

# Punishment and Race

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This article criticizes the standard way philosophers pose issues about the core practices of criminal justice institutions. Attempting to get at some of the presuppositions of posing these issues in terms of punishment, I construct a revised version of Rawls's 'teliishment' case, a revision based on actual features of contemporary criminal justice practices in the USA. In addressing the implications of 'racialment', as I call it, some connections are made to current philosophical discussions about race. I conclude with brief remarks about the importance of race to philosophical discussion as such.

There is a form of philosophical argument, regarding the justifiability of state-imposed punishment, that performs the trick of taking back with one hand what it gives with the other.<sup>1</sup> It is argued that while punishment by the state can be justified under ideal conditions, the conditions obtaining presently are far from ideal, so that the justification of such punishment, while theoretically in place, cannot legitimately be appealed to under present circumstances. This approach seems to conclude by rejecting the project which it appears, at least initially, to be a form of – the justification of current practices of state punishment.

One presupposition that this form of argumentation shares with more traditional approaches to the project of justification is that it makes sense to argue hypothetically or speculatively about the justification of punishment in the abstract or ideally considered, and only afterwards consider the actual conditions obtaining 'here on earth'. The abstract case is defeated after the fact by empirical considerations, but has nonetheless pride of place, being logically antecedent from the beginning. This general procedure further presupposes that the meaning of punishment can be treated as given, before the facts are in, since they 'only' bear on the question whether a given justification of punishment is defensible in view of what we know about the world, or about how the practice of state punishment is actually carried out. The terminology is taken for granted – we know what it means when we say that the question is to justify state punishment, and that whatever answer we arrive at will not throw into doubt what such punishment really is.

<sup>1</sup> A well-known example is Jeffrie G. Murphy, 'Marxism and Retribution', *Philosophy and Public Affairs*, ii (1973), 217–43. Jeffrey Reiman, in his important book *The Rich Get Richer and the Poor Get Prison: Ideology, Crime, and Criminal Justice*, Boston, 1995, seems to adopt something like this overall normative framework (see esp. pp. 182 ff.) While I have found Reiman's book quite stimulating, and agree with much of what he has to say, he rejects the significance of race as an independent factor in discussing the US criminal justice system.

I want to develop a generalized, expanded conception of ‘telishment’ as a way of bringing into question the presuppositions just mentioned. ‘Telishment’ was originally introduced in connection with a standard objection against the utilitarian justification of state punishment; I will generalize it as a way of deflating both utilitarian and retributivist lines of argument about state punishment. I claim that the generalized version of telishment is no mere argumentative conceit but closely parallels features of current criminal justice practices in the USA.

## I

John Rawls presents a version of ‘telishment’ in his early and influential article, ‘Two Concepts of Rules’: ‘an institution ... which is such that the officials set up by it have authority to arrange a trial for the condemnation of an innocent man whenever they are of the opinion that doing so would be in the best interests of society.’<sup>2</sup> Telishment is conceived by Rawls as the institutionalization of the relevant features of a standard objection to utilitarian justifications of punishment. Rawls goes on to suggest that the analogous utilitarian justification of telishment is ‘most unlikely’ given the obvious worries about the excessive levels of discretion built into telishment, the ‘risks involved in allowing such systematic deception’ (p. 152), and the problems that raises about the legitimation and usefulness of such an institution.

Rawls’s discussion of telishment is part of a larger argument about the significance of practices and the distinction between justifying a practice and justifying a particular action falling under it: once the philosophical problem of justifying state punishment is seen to concern the justification of a practice rather than of particular instances of punishment taken singly, the standard objection to the utilitarian view falls away. The telishment concept has the logical status of a hypothetical counterexample – a case (of a hypothetical institution) which shows that the objection is based on an implausible interpretation of what any justification of punishment requires. The context presupposed by the article is that state punishment is a widespread or even universal social reality, telishment a barely conceivable and seldom if ever instantiated mere logical possibility – precisely because telishment is conceived as an institution.

Notice that the difference between the two cases of punishment and telishment, as presented by Rawls, hangs on the issue of guilt or innocence: while ‘punishment’ presupposes that the guilt of those to be punished has been legally established, ‘telishment’ by definition is

<sup>2</sup> John Rawls, ‘Two Concepts of Rules’, in *Theories of Ethics*, ed. P. Foot, Oxford, 1967, p. 151. Hereafter citations to page numbers in this edition will appear in the text.

such that those telished legitimately by the state are in fact innocent and are known – by the officials – to be innocent of the crimes for which they are telished. Here the question of guilt or innocence is the technical one of whether the legal criteria upheld by the institution for attributing guilt have been met or not. And this specification of the question is in keeping with Rawls's 'technical' conception of a practice, which identifies a practice as constituted and circumscribed by legal rules. Now what I want to do is loosen the concept of a practice somewhat from Rawls's legalistic requirement that it be 'specified by a system of rules which defines offices, roles, moves, penalties, defences, and so on, and which gives the activity its structure' (p. 144, n. 2). I want to allow particularly for the possibility that not all the 'moves' in the 'game' are specified by explicit rules. We will get a conception of an institution analogous to telishment, but one that is far more plausible, that is, one whose specific difference from that of state punishment turns the scales, showing that the standard conception of state punishment is a weak and abstract idealization of actual criminal justice practices.

Try to imagine, then, an institution (which we may call 'racialment') which is such that the deliberations of the officials set up by it are generally guided by a presumption that members of a particular social subgroup (which we may call 'good ol' boys') are for that reason more likely to be guilty of a variety of crimes than other members of society (or, better put, than members of other social subgroups). Imagine that in consequence discretionary police activities if not policing strategies generally focus on apprehending suspects who are good ol' boys, and police consequently arrest good ol' boys at a far higher rate than they arrest members of any other subgroup of the population. Imagine that police publish official statistics recording the higher rate of arrest – and consequently of prosecution and conviction – of good ol' boys. Imagine further that legislation establishing categories of crimes and mandating sentences for them require harsher sentences for crimes that are more likely to be engaged in by good ol' boys than for comparable crimes that members of other social subgroups are as likely or more likely to commit. Imagine also that members of juries are more likely to convict good ol' boys than they are other members of society, this again based on a presumption that good ol' boys are more likely to be guilty than others are.

Now it might be argued that good ol' boys deserve such treatment – or at least that their special status in the workings of the institution of racialment can be justified – and the premises of that argument would appeal to – what else? – crime statistics compiled by official agencies dealing with criminal justice. Good ol' boys deserve such treatment – such treatment can be justified – because the presumption

of guilt is justified by the official statistics. The difficulty with this response, of course, is that those statistics are themselves a record of police activities undertaken in the shadow of the very presumptions they are being called upon to justify. The 'facts' of the matter (for which the statistics are taken as evidence) are 'constructed' from materials supplied from the operations of the institution. Racialment, because it is an institution which dispenses knowledge as well as exercising control over a population of subjects, does not merely shape a pre-existing social reality in conformity with specific intentions, but also defines the reality in conformity with its operations and procedures. (It's worth noticing that this difficulty stands in the way of either retributivist or consequentialist justifications of such an institution, since it concerns not the warrant of justification, but the reliability and independence of the evidence appealed to.)

The scenario just described, of the racialment of good ol' boys, is constructed by analogy with Rawls's case of telishment. Roughly at this point in his presentation, Rawls presented a series of (rhetorical) questions intended to cast doubt on the justifiability of telishment in terms of utilitarian arguments, the last one of which is, 'How is one to avoid giving anything short of complete discretion to the authorities to telish anyone they like?' Finally he adds that:

[I]t is obvious that people will come to have a very different attitude towards their penal system when telishment is adjoined to it. They will be uncertain as to whether a convicted man has been punished or telished. They will wonder whether or not they should feel sorry for him. They will wonder whether the same fate won't at any time fall on them. (p. 152)

Here my case of racialment and Rawls's of telishment are significantly different. For in the case of racialment, one of the primary social consequences of that practice is the stratification of the population into subgroups, those directly and specifically affected by the institution itself – the subgroup of good ol' boys and to a lesser degree those who are associated with them in specific ways – and those who are not so affected – all other social subgroups. This stratification will clearly affect the extent to which these last considerations cited by Rawls are seen as relevant by members of the different subgroups. Those citizens who are not good ol' boys are unlikely to be as concerned about racialment as good ol' boys and their 'associates' are, are unlikely to be worried in the way Rawls suggests, and are unlikely to have sympathies that extend to the good ol' boys. This will be especially true in so far as members of other subgroups have an initial tendency to give credence to the institution's own records, statistics and officials' rationales for their practices.

Rawls's example of telishment was devised to highlight the difference between state punishment and a distinct – and merely hypotheti-

cal – practice of ‘punishing the innocent’, and to defend utilitarianism against the charge that it would condone that latter practice. The reference to ‘practice’ is crucial since Rawls’s argument is ultimately that ‘the requirement of having to build the arbitrary features of the particular decision [to punish an innocent citizen] into the institutional practice makes the justification much less likely to go through’ (p. 153). But notice that the considerations Rawls invokes to ground this conclusion all have to do with the dangers, uncertainties or risks inherent in the granting of unbounded discretion to officials. The basis for that objection is absent in the case of racialment, however, since the rules of the practice are such as to construct bounds to the discretion the officials have. Those bounds are the boundaries of the social subgroup of good ol’ boys; the presence of those boundaries substantially vitiates the force of the considerations Rawls brings forward to sustain his claim that the utilitarian justification of the practice is ‘most unlikely’ on those grounds. What makes it possible in the case of racialment to ‘build the arbitrary features ... into the institutional practice’ without forestalling justification is that while telishment is presented as a case of ‘systematic deception’ of the population by the officials of the system, the racialment case is built around the idea of presumptions rationalized (and fed) by the knowledge-producing practices that are part of the institution itself.

Rawls seems to use something close to a ‘preinstitutional’ conception of innocence/guilt in the telishment case, in the sense that the description of the practice (of telishment) presupposes that the innocence of those telished is given independently of the practice itself. Presumably their innocence is established through the procedures of the practice of punishment conceived as already in place and to which the practice of telishment is, as Rawls puts it, simply ‘adjoined’ (p. 152). Isolating the practice of telishment from the determination of innocence – through the device of this sociologically implausible metaphor – is a condition of Rawls’s successfully meeting the objection (Carritt’s) he is polemically concerned with. It is an objection based on a hypothetical case, presented as a counterexample, that Rawls must meet. And he is fully able to do so, indeed he must do so, by employing a legalistic conception of a practice.

In the racialment case, by contrast, a ‘thicker description’ of a practice – a sociologically more plausible description – is achieved by relaxing Rawls’s adherence to a legalistic conception and including social enactments as well as legal rules as constitutive of the institutional practice. By bringing in social enactments – factors affecting jury deliberations, officials’ operational decisions, and suggesting some specific social determination of ‘discretion’, and which are not materially represented in formal rules – this ‘thicker’ conception of a practice

requires reference to norms of innocence/guilt that are fully institutional conceptions, internal to the practice (of racialment) as socially enacted. Because its norms typically function in concert with the products of apparatuses of knowledge production, racialment has the character of a closed system, generating knowledge which serves to reproduce – in the sense of both guiding and justifying – racialment itself as an institutional practice.

For this reason, the question of whether an institution such as racialment can be justified – the analogue of the question Rawls asked about telishment in the 1955 article – is unlikely to be approached in the same way by those included in the population ‘targeted’ by the practice and those excluded (not formally perhaps, but in consequence of the social enactment). This is particularly true if one begins with the standard philosophical contrivance of the issue, which typically begs just the sorts of questions posed by the crucial conditions of the case of racialment – the production by the institutional practice of the grounds of its own justification and the partitioning of the population through the definition or ‘construction’ of discrete social subgroups with distinct sets of interests relative to the institution itself. Thus Rawls concludes his comments on telishment by noting that ‘[i]t happens in general that as one drops off the defining features of punishment one ends up with an institution whose utilitarian justification is highly doubtful’ (p. 152). This seems to depend on the claim that one has antecedently identified the ‘defining features of punishment’ and that they define an institution the (utilitarian) justification of which is either not in doubt or less doubtful. Telishment is the hypothetical case arrived at by ‘dropping off’ the feature of punishment captured by the negative retributive principle – only the guilty can be punished. But this case preserves the presupposition that guilt can be determined or assigned in a way that is ‘innocent’ or independent of the practice itself – a presupposition that is, perhaps, one of ‘the defining features of punishment.’

If so, then the case of racialment results from ‘dropping off’ that feature of the institution of state punishment conceived in its purity. What that yields is an institutional practice with important features close to those typical of the current US criminal justice system. That is, the case of racialment as formulated above is in one sense not hypothetical at all but more like a description of the actual character of the operations of core practices of US criminal justice.<sup>3</sup> Of course, in place of ‘good ol’ boys’ one must substitute young black men as the social

<sup>3</sup> The case of racialment has been constructed based on information about the US criminal justice system collected and reviewed by Dorothy E. Roberts in ‘Crime, Race, and Reproduction’, *Tulane Law Review*, lxxvii (1993).

subgroup 'targeted' by many of the institutional practices of US criminal justice. And the point of the exercise is not to go on to try to resolve the issue of justification for the practice of racialment; indeed, above we concluded that raising that issue would be in effect to beg the question presented by the case. If racialment is in fact an accurate representation of important features of US criminal justice institutions, the question is whether it is appropriate to describe the institutional practice of US criminal justice as a system of state punishment at all.

## II

Obviously a significant difference between the abstract conception of state punishment and the conception of racialment developed above is the difference that 'race' makes in the latter case as contrasted with its absence in the former. Even a casual observer of the US criminal justice system will acknowledge the degree to which its functions have a racial significance. But rather than rest with the notion that this racial significance is the result of a distortion introduced into what is primarily a system of state punishment by being 'adjoined' to an antecedently racially charged social situation, I want to pursue the suggestion that the criminal justice system functions to create or 'construct' and reproduce that social situation of racial division. The practices of criminal justice are not 'innocent' of but are in fact constitutive of 'race' as a significant social reality in contemporary US society. If this is so, it may well be that discussions of criminal justice practices in terms of the justification of state punishment only undercut an understanding of basic features of those practices and obscure the issues presented by them. In pursuing these suggestions, I turn now to consider more recent philosophical discourse about 'state punishment' and its – generally unrecognized – relation to the concept of 'race'.

Mark Tunick has recently argued that punishment is a contested practice, and, consequently, 'punishment' a contested concept, at least in contemporary societies.<sup>4</sup> He argues that the meanings assigned to the practice of state punishment by contemporary retributivists and consequentialists are both embodied in the practice, though perhaps in different aspects of it, and that consequently neither of these meanings can be eliminated from our account of the practice without doing violence to the concept of punishment. Thus posing the question as philosophers have often done, in terms of a dispute that can only be resolved by showing conclusively that one conception or meaning is theoretically superior to the other and is capable of accounting for all

<sup>4</sup> Mark Tunick, *Punishment: Theory and Practice*, Berkeley, 1992.

features of the practice, is fruitless and inappropriate.<sup>5</sup> I believe the idea that 'state punishment' is a contested practice is importantly right, in part: in keeping with what I have been arguing above, we should replace 'state punishment' with 'criminal justice practices' in the claim.

A recent article by Samuel Scheffler,<sup>6</sup> who discusses the actual struggle between conservative and liberal ideological positions in the current American political context, maps out some connections between the debate over 'state punishment' and other positions, both philosophical and ideological. The brunt of Scheffler's argument is that 'political liberalism' is exposed and on the defensive because many of its central positions avoid commitment to traditional conceptions of desert and responsibility. These traditional conceptions, because they are in turn closely linked to the 'reactive attitudes' on which much public political debate hangs, have been mobilized by the right wing to effectively isolate and attack liberal political positions. Drawing on Strawson's 'Freedom and Resentment', Scheffler suggests that because 'reactive attitudes' such as resentment, gratitude and indignation determine how we distribute praise and blame, and because these reactions are tied to conceptions of responsibility and desert rather than to moral categories such as justice, with which contemporary political liberals have generally been concerned, liberalism's implicit renunciation of desert and responsibility as bases for justification is at least part of the reason for its political misfortunes. Philosophical liberalism, with its 'reduced conception of responsibility' and its denial of the foundational pretensions of any 'preinstitutional notion of desert', appears ill-equipped to fight successfully for a reversal of the political tide. Scheffler argues that contemporary philosophical liberalism's convergence with philosophical naturalism, which rejects any appeal to full-bodied traditional conceptions of responsibility or preinstitutional desert, must be revised before philosophical liberalism can help restore political liberalism's popularity.

Both Tunick and Scheffler contribute to an understanding of the current debate about 'state punishment', in different yet related ways. Tunick begins to 'open up' the conception of a practice beyond the narrowly legalistic version Rawls used, combining his conception of practice in a suggestive way with the notion of essentially contested

<sup>5</sup> Tunick seems to have melded the notion of essentially contested concepts – introduced into philosophical literature by W. B. Gallie in a chapter by that title in *Philosophy and the Historical Understanding*, London, 1964 – with the notion of a practice. He writes of essentially contested practices as any practice for which 'aspects of the practice can be accounted for only by distinct and mutually exclusive interpretations of its purpose' (p. 171).

<sup>6</sup> Samuel Scheffler, 'Responsibility, Reactive Attitudes, and Liberalism in Politics and Philosophy', *Philosophy and Public Affairs*, xxi (1992).



concepts. Scheffler begins to address the social and political context and consequence of philosophical theorizing concerning punishment. They can both be understood as suggesting a move away from a conception of philosophical debate as independent of context and susceptible to rational resolution by means of abstract argumentation. But neither of them goes far enough in that respect, on two related counts. First, they both still write as though philosophical theory could be isolated, and treated separately, from the broader social and ideological currents in the context of which philosophers work and – at least sometimes, as in the case of Scheffler’s essay particularly – attempt to analyze. Secondly, and perhaps relatedly, neither one attempts to thematize an issue that is crucially interlinked with that of ‘state punishment’ in the United States today – the issue of race.

Thus, for example, Scheffler attributes philosophical liberalism’s movement away from reliance on traditional conceptions of individual desert and responsibility in part to the growing influence of philosophical naturalism with its sceptical rejection of any autonomous role for individual agency. But his account seriously misses an even more important conceptual source of philosophical liberalism’s seeming paralysis in the face of what he identifies as conservatism’s successful offensive against once popular liberal positions. Scheffler mentions four ‘intensely controversial’ social issues in which liberal positions have been under right-wing attack and have been isolated. The issues are crime, petty morality (concern with laxness in sexual behaviour and drug use), welfare, and affirmative action. In each case, according to Scheffler, the liberal position ‘has met with resistance at least in part because of a perception that it rests on an attenuated conception of personal responsibility’. Anyone familiar with the public discourse surrounding these issues will recognize another significant feature of the debate about them – the prevalence and decisiveness of references to ‘race’ in the debate and the way that reference has shaped the very terms of that debate. These references to ‘race’ are generally not explicit, but are clear to everyone in the debate. Indeed, a large part of the reason these issues have been ‘intensely controversial’ as Scheffler indicates is because of the significance of ‘race’ to all the participants even while the issue is joined in seemingly nonracial or ‘colour-blind’ terms.

One of the things I want to suggest is that the claim that ‘state punishment’ – criminal justice practice – is an essentially contested practice – cannot be separated from the question of the invisible presence of the concept of ‘race’ in the standard philosophical discussions of punishment (as well as other related philosophical discussions). This is related to the fact that both public debate or (to put it somewhat differently) ideological contestation about ‘state punishment’, as well

as the very institutions and practices of criminal justice, are constituted by social processes that are racial projects. That this is not reflected in philosophical thinking about state punishment is not simply the result of philosophical thinking's necessary abstraction, nor of modern liberalism's convergence with philosophical naturalism in general. Rather, it stems from a kind of naturalism about race, and the influence of what I will call a naturalist view of race, that have, in part, kept 'race' off the philosophical agenda and out of the philosophical discourse concerning 'state punishment'.

'Race' is an essentially contested concept – a concept articulated in the play of essentially contested practices making up what Michael Omi and Howard Winant have called the 'racial formation'.<sup>7</sup> What I have called 'racialment', a set of institutional practices clearly distinct from state punishment, is at the heart of racial formation in the United States today, in the sense that the practices of racialment are crucial to sustaining and reproducing fundamental inequalities in 'the opportunity structure of America', inequalities that are constitutive of race as it is understood and figures in public consciousness and policy debates today. This popular understanding of race – a conception that takes as given what are in fact the results of the racial formation process and interprets them 'naturalistically' – has been contested by versions of a 'social constructivist' conception of race which is, in the first place, a denial of this popular naturalistic understanding of the concept.<sup>8</sup> Indeed, the 'racial formation' theory is itself a self-conscious product of that tradition of social constructivist conceptions.

I want to briefly contrast the 'naturalist' notion of race and a 'social constructivist' notion of race, and then discuss their different connections to philosophical discussions of 'state punishment'. A naturalist conception of race crucially involves the idea that 'race' identifies genetic or biological differences distinguishing definite human population groups with distinct patterns of behaviour and, possibly, intel-

<sup>7</sup> The concept of racial formation is formulated in Michael Omi and Howard Winant, *Racial Formation in the United States: from the 1960s to the 1990s*, London, 1994. They write, 'We define *racial formation* as the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed ... we argue that racial formation is a process of historically situated [racial] *projects* in which human bodies and social structures are represented and organized' (pp. 55–6).

<sup>8</sup> The contrast I have drawn, for present purposes, between naturalist and social constructivist conceptions of race, is a somewhat simplified presentation of a very diverse array of views on the matter. The distinction I have drawn, while simplistic, does not falsify but only emphasizes one important axis of alignment of such views. For some of the most important philosophical statements of what I have called the social constructivist view (as distinct from the sociological analysis offered by Omi and Winant), see Kwame Anthony Appiah, *In My Father's House*, New York, 1992; David Theo Goldberg, *Racist Culture*, Oxford, 1993; and Naomi Zack, *Race and Mixed Race*, Philadelphia, 1993.

lectual and moral capacities.<sup>9</sup> This conception makes race into a 'pre-institutional' and constitutive determinant of the individual's natural endowments and so of her life chances, at least when these are conceived naturalistically. On this view, then, one could argue that the fundamental racial inequality in institutional arrangements that is still pervasive in US society is not wildly out of step with the naturally determined (preinstitutional) deserts of typical members of distinct population groups.

The social constructivist conception of race denies the existence of significant biological differences between the human population groups presently taken to constitute distinct races. This denial depends on the claims that there are no genetic markers for 'race' and that the genetic variability is at least as extensive among members of the 'same race' as it is between members of 'different races'. The social constructivist holds that what are taken to be racial differences are the products of social and cultural rather than natural processes. Further, 'race' is a social construct in the sense that the uses of the concept for purposes of enforcing privilege and inequality, or even for explaining social processes, depend on reifying a category that properly has reference only to social interactions and their accumulated consequences, through which racial differences as such are generated. Whatever differences in behaviour, attitudes and expectations in fact constitute perceived racial differences are social outcomes of long-term and large-scale historic processes. But also, race is an artifact of culture: an individual's racial identification is an accommodation to culturally-imposed expectations and conditions of existence that reproduce a social and political status quo.

These distinct conceptions of race have historically contested the meaning and significance of the concept and the legitimacy of its social uses; while the naturalist conception has been dominant for almost the entire history of the modern discussion of the concept, the constructivist conception has recently been ascendant, though by no means triumphant. Although naturalism does not in itself entail that currently widespread social inequalities along racial lines are justified, constructivists generally regard naturalism as suspiciously comfortable with racist privilege and inequality. And while social constructivists may disagree among themselves about the desirability of maintaining racial difference beyond the context of racist inequality, that is because they agree that 'race' is (in some sense) an institution, one which would not exist without human efforts to maintain it – a

<sup>9</sup> What I am calling 'naturalism' with regard to race is described by Kwame Anthony Appiah as 'racialism' in his 'Racisms', *Anatomy of Racism*, ed. David Theo Goldberg, Minneapolis, 1990, pp. 3–17.

claim which any naturalist would deny. Race is an essentially contested concept since each of these conceptions of it involves an implicit contrastive reference to the other. The constructivist conception presupposes the popularity or currency of the naturalist conception even while contesting its adequacy. The naturalist conception, on the other hand, closely linked as it has historically been to European expansion and colonialist political projects, invariably assumes the character of an ideology, thus inviting social constructivist analysis and critique.

But constructivism is not just a critical reflection on the naturalist conception of race, but an attempt to account for and explain the phenomenon of race and its significance in modern (or even postmodern) societies. A large part of such an account must involve reference to institutions and the way those institutions tend to reproduce or provide conditions for 'racial projects' in Omi and Winant's sense. A constructivist might view the criminal justice system current in the US today, as well as the traditional justifications for it conceived as an institutional practice of state punishment, as fundamentally racial projects, that is, practices which function to reproduce and justify society's racial divisions and distinctions. I have already sketched a case for seeing core practices of US criminal justice in this way; I want to turn now to traditional philosophical discourse about state punishment.

### III

Neither retributivist nor consequentialist forms of argument can account for nor accommodate the way in which 'race effects' are constitutive of state punishment in the US today. Here I am not arguing that these modes of justification are in themselves racist but that they presuppose, in different ways, social conditions that do not exist and could not exist given 'race effects' – the systemic effects that play a part in racial formation. Both forms of justification fail not merely through insufficiency but because of a *logical* connection to the self-conception of the practice they are being deployed to justify. That connection is between the presupposition of ideal (or neutral) social conditions – conditions of a social uniformity or solidarity of precisely the sort that racialment makes impossible – and what I call a 'naturalist' conception of race. This connection takes several forms. First, the impetus to consider criminal justice practices as practices of state punishment plain and simple, and so as appropriately justified by contrast to an ideal of punishment framed by ideal, or at least neutral, social conditions, depends on implicit reliance on the naturalist conception. If race is a natural fact, social differences – as for example in arrest rates – need not seem so theoretically disturbing. On the social constructivist view, however, there is a substantial role played by

criminal justice practices in the process of racial formation, as the concept of racialment suggests. But in that case the criminal justice system does not so much punish criminals as constitute them in the process of constituting 'race' in relation to selected social subgroups.

Secondly, the perspective introduced in the concept of racialment and the social constructivist conception of race seems to subvert the basis for evaluation of criminal justice policies as such independently of other social institutions. The project of justification – or more generally evaluation – seems to presuppose an institutional object whose identifiable and distinct function or functions makes possible its evaluation independently of a background of other institutions from which its function(s) separates it. The institutional practices of criminal justice claim for themselves at least one such function – one more or less corresponding to the concept of 'state punishment'. But the practice of racialment is only one project in the process of racial formation which is the product of many other racial projects, that is, practices which tend to constitute and reproduce social inequalities around the focus of 'race'. If criminal justice practices are in fact practices of racialment there seems no ground for isolating criminal justice practices and evaluating them separately.

More generally, philosophy's traditional lack of attention to race – almost an insistence that race is philosophically insignificant – depends on the notion that race is a natural phenomenon and therefore not theoretically problematic (does not raise basic problems in principle for the ideal of colour-blindness). It has been only very recently that contestation over the concept of race has been recognized and addressed in the philosophical academy. That the contestation over 'race' has been largely absent – in a specifically theoretical form, at any rate – from the academic philosophical establishment is in keeping with recent trends in public discourse in the United States. For although race has been, as pointed out above, at the focus of public contestation over crucial public policy issues, that contestation has often if not usually been couched in 'colour-blind' terms that mask references to race. I have argued elsewhere that mainstream philosophy's resistance to any serious consideration of race is more deeply problematic than is suggested by critics of modern philosophy's traditionally a priori and necessitarian constitution of its subject matter.<sup>10</sup> The habit of abstraction with which philosophy generally distances itself from the rough and tumble of the street should be regarded in its immediate historical and political context: in the context of a racial formation, that habit can itself be seen as part of such a formation.

<sup>10</sup> See my 'Introduction' to *African-American Perspectives and Philosophical Traditions*, ed. John P. Pittman, New York, 1997.

Does the practice of racialment conform to broadly consequentialist criteria for criminal justice policies as traditionally conceived? It seems unlikely that the practice of racialment will tend to deter those engaged in criminal activity. It won't deter those not in the identified target population, or those whose crimes are not of the specified types, since they are not targeted and will know it. But racialment will not likely deter those who are targeted either. Since racialment can be seen in part as a campaign to make its targets think of themselves as criminal, if it succeeds, it may drive crime rates up. But racialment is likely to be seen by those targeted by it for what it is, triggering a reaction of defiance and turning the target population into more or less avowed resisters or even combatants against the criminal justice system as such.

Retributivist discussions of criminal justice generally involve institutional desert, since the guilt that governs desert is guilt as defined by the norms of the criminal justice system in place. But here a considerable weight must necessarily fall on the 'institutional': much if not all depends on which institution one is talking about and how one conceives of it. If one treats the institutional practice of criminal justice as state punishment the presupposition must already have been invoked: the weak retributivist criterion finds institutional implementation and the practices in which it is implemented are 'no respecters of persons'. Retributivism depends on the assumption that a considerable part of the practice of criminal justice is concerned with the impartial and neutral determination of guilt. On the social constructivist conception of race, however, race is, in a broad sense, itself an institution, and a significant role in its constitution and reproduction is played by criminal justice practices. This raises a further question: what is the status of the weak retributivist criterion in the institutional practices of criminal justice conceived as racialment?

The answer must, I think, be considered in two parts. If we take the weak retributivist principle to demand that 'only the guilty be punished', the practices of racialment are unlikely to be carried out consistently with this demand. The presumption definitive of racialment, that young black men are more likely to be guilty, not only exposes them to greater scrutiny and policing, increasing their chances of being stopped and arrested, but also makes it more likely they will be convicted whether guilty or not. And this is the flip side of the related criminal justice phenomenon: crimes of which successful upscale white men are most often found guilty are less likely to be the focus of legislative concern and of significant law enforcement resources, less likely to be prosecuted, and generally carry penalties or punishments of lesser severity than the crimes of which young black men are

deemed the more likely perpetrators.<sup>11</sup> There is at work here a specific construction of crime and criminality: the consequence of this construction is that a presumption is fostered and reproduced which links criminality to 'race' and so guilt to 'race' as well.<sup>12</sup> Given this linkage, the validity of all convictions of young black men is thrown into doubt: we can say, echoing Rawls's formulation cited above, we must always be uncertain whether a convicted young black man has been punished or 'racialized', especially since the consequences of racialment are ramified and compounded with other social institutions contributing to racial formation. This uncertainty will only occur to us, however, once we've come to see racialment as a core institutional practice of the criminal justice system, and as one which fits the theoretical model of social constructivism with regard to 'race'.

The second part of the answer goes to the basic presupposition of the question about the weak retributivist principle's relevance to racialment. The question presupposes a model of state punishment against which the justification of racialment is to proceed. And indeed, that is how I have spelled out the answer given in the last paragraph. Proceeding in this way tends to reinforce the difficulty of seeing racialment as a distinct phenomenon and the theoretical 'invisibility' of race with it. The invisibility of race is just this: race is taken as a theoretically unproblematic given, naturalistically conceived, rather than a 'race effect', as itself an effect of the functioning of the system, of racial formation. On the model I have been advancing, on the other hand, criminal justice practices are crucially racial projects, core elements in the social process of racial formation. As such they are constitutive of the institution of race. If that is so, then the institutional or technical conception of guilt/innocence which is central to those practices is complicit in, rather than 'innocent' of, the reproduction of a racially divided society.

Recall that crucial to the difference between the case of telishment and that of racialment was the way racialment yielded a division of the population into a subgroup 'targeted' by criminal justice practices and (a) subgroup(s) safe from such targeting. Now we are in a position to see why both race and 'state punishment' have been essentially contested concepts, and how those contestings are interconnected. Criminal justice practices can be seen unproblematically as practices of state punishment in so far as race is taken naturalistically as pre-institutional given rather than as socially constructed or constituted

<sup>11</sup> On this subject see Reiman, *The Rich Get Richer and the Poor Get Prison*, ch. 3.

<sup>12</sup> This link, between 'criminality' and 'race' – specifically meaning African-American descent – has played a deep and pervasive role in American culture throughout its history.

through practices such as racialment. The contestation over the meaning of 'race' is inherent in the political contestation between social groups whose constitution and division against one another is in part an effect of criminal justice practices and other processes of racial formation. This suggests that we might better understand the concept of state punishment itself as the abstract shadow cast in theory by the actual practice of racialment. This would make clear that the contestation over 'punishment' likewise begins with a division of society – into those 'guilty' and those who are 'innocent' – as given, rather than considering how criminal justice practices themselves serve to constitute and reproduce that division which it takes itself to have found already in existence. Such an understanding of punishment would underline the danger of taking the naturalistic conception of race for granted: such a conception makes it too easy to identify those guilty and so deserving of punishment with members of a racially constructed social subgroup. But it would also call into question the appropriateness of confining the philosophical discussion of punishment to questions of its justification in the abstract, without consideration of the socially complex ways criminal justice practices function in the contemporary world. And it would underscore the need for further philosophical analysis of the complexities of race.<sup>13</sup>

<sup>13</sup> I have benefited from some helpful comments by Professor C. L. Ten.