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Penal Coercion and the Apology Ritual

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RESUMEN

Bosquejo aquí una ruta alternativa hacia una concepción del castigo penal muy semejante a la de Bennett, aunque basada más en una concepción política de la comunidad política y sus ciudadanos que en una concepción moral de nuestras relaciones sociales como individuos, y dando más importancia de lo que él le da al proceso penal. Pero además sugiero que necesitamos revisar algunos aspectos importantes de su concepción para explicar cómo la pena puede imponerse justamente a un delincuente que no coopera, en línea con el tipo de concepción que yo favorezco y que él critica.

PALABRAS CLAVE*: castigo, disculpa; ritual; proceso judicial; responsabilidad.*

ABSTRACT

I sketch an alternative route to an account of criminal punishment very like Bennett's, though drawing more on a political conception of a polity and its citizens than on a moral conception of our social relations as individuals, and placing more importance than he does on the criminal trial; but I suggest that we need to revise certain important aspects of his account to explain how punishment can be justly imposed on an unwilling offender — in line with the kind of account for which I have argued, and which he criticises.

KEYWORDS: *Punishment; Apology; Ritual; Trial; Responsibility*.

There is much with which to agree, and to admire, in Bennett's fine book [Bennett (2008)]:[1] in this brief paper I sketch an alternative route to an account of criminal punishment very like his, though drawing more on a political conception of a polity and its citizens than on a moral conception of our social relations as individuals (both dimensions are crucial to an adequate understanding of criminal punishment); but I suggest that we need to revise certain important aspects of his account — in line with the kind of account for which I have argued, and which he criticises.[2]

I. Taking Crime Seriously

Normative theorising must start from where we are. We can therefore begin with the idea of a liberal polity, of the kind in which we can plausibly aspire to live.[3] This will be a republic of citizens — of members who for the most part recognise each other as fellows who are engaged together in a common project, a civic enterprise, of living together as citizens. Its core values will include the equal concern and respect that citizens owe each other [Dworkin (1989)], as well as individual freedom and privacy. Given such a concern for freedom and privacy, and a familiar liberal commitment to pluralism, the civic enterprise that constitutes its public life (its members' lives as citizens) will be limited in its scope and its claims: it will encompass only a limited dimension of citizens' lives, most of which will be lived in the other, smaller practices and communities to which they also belong; nor will it take an interest (as illiberal political communities might) in the deeper or more inward aspects of their lives — in their souls, as one might put it. Nonetheless a liberal polity will have a public realm, constituted by the civic enterprise, and structured by the values by which the polity defines itself — values that must in fact be shared by most of its members, and that must be able plausibly to claim the allegiance of all members.

The public realm is the realm of matters that are 'public' in the sense that they properly concern all citizens, simply in virtue of their membership of the polity. A central task for the polity, as for any community, is therefore to work out what falls within the public realm, and what is rather a 'private' matter that should not concern the whole polity. It must work out an account of the *res publica*: of what is our collective business in the civic enterprise. Likewise, a university must decide what belongs to its public realm as an academic community: which aspects of its members' lives and activities are of proper interest to the academic community, and which should rather count as private. In a properly democratic polity, the structure and scope of the civic enterprise will be determined by public deliberation (a deliberation that is itself an essential part of the civic enterprise). We cannot discuss the character or the likely results of such a deliberative democracy here [see Pettit (1999), Martí (2006)], but must ask what role (if any) such a polity would find for a system of criminal law and punishment.

Much of the polity's public business, much of what goes on in the civic enterprise, does not immediately create a role for criminal law. A polity will, for instance, see it as part of its business to protect its members against various kinds of harm (both those that can flow from natural causes and those that can flow from human action); it will also plausibly see it as part of its role to provide and sustain procedures through which citizens can try to resolve disputes and conflicts peacefully and to secure compensation for harms they suffer at others' hands. In further specifying, and then pursuing, such ends

as these the polity might of course come to find a role for the criminal law, but as so far specified they do not point us in that direction. We come closer to finding a role for criminal law, as a distinctive mode of law, when we note that a decent polity will be concerned not only with harms and their prevention or remedy, or with disputes and their peaceful resolution, but with wrongs done or suffered by its members, and with the provision of an appropriate response to such wrongs. It will not of course take an interest in all wrongs: for many wrongs are, as far as the polity is concerned, private wrongs that are not its business.[4] But it will take an interest in wrongs that are public in the sense that they violate the values that define and structure the civic enterprise: for to ignore such wrongs would be to betray the values that are violated, to which the polity is supposedly committed; and it would be, as we will see, to betray both victims and perpetrators of such wrongs.

Three questions now arise. First, how should a liberal polity and its members respond to public wrongs committed by and against its members? Second, how should the perpetrators of such wrongs respond to their own wrongdoing? Third, how (if at all) should the polity's collective response be related to or determined by the way in which the perpetrators either do or should respond? One of the merits of Bennett's book is that it shows the importance of the third of these questions — a question that theorists of punishment too often ignore, by talking of punishment simply as something that 'we' inflict on 'them'.[5]

A plausible liberal republican answer to these questions gives the criminal law a central role. The first distinctive task of a system of criminal justice, discharged by the substantive law, is to define the range of public wrongs, of violations of the polity's defining values, that merit a formal, public response. These are the wrongs of which we have decided that we must take collective notice as wrongs. They should not be ignored, or treated merely as sources of harms that require repair or as private conflicts to be resolved (perhaps with our collective help) by those directly involved; they should be publicly defined and condemned as wrongs. Those public definitions constitute the core of the substantive criminal law, which defines the whole range of criminal offences (as well as the defences that can negate the wrongfulness of the commission of such offences).

Second, the criminal law must also make provision for an appropriate public response to the commission of such public wrongs: if we take such wrongs seriously, as violations of the values that define our polity (and of their victims' rights), we cannot merely condemn them in advance and in the abstract, or seek to prevent them; we must also respond after the event to their concrete commission. Central to this response, in a liberal republic, is the criminal trial, understood as a process of calling to public account [Duff et al. (2007)]. The trial summons an accused person to answer to a charge of public wrongdoing (even if the answer might initially be simply 'Not Guilty'),

and to answer for that wrongdoing if it is proved against him — to answer for it either by offering a defence which shows his commission of the offence to have been justified or excused, or by accepting conviction and the formal censure that a conviction communicates. Trials as thus understood are a proper way of taking public wrongs seriously. They do justice to the victim, as someone who has been not merely harmed but wronged, by trying to identify the wrongdoer and call him to account; and they do justice to the wrongdoer by treating him as a responsible citizen who can be held to account for his actions. A crucial feature of trials as callings to account is that they are in this way inclusionary: they display a recognition of the victim as a fellow whose wrongs we make our own, and of the wrongdoer as a member of the polity who is answerable to his fellow citizens.[6]

The culmination of the criminal trial is the verdict: either an acquittal, which declares that the presumption of innocence to which the defendant was entitled remains undefeated; or, if guilt is proved, a conviction, which amounts not merely to a factual finding that the defendant committed the crime charged, but to a formal condemnation of that commission, and so also a formal censure of the defendant for committing it. A 'Guilty' verdict and the condemnation it contains are addressed to the defendant, as marking a judgment on his conduct that he should make his own — which will involve coming to accept and feel his own guilt. This is a matter on which I think Bennett goes wrong, in portraying blame (of which the criminal conviction is a formal version) as having an intrinsically exclusionary character, and the acceptance of guilt as involving a kind of self-lowering. Blame, he argues, involves the 'withdrawal of the respect' or 'recognition' to which the wrongdoer would otherwise have been entitled [pp. 105-7]; and this seems to become a 'withdraw[al] from' the offender, which is naturally (but not inevitably) expressed by 'cutting' him [p. 108; see p. 147]. If the wrongdoer recognises his own guilt, and blames himself, this then involves 'withdrawal of that respect for oneself that one would have been due', and that remorseful recognition will be properly expressed in 'penitential behaviour' that might seem, and that would otherwise be, 'servile or masochistic' [pp. 116-7]. Now blame, of others or of oneself, can take these forms: it is all too tempting to exclude or demean the wrongdoer, and to expect him to debase himself. But in a liberal polity that takes seriously an idea of equal concern and respect, these are temptations that we should resist (as we should in our private lives): it is possible (albeit often difficult, especially when faced by heinous wrongs) for blame to be a mode of communication with a fellow member of the normative community whom we still respect as such — to be an inclusionary rather than an exclusionary response; and it is possible (although often difficult) for a wrongdoer to express her apologetic recognition of what she has done in ways that do not even appear 'servile or masochistic'.

This now gives us an initial answer to our three questions. First, we should collectively respond to public wrongs by calling those who commit them to public account. Second, the wrongdoers should themselves respond by being willing to answer, through such a public process, for what they have done. Third, our collective response should be such as to call, enable and persuade the wrongdoers to answer for what they have done; that is why criminal trials are legitimate only if they do give the defendant a fair chance to answer the charge.

But what of punishment, the deliberately burdensome imposition that typically follows on a criminal conviction? A major challenge for a liberal republic is to work out whether and how criminal punishment can treat those subjected to it with the respect and concern that is due to them as citizens. Punishment as actually imposed in our existing systems is of course all too often exclusionary in its meaning, and oppressive and demeaning in its impact. If that is what criminal punishment as imposed by the state must always be, then it has no place in a liberal republic; but perhaps it need not be like that.

II. From Censure to Punishment via Apology?

Why should the criminal process not end with the defendant's formal conviction: why should we go on to impose the material burden of punishment? Is this to be explained instrumentally, as a way of deterring or hindering future wrongdoing (in which case it will be hard to justify as something that citizens could respectfully impose on each other or on themselves)?

An initial answer is that if punishment is to express condemnation adequately, it must do so in an appropriate language, and that penal hard treatment of appropriate kinds constitutes a language of condemnation that both offenders and victims can be expected to understand. But Bennett also argues, insightfully, that in trying to understand what punishment can be and can do we must also look at what the offender owes to those whom she has wronged — both to the direct victims of her crime, if there are any, and to her fellow citizens. What she owes is some form of apology — an apology that must, if it is to have the weight and seriousness required, be expressed in some kind of burdensome penitential action. It is by undertaking such actions that the wrongdoer can restore herself to community with those whom he wronged; and so, Bennett argues, it is appropriate that the punishment we impose on the offender should consist in what she ought to do to make apologetic amends for her offence — that it 'mak[es] her act as she would were she genuinely sorry for her offence' [p. 146; see also pp. 147, 171]. Now this seems to me just the right move to make if we are to show criminal punishment to be something that liberal citizens can impose on each other, and accept for themselves, and it fits plausibly with the account sketched in

the previous section of how a liberal polity should respond to public wrongs. What we must try to do is to bring the offender to answer for her actions; that involves, from our side, an attempt to bring her to recognise the wrong she did, and to accept her own culpable responsibility; and, from her side, a remorseful recognition of her wrongdoing and an attempt to make amends for it. Punishment, of a suitable kind,[7] can serve both these goals at once: it can give appropriate material form to the message that we must try to communicate to the offender, and constitute an appropriate moral reparation from the offender to the polity. However, Bennett's explanation of this 'Apology Ritual' raises one puzzle, whose resolution will require some amendment to his account.

The puzzle is this. Apology, whether purely verbal or given material expression in some kind of penitential act, is something that the apologiser does. If the wrongdoer owes apology to those whom he wronged, we can properly tell him that this is what he ought to do; we can even demand that he do it, on pain of further criticism if he refuses: but we cannot do it for him; nor can we do it to him — nothing we do to him can constitute him apologising to us. In the case of our formal public responses to public wrongdoing, the same thing is true. Through the criminal court, we can collectively tell the convicted offender that he ought to apologise for what he has done. Since we are dealing here with public apology between people who are relative strangers (related only as fellow citizens), the apology will properly be expressed in a formal, public language, and the court can properly prescribe what it should be: this, the court can say, is what you must do to make amends for your wrong; and 'this' might consist in, for instance, undertaking a number of hours of unpaid community service of a suitable kind, or in paying a suitable amount of money, or even in putting oneself into penitential isolation for a period of time. This would be a system of non-coercive self-punishment: offenders would be told what they must do, by way of an Apology Ritual; and it would be up to them, on pain of further censure if they refuse or fail, to undertake it.[8]

But criminal punishment is not like that. Some sentences, as things are now, are simply imposed on an essentially passive offender: he is taken from court to prison to serve his time; or his fine is deducted from his wages. Other sentences, it is true, are initially required rather than imposed, and this could be made true of all sentences: the offender is required to turn up to undertake his community service or to meet his probation officer; he can be required to pay the fine himself; and he can (as happens in some jurisdictions for some offences) be required to present himself on a specified date to serve his term of imprisonment. But even when the offender is required to undertake his sentence, rather than passively suffering its imposition, the punishment remains coercive; for he knows that if he fails to do what he is required to do he will either have it imposed on him, or will suffer some further sanction

which will itself in the end be imposed on him if he remains recalcitrant. Now when what is required of a person is that he pay for the harm he has caused, by way of damages awarded in a civil suit, it is not crucial that he make the payment himself: damages can be imposed rather than just required (his bank accounts or possessions can be sequestered), since what matters is that the cost falls on the person who culpably caused the harm — not that he actively pay the cost. But apology is different: nothing that is simply done to the offender, or imposed on him, can constitute his apologising for his crime. It is true that even if he undertakes his sentence only because he is threatened with some coercive imposition if he fails, we can still say that he has apologised — he has undertaken the Apology Ritual; a key feature of rituals is that they can be undertaken reluctantly, unwillingly, or under duress. But what is simply imposed, as punishments may in the end be imposed, cannot be an apology.

Bennett does not take sufficient notice of this problem. He talks of what an offender must 'undertake' by way of apologetic ritual, and of 'making' or 'undertaking' amends; but he also talks of 'impos[ing] amends' on the offender [p. 148], and this should strike us as incoherent: amends, of their nature, must be made or undertaken; they cannot be imposed.

One way to resolve this problem would be to abandon the attempt to justify punishment as a coercive institution, and argue that we cannot justify anything more than a non-coercive requirement that offenders undertake the Apology Ritual. Such a radical solution would be in various ways problematic, not least because we would probably find (as abolitionists often find) that coercive punishments are simply replaced by other, non-punitive ways of coercing actual or potential offenders — ways no less morally problematic than punishment. But we can avoid this conclusion by taking a path that Bennett rejects [pp. 188-97] — by seeing criminal punishment as an enterprise in communication, which is intended not merely to express our condemnation to the offender, but also to elicit an appropriate response (recognition, remorse, and apologetic reparation) from her. Punishment, on this view, aspires to be or become a two-way process of communication: a process through which the polity seeks to communicate to the offender a morally adequate grasp of her wrongdoing, and through which she can, if she does recognise it, communicate her apology to the polity. This might sound, and indeed is, very close to Bennett's view, but it differs in the small but crucial respect that it focuses not merely on expression, but on communication. Expression is a one-way process: it does not of its nature seek any specific response from the person (if there is one) to whom it is made. By contrast, communication seeks a response: it is, or aspires to be (since the response might not be forthcoming) a two-way process.[9]

The criminal trial, as normatively described in the previous section, is a communicative process: it calls on the defendant to answer to the charge, and

to answer for his actions if he is proved to have committed the offence. A conviction similarly seeks a response, of remorseful recognition of guilt, from the defendant. If we are then to justify the burdensome punishment to which the convicted defendant is sentenced, it seems to me that we cannot adequately do so in the purely expressive terms that Bennett uses: it is not enough to say that this is the appropriate way to express our response, since other ways, including symbolic punishments that involve no material burden, are available. Nor is it enough to add that what we impose on the offender is what he should anyway undertake for himself by way of apologetic reparation, since we have seen that what is merely imposed cannot constitute an apology. But what we can say, perhaps, is that the burdensome punishment constitutes a communicative attempt to persuade the offender to face up to his crime, and to accept (indeed, to undertake or undergo willingly) his punishment as appropriate reparation for that wrongdoing. That attempt might fail, in which case the wrongdoer has not apologised: but given the importance of trying to bring him to recognise and respond appropriately to his own wrongdoing (which is in part a matter of taking him seriously as a fellow member of the normative community), the attempt can still be justified, without having to claim that it constitutes the amends that the offender is refusing to make.[10]

I cannot discuss or defend this account further here. All I hope to have argued here is that whilst Bennett's account of punishment is imaginative, important, and largely plausible, the idea of the apology ritual cannot do as much work as he wants it to do. In particular, it cannot as it stands justify imposing punishment on the offender who refuses to undertake the ritual for himself: to justify that, I suggest (if it can be justified), we need to turn back to the more ambitiously communicative kind of account that Bennett rejects.

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NOTES

[1] Future bare page references in the text are to this book.

[2] See Duff (2001) and (2007): Bennett (2008), pp. 188-97.

[3] As always in normative theorising, the scope of this 'we' is problematic; my only hope here is that most readers of this comment will recognise the 'we' as including them.

[4] The chief error of traditional legal moralism [Moore (1997)] is not to think that the criminal law is properly focused on wrongdoing, but to think that *all* wrongdoing is, in principle, the criminal law's business.

[5] Others who do attend to this question, though with results very different from Bennett's, include Adler (1992) and Tadros (2011).

[6] I talk here of the criminal law as dealing with wrongs committed by citizens against each other. We must also explain its authority over temporary residents who are not citizens; we should see them as guests.

[7] We should think here not of such problematic punishments as imprisonment, but of more suitable sentences such as Community Service Orders.

[8] Furthermore, since we are dealing with a public ritual, we need not inquire into the offender's sincerity: so long as he does undertake the ritual, that is enough.

[9] Another difference is that communication is essentially a rational process that appeals to the other person's understanding, whereas expression might aim only to arouse (or manipulate) emotions.

[10] It is still true, however, that what we impose on or require of the offender must be something that would be appropriate, were he to undertake it himself, as moral reparation for his crime; and that from respect for the privacy of individual conscience, we should not inquire intrusively into whether he is undertaking it, in the appropriate spirit, for himself: this should meet some of the objections that Bennett and others raise to this communicative conception of punishment. See further Duff (2001), pp. 115-29; (2011), pp. 372-7.

References

ADLER, J. (1992), *The Urgings of Conscience*, Philadelphia, Temple University Press.

BENNETT, C. (2008), *The Apology Ritual: A Philosophical Theory of Punishment*, Cambridge, Cambridge University Press.

DUFF, R. A. (2001), *Punishment, Communication and Community*, New York, Oxford University Press

— (2007), *Answering for Crime*, Oxford, Hart.

— (2011), 'In Response', in Cruft, R., Kramer, M. and Reiff M. (eds.), *Crime, Punishment and Responsibility*, Oxford, Oxford University Press, pp. 351-79.

FARMER, L., MARSHALL, S. E. and TADROS, V. (2007), *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial*, Oxford, Hart.

DWORKIN, R. M. (1989), 'Liberal Community', *California Law Review* vol. 77, pp. 479-504.

MARTI, J. L. (2006), *La república deliberativa. Una teoría de la democracia*, Madrid, Marcial Pons.

MOORE, M. S. (1997), *Placing Blame*, Oxford:, Oxford University Press.

PETTIT, P. (1999), *Republicanism: A Theory of Freedom and Government*, Oxford, Oxford University Press.

TADROS, V. (2011), *The Ends of Harm*, Oxford, Oxford University Press.