On the Dilemma of Contemporary Liberal Theory of Moral Rights for Penalty Justification

— *Exemplified by the Right to Personal Liberty*

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Abstract: *Contemporary liberal theory on moral rights argues that moral rights associated with personal liberty constitute a strong constraint on the boundaries of state power. Therefore, the core issue of the penalty justification is not the purpose of the penalty, but the reason for the penalty to refrain from infringing on the moral rights of individuals. In order to justify the penal system, scholars have explored solutions such as limiting the content of rights, waiving rights, and finally rights forfeiture. However, the concept of rights forfeiture cannot be reasonably integrated into the framework of the liberal theory of moral rights. The failure of these attempts stems from the patchwork understanding of rights presupposed by the liberal theory of moral rights. There is another systematic way of understanding rights that offers a better justification. Individual rights are not an independent non-derivative moral justification, and both individual rights and the penal power of the state are only part of a specific (realistic or ideal) system of rules that collectively serve certain values. The real question of penalty justification is not why the punishment does not infringe on the moral rights of individuals, but whether the overall institutional arrangements, including the penal system, are justifiable for all citizens, including the punished.*

Keywords: moral rights ♦ penalty justification ♦ consent ♦ forfeiture ♦ deprivation

Introduction

Any arbitrary restriction on the liberty of others by either individuals or apparatuses of the state is both illegal and deemed morally unjust. For instance, to respond to city appearance inspections and evaluations from higher authorities, a city detained all the disheveled men in the street. Such an act is

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obviously an unjust act of government. How do we justify this claim? Some scholars believe that such an act is unjust as it violates some of the fundamental moral rights of the victims (such as their right to personal liberty). These moral rights are neither granted nor arbitrarily deprived by institutions or subjects. Not only must both the individual and the state respect others' moral rights, but the state must also protect its citizens' moral rights.

Yet, if an individual is indeed entitled to these fundamental moral rights, then questions about penal practices follow. Now that a typical form of contemporary punishment is the deprivation of a criminal's personal liberty, does such punishment infringe on the criminal's moral rights? If the answer is no — why? These questions are discussed in this study. Rather than seeking to justify either moral rights or penal systems, this study explores possible theoretical approaches to resolving the conflicts between moral rights and penal practices without any damage to the position of moral rights or a complete negation of the legitimacy of penal systems. Such exploration carries great significance as it may identify possible structural problems in the contemporary liberal theory of moral rights and provide enlightenment on the views of the issue of punishment justification. On the basis of its research, this study concludes that the contemporary liberal theory of moral rights presupposes a false concept of rights and can't reasonably resolve the conflict between moral rights and penal practices within its theoretical framework, and affirms that "why punishment does not infringe on moral rights" is not the right starting point to delve into punishment justification.

I. Punishment Justification within the Realm of the Theory of Moral Rights

A. The basic connotations of the contemporary liberal theory of moral rights

Contemporary scholars hold that anyone is entitled to the moral rights that are crucial to their life and personal liberty. These moral rights are neither derived from specific legal systems nor can they be arbitrarily deprived by law, and they impose strong binding moral obligations on other individuals and the state. Any beliefs anchored on this view are grouped for the purposes of this study into the contemporary liberal theory of moral rights due to their common core elements: moral rights and liberalism. First, these beliefs all argue that individuals' moral rights in the sense of the former positive law exist and impose specific moral obligations on the acts of other individuals and the state. These moral rights cannot be arbitrarily negated by the positive law, and the political legitimacy of the state depends to a large extent on whether it respects individuals' moral rights. For instance, despite having differing substantive positions, Robert Nozick and Ronald Dworkin held similar views on the constraint of moral rights on the action of the state except for the difference in

their expressions: the side constraint[1] used by the former and the rights as trumps[2] by the latter; and second, among these moral rights, the rights associated with individuals' negative liberty (such as the right to life and the right to personal liberty) hold the central position and have a strong moral force, subjecting the state under the strong moral obligation of not arbitrarily employing coercive force to interfere with its civil liberties. It is exactly in this sense that various views on moral rights discussed in this study are of "liberalism." Of course, none of these beliefs might necessarily deny that there may be other types of moral rights, but all of them hold that the moral rights associated with individuals' negative liberty impose a rather strong constraint on the act of the state and are closely related to its political legitimacy.

Notably, although these beliefs of moral rights share the two core elements: Moral rights and liberalism, their interpretations of the normative foundation of moral rights might be different. Some scholars inherit John Locke's idea, holding that individuals enjoy the inherent right to self-ownership,[3] while others argue that Equal Respect and Concern[4] are the sources of rights. Hence, the contemporary liberal theory of moral rights is only a loosely aggregated collection of beliefs, with their consensus going no further than recognizing the existence of significant moral rights, which are associated with individuals' negative liberty and impose a strong constraint on both the individual and the state.

Out of moral rights, this study focuses exclusively on the right to personal liberty for two reasons: First, deprival of liberty is the most typical form of modern punishment and may be directly in conflict with the right to personal liberty; second, in contrast to the property right, which per se is subject to much more restrictions and thus has a relatively weak normative sway, the right to personal liberty has an extremely strong normative sway, as affirmed by the contemporary liberal theory of moral rights, and its infringement may seriously undermine the political legitimacy of the state. In terms of the internal composition, rather than a single right to claim or a privilege, as Wesley Newcomb Hohfeld specified, the right to personal liberty espoused by the contemporary liberal theory of moral rights is a bundle of rights consisting of a series of rights to claim, privileges, and immunities. First, having the right to personal liberty means that a right holder has the moral right to require others not to infringe on his personal liberty; second, having the right to personal liberty

[1] Robert Nozick, *Anarchy, State, and Utopia*, translated by Yao Dazhi (Beijing: China Social Sciences Press, 2008), 36.
[2] Ronald Dworkin, *Taking Rights Seriously* (London: Bloomsbury Academic, 2013), 4.
[3] G. A. Cohen affirms that Robert Nozick holds the view of "Right to Self-ownership," though Robert Nozick himself never used the term. See G. A. Cohen, *Self-ownership*, *Freedom*, *and Equality* (Cambridge: Cambridge University Press, 1995), 67.
[4] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 330.

means that a right holder has the privilege to act at will without infringing on others' right to claim; finally, the right to personal liberty and a right holder is generally believed to be inalienable, albeit some disagreement on what being inalienable among scholars. Some hold that inalienability at least means that a right holder shall not be deprived of his right to claim by any other subjects (either the individual or the state) on the strength of an act of will. That is to say, any other subjects have no moral power to deprive a right holder of his right to claim, or the other way around, a right holder has the immunity against the act of deprivation of his right to claim by any other subjects; some argue that, in addition to no being deprived by any other subjects, the right to claim shall not be waived by a right holder himself. Namely, a right holder has no moral power to waive his right to claim, thus having the immunity against the voluntary waive of his right to claim; and others go even further, claiming that in addition to no being deprived or waived, the right to claim shall not be forfeited[5] due to any act of a right holder. The rights forfeiture herein means the circumstance where some acts of a right holder lead to the automatic loss of his right to claim and differs from rights deprivation or waiver in that the latter is the loss of the rights arising from the willingness of others or of a right holder's own free will, while the former the automatic loss of the rights out of some acts of a right holder regardless of the willingness of the right holder or any other subjects. Of course, understanding the nature and basis of rights forfeiture itself is also a theoretical subject, which will be further discussed later on.

Regardless of whether a right holder has immunity against the waiver of its own willingness or the forfeiture, the right to personal liberty as a moral right contains at least the right to claim, privileges and the immunity against others' act of depriving a right holder's right to claim. Moreover, the right to claim enjoyed by a right holder has a very strong justification or normative force, which means that even if an infringement delivers a benefit impairment far less than its benefit gain to a right holder, it may still be morally unjust.[6] Some scholars even state that any infringement is unjust. Hence, we have the so-called absolute right. Yet, such a concept threatens to lead to some absurd conclusions. For instance, although, to save a person's life, unauthorized body touch is obviously acceptable by moral intuition, absolute rightists would insist on it that this act is all the same unjust. Therefore, the absolute right concept is not deemed as part of the connotation of the right to personal liberty in this study.

Besides, it is also well-advised that the relations among various concepts arising over the course of this research, such as natural rights, moral rights, legal rights, and human rights, be explained briefly. The moral right, as a term relative

[5] Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), 282-284.
[6] Chen Jinghui, "The Normative Force of Rights: A Critique of the Interest Theory," *Peking University Law Journal* 3 (2019): 584-602.

to the legal right, shall mean the rights that are not subject to recognition of legal institutions and possess normative forces on their own; the natural right, as a subordinate concept of the moral right, the universal, inherent and inalienable basic moral rights of mankind; and the human right has more varied usages but exists primarily as a legal concept in its evolution and means the rights for all mankind that are recognized by practices of international and domestic law and shall be ensured by governments of all states through domestic law.

B. Dimensions of punishment justification

Punishment is one of the most direct and dominant expressions of the state's coercive force, and the justification of the penal system has been a hotly debated topic within the philosophy and jurisprudence communities. Many scholars hold that the main mission of justifying the penal system is to endow it with desirable benign aims. In their mind's eye, benign aim associated with punishment may be retribution or deterrence (passive general prevention), loyalty to law (active general prevention), correction (special prevention) and/or other merits, and the crux of the controversy centers on which one is dominant and imposes constraints on others[7].

However, others argue that punishment justification covers sub-topics at various levels, with punishment aim simply being one of them. Full justification of the penal system not only entails the explanations of the benefits the penal system in may deliver a general sense but also the reasons behind the justice to the punishees subjected to punishment in particular cases. For instance, Hart pointed out that rather than endow punishment with one or more aims, the critical point of penal system justification is to distinguish the issues at different levels in the penal system as they may be associated with different values. He distinguished the two levels: general justifying aims of the penal system and punishment distribution, with the former being about "why be punished" and the latter "who to be punished" and "how severe a punishment should be"[8]. Although the punishment of the innocent may deliver desirable results under particular circumstances, it does not mean that a penal system that allows for such punishment is just. That is not only because allowing for such punishment may weaken the retributive or preventive aim of punishment in a more general sense, but also because such punishment is unjust in punishment distribution in particular cases.

The contemporary liberal theory of moral rights can agree with Hart's multi-level distinction, but it focuses on punishment distribution as it is deemed as the hard nut to crack in punishment justification. The reason why punishment may be unjust is exactly that punishment usually hurts the basic personal liberty

[7] The sorting of the lineage of the theories of punishment purposes, See Zachary Hoskins and Antony Duff, "Legal Punishment," in Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/legal-punishment/.

[8] H. L. A Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 2008), 8-13.

of punished individuals, which is protected by moral rights. No matter what benefits an act may engender in a general sense, the constraint of moral rights on the acts of the individual and the state can't infer that the achievement of such benefits by infringing on others' moral rights is morally just.[9] Thus, no reasonable explanation of a punishee's moral rights not having been infringed on by the act would greatly reduce the legitimacy of a penal system, no matter whatever aims that a penal system is supposed to achieve. Further elucidation on this assertion and its view on punishment justification goes as follows.

C. Tension between moral rights and punishment

Now, if there is, indeed, the right to personal liberty in a moral sense, then it is obviously a challenge in punishment justification: Why does punishment not infringe on a criminal's right to personal liberty? If everyone has the moral claim to demand others to respect his personal liberty, why does a criminal have no such right to demand punishment agencies not restrict his personal liberty?

John Locke gave a simple answer to the abovementioned potential conflict, asserting that the right to punish any violation of the law of nature as such is a universal moral right, and the right to punish possessed by the state is, in essence, the transferred that enjoyed by the individual, and putting up two arguments on the right to punish as a kind of moral rights. However, neither of these is deemed tenable by this research. The first argument is preventive, where John Locke argued that "all men may be restrained from invading others' rights, and from doing hurt to one another, and the law of nature be observed, which willeth the peace and preservation of all mankind, the execution of the law of nature is, in that state, put into every man's hands, whereby everyone has a right to punish the transgressors of that law to such a degree, as may hinder its violation."[10] This preventive argument, which justifies the right to punish from the perspective of the benign aim of punishment (preservation of the law of nature), is in its self in conflict with the concept that "moral rights constitute boundary restrictions on the pursuit of benign aim," thus being hard to stand tenable; the second argument justifies the right to punish from the perspective of individuals' moral right to self-defense. "On the basis of his universal right of all mankind, everyone has the right to stop or destroy, if necessary, everything harmful to them."[11] However, punishment is different from self-defense, with the latter being for an ongoing or imminent unlawful infringement while the former is for an occurred one. Punishment can't have any bearing on the past but only the future, so it is

[9] Of course, in the case of an infringement on a right leading to tremendous benefits (for example, sacrificing one person for saving the world), many scholars may think that such infringement is also justified. But in less extreme circumstances, moral rightists will claim that rights are more important than social utility.

[10] John Locke, *The Second Treatise of Government*, translated by Ye Qifang and Qu Junong (Beijing: Commercial Press, 2017), 5.

[11] Ibid., 6.

hard to establish justification from the perspective of the right to self-defense.[12]

Another simple answer is that punishment, indeed, infringes on the moral rights of a criminal, but such an infringement is just as the infringement on the criminal's right to personal liberty would protect other subjects' right to personal liberty or that the criminal's act would cause the weakening in the normative force of his right to personal liberty. This answer regards punishment as a conflict of rights. However, even regardless of the controversy over the solutions to conflicts of rights, moral rightists of contemporary liberalism generally do not regard punishment as a conflict of rights. This is because, should the punishment be deemed as a conflict of rights, it would mean that even if legitimate, the punishment still infringes on the rights of a criminal. As a result, punishment actually becomes a special circumstance of necessity, and the criminal has the right to claim compensation for the corresponding losses. But in the eyes of most people, the standing of a punished criminal and that of a third person whose benefits are sacrificed under a circumstance of necessity are completely different. Rather than being an innocent victim, a criminal being punished in itself conforms to the requirement of justice. Thus, there is no element of compromise or sacrifice, and the criminal has no right to claim any losses from his punishment.[13] On the basis of this consideration, moral rightists of contemporary liberalism usually tend to argue that punishment does not actually infringe on a criminal's moral rights. But how is that feasible? The various solutions proposed by moral rightists are discussed below.

II. Solution 1: Contextualization of Rights Content

There are roughly two pathways to resolving the conflict between the right to personal liberty and the penal practice. The first is to start with the coverage of a right holder's right to claim, namely, redefining the right to claim as not applicable in the specific context of a criminal being subjected to punishment, and thus, the punishment won't go against the right to personal liberty of the criminal; and the second is to start with the immunity of a right holder, namely, holding that although the right to personal liberty can't be deprived by others, it can be waived by a right holder himself or forfeited because of his act, and committing a crime is one of the circumstances that may trigger the waiver or forfeiture of one's right to personal liberty. The first pathway will be discussed in this section.

In the view of the contextualization of the right to claim, the right to claim under the right to personal liberty is not a universal claim that is not subject to preset contexts and applies in all space and time but has specific applicable

[12] Some contemporary scholars have tried to demonstrate that a penal system is essentially a trigger defense mechanism, and then to demonstrate the legitimacy of the right to punish from the perspective of the right to self-defense, See Warren Quinn, "The Right to Threaten and The Right to Punish," *Philosophy & Public Affairs*, vol. 14, no. 4 (1985): 327-373. But such efforts have not been widely recognized.
[13] Ibid., 328.

conditions and exceptions attached to it. According to Judith Thomson, these conditions may be either moral or factual.[14] For instance, scholars advocating the right having moral conditions attached to it may argue that the right to personal liberty doesn't have in its content that "I have the right to demand that you do not interfere with my personal liberty" but that "I have the right to demand that you not interfere with my personal liberty in a morally unjust way." On the basis of this view, the imposition of punishment does not infringe on a criminal's right to personal liberty as such punishment is morally just, and the right to personal liberty only asserts itself against a morally unjust interference. Yet, such an approach of defense may well not only fall into a circular argument but also lead to some constraints of rights forfeiture, which in turn contradicts the starting point, or rather the purpose, of the contemporary liberal theory of moral rights. The reason why it may fall into a circular argument is that "whether and why a punishment is morally just" themselves are exactly the topics to be verified here, and therefore, by seeking to explain that punishment does not infringe on a criminal's moral rights by basing the unverified premise "the punishment is morally just," this approach is a case of begging the question. Likewise, the reason why this approach of defense may lead to some constraints of rights forfeiture is that according to this view, the right is no longer an evaluation factor of the moral justice of an act. Rather, the moral justice evaluation of an act is independent of the right itself and determines a subject's entitlement to the right under a specific circumstance. Therefore, for the contemporary liberal theory of moral rights, this approach of defense will lead to the self-collapse of the theory.

Of course, there are more sophisticated variations of "moral conditions." For instance, Ronald Dworkin argues that the "liberty" in the right to personal liberty should not be factually understood but as a value, and not all constraints on an individual infringe on the value of liberty, so not all constraints on an individual infringe on the right to personal liberty. Whether a constraining act infringes on the value of liberty depends on whether it respects the dignity of the individual subject to the constraint, which in turn depends on whether it respects the subjective importance of his life and his special responsibility for his own life[15]. In short, according to Ronald Dworkin, the content of an individual's right to personal liberty is "I have the right to demand that you not interfere with my personal liberty in a way that will deny my personal dignity." Punishment does not deny a criminal's dignity. Therefore, it does not infringe on his right to personal liberty.[16] However, this variation of "moral conditions" all the same leads to constraints of rights forfeiture, serving only as a conclusion of the

[14] Judith Jarvis Thomson, "Self-defense and Rights," in *Rights*, *Restitution and Risk: Essays in Moral Theory* (Cambridge: Harvard University Press, 1986), 37-38.
[15] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 366.
[16] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 367.

argument rather than its basis and running counter to the purpose of the contemporary liberal theory of moral rights. Thus, it is usually hard to intuitively judge what ways of acts represent respect for others. The purpose of the contemporary liberal theory of moral rights is to enrich the connotation of "respect" by expressly specifying the content of the right (such as liberty), so as to provide clear-cut boundary restrictions on the act of other individuals and the state. Therefore, the connotation of the rights should be determined before that of respect. However, Ronald Dworkin's argument is to try to define the connotation of liberty through "respect for individual dignity," thus going against the purpose of the contemporary liberal theory of moral rights. Moreover, Judith Thomson also points out that "disrespect" and "right infringement" are not the same in extension. For instance, despite being disrespect to others, a contemptuous look did not infringe on their human rights. Only when their rights have been infringed on by some acts of disrespect, do individuals have the right to claim respect.[17] Of course, "a contemptuous look" does not necessarily constitute what Ronald Dworkin claims disrespect. Instead of drawing a judgment on Ronald Dworkin's view itself, this study simply makes clear that there is an internal conflict between his view of rights and the purpose of the contemporary liberal theory of moral rights.

Another approach of defense argues that rights contain certain factual conditions. For instance, the content of the right to personal liberty is not "I have the right to demand that you not interfere with my personal liberty" but "I have the right to demand that you not interfere with my personal liberty unless I do a certain criminal act." If other exceptions are included, the list of factual conditions may be longer. For instance, where legitimate defense may also be added, then the content of the right to personal liberty will be "I have the right to demand you do not interfere with my personal liberty unless I do some criminal acts (relative to punishment) or unless I am introducing a real and urgent danger (relative to legitimate defense) to the life, health or property of others due to my actions." There are also three defects with this approach of defense: First, this is an ad hoc remedial defense in that it deals with these circumstances beyond explanation in the theory of moral rights as exceptions but does not explain the basis for these exceptions; second, this approach of defense enables rights forfeiture to guide act. One of the essential functions of rights discourse in daily moral practice is to guide others' actions and clarify the boundaries of acts among subjects, which requires that the connotation of rights itself is relatively specific and clear. If all exceptions are included in the content of rights, the content of rights will be blurred, thus weakening its ability to guide others' actions; third, this approach of defense confuses various moral considerations of different types and at different levels. There may be many factors that determine

[17] Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), 210-211.

whether an act infringes on rights or is morally just. Putting all exceptional legitimate circumstances into the content of rights itself would conceal the complex structure behind moral trade-offs, thus, in fact, establishing the equivalent relation between the rights and "moral justification." Therefore, this approach of defense having factual conditions attached is also not reasonable.

In summary, resolving the conflicts between moral rights and penal practices by limiting rights content is not a feasible practice. The rights content attached with either moral or factual conditions will result in the constraining and explanatory force of rights forfeiture running counter to the purpose of the contemporary liberal theory of moral rights. Therefore, in exploring possible solutions to the conflict between moral rights and punishment, moral rightists are more likely to start with the rights associated with the right to claim and immunity, as will be discussed below.

III. Solution 2: Rights Waiver

As mentioned above, the dilemma of the contemporary liberal theory of moral rights is to have a clear and definite content of moral rights to ensure their explanatory force and constraining force while seeking a convincing explanation for punishment constituting no infringement on them. The right waiver is an easy way to get out of the dilemma. According to this view, the reason why punishment does not infringe on a criminal's moral rights is not that punishment is not within the protected range of the content of the relevant right to claim, but that the criminal waives his corresponding moral claim by exercising his moral rights of his own accord. This particular act of waiver is the "consent" as generally known to us. Larry Alexander pointed out that consent is the trump card of the liberalism theory, which justifies many unconsented arrangements that are unfair to relevant subjects.[18] Consent has such a moral magic as it represents the moral autonomy of an actor, reflects his liability for his own choice, and disqualifies others from interfering. Therefore, this independent choice has the constraining force not only on the consented subject himself but also on other individuals and the state.[19]

Why should a criminal agree to give up his moral right claim? There are two possibilities presented here: the first is that, before choosing to step into a particular social life, an infringer has had the general consent for the basic institutional arrangements in a society, including punishment. That is, the infringer agrees that if he does some criminal acts, he will immediately lose the corresponding moral claim. Therefore, punishment does not infringe on his right to claim. This idea is logically consistent with John Locke's consent theory on law-abiding obligations but also runs into the same tricky problem as the consent

[18] Larry Alexander, "Consent, Punishment and Proportionality," *Philosophy* & *Public Affairs,* vol. 15, no. 2 (1986): 178.
[19] C. S. Nino, "A Consensual Theory of Punishment," *Philosophy & Public Affairs*, vol. 12, no. 4 (1983): 306.

theory does: whether an individual actually makes such general consent, and whether the general consent has the moral constraining force. In fact, most people in a state have neither signed so-called specific social contracts nor expressly consented to be constrained by the state. Of course, one may contend that a person's choice to remain in a particular state and act by its institutional arrangements is in itself tacit consent. However, whether expressed or tacit consent, one of the premises that it has the moral constraining force is that the infringer gives his consent under the conditions of being reasonable, free, and relatively well-informed. Without reasonable alternatives (for instance, the possibility of death if giving no consent), the actor's consent (if still called "consent") is not a reflection of his moral autonomy and can't have the moral effect of waiving his right to claim. In challenging this kind of consent, David Hume gave an example: a passenger who can't swim is riding in a river, and chooses to stay on the boat. Does his choice to stay mean that he consents to the captain's harsh terms and subjects himself to moral constraints?[20] Obviously, even if his choice to stay may be understood semantically as a tacit consent, the tacit consent can't have a moral constraining force as the infringer has no other reasonable alternatives, and his decision is not a free choice. Similarly, in reality, most people do not have the physical conditions of freely choosing where to live. To have them leave the nation they are living in is tantamount to having them choose suicide. Therefore, whether their choice to stay put is tacit consent, it can't have the effect of waiving their moral claim.

Given the abovementioned problem with the idea of general consent, some scholars try to explore another one: When stepping into the life of a state, a criminal does not give his tacit general consent to related arrangements in its penal system, but expresses his consent to specific punishments by doing specific criminal acts. The most famous assertion of this view is Hegel's statement that the punishment fits the criminal's own will.[21] How do we understand this statement? First, this statement could not be understood to be that a criminal regards the ensuing punishment as the purpose of his crime. Although such cases may indeed exist in reality, most criminals do wrong for seeking unlawful interests rather than being punished. Another interpretation is that a person's criminal act itself expresses his consent to the possible ensuing punishment, thus waiving his corresponding moral claim. This view will be examined below in this section, and its most full and famous justification is given by C.S. Nino. Hence, this study will focus on his argumentation.

C.S. Nino states that if (a) under arrangements in a legal system, a person's

[20] David Hume, "Of the Original Contract," in *David Hume's Selected Essays on Politics*, translated by Zhang Ruoheng (Beijing: Commercial Press, 1993), 126-127.

[21] Hegel, *Elements of the Philosophy of Right*, translated by Fan Yang and Zhang Qitai (Beijing: Commercial Press, 1961), 103-104. Of course, many scholars do not believe that Hegel appealed to a criminal's realistic consent.

voluntary act X will inevitably lead to his legal responsibility Y; and (b) despite knowing the foregoing fact, he still chooses to do (c) the voluntary act X, then, he is consenting to bearing the legal responsibility Y and in turn losing his moral right to claim against the judicial organs to enforce the corresponding legal responsibility[22]. This circumstance is termed as consent proposition in this study. According to C. S. Nino, this proposition explains the sources of the moral legitimacy of many legal responsibilities in special laws, such as contract law, tort law, criminal law, and others. For instance, assuming a law provides that putting up a card at an auction means submitting a bid and the winning bidder assumes the obligation to make a payment. When a person who knows this provision still chooses voluntarily to put up his card, then he is consenting to assume the payment obligation and shall be bound by the obligation. Likewise, if a person who knows the specific criminal responsibility for an offense still voluntarily chooses to commit the offense, he is consenting to be punished accordingly.

On the "voluntary conduct" specified in condition (C), C.S. Nino imposes further restrictions: If the alternatives to act X themselves carry other burdens, then the actor's choice of doing the act X is not made voluntarily, unless alternative burdens can be justified without the consent of the infringer involved[23], for instance, if a criminal law provides that committing the act X is subject to the punishment P and not performing the act X the punishment Q, then, it can't be said that the actor, whether doing or not doing the act X, is consenting to the corresponding punishment, because the alternative acts to the act X carry additional burdens, and these burdens can't be independently justified. On the other hand, the obligation of "no killing" is a heavy burden for some individuals with murderous habits, but that does not mean that his choice to kill is not voluntary because the obligation of "no killing" can be independent moral justification in advance, and thus is a reasonable burden.

Regardless of the details of C.S. Nino's argumentation, his core point can be expressed simply as: with the premise that other conditions are justified, if a person knows that the act X will lead to the loss of his legal right to claim C1, and still voluntarily chooses to conduct the act X, then, he waives the moral claim C2 corresponding to C1.[24] However, voluntarily waiving a moral claim presupposes that the infringer is willing to waive the moral claim. So, how does C.S. Nino establish the connection between "knowing the loss of the legal right to claim C1" and "waiving the moral claim C2"? In the view of this study, to establish the connection, C.S. Nino must presuppose that the infringer holds an intrinsic participant perspective regarding the law as his code of acts. If the

[22] C. S. Nino, "A Consensual Theory of Punishment," *Philosophy & Public Affairs*, vol. 12, no.4 (1983): 294.
[23] Ibid., 303.
[24] Ibid., 296.

infringer regards the legal requirement as his inherent code of acts in the first place, then he actually consents to waive the corresponding moral claim when he voluntarily performs something that leads to the loss of the legal right to claim. In contrast, for a "bystander" or even a "dissenter" who does not regard the law as an internal evaluation standard of acts, his act does not contain the willingness to waive the moral claim. For instance, if a dissenter believes from the very beginning that the whole legal system he lives with is unjust and intends to demonstrate his challenge to the legal system by violating the norms of criminal law, then his criminal act itself obviously does not mean that he consents to waive his own moral claim.[25]

C.S. Nino's answer to the abovementioned question is that there is no necessary connection between an actor's consent and his attitude towards the normative burden. In a voluntarily executed contract, a party's disgust with his contractual obligations does not affect his obligations thereunder.[26] The error in this answer is that C.S. Nino failed to distinguish between the "consent" and the "motive of consent." A person's motive for consenting to bear an obligation may be diverse. He may not prefer an obligation but choose to consent to assume it simply out of some prudent motive. But no matter what the motive of his consent, whether he prefers the corresponding normative consequences, the consent itself entails the willingness to accept a specific normative effect. Therefore, as long as the contractual conclusion itself implies the willingness to be constrained by relevant obligations, then no matter what it is, the attitude of the infringer towards the obligations will not affect the assumption of the obligations. In contrast to the aforementioned dissenter case, the dissenter himself does not have any intention to be constrained by the legal system, so his criminal act can't be regarded as his consent. Therefore, C.S. Nino failed to argue effectively that a criminal's voluntary criminal act itself means that he waives his corresponding moral claim.

In summary, both the views of John Locke's general consent and C.S. Nino's specific consent have major defects. Of course, in reality, there are indeed cases of a criminal consenting to be punished, but that is not a universal phenomenon and can't serve as the general basis for justifying a penal system. To resolve the conflict between moral rights and penal practices, we must explore other alternative approaches.

IV. Solution 3: Rights Forfeiture

Many moral rightists will eventually turn to the approach of rights forfeiture to explain why punishment doesn't infringe on a criminal's moral

[25] Similar rebuttals, See Stephen Kershnar, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," *Philosophia*, vol. 29, no. 1 (2002): 68.
[26] C. S. Nino, "A Consensual Theory of Punishment," *Philosophy & Public Affairs*, vol. 12, no. 4 (1983): 295.

claim.[27] As mentioned above, rights forfeiture herein refers specifically to the circumstance where a subject's right to claim is automatically eliminated out of acts other than the subject's involuntary rights waived. This is actually the moral philosophy fitting quite well with the intuition of an ordinary person. Many grow up with the belief that if a person infringes on others' rights, he has no right to demand others not to infringe on his right of the same kind, no matter whether he is willing to waive his right voluntarily.

A preliminary rights forfeiture proposition (T1) can be derived from the above mentioned intuitive view: if the infringer A infringes on the moral claim C1 of others without moral legitimacy or grounds for exemption, then A forfeits his moral claim C1 or a C1-like right to claim C2. For instance, if A illegally detains B and infringes on B's moral right to personal liberty, then he forfeits his right to personal liberty. Therefore, the state imposing a sentence of an appropriate term of imprisonment on a criminal does not infringe on his moral claim.

Dissenters challenge T1 at two levels: the reasonableness and the grounds for justification, with the former meaning that T1 should be able to explain some core features of a penal system and should imply no obviously absurd conclusions, and the latter that T1 proponents need to argue what the moral grounds underlying rights forfeiture is and why an act of infringement leads to the forfeiture of an actor's rights. A look into the criticism from dissenters and the response of proponents respectively at the two levels is given as follows in this study.

A. Reasonableness of rights forfeiture

In terms of reasonableness, the most famous criticism comes from Warren Quinn. He holds that the interpretation of punishment justification by the rights forfeiture view is either unreasonable or redundant. For instance, he said, a committed theft and a law court meted out a sentence of a set term of personal liberty deprivation. The proponents of the rights forfeiture view would claim that the moral justification of the court's sentence derives from A's forfeiture of his rights. But suppose that B kidnaps and keeps under house arrest A for the same period before A is arrested. If A really forfeits his corresponding right to personal liberty because of his theft, how do we explain the moral injustice of B's kidnapping?[28] This issue may as well come out as the puzzle of the punishment subject. That is, the rights forfeiture view fails to explain why only

[27] Alan Goodman, "The Paradox of Punishment," *Philosophy & Public Affairs*, vol. 9, no. 1 (1979): 43-45; Christopher Morris, "Punishment and Loss of Moral Standing," *Canadian Journal of Philosophy*, vol. 21, no.1 (1991): 53-79 ; Stephen Kershnar, "The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing," *Philosophia*, vol. 29, no.1 (2002): 57-88; Christopher Wellman, *Rights Forfeiture and Punishment* (Oxford: Oxford University Press, 2017); Gerald Lang, "Why not Forfeiture?" in *How We Fight: Ethics in War* (Oxford: Oxford University Press, 2014), 38-61.

[28] Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy & Public Affairs*, vol. 14, no. 4 (1985): 332.

specific subjects can impose punishments.

Proponents of the rights forfeiture view may contend that a criminal doesn't forfeit his rights to any individuals but only to the community of individuals as a whole, and thus, only the state representing the whole community has the right to impose a punishment; or that a criminal forfeit his rights only to the victim, and thus, the victim has the privilege to punish the criminal. As such privilege has been transferred to the state in one way or another, so only the state has the right to punish the criminal. Either way, proponents need to explain further why such rights forfeiture should be limited to specific subjects; otherwise, this contention would seem to be an ad hoc remedial argumentation. However, Quinn argues that even if the foregoing remedial argumentation is acceptable, the rights forfeiture view still can't hold water as avoiding unreasonable conclusions by imposing additional restrictions will mean such rights forfeiture runs into the same defects as the abovementioned rights contextualization does, namely the redundant content and the explanatory force. Suppose A is arrested and imprisoned for theft, but is meted out a sentence of the equal term of imprisonment by a court for some wrong charges other than theft. If A has forfeited his right to claim personal liberty from the state, how do we explain the moral injustice of the state's act of wrongful imprisonment of A? Proponents of the rights forfeiture view may revise their doctrine as that, besides specific subjects, A's rights forfeiture is also limited to specific reasons (must be based on specific crimes). Namely, A's rights forfeiture simply implies that he can be punished by specific subjects for specific reasons, and any punishment otherwise would still constitute an infringement on his moral claim. With regards to this, Quinn points out that additional restrictions would render such rights forfeiture lose its explanatory force. One of the hard nuts to be cracked with the punishment theory is to explain why the justifiable punishment has to satisfy this set of restrictions, and the rights forfeiture view claims that such rights forfeiture itself implies this set of restrictions. Therefore, their arguments are nothing more than tautological.

However, proponents of the rights forfeiture view also provide other ways of responding. Christopher Wellman turned to the approach of pluralistic interpretation. He insists that Quinn's instances mentioned above have drawbacks at various levels, which can't be explained by rights forfeiture alone, and other moral and political principles should also step in.[29] In this way, he tried to save the rights forfeiture view from absurd conclusions while ensuring the rights forfeiture itself was simple and clear. He believes that as the question why only the state has the right to impose punishment can't be solved within the framework of rights forfeiture, some independent state theory on the state's

[29] Christopher Wellman, "The Rights Forfeiture Theory of Punishment," *Ethics*, vol. 122, no. 2 (2012): 379-384.

monopoly on penal power is needed to find the answer, and likewise, the rights forfeiture view does not necessarily need to assume that the rights forfeiture is associated with specific right reasons for action. Even if the state punishes a criminal for having committed crime A on the basis of a wrong charge B, the punishment will not infringe on the criminal's moral claim as long as this punishment, both in quality and quantity, is equal to the one the criminal should have been subjected to. The reason why the punishment meted out on the basis of a wrong charge is still moral is not because of the infringement on the criminal's moral claim but probably the violation of other procedural moral requirements.

This study believes that Wellman's approach to pluralistic interpretation is tenable. Hence, the reasonableness of the rights forfeiture view isn't a fatal challenge. The core question to be explained with the rights forfeiture view is why questions such as a criminal do not lay his moral claim against the punishment, the state can justifiably monopolize the punishment, and what due process the state should follow while imposing the punishment, can't be answered by the rights forfeiture view alone. Of course, the approach of pluralistic interpretation also puts additional argumentation burdens on Wellman, who has to provide a reasonable answer to each of the foregoing questions, and explain that these answers are not in conflict with each other, and to this end, Wellman indeed made some effort[30]. By the way, in this study's view, although commenting on his overall view is out of the realm of this research, the justification basis of rights forfeiture is a much more daunting challenge, which will be discussed below.

B. Moral principles of rights forfeiture

Despite its intuitive appeal, the concept of rights forfeiture is not self-evident. Rights forfeiture theorists have to explain that the rights forfeiture will not lead to absurd conclusions. Also, they have to shed convincing light on the moral principles underlying the rights forfeiture. Why does an infringement on others' rights lead to the infringer's forfeiture of his rights? Does an infringer having forfeited his rights remain obliged to respect the rights of others? Will the forfeited rights be reinstated to the infringer when his punishment is served? Answering these questions entails a systematic set of explanations.

With the belief that an infringer is or is not obligated to respect others' rights during his rights forfeiture, the rights forfeiture view breaks down into two theoretical camps: The symmetry doctrine and asymmetry doctrine. The first camp affirms that, having forfeited his own rights, an infringer has instantly no longer the obligation to respect others' rights, or rather, others' moral rights instantly lose their binding and constraining forces on the infringer, which, in

[30] Christopher Wellman, "Rights and State Punishment," *The Journal of Philosophy*, vol. 106, no. 8 (2009): 419-439.

essence, means that it is because of an infringer's forfeiture of some of his moral standing to be back in a natural state with others that he forfeits his rights.[31] The asymmetry doctrine holds that if an infringer has forfeited specific rights but remains under the obligation not to infringe on others' rights, he is being stuck in an asymmetric status of rights and obligations against others,[32] though that does not mean that the moral standing of others is higher than the infringer. On the contrary, it is precisely being still stuck in this normative relationship of equality and reciprocity that results in this asymmetric status of rights and obligations between the parties.

1. The symmetry doctrine

The idea of the symmetry doctrine (an infringer's forfeiture of his specific moral standing) is found in some classical contract theories. For instance, Rousseau holds that a criminal "becomes a betrayer of his nation for his crime; he breaks the laws of his nation, so he is no longer a member of his nation, and even declares war against his nation."[33] Johann Gottlieb Fichte also argues that "Intentionally or carelessly, whoever breaks the civil contract loses, in a technical term, all his legal rights as a citizen and as a person and is completely not under protection of law as he has been deemed as prudent by the civil contract."[34] The basic idea behind these comments is: the rules of justice (for instance, individual rights) as a man-made creation aren't something that existed before a society but a contract signed by reasonable creatures to realize some common interests. Where a party forfeits his qualification of signing such a contract for some reason, he is excluded from the contract and neither protected nor constrained by the rules of justice. Of course, that does not mean that he is not bound by any moral principles, but justice as a special man-made morality can only remain silent here.

Anchoring on this rational contract-based view of justice, contemporary scholar Christopher Morris further elaborated the moral principles of rights forfeiture. The rational contract-based view of justice believes that people have reason to comply with the requirements of justice because they identify with the rules of justice and promise to act by their requirements under particular ideal contractual circumstances. The efficacy of the rules of justice presupposes three premises (i. e., the environment of justice in the term of David Hume): the possibility of common interests, the capability to comply with the rules of justice,

[31] Christopher Morris, "Punishment and Loss of Moral Standing," *Canadian Journal of Philosophy*, vol. 21, no. 1 (1991): 66-69.
[32] A. John Simmons, "Locke and the Right to Punish," *Philosophy & Public Affairs*, vol. 20, no. 4 (1991): 332-335; David Rodin, "The Reciprocity Theory of Rights," *Law and Philosophy*, vol. 33, no. 3 (2014): 281-308.
[33] Rousseau, *Du Contrat Social,* translated by He Zhaowu (Beijing: Commercial Press, 2003), 43.
[34] Ficht, *Foundations of Natural Right*, translated by Xie Dikun and Cheng Zhimin and proofread by Liang Zhixue (Beijing: Commercial Press, 2004), 260.

and the willingness to comply with the rules of justice.[35] The reason why an infringement on others' rights causes an infringer's forfeiture of his moral standing is that his act of infringement reflects his unwillingness to comply with the rules of justice, thus forfeiting his qualification as a contracting party and being excluded from the rational contract. Hence, the infringer can only fall on "kindness" of others to request others not to hurt himself rather than demand others to respect his moral rights.

This study believes that the attempt mentioned above is a failure. The rational contract-based view of justice does not necessarily take it for granted that an infringer is bound to be excluded from the efficacy of the justice rules. Even if the efficacy of the rules of justice presupposes that relevant subjects have the willingness to comply with the rules of justice, as Christopher Morris affirms, doing an infringement act does not mean that the infringer thoroughly forfeits his willingness to comply with the rules of justice. It is necessary to distinguish the infringer's intentions and motives. First, although there may indeed be the case that some creatures are strongly hostile to society as a whole, wanting to destroy the rules of justice for the whole society from the bottom of their hearts, most infringements on others' rights are not driven by infringers' hostility to the rules of justice themselves but other factors (such as pursuit of short-term interests and having poor self-control) prevailing over righteous motives. Therefore, such infringers still identify with the environment of justice and should not be excluded from the efficacy of the rules of justice. Furthermore, if justice is indeed a rational contract, corresponding institutions and mechanisms should be designed to highlight the motives of such subjects compliant with the rules of justice, and the penal system seems to be exactly such a mechanism. According to this interpretation, imposing punishments does not mean that a criminal concerned is excluded from the rules of justice; on the contrary, the penal system itself is a requirement of justice. The details can't be further expounded on herein. Notably, what is emphasized herein is that the rational contract-based view of justice does not necessarily believe that an infringer is willing to forfeit his standing as a contracting party and thus is excluded from the rational contract.

However, despite failing to justify the symmetric rights forfeiture, the rational view of contract justice is believed herein to have actually carved out a new approach to understanding moral rights, promising to bypass the dilemma posed by moral rights in punishment justification, as, rather than as an independent constraining reason on acts, it has regarded moral rights as part of a system of rational rules, thus enabling this system of rules to be justified as a whole. A further discussion on this topic is made in the fifth section herein.

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[35] Christopher Morris, "Punishment and Loss of Moral Standing," *Canadian Journal of Philosophy*, vol. 21, no. 1 (1991): 59.

2. The asymmetry doctrine

The asymmetry doctrine believes that an infringement on the moral rights of others will lead to the infringer's forfeiture of his moral right of a specific type and to a specific degree, but the infringer is still obliged to respect moral rights of others, so the infringer is stuck in an asymmetric status of rights and obligations against others. In this view, the infringer is not excluded from the rule of justice due to his acts but simply is under less protection than the constraint on him under the rules of justice.

In order to understand the essence of the asymmetry doctrine, the protected scope of the right to claim in moral rights may as well be regarded as the inherent moral boundaries of individuals' lives. Despite differing on the extent of an individual's inherent moral territories among scholars, most agree that the use of an individual's own body is a core part of his moral territories and thus it has been defined by Judith Thomson as the First Property.[36] There are also a lot of unoccupied spaces among the inherent moral territories of different individuals, and these unoccupied spaces and an individual's inherent moral territories combine to form the range of his liberty to act, also known as the range of his moral privileges. However, this claim of the asymmetry doctrine can be construed as once an individual trespasses on the moral territories of others, his moral territories will automatically be shrunk proportionally, and the trespasser also shall no longer insist that others not trespass on his original moral territories until his punishment is served when his original moral territories are instantly reinstated.

How do we explain this? Some scholars have tried to turn to the value of fairness or reciprocity. For instance, John Simmons, a modern defender of John Locke's rights view, states that natural fairness can explain why an infringement on others' rights causes an infringer's rights forfeiture. If someone infringes on right of others to claim but still retains all of his own moral claim, then it is unfair to those who voluntarily perform self-discipline as it, in fact, allows the range of the infringer's liberty to act to be greater than that of others. This reasoning seems feasible but is flawed to analysts with a nuanced eye. At the normative level, although the infringer has trespassed on others' moral territories, the moral territories of others haven't shrunk, and the infringer remains obliged not to make such an infringement. That is, on the strength of his act of infringement, the infringer hasn't snatched moral gains. Meanwhile, at the factual level, whether others bear the burden of self-restraint is more of an accidental psychological empirical fact, and the infringer does not necessarily possess a larger de facto capability to act than others.[37] Thus, John Simmons'

[36] Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), 226.
[37] Matthew H. Kramer, "Retributivism in the Spirit of Finnis," *University of Cambridge Legal Studies Research Paper Series*, No.43/2011, page 4-6.

argumentation fails to make clear why an infringer's forfeiture of his right to claim conforms with the principle of fairness.

Some may respond: "He has indeed infringed on the rights of others. Will such infringement happen without any effects on his own rights and obligations?" Of course, it produces some effects, but the effects don't necessarily come out in the form of the forfeiture of his right to claim. For instance, they may emerge in the form of the forfeiture of some of his privileges. An infringer's infringement on others' rights will trigger a series of secondary obligations, such as remediation, compensation, and even protection. That is to say, an infringer's scope of privilege to act is shrunk, whereas the scope of the right to claim of the victims and even others will be expanded proportionally. Yet, the shrinkage of an infringer's scope of privilege to act does not mean the inevitable that of the range of his right to claim and, in turn, the inevitable expansion of the range of others' privilege to act. Therefore, further argumentation is needed from the "an infringement leads to an infringer's forfeiture of his privileges" to the "an infringement leads to an infringer's forfeiture of his right to claim."[38] For example, if A maliciously breaks an arm of innocent B, then A has the obligation to remedy and compensate for the consequences arising from his malicious act, and even the obligation to protect B from similar infringements, as some scholars claim, if the damage can't be fully compensated.[39] But none of the said obligations implies A's forfeiture of his right to claim personal liberty. Some may respond that if B doesn't restrict A's privilege to personal liberty, the said obligations, such as remedy, compensation, and protection, will be unenforceable. This is not a strong rebuttal. Supporters need to directly argue why B has the privilege to restrict A's personal liberty and otherwise have to recognize that these obligations are enforceable only when A's right to personal liberty is not infringed on.

In conclusion, as far as the ongoing discussion is concerned, the value of fairness does not provide a reliable defense of rights forfeiture's asymmetry doctrine. Of course, fairness is a highly complex issue, and its value can engender various punishment justification schemes. This study can't discuss all of them. What the following wants to illustrate is that even if one of these schemes is feasible, the approach of rights forfeiture as a whole is still a failure, as rights forfeiture is not a unique way of extinguishing the right to claim.

3. Rights forfeiture or rights deprivation?

Is "rights forfeiture" a unique circumstance that can extinguish the right to claim? This in itself is worth further reflection. In the preceding part of this text, rights forfeiture has been juxtaposed with rights deprivation and rights waiver, but the concept of forfeiture is far less clear-cut than those of deprivation and

[38] Christopher Wellman, *Rights Forfeiture and Punishment* (Oxford: Oxford University Press), 26.
[39] Victor Tadros, *The Ends of Harm* (Oxford: Oxford University Press, 2011), 273.

waiver. Deprivation means the circumstance where a subject exercises his moral power to have others' right to claim extinguished, while waiver is the one where a right holder (with the right to claim) himself has his right to claim extinguished by exercising his moral rights. Both the concepts contain a complete set of normative relations, namely "the exercise of moral rights by specific subjects" procures "the extinguishment of the right to claim," coming out as the idea of moral autonomy. But what does rights forfeiture mean? As defined above, it means the circumstance where a subject has his right to claim automatically extinguished due to doing some acts other than his voluntary waiver. Although there are two substantive elements in this definition: "doing some acts" and "automatic extinguishment of the right to claim extinguishment," other factors, such as what moral mechanisms work between the said substantive elements and how specific acts produce the effect of the extinguishment of the right to claim, are not found in it.

Therefore, some scholars believe that rights forfeiture's interpretation of the moral permissibility of punishment is either inadequate or redundant.[40] This study agrees with their criticism. To say it is insufficient, the basis is that the concept of rights forfeiture itself is not associated with a specific substantial value, thus not being up to the justifying job. In contrast, the concept "consent" is always associated with moral autonomy, and thus provides the initial justification for the extinguishment of the right to claim. Alternatively, if supporters of the rights forfeiture theory introduce substantial moral principles to perform the justifying job, then rights forfeiture is redundant. Just to compare the following claims: "Punishment of a criminal is morally permissible because he forfeits his right, and the forfeiture of his right is because it meets the requirement of fairness" and "Punishment of a criminal is ethically permissible because it meets the requirement of fairness." The former has one more intermediate link than the latter, rights forfeiture, but this link does not perform any justifying function. Some may contend that this criticism imposes a too demanding requirement on the rights forfeiture theory as even the consent theory also has to turn to additional moral values to perform its justification. However, "consent" is at least an intermediate moral justification, which can be shared by various individuals with moral propositions at different levels, while "rights forfeiture" comes out directly with the conclusion: the extinguishment of the right without giving any substantial grounds underlying it.

Despite being valid, the above criticism is still incomplete and thorough. Why are many theorists of rights still reluctant to give up the concept of rights forfeiture since it is so obviously defective? This study affirms that if replaced by right deprivation, the so-called rights forfeiture can clearly explain many

[40] Massimo Renzo, "Rights Forfeiture and Liability to Harm," *The Journal of Political Philosophy*, vol. 25, no. 3 (2017): 326.

circumstances. However, many theories of rights are reluctant to recognize that, as a type of moral right the right to personal liberty can be deprived and, therefore, can only be replaced with a rather unclear concept like rights forfeiture. So, the concept of rights forfeiture lays bare the internal dilemma of the contemporary liberal theory of moral rights. To understand this, you can compare the system of moral rights with the system of legal rights. According to constitutions and laws, citizens have the legal right of personal liberty (the right to claim), and since it is so, why doesn't punishment infringe on the legal rights of citizens? A reasonable and simple interpretation is that the judiciary is authorized by constitutions and laws to deprive the right to personal liberty of citizens within specific limits and on specific grounds. This interpretation can explain why ordinary citizens have no right to punish a criminal and why only a punishment executed on the basis of the conviction and sentencing made following statutory judicial procedures is justified. This is because any subjects other than the judiciary have no right and power to deprive others of their right to personal liberty arbitrarily, and the law also sets strict triggering conditions for judicial organs to use their right and power to deprive a criminal of his rights.

Why can't the same reasoning structure be directly applicable to moral rights? In the eyes of many theories of moral rights, since everyone is born equal, without consent, no subject has the moral power to deprive others of their moral right to personal liberty, and likewise, not having been authorized by specific subjects, organs of state also have no moral power to deprive others of their moral right to personal liberty. Moral rightists of contemporary liberalism are caught in a dilemma here. They either recognize that, as a type of basic moral right, the right to personal liberty can also be deprived, which would run counter to their basic idea, or that punishment always infringes on a criminal's moral rights, which would mean that a penal system can't be morally justified. The concept of rights forfeiture is, in essence, the "mysterious monster" created by moral rightists of liberalism to cover up their dilemma: when a person infringes on others' rights, his rights are automatically forfeited, and when he serves his punishment, his forfeited rights are automatically reinstated. With this well-designed solution, theorists manage to avoid the concept of right deprivation while securing the justification of punishment. But in reality, it is simply a Trojan horse that has covered up the real dilemma that the contemporary liberal theory of moral rights is caught in over the issue of punishment justification.

This study believes that the concept of rights forfeiture should be cast off, and the dilemma of the inalienable right to personal liberty and justified punishment should be squarely addressed. In this study's view, a reasonable direction to break this dilemma is to recognize that some moral rights are subject to deprivation by other subjects and that the moral right and power to right deprivation does not require authorization from a right holder himself. "The

existence of inalienable moral rights" itself is not self-evident but rather to be justified, and theorists shouldn't use them as a matter-of-course premise of argumentation. Some scholars may contend that the inalienable right to personal liberty has never been so used, and, on the contrary, the reason why the right to personal liberty can't be deprived is that everyone is born equal and none is born to have a higher moral standing. Having the moral power to deprive others of their right to personal liberty means that the said subject can change his basic moral relations with others by actively exercising his unilateral will, rendering others at a moral disadvantage, and also means that the said subject commands a higher moral standing than other subjects. Yet, this is exactly in conflict with the basic moral premise: an equal standing. Therefore, from the perspective of equal standing, everyone must have some moral rights to claim that they can't, without consent, be deprived by other subjects.

The point at issue, therefore, is whether there is a conflict between the recognition that some subjects (for example, states) have the moral power to deprive others of their basic moral claim without consent (for instance, the right to personal liberty) and the fundamental moral premise that all men are born equal in standing. This study believes that the crux in answering this question is to break the special understanding of the relations among the right to claim, privileges, and power in the system of moral rights, which will be discussed below.

V. Two Ways of Understanding Moral Rights

All the approaches to resolving the conflict between moral rights and penal practices adopted in the contemporary liberal theory of moral rights, such as limited content, consent waiver, and rights forfeiture, have proven to have shortcomings. But that does not mean that penal practices can't be morally justified. In contrast, this study believes that it lays bare the intrinsic defects of these doctrines or views of moral rights themselves. This section affirms that the contemporary liberal theory of moral rights presupposes a unique way of understanding moral rights, which exactly renders these doctrines and views stuck in a dilemma of justifying punishments. If we take some new way of understanding moral rights, these doctrines and views might still work well in resolving many problems, including punishment.

To understand the way moral rights are used by the contemporary liberal theory of moral rights, you may turn back to the basic ideas of the rights forfeiture theory. Rights forfeiture theorists assert that everyone is born with the moral claim to demand others not interfere with his personal liberty and that this right to claim is morally legitimate and defensible against any social utilitarian considerations. When being employed as a form of interfering with personal liberty, punishment has its legitimacy called into question by moral rights. Then, since a criminal doesn't consent to be voluntarily punished and the moral claim

is above deprivation by any other subjects, rights forfeiture (an infringer gives up the rights of his own accord) seems to be the only option left available.

The foregoing argumentation starts with treating the moral claim to personal liberty as an independent, non-derivative, and constraining first-order reason of act, and then looks for other independent second-order reasons of act, extinguishing the constraining first-order reason of act. These reasons, respectively, in first and second order, are independent of each other both in concept and justification. This study names this way of understanding moral rights as the patchwork view of moral rights. According to this view, there may not exist some unified internal connections between the content of the moral claim to personal liberty and its acquisition and extinguishment rules, and competing values (such as autonomy and fairness) may be involved in the view.

This study believes that there is another way of understanding moral rights: to tuck various categories of rules, such as content rules, the rules of acquisition and extinguishment, privilege rules, and so on, into a rule system functioning as a whole, where various categories of rules combine and coordinate to serve specific values, thus eliminating the necessity of justifying individual rules. With this way of understanding, the question transforms from the "for what reason can others' moral claim to personal liberty be extinguished" into "whether this whole system of rights rules can be overall morally justified." With this way of understanding, even if you recognize that some subjects may, without consent, deprive other subjects of their moral claim to personal liberty, it does not necessarily go against the fundamental moral premise that all men are born equal in standing. On the contrary, it is exactly a complete set of the rules of rights, including rights deprivation, that guarantee persons' equality in moral standing.

A short briefing on a similar controversy in the property rights field helps to understand the foregoing distinction. In the philosophical inquiry about property rights, the legitimacy basis of the rules of property acquisition has been debated. Suppose that people support some rule of labor-based property acquisition but still differ over the grounds of its justification. Some may believe that labor-based property acquisition embodies the concept of moral desert, others that labor-based property acquisition contributes to the overall efficiency, and both insist that independent justification is needed for it rather than bundling it with other related rules, such as the use rule, into a whole system. Other scholars point out that the general idea of the foregoing debate is wrong: The property acquisition rule needs no independent justification. Rather, its acquisition, its exercise, its extinguishment, its enforcement, and others, constitute a whole, and jointly serve a specific value. This is the systematic understanding of the property rights rules.[41]

[41] Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), 331-332.

This study believes that, just as with property rules, there are also two ways of understanding more basic moral rights: patchwork and systematic, with the latter more reasonable, as various rules of acquisition, exercise, extinguishment, enforcement and so on likewise constitute a whole and work together to serve a specific basic human value. With the moral claim to personal liberty being no longer an independent and non-derivative reason for an act but a part of a systematic arrangement, even if the right to claim is recognized to be deprived, it does not necessarily conflict with the basic value of equality, and does not mean that you recognize that some subjects have a higher moral standing than others.

The abovementioned description of the systematic understanding of moral rights may be too abstract, but a concrete example will be given below. A contemporary republican interpretation of Immanuel Kant's theory of moral rights holds that the essence of rights is "equal liberty" or "freedom as non-domination," namely, no-one is subject to arbitrary unilateral will of another.[42] Therefore, the inherent rights, private rights, and public rights (including the right of the state to punish) in Immanuel Kant's theory of moral rights should not be understood and justified individually, but as a whole to ensure the realization of equal liberty for all. Since an effective legal order is a necessary condition for securing equal liberty, and universal deterrence is, in turn, a necessary condition for ensuring the efficacy of a legal order, the right of the state to punish per se is an indispensable part of guaranteeing the efficacy of a legal order and then equal liberty. Although the truth and validity of this argument can't be expounded on herein, it is important that, instead of the question: Why punishment does not infringe on individuals' inherent rights (the right to personal liberty), we should ask another question: "whether and in what sense a penal system is the integral part of a system guaranteeing equal liberty among individuals"? If guaranteeing equal liberty indeed entails granting the state the right and power to deprive its citizens of their right to personal liberty, then such a system design is legitimate and justifiable, and people no longer need to inquire about where the state's moral power to deprive individuals' rights derive.

The abovementioned systematic understanding contains two further claims, which conflict with moral rights' patchwork understanding. First, rights are no longer an absolutely independent and non-derivative first-order reason of act but the optimal interpretation of their contents, acquisition and extinguishment being subject to the value of their services (for instance, equal liberty), and rights per se are just an intermediate conclusion; second, the content and efficacy of rights are not established before the state and don't constitute the boundaries of

[42] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009), 24. "Introduction of the Republican View on Liberty," See Yao Dazhi, "the Republican View on Liberty: Freedom as Non-domination," *Journal of Social Sciences* 5 (2018): 109-116.

the power of the state. On the contrary, both individuals' rights and the state's rights and power should be regarded as part of an ideal system of norms to jointly serve a specific value goal. Once the systematic understanding of moral rights is accepted, the question of "why a punishment does not infringe on moral rights" is no longer the core issue in punishment justification. For instance, the punishment theory proposed by Anthony Duff, a famous contemporary criminal law philosopher, embodies the systematic understanding of moral rights. In his opinion, the crux of punishment justification is not to resolve possible conflicts between punishment and moral rights, but to research whether punishment as an institutional arrangement is compatible with a political community's respect for all its citizens,[43] and thus, requiring researchers to have both the community dimension and the individual citizen dimension incorporated in their theoretical perspectives, and overall justify specific institutional arrangements, instead of individually and separately looking into the relations between punishment and specific moral rights.

Distinguishing between patchwork understanding and systematic understanding of moral rights creates new ideas for punishment justification and leads to a broader application space. For instance, it helps in settling theoretical disputes relating to the concept of human rights. Nowadays, two differing views on human rights co-exist: The naturalistic conception of human rights and the political conception of human rights.[44] According to the naturalistic conception of human rights, human rights, both in international and domestic law, are essentially institutionalized mirror images of some basic moral rights, whose content transcends specific historical backgrounds and whose justifying basis derives from some basic attributes that everyone is entitled to, such as human dignity and normative initiative.[45] The naturalistic conception of human rights is deeply influenced by the modern theory of natural rights, whose basic view is that everyone has inherent moral rights in the pre-politics natural state. These inherent moral rights constitute a strong constraint on other individuals and the state[46]. In contrast, the political conception of human rights emphasizes that the content of human rights rules should be understood by its functions in specific rule systems in specific historical contexts, and has a more diversified attitude on their justification basis.[47] The naturalistic conception of human rights is

[43] R. A. Duff, *Punishment, Communication, and Community*, translated by Wang Zhiyuan, et al. (Beijing: China University of Political Science and Law Press, 2018), 94.
[44] S. Matthew Liao and Adam Etinson, "Political and Naturalistic Conceptions of Human Rights: A False Polemic?" *Journal of Moral Philosophy*, vol. 9, no. 3 (2012): 327-352.
[45] "For the classical defense of the naturalistic conception of human rights," See James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 29-56.
[46] A. John Simmons, "Human Rights, Natural Rights, and Human Dignity," in *The Philosophical Foundations of Human Rights*, R. Cruft etc. eds. (Oxford: Oxford University Press, 2015), 145.
[47] "The Classical Defense of the Political Conception of Human Rights," See Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 128-160.

generally recognized to have both advantages and disadvantages, with the former being that it can establish a solid moral foundation for human rights and prevent the state from arbitrarily changing the connotation of human rights for policy purposes, and the latter that it has a weak explanatory force in addressing today's complex practice of human rights rules and fails to explain the existence of new human rights. For example, the naturalistic conception of human rights seems to be hard to explain the digital human rights advocated by contemporary scholars, especially the right to personal information, as the digital human rights themselves presuppose specific historical contexts and institutional environments. The same is true with the political conception of human rights, with its advantage being that it places high emphasis on the historical and realistic dimensions of the practice of human rights rules, and its drawback is that it decouples human rights from moral rights, which may weaken the normative connotation and morally constraining force of human rights, and even be reduced to relativism of human rights.

This study believes that the systematic understanding of moral rights justifies the political conception of human rights, enabling it to retain its existing advantages while preventing it from decoupling human rights from moral rights. As mentioned above, the naturalistic conception of human rights holds that human rights are essentially some institutionalized mirror images of some basic moral rights, and its understanding of basic moral rights is influenced by the theory of natural rights. The theory of natural rights holds that some basic attributes of human beings engender some inherent moral rights (i.e., natural rights). These intrinsic moral rights are independent and constraining first-order reasons of acts, which are not subject to specific spatiotemporal environments, thus being able to impose obligations on other individuals and the state, and in answering such questions as whether natural rights are constrained, forfeited, or deprived, other considerations are needed. It can be seen that natural rights actually accept the patchwork understanding of moral rights. Therefore, the naturalistic conception of human rights is also bound to run into the dilemma of justifying punishments, as mentioned herein, and it is hard to gain a systematic understanding of complex human rights practices. In contrast, the political conception of human rights emphasizes the holistic understanding and justification of a system of human rights rules, thus being inherently consistent with the systematic understanding of moral rights. This study believes that the political conception of human rights does not need to decouple human rights from moral rights. Instead, it might as well fully recognize the internal relations between human rights and moral rights, but a systematic understanding of moral rights should be adopted. Of course, with the way of systematic understanding once adopted, moral rights are no longer the ultimate justifying basis of human rights. Instead, the exercise, acquisition, extinguishment, and other rules of specific moral rights should be regarded as an ideal rule system, justified as a

whole, and institutionalized in the form of human rights if necessary. As the intermediate link connecting fundamental values and institutional human rights, moral rights condense abstract value trade-offs into specific and clear propositions and provide guidance and constraint to institutionalized human rights practices.

To sum up, instead of categorically criticizing the contemporary liberal theory of moral rights, this study affirms that, given its difficulties in justifying punishment and the insufficient justification of its presupposed patchwork understanding of moral rights itself, theorists on punishment don't have to adopt its way of discussion at the very beginning and define "why punishment does not infringe on moral rights" as the core question of punishment justification. Once the patchwork understanding is replaced by the systematic understanding, the dilemma that the theory of moral rights faces will disappear, and the question is no longer "why punishment doesn't infringe on moral rights," but "what state purposes the overall institutional arrangement, including punishment, does serve, and whether it is justified for all citizens, including punishes." In this way, we can bypass the rhetorical debate on the concept of rights and go directly into the really significant value debate. However, it is also important to note that instead of a boundless ethical inquiry, the value argumentation herein is a political one, that is, to explore whether a specific institutional arrangement is justified for all citizens, including the adversely affected. The nature and way of such political argumentation may be explored in a separate paper.

Conclusion

This study believes that a reasonable starting point in justifying punishment is not "why a punishment does not infringe on individuals' moral rights," but "why a penal system is justified for everyone, including punishes." The former way of questioning will lead to a patchwork and non-institutional understanding of moral rights, namely, regarding them as an independent and non-derivative moral justification, and guide you to the approach of rights forfeiture, which itself is simply a Trojan horse that has covered up the real dilemma that the contemporary liberal theory of moral rights is caught into over the issue of punishment justification. In contrast, with individuals' rights being regarded as part of a broader institutional arrangement and a systematic examination given to whether a penal system allowing individuals' right to personal liberty to be deprived is also justified for punishees, you don't have to be bedeviled by the issue of "why moral rights will be automatically extinguished" and can more directly go to the value debate on the institutional arrangement.

(Translated by *LIU Zuoyong*)