorporating legal-system have a right to their rights. This may appear to be a tautology but it is actually a crucial point: people endowed with rights are able legally to lay a claim on the state for the enforcement of their rights. They may pursue their rights through the civil judicial system, where they can seek legal

33. Legal systems need not, by definition, include explicit or even implicit rights. While they inhere to some minimal extent in every democracy, other political formations, such as autocracies, dispense with stable rights—with the exception, perhaps, of the rights of power of the rulers.

redress for offenses against their rights through the state's police powers. A fundamental example of the right to rights is due process and access to the law.

The term "subjective rights" is sometimes used for those rights that individuals can lay claim to in relation to the state or to one another.³⁴ The party subject to the claim has a duty to the claimant who (correctly) protests a transgression of his or her rights. These individual claims inevitably produce rights conflicts between claimants, which thus necessitate their own rules for resolution.³⁵ However, the term "claim" does not accurately characterize rights as principles incorporated into the law. As normative compositional laws, rights stipulate rules that the state or the society are legally bound to regard. Rights are not claims in themselves; rather, they are legally described conditions, abilities, possibilities, that can be the basis for claims. They therefore precede claims. A claim for the fulfillment of a right arises only insofar as others fail to attend to them or interfere with them. The legal "duty" of the state or other individuals to take a person's claims against their rights into account is not so much a duty, as in a moral obligation, as it is a legally-mandated action. These actions include the responsibility of the state to provide for people's rights or, depending on the right, to refrain from infringing on them. Rights form the legal counterpart to a moral injunction that we take care of one another or that we leave people be. Some rights block out an area for state-guaranteed individual expansion and expression, while others require the state to more actively to provide goods and services to people.

Rights are not limited to establishing legal preservation of natural human abilities, interests, and so forth. They can also be engendered by procedural and consequential laws. In a democracy, people have the right (in theory) to determine the manner in which they are governed. They choose their lawmakers, and, whether through representational government or referenda, they have the right to set the laws that govern them. Voting is a right that derives from a legally-instituted ability and interest in a democratic society. The legal system itself, in short, can manifest new rights. The members of a rights-based society have a right to the enforcement of compositional laws, such as their rights, as well as to procedural and consequential laws. That is, people have a right to have

34. I make the distinction here between "state" and "population" to allow for those occasions when rights are enforceable only in relation to impeding state action. These arise where the rights have been so codified or interpreted as being limited to conflicts between individuals and state laws.

35. See Eric Mack, *Elbow Room for Rights*, in I OXFORD STUDIES IN POLITICAL PHILOSOPHY 194 (David Sobel, Peter Valentine & Steven Wall, eds., 2015).

laws passed and enforced. And they have a right to have laws that promote their rights, in other words, that fulfill the compositional rules of rights. Whereas in a game a single player has no recourse other than to object or leave when other players violate the rules, in a rights-based civil society, an aggrieved person has the right to appeal to the judicial authority of the state. As a person covered under the society's compositional laws, he or she shares in the society's full collection of rights.

Just as rights can be added to a society's laws, there are various means of instituting new rights: popular referenda, legislative agreement, or judicial holdings. But rights can also be expanded or contracted through legal (possibly starting out as popular) interpretation of extant laws. Typically, rights are developed through legal interpretation either when groups advocate for a broader reading of extant rights or when circumstances, such as changes in social mores, technological advances, or the gain or decline in important resources opens new ground for possible rights.

C. The Limitations of Rules and the Boundaries of Rights

Rules are not self-enforcing. There is no such thing within the definition of rules as an overarching "rule of inviolability" that prevents rules within a system of rules from being self-contradictory. Rules can be nullified or illogically reinterpreted by other rules within the same system. This holds true for each of the three component categories of rules; all rules are vulnerable to being disregarded or violated. While consequential rules steer participants along the path of rule compliance, they, too, exist within a system of rules. Consequential rules do not automatically activate but rather depend on participants for their enforcement. Enforcement, in turn, is only effective if it can reach those who have violated the rules. If players in a game agree to ignore a rule of the game, and not even to bother with an extant process of formal amendment, they can do so. In an individual player decides to depart from the game before it is finished, effectively destroying the game for all the other players, he can. He unilaterally is able to escape the ligature of all the rules, and is subject, at most, to the censure of his fellows. The successful criminal fugitive lives untouched (albeit perhaps at the cost of constant circumspection) by society's criminal laws. Why, then, do we even have rules if they presuppose agreement? Are rules not afflicted by a circularity—rules bind people only where people have already agreed to be bound by the rules, but they will only agree if they already know the rules?

The Supremacy Clause³⁶ in the United States Constitution is an example of such pre-existent agreement on which rules depend. Had those present at the Constitutional Convention, representing their states, not accepted that the Constitution would prevail over states' laws in the areas in which it had annunciated its jurisdiction, the clause itself would have been hollow. The signers of the Constitution were respectively authorized by their states to accede to the primacy national laws of the national over those of the constituent states.³⁷ The states had thus already conceded that their rules could be superseded by another, recognized, system of rules. Rules may well be inconsistent, whether within a given system of rules, or across systems that relate to one another. But where these discrepancies occur, there must either be rules for resolving the conflicts, or the rules are ineffective.

Where there is consensus about a particular practice, rules are useful because they clarify just what the accepted steps and boundaries are. Rules are nothing more than normatively tautological; they direct participants to do what the participants have already united, or been assigned, to do. Rules assume some fundamental consensus. What they add is not so much authority as definition and clarity. They give direction and specificity to acts, thereby helping participants to know what is to be done in what manner, by whom, and when. In addition, rules lay out procedures for reconciling disagreements. Rules can help prevent or resolve conflicts because they inform participants about what they have agreed to. They form a record of reference. In order to counteract disregard of rules, however, systems of rules require rules of enforcement.

Another limitation of rules is that, for all that they establish order, they may not be rational, or fair, or transparent to all. Some rules may invest certain players with discretionary powers that enable them to predominate over predictability and equitable treatment. One of the standard normative compositional rules underlying the rule of law is that fairness and transparency should control the formation and exercise of procedural and consequential rules. Consequential rules have a relationship with procedural and compositional rules. Consequences in a game do not happen haphazardly (unless the consequential rules of the game allow for some randomness). In the context of law, if a person pays her taxes correctly and on time, as the law requires, she should not be subjected to a penalty for dilatory payment.

36. U.S. CONST. art. IV, cl. 2.

37. See RICHARD B. BERNSTEIN & KIM S. RICE, ARE WE TO BE A NATION? 171 (1987); JOYCE APPLEBY, THE AMERICAN HERITAGE: THE HEIRS AND THE DISINHERITED, IN THE CONSTITUTION AND AMERICAN LIFE 146 (David P. Thelen, ed., 1988).

One of the most famous challenges to Hart's argument comparing laws to rules was posed by Ronald Dworkin. He did not entirely eschew the comparison, but rather found it to be insufficient. Rules were an inadequate description of how law functions, he argued, because they are too structured and too inflexible, to account for judicial deliberation.³⁸ When competent judges decide cases, they are doing more than following statutes or rules laid down through precedent. Instead, they draw, as necessary, on social values and principles that may well lie outside the corpus of legal statutes and precedent.³⁹

Dworkin's conception of rules is drastically underdeveloped. Rules are not the rigid, limited propositions that Dworkin presents. In rules systems, compositional rules house the rules of interpretation for rules. These rules of interpretation include the methods and sources that participants in the rule system may resort to in order to interpret rule in all three subcategories of rules. For example, interpretative compositional rules determine the resources that may be used to understand rules. They also define who has the authority to interpret the rules, and whether there is more than one authority, and thus who adjudicates conflicts in interpretations. For example, the Bible has been interpreted differently by different religious traditions, all of which revere it as their primary source for moral and even legal guidance. Yet not only have these diverse religions diverged some in their recognized biblical canons, but they have each exercised multiple, parallel rules of scriptural interpretation.⁴⁰ Secular legal systems similarly have established rules of statutory interpretation of which judges must be cognizant.⁴¹ Where there is no rule to be found concerning an interpretative issue, though, other compositional rules may fill in the blanks. Thus, if judges are considered ultimate arbiters in legal questions, then they could argue that they have the legal power to choose how to interpret legal texts in the absence of more definite hermeneutics.

Therefore, Dworkin's herculean judges who masterfully weave together precedent and principles are not actually arguing from "extra-legal" principles.⁴² Rather, these able judges are following the legal system's compositional rules of interpretation, which recognize the propriety of principled argument in legal decisions, particularly when the

38. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–24 (1978).

39. See *id.* at 26–39, 82–130.

40. See, e.g., STEVEN OZMENT, *THE AGE OF REFORM: 1250-1550: AN INTELLECTUAL AND RELIGIOUS HISTORY OF LATE MEDIEVAL AND REFORMATION EUROPE* 63–73 (1980); JAMES L. KUGEL, *THE BIBLE AS IT WAS* 1–36 (1997).

41. See, e.g., HART, *THE CONCEPT OF LAW*, *supra* note 22, at 97; SHAPIRO, *LEGALITY*, *supra* note 28, at 83.

42. See DWORKIN, *supra* note 38, at 105–10.

principles considered are familiar within the law.⁴³ Were that not the case, the judges' holdings would be invalid, for they would be transgressing the rules of proper adjudication by calling on principles. They are only able to do so because the law permits them to.⁴⁴ The legal system's compositional rules of interpretation acknowledge—indeed, may encourage—judges to rely on their notions of shared principles of justice when considering cases. In Dworkin's world, judges may resort to principles because the law's compositional rules of interpretation allow them this latitude. Dworkin is incorrect when he concludes that judges must at times reach beyond precedent or even precise statutory phrasing to reach holdings that are consistent with the law. Judges can do so where the law's rules permit them a heterogeneous set of sources, including concepts that are immanent in the law but not explicitly codified.⁴⁵

The uncertainties inherent in rules systems are consequential for legal systems. They are most acute in criminal punishment. Where a legal system is based on rights, it might seem logically inconsistent for the legal consequences of criminal violations to contradict the system's foundational principles of rights. But what is to prevent such conflicts among laws? And why should a society care about whether its sentencing practices take rights into account? As our current practice of punishment shows, the majority of us can blithely live with seriously discrepant laws, suffering little personal impingement on our activities. Few of us are affected by criminal sentencing guidelines and court orders that do not wrestle with the conflict between criminal punishment and rights. Rules are enforced only insofar as there is a means for enforcing them, or an interest in abiding by them. If neither the authorities (the checks and balances between branches of government do not demand rule conformity) nor the population (the ultimate arbiters in a democracy) are concerned to follow the laws, then what logically requires conformity with them?

43. *Id.* at 23–26.

44. Robert Alexy, who is strongly influenced by Dworkin, has systematized the relationship between rules and principles to such a degree that principles become combined with rules. In so doing, Alexy unwittingly sets forth rules for interpreting principles. See ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* (1994).

45. Sometimes the rules of interpretation appear to be left to procedural rules, rather than compositional rules. For instance, rather than incorporating a set of principles among the normative compositional rules that judges then use when weighing disputes, voters would choose what legal safeguards and benefits they have, and could change these “popular” rights with each election cycle. The hazard of leaving compositional elements to be resolved through procedural rules is that it lacks an enduring ratification of fundamental principles. A majority of the voting population could simply ignore the interests and abilities of a minority and leave them with no rights. It is the nature of procedural rules that they are not value bound, for any values and principles in a rules system are instituted as compositional rules. Any changes to compositional rules must themselves be guided by consistent procedural rules; otherwise, compositional and procedural rules would be unsynchronized.

As we observed earlier, there exists no overriding rule of inviolability that prevents systems of rules from being internally contradictory. No rule alone can compel those who are defined by the rules as subject to the rules to obey the rules. If rules were invulnerable to being violated, there would, after all, be no crimes. Indeed, there might be no need for rules, for they would simply be facts, like the laws of nature. Rules obtain only insofar as people chose to act in accordance with them. And this principle applies no less to people's decision to change or challenge rules; they assert themselves either in accordance with the procedural rules of change or they accept the consequential rules that come with civil disobedience.

If the solution to insuring rule-conformity does not lie in some higher rule or some deontological authority, it must be found within the nature of rules and the norms that influence them. If a legal system incorporates certain elements within its compositional rules, such as the normative compositional rules of rights, then this system must also include a compositional rule so obvious that we might overlook it: rules should be followed by those who are covered by them. If the legal system also includes other normative compositional particular to judicial practice such as fairness, due process, predictability, it is likewise committed under the compositional rule of internal consistency to creating and acting on procedural and consequential rules that are in keeping with these compositional rules.

One might therefore suppose that a salient constraint governing any legal system is the logical "law" of the excluded middle. Just as there cannot be within the same logical system both 'p' and 'not-p,' so too, should it be logically untenable for a legal system to include laws that are mutually contradictory. Where the state recognizes rights among its compositional rules, it cannot then deny them. As we will explore more extensively in the next section, criminal punishment flies in the face of this logical principle. Punishment interferes with rights in order to help preserve them.

IV. CONTENTIOUS RELATIONS: RIGHTS AND PUNISHMENT

A. Rights as Justification for Criminal Laws and Criminal Punishment

Criminal law writ large falls into all three sub-categories of rules. Criminal statutes and common law crimes are the compositional laws that name and define those acts that are intolerable to the law. The laws of criminal procedure determine how criminal trials are to be conducted, along with the preparatory steps, such as arrest, pre-trial detention, the collection and storage of evidence, the use of grand juries, the safeguarding of rights of defendants and victims, and other steps. And the

laws of criminal enforcement, culminating in the laws of criminal punishment, are the consequential criminal laws that make criminal statutes effective.

The state also has laws for the adjudication of civil conflicts and the imposition of corresponding consequential laws in the form of final judgments. Violations of civil laws, such as breaches of contract (private rule arrangements, the integrity of which, though, can be enforced through the law), or tortious acts. The offended parties may resort to laws to seek adjudication and remediation of the harm suffered.

Most civil disputes do not convert to criminal violations. They are, rather, resolved through civil remedies, which are a legal version of adjustment violation rules. Contractual remedies, for instance, are court-ordered arrangements (sometimes patterned on remedies that the parties expressly included in the contract) that set a substitute outcome for the obligations that would have been completed but for a breach. Some criminal laws are contiguous with specific civil procedural laws. For example, in the case of tax laws, intentional failure to file taxes, as required by law, can result in the crime of tax evasion. The crimes exist in conjunction with the legal duties established through civil laws.

In contrast, transgressions of criminal laws trigger legal penalties that go beyond just an equitable resolution to a wrong. Just as the criminal law that was violated incorporated a moral view of acceptable versus intolerable acts, so, too, does the punitive violation law of legal punishment represent a society's moral outrage at the criminal infraction. Punitive violation rules, in the form of criminal punishment, have the function of condemning a harm or an injustice that cannot be satisfactorily rectified through an exchange between the criminal and the victim. As we noted earlier, not all rules systems require violation rules. All the more is this true in the case of punitive violation rules. Punishment is applied when the insult to the rules cuts to the bone of values, and injures the morals, even the welfare, of the participants.

Not all crimes expressly pertain to compositional laws. For instance, the Bill of Rights, does not mention a right to bodily integrity, yet murder, rape, criminal assault, and battery—all crimes that directly harm the physical (and psychological) welfare of a person—are standard crimes among the states and have not been found to be inconsistent with the Constitution. Or consider the difference between embezzlement and theft. Embezzlement is the taking, through fraud, of another person's personal property with which one has been entrusted. As such, it is a violation of a legal duty to safeguard someone else's property. Theft, in contrast, has no positive legal counterpart in the form of a specific duty, but is simply a violation of the law against improperly taking property. None of these

common crimes is a transgression against an explicit right.

One of the reasons for criminal laws and laws of criminal punishment is to counter offenses against rights. Without criminal laws, the state, which exists in good part to support and protect its people and to preserve their rights, would lack a major means to safeguard those rights.⁴⁶ Punishment also meets a deep need of victims, and indeed of society at large, to see that crimes are not ignored and forgotten, yet at the same time are not left to vigilante actions. This need is enormously widespread. We often speak of “getting justice” when what we expect is not restitution but some kind of vengeance. The state can subsume and conduct the impulse for retribution, but it cannot deny it. Punishment is a crucial device for preserving rights.⁴⁷

In the absence of the laws of criminal enforcement and criminal punishment, the criminal law would be but an ineffective assemblage of recommendations and nomenclature. The practice of criminal punishment gives force to criminal laws. Criminal laws define and proscribe; criminal punishment realizes these definitions and proscriptions. Were there no punishments, criminal laws would be nothing more than expressions of opprobrium, lacking clout and seriousness. Criminal punishments are the consequential laws that realize the prohibitions defined in criminal laws.

As with all consequential rules, the laws of criminal punishment contain their own procedural laws controlling how punishment is to be carried out. These procedural laws are variously precise or broad, and are subject to both statute and judicial discretion.⁴⁸

Just as criminal laws exist to protect the integrity of other laws, so, too, do they define these laws’ boundaries. That is especially evident in the case of rights. The contours of what rights allow are set by criminal statutes. Rights have the potential constantly to come into conflict. One person’s indulgence in his free expression can drown out the voice of others. The landlord who owns tracts of apartment buildings and declines to spend his money on their upkeep leaves his tenants in dreadful housing or compels them to spend their funds on improving his real estate. By restricting certain actions that are iniquitous to rights, the corpus of criminal laws helps to define rights. Where the law recognizes a right to

46. Even those who speculate about abandoning punishment admittedly find their proposals more palatable for material crimes, such as theft or bribery, as opposed to more impulsive and violent crimes. See DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* 237 (2008); see also Stephen P. Garvey, *Alternatives to Punishment*, in *THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW* (John Deigh & David Dolinko, eds., 2011).

47. There is an extensive literature discussing the importance of the threat of punishment, as distinct from the actual punishment. See e.g., Warren Quinn, *The Right to Threaten and the Right to Punish*, 14 PHIL. & PUB. AFF. 4 (1985).

48. See Benjamin L. Apt, *Do We Know How to Punish?*, 19 NEW CRIM. L. REV. 437 (2016).

obtain property, for instance, it forms a legal protection around people's interest in holding possessions free of manipulation or occupation by others. The laws proscribing theft restrict the ability of people to take possession of property, yet we would not speak of these laws as inimical to the right to own property right. Rather, these criminal laws are essential to protect the legally recognized ability to obtain and keep property.

The criminal laws barring theft refine the right to exercise the ability to acquire property. In so doing, the criminal laws protect the right of property by helping to mark off its borders. Criminal law limits some actions for the sake of preserving others. It can do this without consequently intruding on rights because rights, too, are laws, not mere concepts. Rights are not wholesale safeguards of abilities and interests. They are not infinite, unfettered allowances for acting on abilities and interests. Indeed, rights could not feasibly be unrestricted, for they would then inevitably collide.

Rights could conceivably be drafted with the internal explicit provisions that moderate the exercise of abilities and the satisfaction of interests so that people do not cause harm to one another in the enjoyment of their rights. The law usually tempers rights from without, however, by designating acts that are beyond the pale. The advantage of this arrangement is that it does not prematurely retard the definition of rights. Instead, it compels a society to be aware of every occasion, every law, through which it constrains a right. The underlying legal basis for limiting rights resides in another normative compositional rule, which is that law social coexistence must sometimes prevail over individual use of rights. The compositional laws that endow authorities (or, possibly, the public) the power to create and interpret laws (including such compositional laws as rights), include laws that permit these authorities to laws that define and delimit rights.

B. Criminal Laws and Criminal Punishment as a Threat to Rights

The challenge in drafting criminal laws is that they can carve too deeply into the territory of rights. A classic contemporary example is the criminal definition of hate speech. The potential for conflicts with rights is magnified by criminal punishment laws. Criminal statutes must balance restrictions on rights in favor of protecting compositional laws, among them rights. The effort can easily go awry, resulting in laws, including criminal laws that impinge too heavily on rights. Yet, in the United States, at least, there are no criminal provisions prohibiting the passage of laws that are heavily antagonistic to rights. The only processes available to counteract laws that hurt rights lie with the political process or (assuming

one can establish standing) the pursuit of legal complaints through the judicial system. Both routes are uncertain and laborious and above all retroactive.

Punishment by its nature, restricts rights, and cuts against the norms that underlie them. Punishment would not be punishing were it not to impose a negative circumstance on someone who has violated a criminal law (a law meant to protect a norm). That the state applies punishment to some people for the sake of others, that it may properly punish only those who have themselves affronted laws, does not vanquish the paradox of punishment. Nor does it suffice to characterize punishment as some sort of boundary condition of rights, defining them by delimiting them. Punishment is justifiable practiced so long as it is believed to be necessary to shore up the law, to protect rights. But that does not extinguish the fact that punishment impinges on rights.

Criminal punishment nearly invariably entails reductions in rights. Where criminal statutes essentially say, "Take care you do not do X, for that would be damaging to others and would violate their rights," criminal punishment promises, at the very least, that, "Because you did X, you will lose the opportunity for some time to use some of your rights." Direct physical punishments, most glaringly, executions, affect any rights involving bodily integrity, those, that is, that protect abilities to use the body as one wishes, as well as the interests one has in not being harmed. Almost all punishments, though, have some bearing on a person's physical wellbeing. Incarcerating limits where one may go and what one may do in the world. It also exposes people to the dangers of prison, an aspect that is not officially condoned as a punishment, but that is so usual that it becomes inherent in the penalty. Milder restrictions, from being required wearing a leg bracelet to reporting regularly to a parole officer, hinder a person's rights by inserting state-ordered intrusions into one's daily affairs.

It is therefore essential that the laws of criminal punishment be devised with a constant awareness that they exist within the legal system. The temptation can be all too strong, among the public, politicians, and judges, to see criminal sentences slip the reins of compositional laws because they are a reaction to often disturbing, inhumane behavior. Where rights exist among the compositional laws of a legal system, they cannot be vaporized elsewhere within that system. If criminal punishment is to remain consistent with such compositional laws as rights then the laws of punishment must be subject to justificatory rules that rationally delineate how, and how much, punishment may delimit rights. A first step toward addressing this task is to be conscious that legal punishments exist within a legal system oriented around rights.

Legal systems that incorporate rights, however, are constrained in the range of punitive violation laws. For one, they cannot punish a person in a fashion that directly contradicts the rights the legal system grants. To do so would set up a contradiction between compositional rules (rights) and violation rules, where the latter ignore the former. Rights preexist the people to whom they are attributed. They are fundamental legal assumptions; they apply to people because they are. Laws of punishment, in contrast, become activated because of what people do. They cannot both retain the criminal within the jurisdiction of the legal system yet also deny the criminal recognized rights.

The two most extreme possible punitive violation rules in any rules system are the ejection, through expulsion or alienation, or the destruction of a participant (and, possibly, the participant's allies).⁴⁹ The legal counterparts of these ultimate violation rules are banishment, either through exile or internal segregation from the population at large, or execution. Exile is the last legal action of the legal system, for it declares that a participant is no longer welcome. Execution, in contrast, holds the person within the law's realm, but only in order to annihilate him. While such an outcome is not in itself rationally untenable in a rules systems, it is contradictory within a legal system that is founded on rights. While rights could be written in such a way that they exist or dissolve depending on a person's actions, that condition would subject to whether the person continues as a member of the society or not. So long as criminals remain legally-acknowledged members of the society, they have rights. The puzzle is devising punishments, which will ineluctably minimize some rights, without instigating a contradiction.

If a central purpose of punishment is that it expresses condemnation, then there may well be a correlation between the severity of a penalty and the crime for which it is inflicted. Rights, as normative compositional rules, can be conditioned, but only through a reasonable argument that accounts for which rights are being suspended, and why, and for how long. This fundamental consistency within the body of laws is one of the tenets of state legitimacy: that the state, in its capacity as legislator, enforcer, and adjudicator, abides by the laws that create and instruct the state.⁵⁰

49. These kinds of eliminative punitive violation rule can obtain in both voluntary and compulsory rules systems. Legal systems are a mix of voluntary and compulsory. They are voluntary in that people can choose to enter or leave the system, but they are also mandatory, for they are binding for those living within the system's jurisdiction.

50. For a thoughtful discussion of state legitimacy as critical condition for criminal punishment, see Alice Ristroph, *Conditions of Legitimate Punishment*, in *THE NEW PHILOSOPHY OF CRIMINAL LAW* 79 (Chad Flanders & Zachary Hoskins, eds., Rowman & Littlefield, 2016).

The very existence of crime might be taken as evidence that the state has not upheld its task of protecting rights. Perhaps the proper solution for the state is to do its utmost to protect rights preventively rather than waiting for violations. But deliberate prevention of crime would not resolve the paradox posed by criminal punishment; it would only shift it. For the more a state monitors its citizens' actions in order to restrain them from possibly violating one another's rights, the more it steps onto the rights of its people.

None of the prevalent theories of punishment offers a good solution to this dilemma.⁵¹ None can rationally explain just which rights may be restricted, and to what extent, as the consequence for committing a crime. The argument for deterrence is concerned with discouraging future crimes. Rights do not figure into its rationale. The same is true for retributivism. Even in its arguably milder form of "limited retributivism," the theory calls for punishment to be an adverse experience for the criminal and justifies it as an expression of social disapprobation. Arguments based on the notion of desert deem punishment as the due consequence to which a criminal exposes himself for engaging in his crime. We might expect that desert theory would have something to say about why specific crimes deserve specific reductions of particular rights, but that is not the theory's preoccupation. Like retributivism, desert theory is not forward looking, with the aim of producing a reformed person, but looks only to what one has coming to him. Even reparative theories, such as rehabilitation and restorative justice, are grounded in the belief that the repentant criminal will suffer remorse and shame. Moreover, they, too, call for the state to take hold of the criminal's life and to mandate that he undergo some process.

This is all to say that punishment does not necessarily accomplish the effects that are—often with little evidence—attributed to it. For all the empirical insufficiencies and theoretical speculations behind most theories of punishment, it is hard to imagine that a society could dispense with it. Criminals need to know that they cannot commit crimes with impunity, victims necessitate some kind demonstration of society's solidarity with them and regret for their pain, and the public at large demands that the state will take measures to protect it from being ravished by those of ill will.

51. See Apt, *supra* note 48, at 438–39.

IV. FORFEITURE OF RIGHTS

One particularly pernicious proposition put forward that intersects with criminal punishment is that criminals “forfeit” their rights through their illegal acts. At root, the rationale behind rights forfeiture is that the criminal loses some, or possibly all, of his own rights, because he intentionally scorned both the rights of others and, still worse, the very legal system that grants him his rights. His defiant actions thus dissolve his moral and legal standing to claim rights.⁵² As a result of losing its trust in him, the society banishes the criminal to an inner exile, where he lives without legal protections and at the mercy of a society that sees him of diminished worth.

Christopher Heath Wellman, a contemporary proponent of the rights forfeiture view, notes that rights are forfeited in order to make punishment permissible. Rather, forfeiture simply happens as a result of an actor's misdeeds. However, this change is necessary if punishment is to be justifiable.⁵³ Whether this drastic status comes about by legal decree or some sort of moral/legal metaphysics is not clear. Regardless, he somehow knows that rights evaporate upon the commission of—or perhaps only after the conviction for—a crime.

Wellman further observes that, just because rights forfeiture is a precondition for punishment, that by no means entails that punishment will occur.⁵⁴ He neglects to acknowledge that losing the legal security of rights, however, is itself a form of punishment.⁵⁵ Rights forfeiture exposes the subject to the unchecked wrath of society, whether in the form of vigilantism or state penalization. And punishment invariably follows: the wrongdoer, left out in the open without normal legal protections, will not be charitably ignored. So, while forfeiture arguments may not themselves prescribe punishments (beyond the dissolution of rights), they cannot decently maintain that questions of criminal punishment lie beyond their concern. One dilemma for the advocates of rights forfeiture is how to explain which rights are forfeited for which crimes: does the commission

52. For the moral standing argument, see Christopher W. Morris, *Punishment and the Loss of Moral Standing*, 21 CANADIAN J. PHIL. 53 (1991).

53. See Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 372, 378 (2012).

54. Wellman repeatedly says that rights forfeiture goes the question of the permissibility of punishment. He is careful to distinguish rights forfeiture from a theory of punishment, i.e., an argument for why punishment should occur. *Id.* at 371–72, 375.

55. In his treatment of rights forfeiture as a nearly natural result, Wellman holds that rights forfeiture is a necessary presupposition for the justification of criminal punishment. However, certain that he is that rights vanish, or at least diminish, with the criminal act, he does not consider their loss to be punishment in itself. *Id.* at 374.

of a crime, or a crime of a specified severity, result in the forfeiture of all of the criminal's rights, or only those that he violated (his victim's), or only those that he abused in doing his crime (his own)?⁵⁶ Does a murderer lose far more rights than a petty shoplifter because he took the life of his victim? Does the murderer forfeit a right to his life, or at least the normal free enjoyment of it, because of his crime, whereas a shoplifter's penalty is presumably much milder? The question of proportionality thus finds its way into rights forfeiture theory, albeit in singular, and still unsettled, form.⁵⁷

Yet another set of problems facing rights-forfeiture is explaining the future legal status of the person who has forfeited his/her rights. The loss of rights extends to sentencing and beyond, but how far?⁵⁸ Wellman cannot say whether a criminal can be punished with no limit of severity or duration.⁵⁹ He allows that the criminal falls into a vulnerable legal status because he/she can no longer claim his rights against injustices and errors by others. One is left wondering how a criminal can even have a right of judicial appeal after being found guilty at trial. Wellman concedes that he has no firm stand on the question, whether only the government may punish, even execute the convicted, right-less criminal, or whether vigilante vengeance is just as permissible, given the criminal's drastic legal degradation.⁶⁰ In sum, right forfeiture, as exemplified by Wellman's remarks, does not recognize reciprocal duties between society and the criminal. The righteousness of rights-forfeiture reflects a desolate social ethic.⁶¹

In addition, committing criminal acts no more causes someone to forfeit his/her rights than does a person's decision voluntarily to waive a right in a particular circumstance. When one waives a right, one draws on one's right to choose not to exploit a particular right (and some rights, in some systems, cannot be waived). Waiving a right is provisional; it does not mean that a person has surrendered—or even can surrender—that

56. The notion of rights forfeiture is hardly new. Mill, for one, raised it in Utilitarianism. For a recent defense of rights forfeiture, see Christopher Heath Wellman, *Piercing Sovereignty: A Rationale for International Jurisdiction over Crimes that Do not Cross International Borders*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW (R.A. Duff & Stuart P. Green, eds., 2011).

57. See Alm, *supra* note 13, at 104–05 n.3.

58. Lax limitations on punishment are already prevalent in contemporary American practice; adopting a cavalier rights-forfeiture position would exacerbate foul treatment of convicted criminals. Consider Michael Tonry, *Making American Sentencing Just, Humane and Effective*, 46 CRIME & JUST. 441, 444 (2017).

59. Wellman, *Rights Forfeiture Theory*, *supra* note 53, at 386.

60. *Id.* at 378–79.

61. See Antje du Bois-Pedain, *Punishment as an Inclusionary Practice*, in CRIMINAL LAW AND THE AUTHORITY OF THE STATE 205 (Antje du Bois-Pedain, Magnus Ulueng, & Petter Asp, eds., 2017).

right entirely to another. Rights persist as recognized laws. A person cannot cause them to vanish, nor can the state insist that they have somehow been lost.

Lowering in the background of the call for rights forfeiture is an invidious perception of the criminal as someone who has, by his acts, converted himself into an inferior being compared to law-abiding citizens. It views the commission of the criminal act as somehow capable of metamorphosing the criminal into a different ontological status: as a being who lacks the abilities, interests, or capacity for intentions of humans.⁶² But if the criminal is, or becomes, intrinsically different from other people, in terms of rights, then we cannot speak of criminal culpability. Rather, the criminal reveals himself to be something, perhaps to have been something all along, from a normal member of society. Rights forfeiture needs to be upfront about this unsettling ontological distinction between people who have rights and those who, through any of a range of acts, do not.

But ultimately the critical flaw of rights forfeiture is that it misunderstands what rights are. Rights are the tenets to which a legal system is committed.⁶³ They cannot be unilaterally annulled or withdrawn by the state because part of the state's very *raison d'être* is the preservation of rights. Rights are not the possessions of the state, to be disposed of as the state sees fit, any more than they belong to the individual. The compositional laws that establish the state endow it with the duty to preserve the law. In those legal systems that recognize rights among their compositional laws, the state's mandate includes the protection of rights.⁶⁴

Norval Morris has observed that a victim whose rights are violated by a crime does not thereby lose those rights. The offense of the crime does not destroy the victim's rights; it only infringes on them.⁶⁵ A corollary of his argument is that the criminal's rights, too, are not abolished by his actions.

62. See COREY BRETTSCHEIDER, *DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT* 99–101 (2007).

63. Other theories of rights laid out in this article have also found the rights forfeiture position to be based in a flawed conception of rights. *Id.* at 98.

64. Here my position most bluntly diverges from Wellman's. In his counter-argument to what he calls the "problem of status," Wellman writes:

But notice: the rights forfeitures view need not contest that we qualify for moral rights in virtue of our status as human beings or rational/autonomous agents; it conflicts only with the view that we qualify for nonforefeitable rights in virtue of that status. So the question is not whether we qualify for rights in virtue of our status, it is what type of right we qualify for as rational agents or human beings.

Wellman, *Right Forfeiture Theory*, *supra* note 53, at 377. Leaving aside whatever Wellman thinks he means by "moral rights," I argue that rights are legal rules that envelope those who live within a particular legal system, not attributes that come with condition of "status" of being human.

65. See Norval Morris, *The Status of Rights*, 92 *ETHICS* 40, 41–42 (1981).

Without question the two parties, perpetrator and victim, are very different: one has been harmed against his will, the other has purposely or recklessly caused the harm. They are alike, though, in relation to the legal permanence of their rights, for the existence of rights does not hinge on acts. They are presupposed legal principles binding the society. Incorporated in a legal system as fundamental legal principles, rights exist apart from the people who live within the legal system. True, a person may choose to act on his or her subjective rights, although a legal system may deny the legal ability for people to waive certain rights. But rights are the perduring substrate of the legal system.

Rights pre-exist uniformly for all members as part of the society's compositional laws, as some of the axioms of its legal system. They pertain to a person until he or she decides to leave the region of legal jurisdiction. And rights apply equally to each person because, as laws established for all of a society's members, they precede individuals. They thus set a margin, a buffer, shielding him or her from a degree of state intrusiveness.⁶⁶ Because rights are foundational, compositional rules, they cannot be permanently revoked by the government. Once created, rights perdure in their legal system. They remain in existence except in the eventuality that the activities, the abilities and interests that underlie them, themselves disappear. The history of the United States Constitution reveals the dangers to a nation's population of misguided conditioning normative compositional laws according to such characteristics as sex or race that are irrelevant to the definition of rights.

For all its deficiencies, though, the argument for rights forfeiture is correct on one central point. If there is a place for criminal punishment in a rights-based legal system, indeed, if punishment serves to shore up rights, it is nevertheless only rationally permissible if rights are not absolute, but can be limited, conditioned. As we noted earlier, a legal system can refine rights so as to exclude certain actions, just as it can condition them according to people's age, or mental capacity, or citizenship status. Punishments must fit within the structure of these limitations on rights to form a seamless (as far as practicable) puzzle.

66. While Judith Jarvis Thomson does not reject the rights forfeiture position, she correctly warns that a government's penal code must be consistent with the society's formal rights (she also distinguishes between legal and moral rights; the differentiation misunderstands the function of rights as principles of a legal system that, in turn, enforces them). See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 366 (1990).

CONCLUSION

To help ensure that rights remain respected in society, they must rely, like all laws, on the specter of enforcement. While there is very good cause to question how the state accomplishes punishment, laws of enforcement are critical to binding people to compliance with legal systems. Participation in a system of rules, and conformity to the rules of the system, cannot be entirely voluntary, or rules would be merely equivalent to suggestions.

When they are punished, criminals are not able to do some legal activities that were available to them before they were arrested, tried, and sentenced. This is always the case, for rules of enforcement circumvent other rules. They limit the continued engagement of those who violate rules in the system of rules. Criminal laws and the consequent prescribed range of punishments may thus limit criminals' association with others, or restraints on their ability for expression, or the exercise of any of a plenitude of other activities. In short, people subject to punishment have fewer opportunities to use those abilities and to pursue those interests that are instituted as rights. Yet how can this fact be reconciled with the existence of rights in the same legal system?

Rights are not absolute allowances for acting on abilities and interests. They are normative compositional laws created as part of a society's legal system to encourage and shield certain human proclivities. They guarantee liberties and invest the state and the population with duties over one another. But they are also circumscribed by that very society in which each person enjoys his or her rights. Rights are laws, whereas a society that allows unfettered actions is anarchic. The decision to create rights in the first place is a normative one, reflecting a confidence that the law and the state are the right instruments to order decent social behavior. That rights are necessarily limited in society is not, in itself, a contradiction. Other norms, such as those incorporated into criminal laws, ban acts that would otherwise cause harm. Certain applications of abilities, such as the ability to undertake raging violence, are precluded from normative compositional laws of rights because it is an abhorrent use of ability and reflects no socially tolerable interest. Criminal laws, including criminal punishment, exist to check activities—the use of abilities and the pursuit of interests—that lie outside the range of rights.

Ideally, criminal laws are devised to be congruent with rights. They set the limits that make rights practicable within a society. Criminal punishment, though, is a different animal from criminal law. It is conceivable, but improbable, that criminal punishments could avoid trespassing on rights. That could only obtain where either the set of rights

recognized by the given legal system were already minimal or the nature of the punishment applied is nearly negligible. The potential for the logical contradiction between rights and effective criminal punishment cannot be entirely vanquished; it can only be reduced.

The indispensable utility of punishment notwithstanding, rights and punishment will never be entirely compatible. Criminal penalization is intended to do more than restore all the parties to their situations before the crime was committed.⁶⁷ Punishment is not designed solely to achieve restitution, to repair the victim, alone. It is not an equitable remedy in the fashion of a civil judgment that aims to set the victim right and to remove the offending party's unjust enrichment. The peculiar purpose of punishment is to be punitive. Even those theories of punishment, such as rehabilitation, that seek humane ends for the criminal rather than sheer suffering and banishment, are punitive. The criminal is not free to refuse rehabilitation and walk free. He/she remains a charge of the state, and the state determines the degree of his/her freedom to exercise certain rights. Whether the rationale for the discomfort of criminal punishment is to turn the criminal toward regret, to scare him/her off from future crimes, to announce a society's collective dismay at the criminal's commission of immoral or repellant acts, or all of these reasons, the function of punishment is to seize the criminal perpetrator and to control his fate to some degree. Even punishments that are not as severe as incarceration or bodily harm, such as fines, are driven by a purpose that is different from making the victim whole. Fines subject the criminal to payments that are meant to be sufficiently costly to influence his behavior toward legal compliance.⁶⁸

Punishment cannot undo the irremediable damage of a crime. This is most evident in instances of terrible crimes such as murder, maiming, rape and sexual abuse, physical and psychological torture. Yet those crimes that do not cause permanent destruction likewise inflict harm on their victims and intrude on their rights. The task of punitive violation laws is

67. Just restoration is a civil law solution to legal disagreement. It aims to make injured parties whole (as far as possible). Criminal penalties go further, motivated by a somewhat different notion, or, better "sense" of justice. Punishments appear where society deems the legal violation to be morally offensive, malicious, and harmful. This distinction between adjustment violation laws and punitive violation laws has a long history. Consider, as just one instance, the complex debates over appropriation and recompense developed in the Bava Kamma, the Talmud's tractates on damages. The material outcomes between a thief and his victim were extensive, yet also very different from the penalties for theft.

68. Theodore Blumoff's trenchant consideration of the justification for punishment offers a superb discussion of the reasons for punishment, and their limitations. My main quibble with his argument for "multiple rationales" is that we must have clearer, consistent defenses for any practice of punishment before we apply them; adjusting punishment to after the fact is not sufficient. See Theodore Y. Blumoff, *Justifying Punishment*, 14 CANADIAN J. L. & JURIS. 161, 162, 201-10 (2001).

not to make the victims whole again. This is because the offense cannot be repaired by any consequential arrangement, but also because the wrong is too intolerable to go uncensored. Still, whatever the reasons for punishment, the actual practice creates intractable quandaries for the law: deciding which rights may be limited through punishment, to what degree, in what manner. Perhaps the criminal should lose access to the same rights that he “took” from his victim? In that way, he would share something of what his victim suffered. Through this experience, the criminal might achieve a more lucid awareness. The problem with this approach is that there is little cause to think it would improve understanding. Rather impress the criminal, particularly if he is unrepentant, it could be interpreted as sheer revenge. Still worse, it leads to state down a path of reprehensible cruelty. Subjecting the rapist purposely to rape only reprises a terrible act that should never have occurred in the first place.

Punishment serves to isolate those who have proven themselves to be dangerous to the well-being and to the rights of others so that they do not harm people further—at least for the time that they are isolated and, one hopes, after their release from incarceration. No less essential as a part of punishment, however, is that it educates those who are punished about rights—theirs and those of others. Thus, punishment should do more than just remove the criminal from society. One of its core purposes should be to inculcate in its subject a better awareness of his role in society, and specifically the importance of rights. Because criminals chose to disregard the rights of others, because their skewed *mens rea* combined with their deleterious *actus reus* revealed their disregard for the rights of others, the state should try to make the criminal understand why it is limiting his rights as it is.

The state punishes by holding the subject apart from some of his rights in a kind of promissory suspension. It may do this by subjecting the criminal to an adverse treatment, or by segregating him from most of society and placing him in a more constricted policed environment.⁶⁹ The criminal does not lose or surrender his rights to the state. The state may justifiably reduce a criminal’s rights for two reasons only: public safety and in order to make the criminal more conscious of what rights are—his

69. In theory, the separate world of incarceration is not simply normal society on a smaller scale, but, rather, in a realm that is guarded and controlled. Otherwise criminals would merely be able to prey on one another in their new domiciles just as they had in society at large. That is the theory. That prisons are in fact very dangerous places is yet further evidence of the ineffectiveness of incarceration in practice does not conform to its proposed purpose. See ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* 219 (2014).

and others’—and how they coexist in a social environment. The central message to be conveyed to the subject of punishment is: “You have not understood what your rights are, and how your exercise of them must not be inimical to those of others. Just as the respect and preservation of people’s rights is a duty of the state, so is it incumbent on the people toward one another.” Punishment that is designed instead to make the subject suffer beyond any edifying goal diverges from its purpose.

A rational method for punishment therefore would be one that is concerted pedagogical and ameliorative. The period mandated in judicial sentences would be structured around the time necessary for schooling convicts in rights and in the larger lesson of what it means to live in a rights-based society. Penal rehabilitative pedagogy demands innovative educational methods, such as seminars, counseling, and practica that do not merely conform to the practices of conventional schooling.⁷⁰ Educational schema will need to be modified to reach each prisoner. Sentences should continue for as long as the convicted criminal needs to understand how to behave in society, to realize what the borders of his rights are, and what the existence of others’ rights demands from him. The duration and method of punishment should be driven by the genuine (as far as this is determinable) metamorphosis of each convict’s consciousness. Whereas current criminal sentencing, comprising a mix of custom, suggested guidelines, and the individual judge’s sense of just deserts, is oriented around the amount of time to be served, educative punishment looks to the progress of the inmates’ comprehension and social adjustment. This approach is more consistent with rights, because the sentence endures only as long as necessary for the convict truly to become aware of rights.

Of course, this kind of punishment must be something more than a civics lesson for the good natured and willing. The convicted criminal needs to learn that what he did was cruel and must not be repeated. The criminal justice system is routinely confronted with angry, thoughtless, and remorseless perpetrators. Many may never regret their crimes absent some adverse experience that demonstrates to them the pain for which they were responsible. Yet if penalization is too oppressive, it engenders resentment, not empathic understanding.

The pedagogical, reformative goal for punishment must additionally abide by the “principle of suitability.” This principle is reminiscent of

70. While she takes a slightly different view of the nature of the purpose of education as a form of punishment, Jean Hampton lays out a persuasive defense for its importance. See Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 212, 224–26 (1984).

Bentham's principle of parsimony.⁷¹ But, whereas "parsimony" maintains that punishment, in both degree and form, should be no more severe than necessary, "suitability" is more specific. Under this principle, punishment should be tailored (made suitable) to help reintegrate (made suitable) the criminal into society. This means that punishment is not simply a restriction on some of the criminal's rights, but that the state counsel and train the person. Moreover, such efforts cannot exclusively on the subject. They must work in conjunction with practical programs; education and job training must be connected to job placement, budgeting lessons must be tied in to housing placement and support services, as necessary. Not only does the suitability principle eschew punishments that are needlessly protracted. Degrading, and gratuitous; it requires that they be conducive to getting the criminal "back into" society. Punishments that would be barred under this rule would include extensive periods in solitary confinement, or living conditions so exiguous as to be more bestial than human.

The regulative basis for precluding a type of punishment is not that we find it "extreme." It is, rather, a minimal standard: whether the punishment indicates to the criminal that he has acted wrongly and illegally. For example, unless communications between people in detention and the outside world are plausibly dangerous or undermine the effectiveness of the punishment, criminals' freedom of expression should be preserved. There is also no sound argument to deprive criminals (or ex-convicts) of the right to vote.⁷² The suitability principle entails that serious restrictions on a criminal's rights, such as restrictions on free movement (which would also impinge on freedoms of association and, to some degree, communication) are permitted only when, and only to the degree necessary, the criminal is demonstrably dangerous or prone to recidivism.

71. See Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME & JUST. 141, 169 (2013).

72. For thoughtful arguments against disenfranchisement as a general punishment, see, e.g., Richard L. Lippke, *The Disenfranchisement of Felons*, 20 L. & PHIL. 553 (2001); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 335-36 (2016).

Behind all this discussion lurks yet another set of questions that are ineluctable for which the solutions are elusive. We must be able to answer them if we are to sustain a consistent legal system that encompasses both rights and punishments for crimes: how can we know just which rights should be affected, or that the justification for the reduction in rights that comes with a punishment is correct? The recommendations offered here aim to keep criminal penalization as consistent as possible with rights while acknowledging that the criminal has failed in his perception of rights. He does not comprehend (or care to) his own rights nor does he understand, or value, the rights of others.