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Replies to My Commentators

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First of all, I would like to thank the participants very much for their generous, thoughtful and searching discussions of my book. I have found the process of engaging with their criticisms very fruitful. In this section I will deal with each commentator in turn, attempting to state what I take to be the main points at issue, before turning to my response. This method may lead to some repetition in my responses, but dealing with matters in this way allows me to engage with the precise formulation of the commentator's point. I have taken the commentators in alphabetical order.

1. RESPONSE TO BERMEJO

Bermejo rejects my claim that we should reform our criminal justice processes to increase their resonance with our extra-legal expectations about reactions to wrongdoing. He seeks to convict me of the errors of restorative justice theorists who argue for similar conclusions. Although I present my view as a third way between the traditional criminal justice and the restorative alternative, drawing from the strengths of each, Bermejo argues that "principles of Bennett's theory push the institutional demands much closer to the restorative models than Bennett avows" [p. 100] .

First of all, Bermejo thinks that I am wrong to base my view on a conception of the virtuous offender, because law is not concerned with a person's virtue, but rather with their external conformity to law. Furthermore, "in a theory where the attitudes of blame and apology are contemplated as the right attitudes, it is difficult to avoid the conclusion that repentance should be pursued whenever it is possible and as much as possible" [ibid.]. Now I think that the claim that law is not concerned with virtue but only with external conformity has to be understood in a nuanced way. Some acts become criminal only when they have a certain motivation; some defences cite motivational factors as an exculpatory or mitigating factor (e.g. provocation) that might affect culpability; and some motivational features can be taken as ag-

gravating or mitigating at sentencing (e.g. in hate crime). But setting this aside, my view does not require that the offender display "an internal attitude including an acknowledgement of the wrongness of the behaviour and some sincere states of shame, guilt and affliction" [p. 99]. Rather the task of criminal justice, as I understand it, is to make proportionate condemnation of the offender, dissociating itself from his action where remaining silent would imply acceptance. Therefore it is not the case that my view commits me to pursuing repentance as far as possible. Bermejo might then ask why I bother with the "apology" side of the apology ritual: "What would be the use of all the concern with the proper attitudes of the offender if punishment is just an expression of whoever condemns. An expressive theory could have dispensed perfectly with all this complex internal background" [p. 100]. The answer to this has to do with the symbolic aspects of condemnation that I claim justify imposing some determinate burden on the offender. Only because the virtuous offender would find such a burden meaningful if properly sorry is it meaningful to impose such a burden in order to express condemnation.

Bermejo also points to the important fact that, in a pluralistic, democratic society, even criminal law is bound to be in part based on "political" consensus. The force of punishment, on my view, is that it proclaims that the offender should be sorry enough for the offence that they would willingly take on the burden the sentence imposes on them as penance. But would it be more honest for the law to openly admit its nature as a political compromise and thus drop the supposed appeal to conscience that (I claim) is part of the force of the criminal sanction?

One response to this is to say that, even in the case of the conscientious civil disobedient, there is a wrong involved in taking himself to have the authority to act as he did: his action neglects the fact that his act was rightly subject to the authority of law. However, this response still leaves a problem, which is that the punishment condemns the offender, not merely for the wrongful arrogation of authority, but for the wrongful destruction of human life (e.g. in abortion or euthanasia). The best response to this problem, it seems to me, is not to follow Bermejo in saying that the criminal law should admit itself to be a product of political consensus, but rather to explain why, or under what conditions, the criminal law can rightfully present itself as the political community's authoritative collective view of what standards of behaviour citizens owe to one another. We need an argument for this view, which I admit in my book I do not provide.

Bermejo also attacks my suggestion, at the end of the book, that a condemnatory institution of punishment could retain some of the advantages of restorative justice if the sentencer indicates the broad margins of the penalty, and victim and offender agree the precise nature of the activity. He argues that this is too close to private law principles of corrective or restitutive justice, or the paying of damages, and does not address the aspect of the crimi-

nal offence that is not material harm but "an objective violation of rights, or, in other words an attack against the most important moral values of the community." However, Bermejo seems to assume that my talk of amends can only signify private restitutive amends. It is true that some writers on restorative justice have sought to reform criminal justice in this direction [see e.g., Barnett (1977)]. My position, however, is that one who acts wrongly becomes liable to two sorts of amends, one being restitutive, the repair of material harm, and the other penitential. Penitential amends seek to address the wrongfulness of the action. My thought is that the imposition of penitential amends on an offender by a public institution as an act of collective condemnation would avoid the problems he notes with the private law model.

Bermejo also attacks my suggested integration of censure and restorative mediation in sentencing policy. He sees this as threatening "incoherence and arbitrariness", and even jeopardising rule of law principles such as that there should be no punishment or crime in the absence of a duly enacted law in force at the time of the offence. However, on my proposal this restorative initiative enters into the criminal justice process only after conviction and sentencing. Only then can the restorative initiative be made compatible with the sentencing process doing its job of expressing some determinate degree of condemnation for the offence. I agree that the devolution of even limited sentencing powers would make it hard to achieve strict consistency in sentencing. But, firstly, strict consistency is only achievable if one has a particularly inflexible way of categorising offences and their accompanying punishments. Secondly, Bermejo notes that I allow that some loss of consistency might be a price worth paying, but he does not say what I think it would be worth paying for. What I am concerned to preserve, and what Bermejo himself neglects, is that the criminal justice process might become something that its participants can experience as a meaningful enactment of the reactions they would take to be appropriate when the criminal act is viewed as the wrong it is. One thing I take to be valuable in the restorative justice movement is its seriousness about crime and its rejection of the notion that crime should become the preserve of a bureaucracy that categorises offences in ways that are opaque even to the educated moral consciousness.

2. Response to Duff

Duff thinks that I go wrong in portraying blame as having an intrinsically exclusionary character. This is a particularly serious charge for me because, as Duff recognises, the argument for blame as withdrawal also plays a role in explaining why the wrongdoer who fully recognises the significance of what he has done can be expected to undertake penitential amends, and in explaining why penance has the character it does – that is, of something bur-

densome. However, Duff thinks that such exclusion is incompatible with the equal concern and respect that members of a liberal political community should have for one another.

In response, there are three points I would like to make. 1) Duff reads "withdrawal" from the offender as essentially involving "cutting the offender off" and excluding – and, to be fair, I have sometimes attempted to dramatise the essence of blame by giving such examples [see e.g. Bennett (2002)]. But withdrawal is a scalar notion, and the extent of the withdrawal should fit the nature of the crime. What I mean by proper "withdrawal" doesn't *have* to involve treating someone as though she were not there: that is, literally excluding her from community. I have (I think) always emphasised that the withdrawal should be partial and temporary. I am happy to allow that there can be many ways in which withdrawal can be registered. The key intuition that my talk of withdrawal is meant to pick up on is what I call the distancing intuition: that, whatever else happens, if you have done something intolerable then things can't stay the same between us; the relationship has to alter in a way that reflects the seriousness of the wrong. If this way of phrasing the intuition seems acceptable, we might then ask *how* the relationship must alter. And the answer presumably has to do with "not being on good terms" any longer. And this is the crucial thing I mean by "withdrawal of recognition". My talk of withdrawal is not meant to commit me to the view that, whenever you are not on good terms with someone, you ought to cut them off. Rather it commits me to the view that, when wrongdoing has occurred, you ought not to be on good terms with the wrongdoer. We should then consult our best understanding of how we act towards wrongdoers when we are not on good terms with them. I suspect that when we look at what we do we will realise that cutting people off, though sometimes the best way to do it, can also sometimes be a blunt instrument.

2) One of the reasons that cutting someone off is sometimes effective in symbolising moral distancing and sometimes not is because of the dual nature of withdrawal. Duff is wrong to characterise me as holding that blame has an "intrinsically exclusionary character". Rather my view is that it only makes sense to blame someone who is "one of us" and hence that blame is precisely a way of including someone in the moral community. This is one of the aspects of the meaning of the "right to be punished" strategy, which after all, attempts to show why, if one is bound to treat someone as a member of a community bound by shared normative expectations, it might also be necessary to have certain retributive responses to her should she violate those expectations. The exclusionary treatment of blame is precisely the way to recognise the offender as a member of the moral community. The practical import of this claim is that, when we are trying to give form to our judgement of the offender's moral position – that is, when we are trying to find a form of behaviour that does justice to her moral position – we have to find a form

that recognises his problematic position as a member of the moral community who has done one of those things that, qua member of that community, one must on no account do.

3) My third point is more *ad hominem*. As Duff notes, the notion of withdrawal plays the important role in my account of providing an explanation of why penance comes to seem necessary for the repentant offender. If, on the other hand, we follow Duff in rejecting talk of withdrawal, it raises the question what kind of justification penance can be given. Duff recognises that penance can be a vehicle for remorse and repentance; and that claim has some intuitive resonance. Emotional states do seem to have behavioural manifestations – what we sometimes call the expression of emotion. So it may be said that penance is simply the (appropriate) expression of remorse. But first of all, even if this claim about penance were widely accepted, we would still understand it better if we could say something about why penance is appropriately connected to repentance. And secondly, many people look on claims about penance askance and see them as a hangover from a Judaeo-Christian period of European history that we would be better off without. My project has been to explore a characterisation of the repentant offender, to try to explain why penance might come to seem attractive to such an offender, and thus to address this need to give some justification for the claim that penance is the appropriate expression of remorse and repentance. This doesn't, of course, show that my substantive story about penance as self-withdrawal is the right one. But the point is *ad hominem*: I think Duff needs to come up with some explanation of why penance is the appropriate vehicle for repentance, and I don't think that he has done so yet.

Duff's second concern has to do with the significance of apology within criminal justice. He argues that apology "is something that the apologiser does" and that, as a matter of the logic of the act, no one can do it for him – "nothing we do to him can constitute him apologising to us". But, he thinks, this raises a puzzle as to how to integrate apology into criminal justice. Duff imagines a situation in which courts issue some formal condemnation that would include a demand for an apology – and this might include a demand for amends. This would be a system of "non-coercive self-punishment". Criminal punishment, on the other hand, is coercively imposed "on an essentially passive offender". Therefore "what is simply imposed, as punishments may in the end be imposed, cannot be an apology".

I think the question is why I cannot simply agree with this. Duff points out that I do talk about "imposing amends" on the offender. And he is right that this would be "incoherent" if my claim was that, in such a situation, they retained the moral character of voluntarily made amends. However, I would have to make that claim only if I were committed to the view that the offender owes a public apology to his fellow citizens in the sense that he must make such an apology as a condition of his resuming the civil status that is

suspended after his conviction. But that is not my view. My view is that it may be true, morally speaking, that the offender owes his fellow citizens an apology. That may be something that affects his relations with (some) citizens, as they might rightly blame him if he does not give such an apology. However, I argue that the offender's making or not making of this apology is not something that the state should make a condition of the offender having or losing the basic civil rights and liberties that are at issue in punishment. If the state were to do that then it would be committed to having a concern with whether the apology was made sincerely or not, and I argue that this would be intrusive. Rather my view is that the offender can have his civil rights and liberties restored when he has been subjected to the relevant condemnation, regardless of how he has responded to that condemnation. Therefore I am not committed to the view that the offender's amends have the same significance in punishment as they do in standard cases of apology.

Why, then, do I use the language of amends? Because the way to find adequate symbols for condemnation, on my account, is to symbolise how sorry the offender ought to be for what he has done. How does one symbolise how sorry a person ought to be without imposing amends, or, as I might put it more carefully, imposing action on an offender of the sort that he might spontaneously undertake as amends were he properly sorry?

Duff himself thinks that the way out of this problem is to present the imposition of punishment as communicative rather than simply condemnatory: part of our reason for imposing some burden as punishment, he thinks, is a reasonable hope that the offender come to see its justice and hence receive it as penance. Only when it is performed willingly can it have the character of penance. However, there are numerous reasons for rejecting this account. For instance: 1) If we have the aim of communication, awakening repentance, do we not invite the question whether the imposition of penance is the best way to make someone repentant? If the answer to this question is negative then we have lost our justification for punishment. 2) If the avowed role of criminal justice is communicative then why should punishment be bound to respect limits of proportionality rather than something more individualistic punishment tailored for each criminal? 3) Doesn't Duff's story assume some conception of the expressive role of the imposition of punishment/penance, in so far as he takes it that the offender can receive the punishment as the proper expression of condemnation? In other words, Duff's account seems to rest on the suppressed assumption that the imposition of something that could be willed as penance has fitting expressive power as a mode of formal condemnation. If so, then it is not open to Duff to reject the notion of the expressive function of punishment as one-way: certain forms of communication rest on the recognition of the expressive power of the vehicle of communication. It is this expressive power that needs to be explained.

Thus I attempt to explain something that seems at the heart of Duff's account, namely how the undertaking of penance, or the imposition of what one would will as penance if truly sorry, can have expressive power. And I seek to make this central to a censure theory of punishment without taking on some of Duff's problematic commitments e.g. that a highly expensive coercive state process should find its justification in aiming at the offender's repentance.

3. Response to Martí

Martí also has concerns about the use to which I put the notion of apology in my account. I hope I am capturing the main burden of his argument if I characterise it as follows: 1) Martí is sympathetic to my claim that it is important to place apology at the heart of criminal justice; 2) he thinks, however, that I lose what is important about apology by making the apology merely ritualistic; and 3) Martí rejects my reasons for thinking that the role of apology need be merely ritualistic.

Before addressing some of Martí's more specific points, I would like to clarify something about my quite specific interest in the notion of apology. I hope this will address some of Martí's opening remarks. One of the overarching aims of my account of punishment has been to vindicate Duff's use of the notion of penance in his own theory of punishment. One strand of this defence comes in what in my précis I call the Penance Argument. But my defence of the notion of penance also in part simply involves reminding readers that something like penance – some kind of symbolic amends – is part of what makes a successful apology – and that apology is a very familiar part of the furniture of the moral life. This "familiarisation" is important, because penance can be thought a strange notion, with unwelcome connotations. My point is to puncture this "gut" scepticism that many have by reminding people how familiar we are with penance (though we may not call it such) in actual practice. Willingness to undertake, not merely restitutive, but penitential amends is one of the acts that is constitutive of being properly sorry. Being properly sorry is, in turn, one of the success conditions of an apology. Now it is particularly the notion of penitential amends that is central to my account, and in some respects I could have been clearer if I had talked about the penitential amends ritual rather than the apology ritual. Thus I agree that there is much to the notion of apology that is not relevant to my account – for instance, that an apology is normally addressed to a particular person, and normally asks for some response. Nevertheless, what I want to concentrate on is the essence of apologetic or remorseful action that applies in all cases of wrongdoing – for after all, many cases of wrongdoing have no direct victim, and therefore require no "requesting" apology; or cause no material damage, and therefore require no restitutive amends. Penitential amends is a universal

requirement of virtuous response across all cases of wrongdoing in a way that apology addressed to a victim is not: therefore it is the need to make such amends that I make central to my account. Nevertheless, I seek to leave open the possibility that, in cases where there is a victim, and victim and offender are willing, a meeting between the two can take place in which an apology can be given.

The reason it makes sense to make penitential amends central, on my account, is that I am concerned to find a way to make state condemnation of crime meaningful. However, Martí thinks that this takes the attraction out of the appeal to apology:

> If [apology] is only a heuristic device to be used by officials, apology, actual or ritual, does not need to play a role at all in actual legal contexts. It is something that needs to take place only in judges' heads. But this seems not to leave any role to rituality. Moreover, I cannot see then why Bennett insists ... that his theory is close to a particular interpretation of restorative justice, one for which the actual communication between the wrongdoer and the victim becomes important and has some important room for actual processes of apology" [p. 125].

Martí in this passage draws a distinction between two ways in which I might be appealing to the notion of apology: one, where apology is used merely as a heuristic thought process to help us imagine what is the appropriate sentence; and the other, where apology is something that ought actually to be given by the offender. One question that I might ask in response is whether this dichotomy is mutually exclusive. For instance, when Martí is explaining what he means by a heuristic device, he says it is something "that legislators and judges need to use in order to justify in abstraction and concretely determine the punishment to be inflicted in a particular case." Now it depends what Martí means here by "justify in abstraction", but one possibility is that this is a recognition that apology, on my account, does not simply play a role in helping us fix ideas about what sentence will fit a particular crime, but is central to the story about why something like punishment is necessary at all. On my account, it is in part because something penitential has to be part of a morally satisfactory response of a perpetrator to a wrong that the imposition of something onerous on the wrongdoer (punishment) is necessary. So one role for apology/penance is justificatory. However, because it has this justificatory role, the penitential amends are something that the offender does have to carry out: what the justificatory story is supposed to justify is the imposition of penance. That's what it turns out that justified punishment is, on my account. And because of this, imagining a case in which some actual apology could be made is an important heuristic device for fixing a sentence. So I don't see that I am forced to make a choice between the terms of Martí's distinction.

My response to Martí so far rests on the claim that the fundamental state purpose in coercively imposing some penance is condemnation, rather than giving the offender the opportunity to say sorry to his victim, or to make amends, or to achieve reconciliation or forgiveness. As Martí points out, my reasons for thinking that the state's business is limited to condemnation are in part to do with the importance of freedom of conscience: that it would be wrong for the state to force an offender to be party to a situation in which he would feel bound to express some sentiments, and present them as sincere, even if they are not. Now, Martí diagnoses my concern for freedom of conscience as rooted in a commitment to state neutrality and avoidance of any comprehensive conception of the good. He points out, quite rightly I think, that if this were my position, I would be on shaky ground, for even the neutral liberal might have grounds to "favour or even impose" a particular conception of the right. Thus as long as the values being enforced are values of public reason rather than the values of some particular faction within the political community, the liberal can agree that such values can and should be promoted. I think that this is a good argument, and presumably is needed to explain why moral education can go on in schools in an avowedly neutral liberal state, and why the state can undertake all manner of public health education campaigns, etc., aimed at adults.

However, I think that Martí has given the wrong diagnosis of the importance of freedom of conscience by linking it with liberal neutrality: rather the key value that freedom of conscience defends is, as I will now explain, integrity or authenticity. The question Martí's criticism raises is whether it follows from the fact that the liberal or republican state should promote belief in certain values (which I agree with), that it is therefore also "entitled to seek that citizens recognise [a crime] as a wrong and feel sorrow and guilt when they commit it, and why not, that they express such feelings publicly when they are blamed for that wrong" [p. 127].

The first thing to note is that there are two things that can be meant by "seeking that citizens recognise the crime as wrong and experience appropriate feelings." Of course, any act of expressing condemnation claims validity for itself, and thus seeks the agreement of like-minded others, and in particular seeks the agreement of the person who committed the wrong. Expressive acts are always communicative in this sense: they are couched in a communicative medium; they embody and respond to some conception of a situation that, it is claimed, others should likewise affirm. If guilt and sorrow can be seen as constituents of proper understanding then in that sense condemnation always seeks such a response from an offender. However, this way of framing the matter puts our reason to express condemnation in the dominant position, and sees communication coming about *as a result of* the offender grasping the appropriateness of the expressive act. The expression is prior in the sense that it is the vehicle for communication (and thus we have to ex-

plain how the expressive act is the proper bearer of some meaning before we can explain how communication can take place).

However, another thing that might be meant by seeking that citizens recognise the crime as wrong and experience appropriate feelings is something more educative and individual-centred. If one's main concern is, not to give form to one's repudiation of the offender's action (i.e. as an expressive act), but rather to help the offender to such a repudiation himself, one will be confronted with the question of the best way of achieving that goal. And while it *may* be the case that the best way to instil guilt and sorrow in the offender is to express due condemnation, in many cases it surely will not be. One will have to look at each individual offender and her sensibilities in order to judge what strategy to take. If communication is our aim then our approach must be individualised: the process must take the form, and the duration, necessary for each offender. If expression is in the dominant position, on the other hand, as in the first option sketched above, then it is the due and proportionate expression that we are aiming at, rather than the instilling of some state of mind in the offender.

My claim is that it is expression rather than communication that should be the state's business in criminal justice. Now I need to make it clear how my point is compatible with all sorts of perfectly legitimate public education initiatives that might be carried out to disseminate and encourage understanding and acceptance of the state's values. One important difference between the two cases is that public education initiatives always leave the recipient free to dissent. This is not simply freedom in the sense that belief formation always requires a certain freedom – and that one can never be forced to form a certain belief. Rather the sense of freedom at issue is that the dissenter is not to be penalised for having failed to assent to the claim that he is presented with. Now it might be disputed that a public education campaign does leave the offender free in this sense. After all, perhaps the dissenter who decides not to look after himself by e.g. stopping smoking will then be judged to have been given "fair warning" and made to contribute to the costs of his own medical treatment. However, this would not be the same as incurring extra punishment as a result of the failure to assent to some claim. Whereas if the criminal process dispenses with proportionality and goes on until the offender is prepared to repent then clearly the failure to assent is what is being targeted.

Of course, Martí might argue that the offender's other rights, as well as considerations of efficient use of state resources, are likely to prevent great abuses of proportionality, or great intrusiveness. However, Martí might nevertheless propose that it is legitimate to put offenders in a situation in which – to paraphrase Duff – their attention might be forced on the wrongness of what they have done. This is something I allow on my model, but only if the offender (and victim) consents. Where there is no consent, and the offender rejects e.g. the justice of the charge, or the authority of the state to hold him to

account, then according to my model the state can (and should) still impose a burden on the offender in order to symbolise condemnation, but must be content to accept the offender as having "done his time" once he has been subjected to that burden, regardless of the spirit in which he does it. Martí's objection to me raises the question whether the state could force offenders to attend e.g. a restorative justice meeting even when there is no consent. It seems if the fundamental aim of the criminal justice system is educative or communicative (in the sense I argue against) then the answer might be yes, if that is what it takes to communicate effectively. Martí will then ask me what would be wrong with doing this. My answer to this now appeals, not to liberal neutrality, but to respect for basic integrity or authenticity: if offenders are placed in such a situation, where they have some reason to dissent from the verdict, they would be under psychological pressure to buckle under and give an apology that they didn't believe in and which didn't reflect their fundamental view of the matter. The issue here has to do with whether it would be humiliating for the person to have to do this. The key guiding thought on my account has to do, therefore, not with liberal neutrality, but with the fact that respecting the dignity of offenders requires a certain respect for their authenticity, that is, their right that their public avowals and statements, those things in which they present themselves as expressing what they deeply believe in, should reflect what they really do deeply believe in. The decent state should not put citizens in a position in which they have to dissemble about their fundamental beliefs for fear of the consequences. It should not give them strong incentive to act in a way that they might afterwards reasonably regard as craven or humiliating.

Therefore while we should welcome public education based on values to which the state is committed, we should reject the use of "educative" means in criminal justice that put offenders in a position of having to choose between presenting a false face on some weighty issue and enduring some hardship as the cost for their honesty. The problem here can be dramatised if we take a case of someone convicted for murder for having practised euthanasia on a patient with an irreversible, painful and deteriorating condition. This act is criminal, but many think it morally permissible, or even right (in the case where euthanasia has been requested). This is only an example, but any realistic justice system will convict many people who are morally innocent. Wouldn't the system Martí advocates compound the wrong done to these people?

Having said all this, I should acknowledge that there is an unresolved issue raised by Martí's point. For it is one thing to say that the state cannot coercively impose remorse and another to say that being remorseful or not is irrelevant to the offender's relations with the state. Now "relations with the state" can mean various things. The question my position raises is whether the offender's being remorseful or not should be relevant to the offender's

having the basic rights and liberties that are removed or altered in punishment. The decent state should allow a diversity of opinions, even about the validity of the state's criminal code, or its authority to rule, and people should be able to have these opinions without fear (perhaps within limits) – however much it might also be a legitimate state purpose to argue against or otherwise counteract those opinions. However, one might worry that my argument proves too much, since it might show that it was wrong to allow expressions of remorse to enter as relevant mitigating circumstances at sentencing, or in parole board hearings. On this issue, my feeling is that I need to do some further work.

4. Response to Rosell

Rosell's first objection to me is that, even if I am correct to argue that the presence of a certain amount of luck in the circumstances of human life does not preclude moral responsibility, it does call for a milder reaction to wrongdoing, since luck is unequally distributed. In other words, doesn't the unequal distribution of luck have to be recognised somehow in retributive justice? Rosell's point is a good one, and seems to me to merit further thought. I can only offer some suggestions here.

If we want to accept Rosell's point, there are various possibilities. One would be to follow Nussbaum in "Equity and Mercy" in arguing that recognition of the fact that we are not the "sole authors of our lives" should lead us, not to deny moral responsibility and desert of some sort of retributive responses, but rather to tone down our sense of what kinds of responses are proportionate to what offences [see Nussbaum (1993)]. Recognising the extent to which our actions are products of contingency rather than autonomous, self-causing will should lead us to take individual culpability less seriously. Another possibility would be to follow a view that might be attributed to Bernard Williams in seeing moral responsibility as more akin to strict liability in law: we see the person as guilty or polluted as a result of the offence, but, knowing that his becoming so is largely a matter of luck as well as choice (and that choices themselves are largely conditioned by luck), our reaction to his moral state, while perhaps retributive in some sense, can and should also be combined with something like pity for what he has become (and has not in any simple sense brought upon himself) [see Williams (1993)]. The argument for keeping the distinctively blaming, fault-ascribing aspect of our retributive reactions seems to me to stem from the intuition aroused by asking something like the question "What did he think he was doing?" The act was one that the perpetrator came to see as good, as choice-worthy, and yet its contrary aspects – its wrong-making features – could and should have been evident to him. It is the fact that he accepted this view of

the act as choice-worthy, and was prepared to set the stamp on it in action, in the face of everything that counts against it, that evokes our blame. I agree that this is a point that needs further attention, but I register my view that it is hard to imagine a real case in which we might come across someone who had willed such a wrongful action, and was capable of seeing its other sides, and yet not find ourselves asking, with the distinctive note of blame, "What did he think he was doing?" The important implied note is that it is a basic responsibility, for some "us", to remain vividly aware that such an act is not choice-worthy at all.

Rosell's Chekhov example, which figures in his second objection, is a good one. The example seems to count against my view that a proper appreciation of culpable wrongdoing must involve coming to see the action as changing the relationship that is possible between the relevant parties, and in particular that it must involve withholding some of the respect that is normally a concomitant of that relationship. With all such apparent counter-examples, it is possible for me to respond either by convicting the apparently admirable non-retributive response of missing something important, or of claiming that the response does, despite appearances, involve something that would count as withdrawal or distancing. In response to this example I am tempted to take the first tack. I think that Rosell's example makes it clear that, in *The Apology Ritual*, I don't say enough about moral obligation and what is distinctive about being bound to do certain actions, and the role of obligations as distinctive sorts of reasons informing our retributive reactions. It is characteristic of the passage quoted that, insofar as Kutcherov uses condemnatory language, it is the language of virtue and vice: "Is this how decent men behave?" "You are unjust, my friends." Kutcherov clearly thinks that Rodion has good reason to treat him and his wife humanely. But what we don't get a sense of from this passage is that Kutcherov thinks that he and his wife have a *right* to that treatment, and that the Rodion is failing in an obligation *owed to them*. We get the sense that Kutcherov regards Rodion as an equal in the sense of being open to the relevant considerations, when those considerations are presented to him in the right way. But we don't get the sense that Kutcherov regards Rodion as an equal in the sense that they share a duty or obligation to behave towards one another in accordance with certain standards. Indeed, it is perhaps hard to see what obligation would amount to if it were not connected with the thought that it is the minimal acceptable standard of treatment between (qualified and self-governing) persons in a given relationship, and that the violation of that standard makes one's standing in that relationship problematic.

The Chekhov example is also complicated by the fact that the question whether blame is a necessary response to wrongdoing is always more complex in first-personal cases. When one is oneself the victim, or one of the victims, then one can have a certain moral leeway to waive one's right to be indignant.

But now re-write the Chekhov example so that Kutcherov is complaining, not about how Rodion has treated him, but rather about how he has treated a vulnerable third party who will not make any response herself. Are our intuitions still that blame in my sense can acceptably be foregone?

In a further strand of this objection, Rosell rejects the relevance of my claim that, if one responds to wrongdoing with the assumption that something would need to be done to put things right, then that shows an acceptance of retribution. My line of thought is this. Where the amends that are taken to be appropriate include penitential and not merely restitutive amends, this must be because we think that the offender should blame herself – since, on my argument, penance stems from one's treating oneself less well than one normally would, as a result of one's wrong, just as blame involves withdrawal of the normal standards of treatment. Therefore an expectation of penance involves the claim that self-blame is appropriate. But where self-blame is appropriate, blame is pro tanto appropriate. Although blame can be expressed in various ways, and some of these can involve something less than "cutting the wrongdoer off" – i.e. literal withdrawal – the normal state of affairs is that the relationship with the offender must alter, especially as the wrongdoer fails to respond to exhortation.

Rosell's final objection is that punishment has some features that make it quite unlike blame, specifically that its effect as a cause of suffering is not dependent on the offender understanding and accepting its force; and therefore we should not expect the justification of punishment to be connected with the justification of blame. However, while I accept the premises, namely that punishment has features that make it quite unlike blame, I reject the conclusion, that the justification of punishment can be entirely divorced from that of blame. Blame and punishment share a fundamental part of their justification because they are both responses that aim to do justice to the significance of wrongdoing by condemning it. Furthermore, the way in which blame and punishment operate differently as condemnation explains the other differences – they do not require that we abandon the view that punishment is condemnation. The fundamental thing that condemnation must do, on my view, is to capture the fact that the wrongdoer's act has altered the relationship that it is now possible to have with her. Therefore what we are looking for in the case of both blame and punishment is a response to the wrongdoer that embodies this new state of things. However, because of the context in which they are carried out, blame and punishment need to do this differently. Punishment is a formal procedure for the issuing of authoritative condemnation on the behalf of some group or collective, by agents in a proper position to issue such condemnation on the group's behalf. Blame takes place in the context of interactions with a person that are often reasonably intimate and to which the participants can be presumed to be committed. Therefore in blame the offender's moral standing can be adequately captured and made clear by

various often subtle departures from the treatment the offender would normally think herself entitled to. Formal condemnation, on the other hand, is more of a performance, and has something of the ceremonial about it. In order to avoid being merely ceremonial, however, it has to make its point with a greater splash – although it has the same end as blame, namely doing justice to the significance of the wrong. Making formal condemnation meaningful therefore requires, I argue, the imposition of something on the offender that indicates how far from being in good standing her wrong has placed her. This is the role for imposed amends. These amends, because they are onerous and imposed, can be experienced as hardship even by an offender who does not accept their justice. But this does not show that the justification for blame and punishment is radically different. On the contrary, the differences stem from the fact that they do the same expressive job in different contexts.

5. Response to Sandis

Sandis opens his comment with the concern that no theory of state punishment can be built solely on the notion of a "right to punishment". This is because the notion of having a right to something (say, some benefit or opportunity) implies that one be free to take it up or not; whereas punishment is coercively imposed. "At best, to have something that one is entitled to forced upon one is to have a right that one is prevented to exercise." There is an important difference, Sandis points out, between a system that allows offenders freely to make amends and one that forces them to do what they would do if they were decent. Although my account may be justified in taking the latter approach, it should not claim to be the former.

However, I am not pretending to introduce a voluntary element into punishment with my talk of the right to be punished. As others have explained, there are two ways of thinking about rights: rights as delineating proper respect for status; and rights as securing benefits or protection of interests. John Deigh (1984) applies this dichotomy to the right to be punished. If we accept that at least some rights fall into the first category then there might be things that a person may have a right to that cannot be waived, for instance, if they are rights to respect for one's basic moral status. The right to be punished, on this interpretation, would be a right that one would have – and could not waive – if it is constitutive of respect for a certain important moral status. It is this first tradition of thinking about the right to be punished that I seek to elaborate. In the book, I skirt round debates about rights and go straight for a defence of the claim that punishment, or rather some retributive response, is constitutive of respect for one's status as a qualified moral agent. But it seems to me that one could equally well couch the claim in the lan-

guage of rights, arguing that one has a right to be respected as a qualified moral agent, a right one cannot waive, and hence a right to be punished.

As Sandis reads the right to be punished, however, it leads him rather towards the idea that the state has a duty to provide her with the benefit of moral reconciliation (and hence that the right to be punished is the right to some benefit rather than respect for status). He quotes Melden on "the idea that punishment serves to purge those upon whom it is imposed of their guilt and by thus redeeming them enables them once more to join their lives with others." Criticising the view he attributes to me, Sandis then argues that state punishment cannot serve this purging function – e.g. not with repentant offenders. "Offenders do not need it to redeem themselves, and it does not automatically bestow redemption on the unrepentant ..." He concludes that I need some further argument to explain why criminal must be given the chance to make public amends.

However, I can agree that it is not the opportunity to make public amends that justifies state punishment, while claiming that there is still an important link between state punishment and the redemptive power of suffering. My argument is that punishment is the political community's way of expressing condemnation of, and hence dissociating itself from, a wrongful action, and that the practice of apology and, specifically, making amends, is a (probably) uniquely powerful way of symbolising such condemnation and making it meaningful. On my view the political community has a duty to stand up for certain values, and to resist complicity with or implication in violations of those values, and for that reason it has a duty to condemn certain forms of wrongdoing. But my view rejects two more ambitious theses – that the state has a duty to "try to get the offender to recognise that wrong and make a suitable apology for it"; and that the state has a duty to give the offender the opportunity to expiate the wrong. Both of these approaches see punishment as essentially paternalistic, and motivated by the offender's moral welfare. They are committed to a) the thesis that the offender is better off if he expiates his offence; and b) the view that it is the place of the state, as an aspect of its proper concern for the offender, to seek to promote the offender's moral welfare, albeit subject to certain constraints. The advantage of my account is that it takes an argument for why someone who accepts and understands the significance of their wrongdoing would find penance compelling, shows how state punishment derives its condemnatory force from the connection with penance, but remains uncommitted to a) or b).

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