SIMPOSIO/SYMPOSIUM

CHRISTOPHER BENNETT

The Apology Ritual. A Philosophical Theory of Punishment

THE APOLOGY RITUAL

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Presentation

Edgar Maraguat

In his book entitled *The Apology Ritual. A Philosophical Theory of Punishment* [Cambridge University Press, 2008] Christopher Bennett attempts to answer the legal theoretical question: 'Why punish?' In this aim, he develops an essentially retributivist argument that incorporates what he considers to be useful insights of restorative positions. His long-winded reasoning rehearses and settles quite a few moral, philosophical and legal practice issues, and while it might not prove completely convincing from beginning to end, given its plausible lack of some middle term, it does bode excellent results for this type of approach, highlighting brilliantly how tackling metaphysical problems can not only have an impact on practical or political debates, but also lead to specific conclusions.

What the book intends to provide is an ideal or philosophical model, neither a historical nor a legal reconstruction of penal practices in Western societies. Such a model relies, as is the norm in this field, on presumably common intuitions, at least in liberal cultures, about moral emotions and their propriety, freedom of conscience, citizens' autonomy, the domain of public wrongs, fairness and proportionality and the like. On this basis, Bennett attempts to deduce a system of criminal justice capable of standing the test of ethical legitimacy. The need to overhaul the legal and moral underpinnings of criminal justice seems assumed by most, but not all, commentators. In Bennett's case, this demand stems from his global rejection of traditional justifications that conceive punishment as a convenient way to meet collective ends, such as crime prevention or public edification and moral education, or psychological aims, such as wrongdoers' moral improvement.

The strategy of building on intuitions, values, widespread self-understandings, existing consensus or the overlap of individual moral viewpoints – explicitly endorsed in the comments of Martí, Duff and Pérez Bermejo – undoubtedly appears only superficially Hegelian. More genuinely Hegelian is the rationale offered for retribution: the public offender has a right to be punished, in accordance with his moral and rational status. Bennett seeks to avoid the traditional and crude retributivist motivation of making the offend-

ers 'pay dearly' for their deeds, based on plain vengefulness or the victim's possible satisfaction of 'seeing (the wrongdoer) suffer'. Therefore, although he willingly admits his theory 'looks back' on the crime and on the reactions it might have elicited, it also 'looks forward' to restoring the moral and civil credentials of the convict. This compromise leads Bennett to draw on restorative strategies and procedures in order to outline a reconfiguration of penal practices. In fact, the 'apology ritual' is thus named (instead of, say, the public condemnation ritual) precisely because it rests on the normative theoretical idea of what the offenders could and should do in order to regain their fellow citizens' confidence.

According to the synopsis, the book lays out three distinct but interwoven arguments: the Apology Ritual Argument strictly speaking, the Penance Argument and the Right to Be Punished Argument.

The first contends, on the one hand, that the symbols best suited to the public condemnation of crime may be found in the way we react spontaneously to everyday abuses. On the other hand, what matters for the state is the formal expression of censure, so the process of punishment does not require the amends – the apology – to be sincerely wanted by the offender: a ritual suffices.

The Penance Argument claims the necessity of selecting, among available symbols of disapproval, those that show the offence is taken seriously *and* open the door to the offenders' authentic 'dissociation from the wrong.' According to Bennett, such a separation is achieved when the wrongdoers internalise the withdrawal of their peers' previous 'goodwill', and ultimately through their subjection to 'something penitential.' The withdrawal of 'goodwill' is justified by the offenders' violation of the expectations generated by their participation in some relationship (in the final analysis, a civil or political one), a situation that needs to be 'marked' by a certain suspension of recognition, though not by the offenders' eviction as independent members of the relationship.

The Argument of the Right to Be Punished does not aim to defend the inclusionary nature of punishment, in other words, the fact that by condemning, the state takes not only the crime but also the convict seriously as an effective member of the damaged relationship; this had already been made clear in the second argument, especially in the discussion on the internalisation of goodwill withdrawal. If anything, what Bennett still needs is to buttress his previous argument against sceptics who would question our ultimate control over our actions as well as our status of qualified participants in moral relationships. Bennett offers no metaphysical solution to those doubts, but skirts them by resorting to the erstwhile Kantian and, in any case, Hegelian reasons for us to treat each other as rational and responsible agents who must be required to answer for their actions, for better or for worse. The 'right to be punished' concept would thus contain some truth, in Daniel Dennett's sense that we indeed have a vital interest in being held accountable for our deeds.

The contributors to the discussion cast doubt on several aspects of those arguments. Martí, to begin with, seems to question the need for a retributivist justification of punishment. According to him, coercion in general and penal practice in particular are sufficiently supported by our liberal sense of legitimacy, which entitles the state to coerce citizens into behaving correctly and to instil them some sense of justice, that is, to educate them.

Martí, Duff and Pérez Bermejo also dissent to Bennett's defence of the apology ritual, for complementary reasons. Duff asserts, convincingly, that imposed apology is doomed to be no more than mock apology. Martí adds that in moral relationships, where Bennett seeks a model for his criminal apology ritual, apology not only comes about independently of punishment, but usually avoids or substitutes it. Sandis seems to hint in the same direction when he suggests, following Winch and Weil, that someone who sincerely wishes to expiate guilt may no longer be expected to restore the breached relationship. Martí believes that for the apology to be more than a heuristic tool in the hands of the judges who dictate punishment, in other words, for the apology to be effectively offered by the wrongdoer, it must be sincere and not ritualistic. Pérez Bermejo agrees about the need for Bennett's apology to convey the highest possible sincerity, although he also doubts that the convict's *forum internum* should have a role to play in criminal justice and deplores Bennett's support of restorative considerations in setting the *quantum* of punishment.

In general, Pérez Bermejo and Duff, while explicitly approving of Bennett's updated retributivist strategy, hold to an essentially communicative view of criminal prosecution (Sandis seems tempted by the same perspective). This being said, Pérez Bermejo's version of communication tends to be more austere than Duff's. The latter conceives it as a two-way process during which the offender's display of specific responses is required, taken into account and encouraged, potentially leading to his 'moral reparation'; the former, however, feels that the restorative elements in Bennett's theory – those that look forwards – are at odds with the broader retributivist framework, involving a relapse into instrumentalism, arbitrariness and, thereby, impairment of the rule of law.

As for Rossell, he dedicates part of his contribution to criticising the Penance Argument. Instead of questioning the conceptual nexus between apology and punishment, he rebuffs the necessary link between condemnation and punishment or, to be more precise, between condemnation and 'suffering-oriented adverse emotional reactions.' In other words, he opposes the vindictive or retributive view of condemnation. Rossell deems that the often – legitimately – praised cases of Gandhi and King, cited in Bennett's book, prove that genuine condemnation, even when it is moving and hits its target, does not automatically imply retribution for the harm inflicted. Whoever may own the right interpretation of those cases, the objection adds to Duff and

Martí's cautiousness about taking the private cycle of condemnation and apology as a model for legal punishment.

In the last contribution, Sandis discusses the very idea – aptly described as 'elusive' – of a right to be punished, thus touching obliquely on Bennett's third argument. This notion, his comment shows, does not readily fit in the common understanding of rights as liberties, nor in the concept of inalienable rights such as life or freedom, taken as a whole. This, he reckons, must explain why the expression is usually found between quotation marks. In his analysis, Sandis identifies the disadvantages and counterproductive effects of two ways of conceiving the right to be punished, by seeing punishment either as a payment for harmful behaviour or as a path towards moral restoration (in Melden's words, 'moral ratification'). Regarding the first interpretation, he objects among other things – and for Wittgensteinian reasons – that it blurs the basically transgressive nature of crimes. As for the second one, he draws on examples from Woody Allen's work to claim that the necessary and sufficient conditions for moral restoration cannot be determined.

The book was presented and discussed in a symposium held by the Nomos Network for Applied Philosophy on the 27th and 28th of January, 2011, at the University of Valencia. I would like to give thanks to the members of the organizing committee for their invitation to edit these proceedings, as well as to Luis M. Valdés, who participated in the sessions, for accepting to publish them in a special issue of *Teorema*. My gratitude also goes to the University of Valencia, the Ministry of Science and Innovation and the University of Barcelona, who supported the symposium, and to those who took part in the meeting: Josep Corbí, Manuel García-Carpintero, Carlos Moya, Fabian Dorsch, Francisco Javier Gil, Tobies Grimaltos, Jules Holroyd, Sandra Marshall, Adèle Mercier, Mari Mikkola, Pablo Rychter, Pepa Toribio, Jennifer Saul and Jordi Valor.

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Presentación

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Christopher Bennett ofrece en su libro *The Apology Ritual. A Philosophical Theory of Punishment* [Cambridge University Press, 2008] una respuesta a la pregunta jurídico-teórica: '¿por qué castigar?'. Para ello, construye una justificación fundamentalmente retribucionista que integra los que él juzga aciertos de las posturas restauracionistas. El suyo es un argumento de largo aliento, que revisa y responde no pocas cuestiones filosófico-morales y de práctica legal, y que, si es difícil que convenza al lector de principio a fin, por la plausible falta de algún término medio, coloca bajo una luz muy favorable un acercamiento al asunto de esa índole, al tiempo que muestra asombrosamente cómo la resolución de algunos problemas metafísicos, no sólo no deja intactas las cuestiones prácticas, públicas, políticas, sino que conduce a decidirlas de cierto modo.

La meta del libro es un modelo ideal o filosófico: ni una reconstrucción histórica ni legal de la práctica penal. Un modelo cuya definición, como es norma en este campo, se funda sobre intuiciones que se presumen corrientes, al menos en nuestro espacio cultural liberal, sobre las emociones morales y su propiedad, la libertad de conciencia, la autonomía de los ciudadanos, el ámbito de las 'malas acciones' de carácter público, la equidad y proporcionalidad y cosas semejantes. Sobre esa base Bennett intenta razonar un tipo de práctica penal que pueda superar la prueba de la legitimidad ética.

La necesidad de revisar la justificación moral y jurídica de la justicia penal parece asumida por la mayoría de comentaristas, aunque no por todos. En el caso de Bennett viene determinada por el rechazo global de las justificaciones que hacen de la pena un instrumento para lograr bien fines colectivos, como la edificación o educación moral de la ciudadanía o la prevención de futuros crímenes, bien fines psicológicos, como la mejora moral de los condenados.

La estrategia por la que se parte de intuiciones, valores, auto-comprensiones comunes, del consenso o solapamiento de puntos de vista morales individuales, tiene seguramente un aspecto sólo superficialmente hegeliano (que, en todo caso, Martí, Duff y Pérez Bermejo aprueban explícitamente en sus comentarios). Más hegeliana es, desde luego, la razón para el retribucionis-

mo: que el delincuente tiene derecho a ser castigado, de acuerdo con su carácter moral racional. Bennett quiere evitar, ciertamente, una motivación cruda y tradicional de la retribución, basada en el sentimiento (vengativo) de la necesidad de 'hacer pagar' por lo hecho o, no digamos, en la satisfacción que a las víctimas puede proporcionar 'ver sufrir'. Por ello, aunque él mismo dice que su "teoría" mira hacia atrás, hacia el delito y hacia las reacciones que debe haber despertado, mira también hacia delante, hacia la restauración de las relaciones morales y civiles del acusado. Esta posición de equilibrio es la que mueve a Bennett a tener en cuenta las estrategias y procedimientos restauracionistas en el rediseño –a grandes rasgos– de la práctica penitenciaria. De hecho, si la propuesta ha de denominarse 'el ritual de la disculpa' –y no, por ejemplo, el ritual de la condena pública– es porque la clave teórico-normativa la proporciona para Bennett lo que el delincuente puede y debe hacer *para* hacer posible la restauración de la confianza de sus conciudadanos en él.

El libro consiste, según analiza el *précis*, en tres argumentos distinguibles pero imbricados: el Argumento del Ritual de la Disculpa (estrictamente tomado), el Argumento de la Penitencia y el Argumento del Derecho a Ser Castigado.

El primero defiende, para empezar, que los símbolos adecuados para la condena pública del delito hay que buscarlos en el modo en que reaccionamos cotidiana y espontáneamente a los atropellos, y, en segundo lugar, que, estando el Estado obligado a condenar o expresar censura, no es esencial al castigo que la enmienda –la 'disculpa'– sea deseada por el delincuente, y por tanto basta que adopte la forma de un rito.

El Argumento de la Penitencia ha de probar a continuación que entre los símbolos disponibles para expresar reprobación resultan obligatorios los que muestran que el delito es tomado seriamente *y* pueden además conducir al causante a 'disociarlo del daño'. Esta disociación, según Bennett, la opera la *interiorización* de la retirada de la "buena voluntad" con la que los demás nos tratan habitualmente y, al fin y al cabo, por el sometimiento a "algo con carácter penitencial". La retirada de esa "buena voluntad" se justifica como la consecuencia apropiada del hecho de que el delicuente haya violado las expectativas intrínsecas a la participación en cierta relación (en definitiva la relación civil o política), hecho que ha de 'marcarse' por medio de cierto nivel de suspensión del reconocimiento que en otras circunstancias le correspondería, aunque no quede desahuciado como miembro (independiente) de ese tipo de vínculo.

El Argumento del Derecho al Castigo, finalmente, no tiene por objeto la defensa del carácter incluyente de la pena: que, al condenar, el Estado no sólo toma en serio el delito, sino que toma en serio al condenado como miembro efectivo de la relación dañada, pues esto es algo que ha dejado ya claro el argumento previo (concretamente, la justificación de la interiorización de la retirada de la buena voluntad). Si acaso, lo que resta es defender el argumento

anterior de las dudas escépticas que puede despertar, tanto las relativas a nuestra falta última de control sobre lo que hacemos, como al carácter de participantes cualificados –moralmente autosuficientes– en esas relaciones. Bennett no tiene una respuesta metafísica para estos recelos, pero se ve dispensado de ofrecerla apelando a las en su día razones kantianas y, en todo caso, razones hegelianas para tratarnos unos a otros como seres sensibles a razones y por ello responsables, a los que hay que pedir cuentas y exigir que respondan por lo que han hecho, para bien y para mal. Habría contenida en la idea de 'derecho al castigo' una porción de verdad: que, como ha defendido Daniel Dennett, los primeros interesados en que nos pidan cuentas por lo que hacemos somos nosotros mismos.

Los participantes en la discusión siembran dudas sobre muchos aspectos de estos argumentos. Martí, por de pronto, parece no sentir la necesidad de un argumento retribucionista a favor de las penas como el de Bennett, y defiende que la coerción en general y la práctica penal en particular están suficientemente amparadas por nuestro sentido liberal de la legitimidad: que el Estado está facultado para coaccionar a los ciudadanos para que se comporten correctamente y a promover un sentido mínimo de justicia entre ellos, esto es, a educarlos.

Tanto Martí como Duff y Pérez Bermejo protestan además contra la defensa del ritual de la disculpa que realiza Bennett, por razones complementarias. Duff hace valer, verosímilmente, que una disculpa impuesta sólo puede ser un simulacro de disculpa. Martí añade a esto que la disculpa a la que recurrimos en nuestras relaciones morales –según Bennett, el mejor modelo para el ritual de la disculpa penal– no sólo es independiente del castigo, sino que normalmente lo desactiva o evita. Sandis apunta en la misma dirección, parece, cuando sugiere, de acuerdo con Winch y Weil, que si alguien siente verdaderamente la necesidad de expiar una culpa, deja de parecernos necesario un castigo que restaure la relación que ha quebrado. Martí piensa que si la disculpa ha de ser algo más que un recurso heurístico para el juez o jueces a la hora de fijar una pena determinada, es decir, si ha de ser ofrecida de forma efectiva por parte del condenado, entonces ha de ser sincera y no meramente ritual. Pérez Bermejo piensa lo mismo: que Bennett debería favorecer en su teoría una disculpa con el más alto grado de sinceridad, en la medida en que se pueda llegar a ella, sólo que, por otro lado, rechaza que el fuero interno de los condenados tenga algún papel que desempeñar en la práctica penal y deplora en general la voluntad de Bennett de tener en cuenta propuestas restauracionistas en la fijación del *quantum* de la pena.

En general, Pérez Bermejo y Duff, que simpatizan explícitamente con la estrategia retribucionista modificada de Bennett, prefieren una visión del enjuiciamiento criminal esencialmente comunicativa (también Sandis parece tentado por ella). Pero Pérez Bermejo diríase que vindica una versión más austera de la comunicación que Duff. Éste habla de un proceso bidireccional,

en que se tienen en cuenta, se exigen y se fomentan las respuestas específicas del condenado que pueden conducir a una "reparación moral". Pérez Bermejo, por el contrario, considera que los elementos restauracionistas de la teoría de Bennett –los que miran hacia delante– no son coherentes con el marco retribucionista general, y suponen una recaída en el instrumentalismo, la arbitrariedad y, por ende, el menoscabo del imperio de la ley.

Rossell dedica parte de su contribución a objetar, más bien, contra el Argumento de la Penitencia. En lugar de poner en cuestión el vínculo conceptual entre disculpa y castigo, él pone en duda la conexión necesaria entre condena y punición o, más precisamente, entre la condena y las "reacciones emocionales adversas orientadas al sufrimiento". Dicho de otro modo, opone resistencia a una visión de la condena según la cual ésta es forzosamente vindicativa o retributiva. Rossell juzga que los casos históricos –generalmente admirados– de Gandhi o King, a los que Bennett apela en su libro, prueban precisamente que la condena real –incluso cuando es conmovedora para su blanco y tiene en él el efecto que persigue– no tiene por qué implicar una retribución por el daño recibido. Sea quien sea quien interprete adecuadamente esos casos, su objeción abunda en lo discutible del carácter modélico del ciclo privado de condena y disculpa para la punición legal, que tampoco aprueban Duff o Martí.

Sandis, por su parte, discute en la última contribución la idea misma –que con tino califica de "elusiva"– de un derecho a ser castigado (y, así, aunque oblicuamente, el tercer argumento). Sus comentarios muestran que esta noción no se compadece bien con el entendimiento habitual de los derechos como libertades, pero tampoco con el concepto de derecho inalienable que aplicamos a la vida o la libertad, tomada como un todo. Esto explica, como él reconoce, que la idea aparezca en el libro, normalmente, entrecomillada. En su análisis se consideran las limitaciones o efectos contraproducentes de dos intentos de darle sentido: bien tomando los castigos como pagos por conductas en principio dañinas, bien tomando los castigos como ocasiones para la restauración moral o, en palabras de Melden, para la "ratificación moral". Entre otras cosas, se objeta contra la primera interpretación que desdibuja el carácter transgresor de los delitos (por razones wittgensteinianas) y, contra la segunda, al hilo de algunas ilustraciones proporcionadas por la filmografía de Woody Allen, que no pueden determinarse condiciones necesarias y suficientes para tal restauración.

La presentación de la obra y su discusión fue objeto de un simposio celebrado los días 27 y 28 de enero de 2011 en la Universitat de València, organizado por la *Nomos Network for Applied Philosophy*. Quiero agradecer al resto de miembros del comité que preparó el encuentro la invitación a editar estas actas, y en particular a Luis Valdés, que participó en las sesiones, la voluntad de acogerlas en un número especial de *Teorema*. Las instituciones que respaldaron el simposio –la propia Universitat de València, el Ministerio de

Ciencia e Innovación, la Universitat de Barcelona– merecen también una palabra de agradecimiento, así como todos los que tomaron parte aquellos días en la discusión del libro y los comentarios: Josep Corbí, Manuel García-Carpintero, Carlos Moya, Fabian Dorsch, Francisco Javier Gil, Tobies Grimaltos, Jules Holroyd, Sandra Marshall, Adèle Mercier, Mari Mikkola, Pablo Rychter, Pepa Toribio, Jennifer Saul y Jordi Valor.

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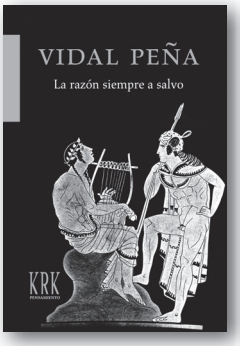

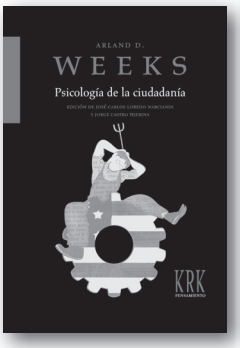

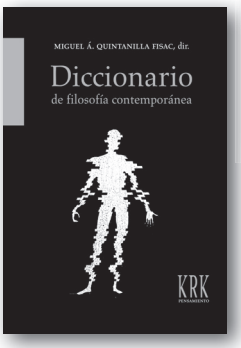

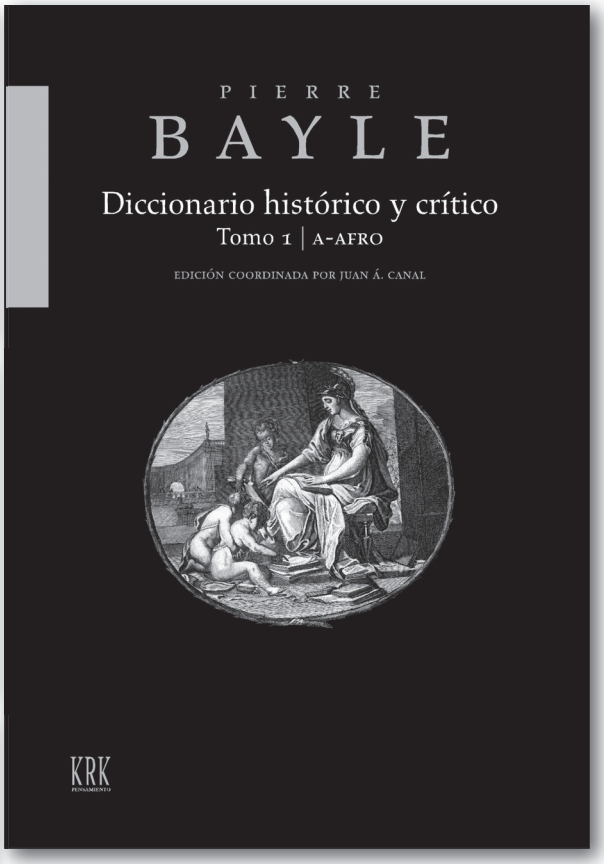

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Précis of *The Apology Ritual*

Christopher Bennett

RESUMEN

En este trabajo resumo los argumentos principales de mi libro *The Apology Ritual*. Llamo la atención sobre tres líneas principales de argumentación, tomándolas en un orden inverso al de aparición en el libro. Primero, dirijo la mirada a la justificación expresiva-comunicativa del castigo por parte del estado que ofrece el libro. En segundo lugar, al argumento a favor de la afirmación de que sentirse verdaderamente arrepentido trae consigo la exigencia de que se asuma algún tipo de penitencia. Y, en tercer lugar, me ocupo del argumento a favor del "derecho a ser castigado", tal y como lo interpreto, según el cual hay un estatuto importante asociado a que uno sea tratado como un agente responsable.

PALABRAS CLAVE: *castigo; justicia penal; retribución; emoción; responsabilidad; penitencia.*

ABSTRACT

In this paper I summarise the main arguments of my book *The Apology Ritual*. I draw attention to three main lines of argument, taking them in reverse order to that in which they appear in the book. First, I look at the book's communicative-expressive justification of state punishment. Secondly, I look at the argument for the claim that feeling properly sorry involves a requirement to undertake some sort of penance. And thirdly, I look at the argument for the "right to be punished": as I interpret it, that there is an important status associated with being treated as a responsible agent.

KEYWORDS: *Punishment; Criminal Justice; Retribution; Emotion; Responsibility; Penance.*

I. INTRODUCTION AND OVERVIEW

In this introductory piece, I would like to set out three of the main arguments from *The Apology Ritual* [C. Bennett, *The Apology Ritual. A Philosophical Theory of Punishment*, Cambridge, Cambridge University Press, 2008]. I will start from the end of the book, as it were, hoping that this might shed

some fresh light on the topics the book covers. The book ends up with a theory of state punishment that is in some key ways backward-looking or retributive. That is to say, it defends a justification for inflicting some setback on the offender for their offence according to which such a response does justice to what the offender has done, rather than bringing about some further good. However, the argument for state punishment is meant to escape the pitfalls of more basic forms of retributivist theory of punishment that rest on an unappealing brute claim that offenders deserve to suffer. The Apology Ritual argument sees the central aim of state punishment as proportionate condemnation of moral wrongs – or at least those moral wrongs that are the business of the collective (for which Duff [Duff (2001)] has appropriated the term "public wrongs"). And in explaining why condemnation has to involve punishment, it draws on a parallel between punishment and those retributive reactions that seem appropriate in interpersonal interactions. Hence I will review the arguments of the book by starting with where I end up and working back through some of the steps to which my conclusion commits me. I will then show how I attempt to defend those commitments by looking at the parallel with interpersonal interactions.

So the arguments we will look at here are: 1) the Apology Ritual argument; 2) the Penance argument; and 3) the Right to be Punished argument. Before going into these arguments in more detail, a quick overview of the way the three fit together might be helpful.

The Apology Ritual argument tries to establish that the decent state needs a reprobative institution, and that such an institution will have to be retributive to the extent of a) imposing hardship, and b) deriving its justification for imposing hardship from the need to take the offence seriously. One key objection that reprobative theories of punishment face – for instance, in Joel Feinberg's classic paper [Feinberg (1974)] – is the demand to explain why, if condemnation of an offence is necessary, it could not be issued verbally, or symbolically. How does the argument that hardship is necessary resist lapsing back into a more basic form of retributivism? The argument for a) in *The Apology Ritual* doesn't take the common retributivist route of looking at the way in which something like outrage at an offence makes us want to inflict harm on offenders. Rather it derives from the fact that an appropriate response to the offence on the part of the offender will involve willingly assuming some burden as a way of making amends. Hence we need something like the Penance argument to explain why penitential amends proportionate to the offence are a necessary part of an appropriate response to that offence. The Penance argument needs to explain why a response to offenders that didn't involve treating offenders in a certain way in order to do justice to their offence (such as the purely verbal or symbolic communication of condemnation) would fail to take the offender and offence seriously. Finally, the Penance argument assumes that the demand for penance is a compelling one

for the offender. But this involves a certain view of identity and responsibility, and so we need an argument that spells out that view and defends it against some of the concerns that philosophers have traditionally had about moral responsibility. This is the role of the Right to be Punished argument, the conclusion of which is that we owe it to offenders that we should hold them responsible, on the grounds that doing so is constitutive of treating them as a capable and independently functioning member of a relationship.

II. The Apology Ritual Argument

One way to motivate intuitions when dealing with a question like that of the justification of punishment is to attempt to put oneself, imaginatively, into a society in which the institution in which one is interested doesn't exist, and then ask whether there would be a need for that institution. So: if punishment didn't exist, would we need to invent it? The reason for trying this thought-experiment is not so that we will be in a position to assert the rational necessity, for all forms of human society, of the institution of punishment, let alone in order to make claims about the actual historical genesis of the institution of punishment. Rather the thought experiment, it is hoped, might illuminate the place of the institution of punishment in our values and our self-understanding. For instance, one way of justifying punishment would be to show that, however unattractive or unpleasant punishment might be, it is in fact a necessary part of something else that is more uncontroversially good. If punishment really is a necessary part of that good then the appearance of unattractiveness can be dispelled. But such an account might also help us to understand better what punishment is really there for, and hence to understand how we might do it better, undistracted by other competing but false accounts of what it does.

From the overview given in the first section, it might already be obvious that the strategy for the justification of punishment adopted in *The Apology Ritual* is to claim that punishment is necessary in order to take wrongdoing seriously. Taking wrongdoing seriously is something that many people will agree is an important aim. Therefore if punishment is necessary to do that – if the absence of punishment would be in some way to tolerate wrongdoing – then we could perhaps see that punishment, up to that point, is justified. (It is worth noting, at this point, that the same strategy goes through the whole book: the Penance and Right to be Punished arguments will also be found to rest on a conception of what it is to respond to human wrongdoing in a way that is sufficiently morally serious.)

Let us start, then, with the notion of a decent society. I don't mean "decent" as a term of art, as in Margalit's conception of the society that allows its citizens to live free from humiliation [Margalit (1998)]. I simply have in

mind a hopefully uncontroversial claim, that a decent society is one that won't stand for, or won't tolerate, certain things being done by its citizens. The decent society is one that is organised in line with certain values, and a reasonable view of these values will extend to the lives of its citizens (and not just its own citizens), their environment, the common institutions of society, the lives of future generations, and so on. Now because it is citizens themselves that have to be the agents of the promotion and respect of these values, it follows that a society that has values must hold that citizens ought not to act in certain ways: it will hold that citizens have responsibilities.

Now imagine a society in which there was no system of criminal justice of any sort, by which I mean no mechanism in which society collectively takes action against someone who violates their responsibilities. The difference between our society and this alternative society is that in the alternative the society takes no action to mark the action as impermissible or intolerable. In such a society, it may be true to say that citizens have those responsibilities, but it can't be said that the society is one that, collectively, takes those responsibilities seriously. At any rate this society is not one that regards its citizens as bound by those responsibilities. If the society takes no action to mark the actions as impermissible or intolerable it is hard to see how that society could be claimed to regard those responsibilities as binding. Otherwise put, the decent society has to condemn those acts that are intolerable.

That will do at present for the argument that a state that takes a stand on certain values needs an institution of censure: an institution that marks certain acts as beyond the pale. The question now is whether punishment is necessary for such censure to take place. The argument for this point begins with the observation that, for an act to be an act of condemnation, it must meet certain conditions, one of which is that it should be symbolically adequate. Like a well-formed proposition, it needs to take a certain form in order to have condemnatory meaning. Now, if this is accepted, the next question that arises is where the relevant symbols are to be found. The answer that the Apology Ritual argument gives is that the symbolism of condemnation will have to connect state condemnation of crime in some way with the way in which we react to wrongdoing in everyday life. Our intuitive expectations about reactions to wrongdoing are inextricably linked to the practices of dealing with wrongdoing that we play out time and time again in interpersonal life. Thus, in order to find the symbolism that will express condemnation, we should look at the emotional behaviour that surrounds wrongdoing in non-state situations.

This should then direct our attention at the range of emotions that we experience towards wrongdoers. Of course, we should not be uncritical in our drawing on the emotions. Some emotions are mean-minded, ungenerous, malicious, cruel, egoistic, and so on. But some emotions, it might be, can survive critical reflection. It is ideally those emotions that we will want to draw

on. Critical reflection on the emotions will look at a) how the emotion portrays the wrongdoer, and whether that is compatible with our considered view, and b) what is a proportionate emotional response to the situation. The idea is that we therefore come up with some view about what a proportionate and appropriate emotional response to wrongdoing would be, and seek in some way to replicate that in punishment.

One way to do that would be to argue that emotions like blame and indignation lead us to attack the wrongdoer and inflict suffering on him, and that in this way such emotions are directly analogous to punishment. However, it is not at all clear that blaming *can* justifiably lead to such aggressive responses. Blame, on my view, is characterised more by *withdrawal* from the offender than by the active infliction of suffering. My approach is rather to argue that we should look at the reaction that we think the *offender* should have to the offence. Self-blame, or guilt, I argue, leads to penitential action; and though penitential action can often get out of proportion, we have a fairly determinate sense of how a person's willingness to make amends should match the seriousness of their breach (such that an offer of insufficient amends can add insult to injury by showing that the offender has failed to grasp the seriousness of what they have done). In other words, the properly sorry person will be motivated to do something to make up for the offence. And it is this fact that gives us our symbolism for expressing proportionate condemnation. In imposing a certain level of amends on an offender we express condemnation in a symbolically adequate way: we condemn the wrong as being of a certain gravity by expressing how sorry the offender ought to be for what they have done.

Since the role of the state is simply to express censure, it is not essential to the success of punishment that the offender makes the amends willingly. The state's role is simply to express censure, and it is not clear that it properly has a role of ensuring that the offender is truly guilty. Hence the process of making amends is one that the offender can engage in purely ritualistically, without appropriate motivations. Such a scenario would not be ideal; but it would not prevent the state from having expressed due condemnation of the act.

The Apology Ritual argument raises various questions, of course. The one I want to concentrate on at the moment is the crucial question of why an offender who is properly sorry should be motivated to penitential action. This is an important claim because it is not enough for the Apology Ritual argument that the connection between having done wrong and making amends should be widely accepted, or that many people accept it. That might be enough if the point of punishment was to get people to *realise* that the state disapproves of an action, to *communicate* disapproval: if that was the point then the state should use whatever symbols the folk use. But the Apology Ritual argument is more ambitious, since it holds that, for some very serious actions, acts that constitute condemnation are necessary because not to con-

demn would be to acquiesce in the offence. Therefore the symbols used for condemnation have to be, not just those that happen to be in use, but those that *actually* dissociate us from the wrong. Penitential action seems like a candidate here; at any rate those who undertake it experience it as a way of dissociating themselves from their action. But the question is, are they right to experience it in that way? In order to answer that question, we need the Penance argument.

III. The Penance Argument

The Penance argument states that penance is the offender's withdrawal of goodwill from himself. It rests on an explanation of why withdrawal is an appropriate reaction to an offender; and then sees penance as the internalisation of this reaction. Penance occurs when the offender accepts blame.

The argument in defence of this view starts from a claim about relationships that a) are valuable in the sense that we look on them as part of what makes our lives good and worthwhile, and b) that are structured, in part, by one's being subject to certain responsibilities. It looks at what is involved in being *included* in such relationships. When one is included by others in a certain relationship, I claim, they treat you in ways that mark you out as a member of that relationship. Some of these forms of "special treatment" or "recognition" are things such as greetings, inquiries after one's well-being, types of care and affection, etc., by which people affirm their shared participation in a relationship they regard as an important tie. But other marks of recognition have to do with being asked to perform the duties that are part of the relationship, or to get involved with the activities we are involved with as a member of that relationship. Friendship is a good example of this. To be a friend to someone is to recognise that there is such a thing as being a *good* friend to someone. That is to say, there are certain standards or responsibilities to the relationship, standards the meeting of which is constitutive of being in that relationship. If one has no regard whatsoever for those standards, and if the person involved has no claim on your time and attention that marks them out as someone in that relationship with you, then it is not clear whether the relationship really exists. So the first premise in the argument is that there are marks of "recognition," distinctive forms of treatment that one gets when one is a member of a certain relationship.

Now in between the two extremes of being a truly good friend and being no friend at all, lies a large grey area where the question of what friends can reasonably demand of one another is settled. The part of this continuum in which I am interested, is that in which a person a) violates the basic standards that can be reasonably expected of her in the context of that relationship but without b) thereby no longer being in that relationship. In that case it

is not that she is (literally) no friend at all – she is, after all, still subject to the demands of the relationship. (The fact that the demands of that relationship still make a claim on her shows this.) However, the question arises how one should take that violation of friendship seriously – assuming, that is, that the friendship still holds, is still important, but has been violated.

First of all, one might take various courses of prudential action, in order to protect one's own feelings, say, or to stop wasting any more time in the relationship. On those grounds they might withdraw from the relationship or break it off. However, I am interested in something different. As I have said before, I am interested in behaviour that is not forward-looking, but rather is *constitutive of* taking the violation of friendship seriously. And here the thought is that one wants to do something that prevents one acquiescing in or condoning what the other person has done. One wants to resist the claim, implicit in the violation, that these are the terms on which the friendship might proceed. My claim is that the basic retributive intuition is that one should not simply remain on good terms with the person because that would be to imply that one went along with their way of behaving. If one has that intuition, there is a question how one should show one's non-acquiescence. One might confront the person, explaining to them why one feels that their behaviour was beyond what is reasonable. However, I think that it will also be the case that, until the person has accepted the justice of your complaint, you will also find it necessary to alter the terms of the relationship with the person, and will do so by withdrawing some of the "marks of recognition" that you would have given the person otherwise. Hence the thought that moral disapproval expresses itself essentially in a withdrawal of goodwill or recognition. One withdraws from the relationship, partially and temporarily, not in order to protect oneself or save one's precious time, but rather because to treat the person as if nothing had happened would be to condone or acquiesce in the violation of the relationship. Therefore the terms of the relationship have to alter.

It is important also to distinguish this backward-looking expressive behaviour from forward-looking communicative behaviour. The point is not that one wants to communicate one's disapproval to the offender. For if this was the case the question would arise whether withdrawal of recognition was the best way to communicate disapproval: it would become a contingent question. Whereas the question of the fittingness of withdrawal behaviour has rather to do with the non-contingent matter of whether it does justice to the gravity of the wrongdoing. Blame is therefore not essentially communicative, but rather forms part of that large realm of expressive behaviour that is often neglected by moral philosophers, such as saying sorry, expressing gratitude, mourning, expressing joy, and so on. In this realm the standards of "getting it right" are akin to aesthetic standards; they have to do with whether the behaviour does justice to the situation, or captures it. It is not a forward-looking aim.

When one is oneself the offender, what happens if one accepts the disapproval of others and takes their part? If my story is correct, one will withdraw recognition from oneself. One will feel it impossible to be on good terms with oneself and give oneself the usual respect and good treatment. One way in which this will come out is the feeling of guilt which, as a number of writers have acknowledged, is a feeling of self-alienation, or self-splitting. But this analysis also explains why the guilty person might feel compelled to undergo something penitential. The meaning of penance derives from the fact that one cannot be on good terms with oneself and will have to treat oneself less well until the offence has been dealt with. What this will actually involve in any particular instance is a large question, but it seems an observable fact about the phenomenology of moral experience that we judge the sincerity of a person's remorse by their unwillingness to look for the normal benefits that accompany a good life, in a manner proportionate to their understanding of the seriousness of their wrong.

All this suggests, then, that the imposition of penitential amends is an appropriate symbolisation of "how sorry one ought to be": a certain amount of amends is what the "virtuous offender" would feel compelled to make in a situation of wrongdoing.

IV. The "Right to Be Punished" Argument

The argument so far has been that, with respect to interpersonal relationships, taking violations of the demands of a relationship seriously requires blame (withdrawal) and hence penance on the part of the offender; and that, with respect to the decent state, taking "public wrongs" seriously requires imposing penitential amends, in order to appropriately symbolise the necessary condemnation of the offence. But the retributive responses in which I am interested could also be seen as a way of taking the wrongdoer seriously, since seeing the action as an offence involves seeing it as the action of an agent bound by certain demands. The Penance Argument makes it clear that, in blaming, the offender is seen as a member of that relationship that has been violated. The argument therefore claims, contrary to many of the common criticisms of retributivism, that retributive responses can be inclusive – and, indeed, necessary for inclusion. That is the truth I claim can be found in the seemingly strange idea of the "right to be punished". I now want to explain how this argument can be defended against two objections.

The first objection is what in the book I call the "sceptical argument from luck". It states that, since control is a necessary condition of true moral responsibility, the fact that we are not ultimately in control of what we do (because what we do is conditioned by who we are and how we think, and we are not ultimately in control of *that*) means that we are not ultimately morally

responsible, and that it is therefore unfair to blame anyone for wrong actions. One way to see what is wrong with this challenge is to ask how we should treat offenders (or "offenders") if the conclusion of the argument were to be accepted. One possibility would be that we should, as far as possible, simply *accommodate* disruptive behaviour, as we might accommodate the disruptive behaviour of someone with Tourette's Syndrome; and that insofar as we cannot accommodate or tolerate it, we should take minimally harmful steps to protect ourselves against it. This is, indeed, to deal with "wrongdoing" as if it is analogous to a condition such as Tourette's. The problem with this analogy is that it denies that we have an important form of freedom, and hence that we are free in respect of wrongdoing in a way that the Tourette's sufferer is not in control of his shouting and swearing. The crucial difference between the Tourette's case and that of the wrongdoer is that the person who does wrong does so because he thinks that it is all right to act in that way. Why is that a morally critical distinction? Because one might think that one is free in the sense that one has the ability, if one thinks about it well enough and imaginatively enough, a) to recognise that some acts are impermissible or intolerable, and b) to conform one's behaviour to what one thus recognises. What this ability amounts to can be seen if we look at our engagement in the practice of shared inquiry. Shared inquiry rests on the assumption that our conclusions can be guided by considerations that we can recognise in common. Only a person who is responsive to relevant considerations when they are put to her can seriously be engaged by others in a shared inquiry. Furthermore the practice of shared inquiry into practical matters of what to do and feel is so essential to social interaction that the denial of freedom in this sense would limit one's life chances severely. Therefore being treated as free in this sense – and hence responsible in the sense that one can be called to account for one's beliefs and actions and expected to recognise relevant considerations counting for and against acting that way – is an important form of inclusion and one that, when one has it, should be affirmed and recognised. The analogy between the Tourette's sufferer and the wrongdoer threatens to overlook the importance of this distinction.

We have now sketched the answer to the first objection. However, the second objection arises immediately from the response to the first. Let's say we grant that it is important to treat the agent as free in the sense that she can engage in shared inquiry. In that respect we might draw the conclusion that a given agent has the "right to be treated as one who can appropriately be held to account." But it does not give us a "right to be punished." Rather it suggests a non-retributive response to wrongdoing, which is that we engage the wrongdoer in dialogue about why what she did was wrong, aiming to get her to engage imaginatively with the considerations that count against acting as she did. It is not clear why the inclusion of the offender in an important

form of social interaction requires that she be subjected to retributive reactions such as blame and withdrawal.

The response to this objection draws a distinction between being an agent who can be engaged in a practice of shared inquiry, and who is therefore capable of learning and adjusting their behaviour to what they learn, and an agent who is an independently functioning member of a particular relationship, capable by himself of recognising his responsibilities and conforming with them. Thus in the book I distinguish between those who, with respect to the responsibilities of a particular relationship, are *apprentices* (who are capable of learning but need guidance), and those who are *qualified practitioners* (who can reasonably be expected to function independently). My claim is that the symbolism of withdrawal is appropriate for qualified practitioners, but not for apprentices, and that entering into dialogue about the wrong with qualified practitioners and without the symbolism of withdrawal is inappropriate since it doesn't recognise that, even if the agent acted as he did through a failure in imagination or moral understanding, the qualified practitioner has a responsibility to take the necessary steps to full recognition of his responsibilities himself. If he needs guidance then it is up to him to seek guidance; therefore if he fails to seek guidance and thence does wrong, the wrong is a failure to do something that it was his responsibility to do.

My interest is therefore in the importance within social interaction of our being treated as qualified practitioners, and hence as independently – without guidance or intervention from others – capable of recognising what, in a given situation or relationship, can reasonably and justifiably be expected of us. My view rests on the claim that a) it is hugely important to be recognised, with respect to at least some areas of our lives, as qualified practitioners, since those who are not so qualified are not given the same liberty, privacy, and room for individuality and creativity, as those who are; and b) that when a qualified practitioner does wrong, they are in the position of being a member of a relationship whose basic terms they have violated, and the appropriate way to respond to that, in order not to accept or condone or acquiesce in it, is to withdraw (partially and temporarily) the marks of recognition that would normally go with membership of that relationship. That is the kernel of truth in the "right to be punished".*

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NOTES

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REFERENCES

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

FEINBERG, J. (1974), "The Expressive Function of Punishment", in *Doing and Deserving*, Princeton, NJ: Princeton University Press, pp. 95-118.

MARGALIT, A. (1998), *The Decent Society*, Cambridge MA: Harvard University Press.

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Resumen de *The Apology Ritual*

Christopher Bennett

ABSTRACT

In this paper I summarise the main arguments of my book *The Apology Ritual*. I draw attention to three main lines of argument, taking them in reverse order to that in which they appear in the book. First, I look at the book's communicative-expressive justification of state punishment. Secondly, I look at the argument for the claim that feeling properly sorry involves a requirement to undertake some sort of penance. And thirdly, I look at the argument for the "right to be punished": as I interpret it, that there is an important status associated with being treated as a responsible agent.

KEYWORDS: *Punishment; Criminal Justice; Retribution; Emotion; Responsibility; Penance.*

RESUMEN

En este trabajo resumo los argumentos principales de mi libro *The Apology Ritual*. Llamo la atención sobre tres líneas principales de argumentación, tomándolas en un orden inverso al de su aparición en el libro. Primero dirijo la mirada a la justificación expresivo-comunicativa del castigo por parte del estado que ofrece el libro. En segundo lugar, considero el argumento a favor de la afirmación de que sentirse verdaderamente arrepentido trae consigo la exigencia de que se asuma algún tipo de penitencia. Y, en tercer lugar, me ocupo del argumento a favor del "derecho a ser castigado" tal y como lo interpreto, según el cual hay un estatuto importante asociado a que uno sea tratado como un agente responsable.

PALABRAS CLAVE: *castigo; justicia penal; retribución; emoción; responsabilidad; penitencia.*

I. INTRODUCCIÓN Y PANORAMA

En esta pieza introductoria me gustaría destacar tres de los argumentos principales de *The Apology Ritual* [C. Bennett, *The Apology Ritual*. *A Philosophical Theory of Punishment*, Cambridge, Cambridge University Press, 2008]. Empezaré por el final del libro, con la esperanza de, por así decir, arrojar alguna nueva luz sobre los asuntos que el libro abarca. El libro acaba con una

teoría del castigo por parte del estado que en ciertos aspectos clave es retrospectiva o retributiva. Esto quiere decir que defiende una justificación para infligir algún tipo de revés al delincuente (*offender*) por su delito, según la cual esa respuesta hace justicia a aquello que el delicuente ha hecho y no se puede decir que produce en la misma medida un bien ulterior. Sin embargo, el argumento a favor del castigo por parte del estado se supone que evita los escollos con los que tropiezan formas más básicas de la teoría retribucionista de la pena, basadas en la idea pura y dura y poco atractiva de que los delincuentes merecen sufrir. El argumento de *The Apology Ritual* considera que el propósito más importante del castigo por parte del estado es la condena proporcionada de las malas acciones (*wrongs*) morales –o, al menos, de las malas acciones morales que son asunto de la colectividad (para las que Duff [Duff (2001)] se ha apropiado del término "malas acciones públicas (*public wrongs*)"). Y, para explicar por qué la condena tiene que involucrar una pena, se apoya en el paralelismo que hay entre la pena y esas reacciones retributivas que parecen apropiadas en las interacciones interpersonales. De ahí que vaya a revisar los argumentos del libro empezando por el final y desandando algunos de los pasos con los que mi conclusión me compromete. Luego mostraré cómo trato de defender esos compromisos examinando el paralelismo con las interacciones interpersonales.

Así pues, los argumentos a los que prestaremos atención aquí son: 1) el Argumento del Ritual de la Disculpa; 2) el Argumento de la Penitencia; y 3) el Argumento del Derecho a Ser Castigado. Pero antes de entrar en el detalle de estos argumentos podría servir de ayuda que proporcionara brevemente una visión de conjunto del modo en que los tres encajan entre sí.

El Argumento del Ritual de la Disculpa intenta establecer que un estado que es como debe ser (*decent*) necesita de una institución reprobatoria, y que semejante institución tendrá que ser retributiva hasta el punto de a) imponer sufrimientos y b) derivar la justificación para hacerlo de la necesidad de tomarse el delito en serio. Una objeción clave a la que tienen que hacer frente las teorías reprobatorias de la pena –por ejemplo, en el trabajo clásico de Joel Feinberg [Feinberg (1974)]– es la exigencia de que se explique por qué, siendo la condena del delito necesaria, no se podría aplicar verbal o simbólicamente. ¿Cómo evita el argumento de que el sufrimiento es necesario una recaída en formas más básicas de retribucionismo? El argumento a favor de (a) en *The Apology Ritual* no sigue la vía retribucionista común de volver la mirada hacia el modo en que algo parecido a la indignación ante un delito nos hace querer infligir daño a los delincuentes. Más bien deriva del hecho de que una respuesta apropiada al delito de parte del delincuente involucrará la aceptación voluntaria de alguna carga a modo de reparación. Por tanto, necesitamos de algo parecido al Argumento de la Penitencia para explicar por qué las reparaciones de tipo penitencial proporcionales al delito son una parte necesaria de la respuesta apropiada a ese delito. El Argumento de la Penitencia

tiene que explicar por qué una respuesta a los delincuentes que no involucrara tratarlos de cierto modo para hacerle justicia al delito (tal y como lo sería la comunicación puramente verbal o simbólica de una condena) fracasaría a la hora de tomarse en serio al delincuente y el delito. Finalmente, el Argumento de la Penitencia supone que la exigencia de penitencia es obligatoria para el delincuente. Pero esto implica cierta concepción de la identidad y la responsabilidad, así que necesitamos un argumento que explicite esa visión y la defienda contra algunas de las preocupaciones que los filósofos han expresado tradicionalmente a propósito de la responsabilidad moral. Éste es el papel del Argumento del Derecho a Ser Castigado, cuya conclusión es que estamos obligados para con los delincuentes a hacerlos responsables, y esto sobre la base de que hacerlo es constitutivo de tratarlos como miembros capaces y funcionalmente independientes de una relación.

II. El argumento del Ritual de la Disculpa

Un modo de motivar intuiciones cuando tratamos de cuestiones como la de la justificación de la pena es intentar situarse uno mismo, imaginariamente, en una sociedad en la que la institución por la que nos interesamos no existe y preguntarnos, entonces, si habría necesidad de una institución tal. Así pues, si no existiera la pena, ¿necesitaríamos inventarla? La razón para ensayar este experimento mental no es tanto que [después de hacerlo] estaremos en condiciones de afirmar la necesidad racional, para todo tipo de sociedad humana, de la institución de la pena, no digamos ya de decir algo sobre su génesis histórica real. Más bien, se espera que el experimento mental ilumine el lugar de la institución de la pena en el conjunto de nuestros valores y nuestra comprensión de nosotros mismos. Por ejemplo, un modo de justificar la pena consistiría en mostrar que, a pesar de lo poco atractiva y desagradable que la pena puede ser, es de hecho una parte necesaria de otra cosa que es buena en un sentido menos controvertido. Si la pena fuera realmente una parte necesaria de ese bien, entonces la apariencia de falta de atractivo podría conjurarse. Pero tal concepción podría ayudarnos además a comprender mejor para qué existe la pena y, por tanto, a entender cómo podríamos mejorarla, no tentados ya por otras concepciones, rivales pero falsas, de su función.

A la vista del panorama ofrecido en la primera sección, podría resultar ya obvio que la estrategia para la justificación de la pena adoptada en *The Apology Ritual* es afirmar que la pena es necesaria con vistas a tomar el delito seriamente. Tomarse el delito seriamente es algo que mucha gente estará de acuerdo en que es un fin importante. Por consiguiente, si la pena es necesaria para hacerlo, si la ausencia de pena significa, en algún sentido, que el delito es tolerado, entonces podríamos entender que la pena está, hasta ese punto, justificada. (Vale la pena señalar aquí que la misma estrategia atraviesa todo

el libro: los Argumentos de la Penitencia y del Derecho a Ser Castigado vendrán también a descansar sobre la concepción de en qué consiste responder al delito del hombre de un modo que sea moralmente serio).

Empecemos, pues, por la noción de sociedad que es como debe ser (*decent*). No utilizo 'decent' como si fuera un término técnico, como ocurre en la concepción de Margalit de una sociedad que permite a los ciudadanos vivir libres de humillaciones [Margalit (1998)]. Tengo en mente, simplemente, una afirmación que espero que no sea controvertida: que una sociedad que es como debe ser es una sociedad que no respaldará, o que no tolerará, que los ciudadanos hagan ciertas cosas. Una sociedad así es tal que está organizada de acuerdo con ciertos valores, y una concepción razonable de esos valores se extiende por la vida de los ciudadanos (y no sólo de sus ciudadanos), a su entorno, a las instituciones comunes de la sociedad, a las vidas de generaciones futuras, etcétera. Pues bien, puesto que son los ciudadanos mismos quienes tienen que ser los agentes de la promoción y el respeto de estos valores, se sigue que una sociedad que tiene valores debe sostener que los ciudadanos no deberían actuar de ciertos modos: sostendrá que los ciudadanos tienen responsabilidades.

Imaginemos ahora una sociedad en la que no existe un sistema de justicia penal de ningún tipo, y con ello me refiero a un mecanismo por el que la sociedad emprende colectivamente acciones contra quien conculca sus responsabilidades. La diferencia entre nuestra sociedad y esa sociedad alternativa es que en la alternativa la sociedad no hace nada para señalar tal acción como inadmisible o intolerable. En semejante sociedad podría ser correcto decir que los ciudadanos tienen esas responsabilidades, pero no se puede decir que la sociedad es tal que, colectivamente, se toma en serio esas responsabilidades. En cualquier caso, esa sociedad no considera que sus ciudadanos estén sujetos a esas responsabilidades. Si la sociedad no hace nada para señalar las acciones como inadmisibles o intolerables, es difícil ver cómo se puede decir que la sociedad considera que esas responsabilidades son vinculantes. Dicho de otro modo, una sociedad que es como debe de ser tiene que condenar esos actos intolerables.

Esto funciona por ahora como argumento a favor de que un estado que se posiciona con respecto a ciertos valores tiene necesidad de una institución de censura: una institución que marque ciertos actos como extralimitaciones. La cuestión ahora es si la pena es necesaria para que esa censura tenga lugar. El argumento a favor de esto parte de la observación de que, para que un acto sea un acto de condena, tiene que satisfacer ciertas condiciones, una de las cuales es que debe ser adecuado simbólicamente. Como una oración bien formada, tiene que adoptar cierta forma con vistas a tener un significado condenatorio. Pues bien, si esto se acepta, la siguiente cuestión que se plantea es dónde se pueden encontrar los símbolos relevantes. La contestación que el Argumento del Ritual de la Disculpa ofrece es que el simbolismo de la condena tendrá que conectar de alguna manera la condena del delito por parte del estado con el modo en que reaccionamos ante el delito en la vida cotidiana.

Nuestras expectativas intuitivas sobre las reacciones ante el delito están inextricablemente vinculadas a las prácticas de tratar con delitos en las que participamos una y otra vez en la vida interpersonal. Así pues, con vistas a dar con el simbolismo que expresará la condena, hemos de considerar el comportamiento emocional que rodea al delito en situaciones que no son competencia del estado.

Esto ha de dirigir nuestra atención hacia el espectro de emociones que experimentamos hacia quienes delinquen. Por supuesto, no deberíamos dejar de ser críticos cuando recurrimos a las emociones. Algunas emociones son mezquinas, no generosas, maliciosas, egoístas, etcétera. Pero algunas emociones, podría ser, pueden sobrevivir a la reflexión crítica. Es a esas emociones a las que queremos recurrir. La reflexión crítica sobre las emociones considerará a) cómo la emoción retrata al delincuente, y si es compatible con el punto de vista que estamos considerando, y b) cuál es una repuesta emocional proporcionada a la situación. La idea es que, así, llegaremos a tener una visión sobre cuál sería una respuesta emocional proporcionada y apropiada, y buscar entonces un modo de reproducirla en la pena.

Un modo de hacer esto sería argumentar que emociones como la censura y la indignación nos conducen a atacar al delincuente y a causarle sufrimientos y que, en este sentido, esas emociones son directamente análogas a la pena. Sin embargo, no está en absoluto claro que censurar *pueda* conducir justificadamente a tales respuestas agresivas. La censura, desde mi punto de vista, se caracteriza más por un *rechazo* del delincuente que por causar activamente sufrimiento. Mi enfoque consiste más bien en argumentar que deberíamos contemplar la reacción que pensamos que el *delincuente* debería tener ante el delito. La auto-censura, o la culpa, razono, conduce a la acción penitencial; y aunque la acción penitencial rebase a menudo la proporcionalidad, tenemos un sentido bastante determinado de cómo la disposición de una persona a llevar a cabo una reparación debe corresponder a la seriedad de su infracción (de modo que una oferta de reparaciones insuficientes puede agregar sal a la herida, al mostrar que el delincuente no ha logrado captar la seriedad de lo que ha hecho). Con otras palabras, la persona genuinamente arrepentida estará motivada a hacer algo para compensar el delito. Y es este hecho el que nos proporciona el simbolismo para expresar una condena proporcionada. Al imponer cierto nivel de reparaciones al delincuente expresamos condena de un modo simbólicamente adecuado: condenamos el mal causado como algo que tiene cierta gravedad al expresar cuán apenado debería estar el delincuente por lo que ha hecho.

Puesto que el papel del estado es simplemente el de expresar censura, no es esencial para el éxito de la pena que el delincuente haga la reparación de modo voluntario. El papel del estado es puramente el de expresar censura, y no está claro que tenga el de asegurar que el delincuente se sienta verdaderamente culpable. Por eso, el proceso de reparación es tal que el delincuente puede participar de un modo puramente ritual, sin las motivaciones corres-

pondientes. Semejante escenario no sería el ideal; pero no impediría que el estado hubiera expresado la debida condena del acto.

El Argumento del Ritual de la Disculpa suscita varias cuestiones, por supuesto. Una en la que me quiero concentrar ahora es la cuestión crucial de por qué un delincuente que se siente propiamente apenado por lo que ha hecho debería estar motivado para actuar penitencialmente. Esto es importante, porque no es suficiente para el Argumento del Ritual de la Disculpa que la conexión entre haber actuado mal y la reparación sea ampliamente aceptada, o que mucha gente la acepte. Tal cosa podría bastar si el objeto de la pena fuera que la gente *se diera cuenta* de que el estado no aprueba una acción, *comunicar* desaprobación: si ese fuere su objeto, el estado debería usar cualquier símbolo empleado por la gente. Pero el Argumento del Ritual de la Disculpa es más ambicioso, pues sostiene que, con respecto a algunas acciones muy serias, los actos que constituyen la condena son necesarios, porque no condenar vendría a ser condescender con el delito. Por lo tanto, los símbolos usados para condenar han de ser, no los que sucede que están en uso, sino los que nos disocian *efectivamente* del daño realizado. La acción penitencial parece aquí una buena candidata; en todo caso, quienes emprenden tal acción la experimentan como un modo de disociarse de su acción previa. Ahora bien, la cuestión es: ¿tienen derecho a experimentarla de ese modo? Y para contestarla, necesitamos del Argumento de la Penitencia.

III. El Argumento de la Penitencia

El Argumento de la Penitencia establece que la penitencia consiste en que el delincuente retira la buena voluntad con que se trata a sí mismo. Descansa sobre la explicación de por qué la retracción es una reacción apropiada hacia el que delinque; y luego ve la penitencia como una interiorización de esta reacción. La penitencia tiene lugar cuando el delincuente acepta la censura.

El argumento en defensa de esta concepción parte de una afirmación sobre las relaciones: a) que son valiosas en el sentido de que las consideramos parte de lo que hace nuestras vidas buenas y dignas de ser vividas, y b) que están estructuradas, parcialmente, por la sujeción a ciertas responsabilidades. Contempla lo que está implicado en estar *incluido* en tales relaciones. Cuando uno está incluido por otros en una cierta relación, sostengo, es tratado de maneras que lo distinguen como miembro de la relación. Algunas de estas formas de 'trato especial' o 'reconocimiento' son cosas tales como saludos, preocupación por el bienestar de uno, ciertos tipos de atención y de afecto, etc., por medio de los cuales la gente afirma su participación común en una relación que es considerada un lazo importante. Pero otras señales de reconocimiento tienen que ver con que se demanda que se cumpla con los deberes que son parte de la relación, o que uno se involucre en actividades

que trae consigo la relación. La amistad es un buen ejemplo de esto. Ser el amigo de alguien pasa por reconocer que existe algo así como ser un *buen* amigo de alguien. Esto significa que hay ciertos estándares o responsabilidades para con la relación, estándares cuya satisfacción es constitutiva de la participación en la relación. Si uno se desentiende totalmente de esos estándares, y si las personas implicadas no tienen derecho alguno sobre tu tiempo y atención que las distinga como personas que mantienen cierta relación contigo, entonces no está claro que la relación exista realmente. Así pues, la primera premisa del argumento es que hay señales de 'reconocimiento', formas distintivas de trato que se le otorgan a uno cuando participa en cierta relación.

Ahora bien, entre los extremos de quien es verdaderamente un buen amigo y quien no es un amigo en absoluto hay una gran área gris en la que se decide la cuestión de qué pueden los amigos exigir razonablemente. La parte de este continuo por la que me intereso es aquella en que una persona a) conculca los estándares básicos a los que está sujeto lo que puede esperarse razonablemente de ella en el contexto de la relación, pero b) sin por ello dejar de mantener esa relación. En tal caso, no ocurre que (literalmente) esa persona no sea amiga en absoluto – después de todo, está todavía sujeta a las exigencias de la relación. (El hecho de que las exigencias de esa relación todavía la interpelen es una muestra de ello). Sin embargo, la cuestión que se suscita es cómo se debería tomar en serio la violación de la amistad – dando por supuesto que la amistad subsiste, que es importante todavía, pero que ha sido quebrantada.

Antes que nada, se podrían adoptar diversas medidas de prudencia con vistas a, digamos, proteger los propios sentimientos, o a dejar de perder el tiempo en esa relación. Sobre esta base, uno podría renunciar a la relación o interrumpirla. No obstante, me intereso por otra cosa. Como he dicho, me interesa el comportamiento que no mira hacia delante, sino que es *constitutivo* del tomarse en serio la violación de la amistad. Y lo que se piensa aquí es que uno quiere hacer algo que evite la condescendencia con, o la convalidación, de lo que ha hecho la otra persona. Uno quiere ofrecer resistencia a la pretensión, implícita en la violación, de que estos sean los términos en los que podría continuar la amistad. Mi postura es que la intuición retributiva básica es que uno no debería sin más mantenerse en buenos términos con la persona, porque eso implicaría que uno consiente ese modo de comportarse. Si se tiene esa intuición, se plantea la pregunta por cómo uno debería mostrar su propia intolerancia. Podría enfrentarse a esa persona, explicarle por qué uno siente que su comportamiento ha traspasado los límites de lo razonable. Sin embargo, creo que también ocurrirá que hasta que la otra persona haya aceptado la justicia de nuestra queja nos parecerá necesario alterar los términos de la relación con ella, y lo haremos retirando algunas de las 'señales de reconocimiento' que de lo contrario le concederíamos. De ahí que se piense que la desaprobación moral se expresa esencialmente por la retirada de la buena voluntad o el reconocimiento. Uno se aparta de la relación, parcial y temporalmente, no con vistas a proteger-

se o a ahorrarse un tiempo precioso, sino más bien porque tratar a esa persona como si nada hubiera ocurrido sería condonar o tolerar la violación de la relación. Por lo tanto, los términos de la relación han de cambiar.

También es importante distinguir este comportamiento expresivo que mira hacia atrás del comportamiento comunicativo que mira hacia delante. El asunto no es que uno quiera comunicar la propia desaprobación a quien comete un delito. Pues si ése fuera el caso, se plantearía la pregunta de si la retirada del reconocimiento era la mejor manera de comunicar la desaprobación: eso se convertiría en una cuestión contingente, mientras que la cuestión de la oportunidad de la retracción tiene más bien que ver con la cuestión no contingente de si hace justicia a la gravedad del delito. La censura no es, por tanto, esencialmente comunicativa, sino que forma parte más bien de un amplio espacio de comportamiento expresivo que es con frecuencia olvidado por los filósofos morales e incluye la expresión de disculpas, la expresión de gratitud, los lamentos, la expresión de gozo, etcétera. En este espacio los estándares de 'corrección' están emparentados con los estándares estéticos; tienen que ver con si el comportamiento le hace justicia a la situación o la 'capta'. Este comportamiento no tiene un propósito prospectivo.

Si uno es quien delinque, ¿qué ocurre cuando acepta la desaprobación de otros y se pone en la piel de ellos? Si mi reconstrucción es correcta, él mismo se retirará el reconocimiento. Sentirá que es imposible mantenerse en buenos términos consigo mismo y concederse el respeto y buen trato habitual. Esto puede resultar en un sentimiento de culpa que, como muchos autores han reconocido, es un sentimiento de auto-alienación o auto-escisión. Pero este análisis explica también por qué la persona culpable podría sentirse empujada a soportar algún tipo de penitencia. El significado de la penitencia deriva del hecho de que uno no puede estar en buenos términos consigo mismo y de que tendrá que tratarse peor hasta que se haya resuelto lo que ha hecho. Qué haya de implicar esto, de hecho, en un caso particular es una cuestión muy amplia, pero me parece que es un hecho observable de la fenomenología de la experiencia moral que juzgamos la sinceridad del remordimiento de una persona por la falta de pretensiones con respecto a los beneficios normales que acompañan a la vida buena, de un modo proporcionado a su comprensión de la seriedad de la injusticia.

Todo esto sugiere, pues, que la imposición de reparaciones penitenciales simboliza apropiadamente 'cuán apenado se debería estar': una cierta cantidad de reparaciones es lo que el 'infractor virtuoso' debería sentirse forzado a realizar en una situación de delito.

IV. El Argumento del 'Derecho a Ser Castigado'

Hasta aquí la argumentación ha sido que, con respecto a las relaciones interpersonales, violar seriamente las exigencias de una relación demanda

censura (retirada o rechazo) y por tanto penitencia de parte del delincuente; y que, con respecto al estado que es como debe ser, tomarse en serio las 'malas acciones públicas' exige imponer reparaciones penitenciales, con vistas a simbolizar apropiadamente la condena necesaria del delito. Pero las reacciones retributivas en que estoy interesado podrían verse también como modos de tratar al delincuente en serio, ya que considerar una acción como un delito implica que sea vista como la acción de alguien que está sujeto a ciertas obligaciones. El Argumento de la Penitencia deja claro que, al ser censurado, el delincuente es visto como miembro de una relación que ha sido violada. El argumento afirma, por ello, en contra de muchas de las críticas comunes al retribucionismo, que las respuestas retributivas pueden ser incluyentes y que, de hecho, son necesarias para la inclusión. Ésta es la verdad que digo que puede hallarse en la idea aparentemente extraña de un 'derecho a ser castigado'. Quisiera explicar ahora cómo puede defenderse este argumento de dos objeciones.

La primera objeción es lo que en el libro denomino 'el argumento escéptico a partir de la suerte'. Dice que, puesto que el control es una condición necesaria de la verdadera responsabilidad moral, el hecho de que no controlemos en última instancia lo que hacemos (porque lo que hacemos está condicionado por lo que somos y cómo pensamos, y no tenemos un control último sobre *eso*) indica que no somos en última instancia responsables, y que por tanto es moralmente injusto censurar a alguien por sus malas acciones. Un modo de ver en qué falla este cuestionamiento es preguntar cómo deberíamos tratar a los delincuentes (o "delincuentes") si hubiera que aceptar la conclusión del argumento. Una posibilidad sería que tuviéramos simplemente, en la medida de lo posible, que *acomodar* el comportamiento disruptivo, como hemos de hacer con el comportamiento de quien padece el síndrome de Tourette; y en la medida en que no pudiéramos acomodarlo o tolerarlo, tendríamos que dar los pasos menos gravosos posibles para protegernos de él. Esto es, en efecto, habérselas con el 'delito' como si hubiera una analogía entre él y una condición como la de Tourette. El problema de esta analogía es que niega que tengamos un tipo de libertad importante, que seamos libres con respecto al delito en el sentido preciso en que el paciente de Tourette no lo es respecto del gritar y el maldecir. La diferencia crucial entre el caso Tourette y el del delincuente es que la persona que actúa mal lo hace porque piensa que está bien actuar así. ¿Por qué es esta una distinción moral crítica? Porque uno podría pensar que es libre en el sentido de que tiene la capacidad, si piensa empleando suficiente imaginación y como es debido, de a) reconocer que algunos actos son inaceptables e intolerables, y b) adaptar el propio comportamiento a lo que así se reconoce. Se puede entender lo que significa esta capacidad si observamos nuestra implicación en la práctica de la investigación compartida. La investigación compartida se asienta sobre el supuesto de que nuestras conclusiones pueden guiarse por consideraciones que pueden reconocerse en común. Sólo una persona que responde, cuando se le hacen, a

consideraciones relevantes puede participar seriamente con otras en una investigación compartida. Es más, la práctica de la investigación compartida sobre cuestiones prácticas respecto de qué hacer y sentir es tan esencial a la interacción social que la negación de la libertad en este sentido limitaría severamente las oportunidades vitales. Por tanto, ser tratado como libre en este sentido –y por ello como responsable en el sentido de que a uno se le pueden pedir explicaciones por lo que cree y hace y se espera que identifique las consideraciones relevantes a favor y en contra de actuar de cierta manera– es una forma importante de inclusión, una forma que, cuando se disfruta de ella, debería ser afirmada y reconocida. La analogía entre el paciente de Tourette y el delincuente amenaza con pasar por alto la importancia de esta distinción.

Con esto he bosquejado una respuesta a la primera objeción. No obstante, la segunda objeción surge inmediatamente de la respuesta a la primera. Aceptemos que concedemos la importancia que tiene que el agente sea tratado como libre en el sentido de que puede participar en una investigación conjunta. En ese sentido, podríamos sacar la conclusión de que un agente dado tiene 'derecho a ser tratado como alguien al que se le puede, apropiadamente, pedir cuentas'. Pero eso no nos proporciona un 'derecho a ser castigados'. Más bien favorece una respuesta no retributiva al delito, que consiste en entablar un diálogo con el delincuente sobre por qué lo que hizo estuvo mal, con la intención de que tome en consideración, con imaginación, ciertas cosas que hablan en contra de lo que hizo. No está claro por qué la inclusión del delincuente en una forma importante de interacción social tendría que requerir que fuera sujeto a reacciones retributivas como la censura y el rechazo.

La respuesta a esta objeción traza una distinción entre ser un agente que puede participar en la práctica de la investigación, y es por ello capaz de aprender y ajustar su comportamiento a lo que aprende, y un agente que es un miembro funcionalmente independiente de una relación particular, capaz por sí mismo de reconocer sus responsabilidades y atenerse a ellas. En consecuencia, distingo en el libro entre aquellos que, con respecto a las responsabilidades de una relación particular, son *aprendices* (quienes son capaces de aprender pero necesitan de guía) y quienes son *participantes cualificados* (de quienes se puede esperar razonablemente que funcionen independientemente). Mi tesis es que el simbolismo del rechazo es apropiado para los participantes cualificados, pero no para los aprendices, y que entablar un diálogo sobre lo que se ha hecho mal con los participantes cualificados y sin el simbolismo del rechazo es inapropiado, puesto que no reconoce que, incluso cuando el agente actuó como lo hizo por un déficit de imaginación o comprensión moral, el participante cualificado tiene la responsabilidad de dar los pasos necesarios para reconocer plenamente y por sí mismo sus responsabilidades. Si necesita guía, entonces le toca buscarla; por lo tanto, si no la busca y en consecuencia hace algo malo, la maldad obedece a que no hizo algo que era su responsabilidad hacer.

Mi interés reside, por ello, en la importancia que tiene dentro de la interacción social que seamos tratados como participantes cualificados y, por consiguiente, como seres capaces de reconocer de forma independiente –sin guía ni intervención de otros– qué se puede esperar razonable y justificadamente de nosotros en una situación o relación dada. Mi visión se basa en la afirmación de que a) es enormemente importante ser reconocido como participante cualificado, al menos en relación a algunas áreas de nuestra vida, ya que a quienes no lo son no se les otorga la misma libertad, privacidad y espacio para la individualidad y la creatividad que al resto; y b) que cuando un participante cualificado hace algo mal, está en una situación en la que es miembro de una relación cuyos términos básicos han sido violados, y que el modo apropiado de responder a eso, con vistas a no aceptarlo, condonarlo o tolerarlo, es retirar (parcial y temporalmente) las señales de reconocimiento que acompañarían normalmente la implicación en la relación. Éste es el núcleo de verdad que hay en el 'derecho a ser castigado'.

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NOTAS

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REFERENCIAS BIBLIOGRÁFICAS

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

FEINBERG, J. (1974), "The Expressive Function of Punishment", in *Doing and Deserving*, Princeton, NJ: Princeton University Press, pp. 95-118.

MARGALIT, A. (1998), *The Decent Society*, Cambridge MA: Harvard University Press.

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Some Familial Problems in the Retributivist Theory

Juan Manuel Pérez Bermejo

RESUMEN

El siguiente análisis comparte la defensa de Bennett del retribucionismo y, concretamente, de su versión denunciatoria. El problema es que, para resolver los problemas de estas versiones, Bennett confía en las teorías de la "justicia restauradora", y asume algunos de sus postulados doctrinales. El resultado es una teoría compleja que, tal vez, pueda reconstruir adecuadamente algunas prácticas morales, pero que tropieza con serios problemas de consistencia con la práctica jurídica.

PALABRAS CLAVE: *castigo, regla, práctica jurídica, retribucionismo, justicia restauradora.*

ABSTRACT

The following comments side with Christopher Bennett's defence of retributivism and his preference for a denunciatory version. Unfortunately, Bennett resorts to the so-called restorative theories as a theoretical complement of this version of retributivism, and borrows from them some important assumptions. The result is a complex theory that could be an accurate reconstruction of some moral practices, but has problems of adequacy regarding some features of legal practice.

KEYWORDS: *Punishment, Rule, Legal Practice, Retributivism, Restorative Theories.*

This paper contains an important level of agreement with *The Apology Ritual*. With regards to the philosophy of punishment I am also a retributivist, and the following ideas do not express a deeply confrontational approach. In coherence with this position, the first part of this essay contains a defence of the main theses of Christopher Bennett's book.

After the first section, I will add a second and a third part in which I will make explicit some disagreements with Bennett's position. It is relatively simple to outline the focus of the discrepancy. Bennett sides with a denunciatory version of the retributivist theory, and contributes with a sophisticated reconstruction of this version which apparently overcomes some of its traditional difficulties. This reconstruction borrows some assumptions from the so-called

restorative theories: the belief that any offender owes a sincere apology to the victim, which involves a disposition to make amends and to restore the relationships that have been damaged by his action. I agree with Bennett that the denunciatory branch of retributivism is partially correct, but also an incomplete explanation of punishment. We need a theoretical supplement to complete this explanation. However, the restorative models are not the best candidate to play this role.

Following this outline, the second part of my comments focuses internally on Bennett's answer to the question 'why punish?' I maintain that Bennett's theory could be an accurate reconstruction of some moral practices, but it has problems of adequacy regarding some features of legal practice. In the third part, I focus upon the source of many of the problems of the theory, the unnatural alliance of a retributivist theory with the restorative theories.

I. In Praise of Bennett's Theory

A theory of punishment explores basically why, when, and how much we should punish. It is commendable that the book focuses on the first of these questions. In other terms, it does not dissolve the problem 'why punish' in the problem 'when we should punish'. We fall into one of these amalgamating theories when we maintain that the entire reasoning behind any justified punishment of an action is that this action is wrong, so that the real problem of a theory of punishment is to establish a list of moral wrongs.[1] However, these theories skip the relatively independent question of what is the legitimacy of the practice of punishment *as a whole*, regardless of the morality or immorality of any single action that might be classified as a crime by any single criminal law.

Bennett is clear and unambiguous on the nature of the theory he pursues: his book is a normative construction and not just a description or an analysis of the existing practices [Bennett (2008), p. 197]. This is again praiseworthy as methodological ambiguities are not uncommon in this subject.[2] But, assuming that the author and I agree upon the importance of normative theory, I will seize the chance to highlight one of the attributes of any normative theory. A normative theory must satisfy a dimension of minimal fit with the practice it refers to, and it cannot be incompatible with its necessary elements. We do not construct our theories under the dictates of reality; however neither do we write them on a completely blank paper. The aim of this warning is not to deny the aspiration to bind within our normative theory all the positive legal practices. I concur with Bennett that legal practice is a moral practice [Bennett (2008), p. 166]. However, we should also admit that legal practice is a peculiar moral practice and, if we suggest a moral justification of punitive practice, it must be a theory fitting with these peculiarities.

If the issue of minimal fitness is problematic for Bennett's theory it will be addressed throughout this commentary. But, for the time being, my conclusion is that this particular issue plays an important role in his favour. More specifically, the general description of legal practice fits very well with Bennett's strategies to reject scepticism and instrumentalism, for which he displays solid and convincing arguments.[3]

Ruling out scepticism, I also support the dedicated search for a moral justification of legal punishment. The book does not consist in a purely definitional strategy reduced to an analysis of general legal concepts. Moral strategy is necessary because law is basically a moral practice. But it is also necessary because we cannot make a purely legal theory of punishment without being involved in a vicious circle: in this case, we would probably define 'punishment' appealing to the notion of 'crime' or 'offence';[4] but, if we want to define 'crime' or 'offence' in purely legal terms, it would probably be unavoidable to resort to the concept of punishment [Kelsen (1960), p. 114].

And ruling out instrumentalism, my following comments regard retributivism. Bennett considers generally two retributivist roads of moral justification: firstly that punishment is based on the principles of fairness and secondly that punishment is conceived as an expression of our disapproval, reprobation or reproach for the moral wrong contained in the crime. Basically, he rejects the first road, and assumes that the moral answer to the question 'why punish?' must come from the second branch of retributivism, from a denunciatory theory of punishment.[5]

Denunciatory theories have traditionally been objected to for several reasons. Bennett focuses on the most important criticism:[6] that these theories may explain why we express moral disapproval, condemnation, resentment... but the question 'why punish?' still remains. Does moral denunciation really demand the imposition of pain and suffering?[7] There seems to be here a logical gap that should be filled with an additional justification which would inevitably be more urgent in legal punishments. Answers to this thorny question have many times been disappointing.[8] Bennett openly faces this challenge, and we will now consider if his accomplishments provide a convincing answer.

II. BENNETT'S RETRIBUTIVIST PROPOSAL

For a legal philosopher, a good reason to enjoy Bennett's work is that it is easy to detect in its pages many echoes of some of the most important debates of contemporary jurisprudence.

Firstly, Bennett's strategy to justify punishment is an analysis of moral rules and practices constructed from the point of view of their participants, driven to grasp what he calls the 'normative expectations' of the participants

in an offence. This method reminds us of the analysis from the internal, hermeneutical point of view suggested by Hart to understand what sharing a social rule means. Following Bennett and Hart, we would say that, if we participate together in a moral practice under important moral rules, and if you break one of these rules, 'I do necessarily disapprove of your doing (If I don't disapprove, it turns out that I don't adhere to that standard)' [MacCormick (2008), p. 168],[9] and, if I really respect you as a moral agent with which I share the moral practice, I will have to express my condemnation, and to expect from you some feelings of blame, guilt and, finally, the acceptance of punishment as a justified response.

Secondly, Bennett's representation of the practice of punishment fits perfectly with one of the main claims of Ronald Dworkin's legal theory: that we have to portray any legal or moral practice in its best light. If we are going to reconstruct a social practice like the practice of punishment, we cannot simply focus on the empirical routines or the daily habits of most of the participants; we have to start putting in order the main principles and values that inspire it [Dworkin (1986), p. 52]. Bennett therefore attempts to draw on good examples of moral practice. We could define these examples as practices where the participants sincerely aspire to fulfil and satisfy the moral demands and expectations of the practice. Focusing on the best examples of punitive practices and its moral demands, Bennett concludes that the moral way of dealing with an offender is not by teaching him values or criticising morally his behaviour, which would offend his autonomy and full membership: it is by condemning him and demanding that he makes amends. On the other hand, a moral participant cannot simply accept his degradation in the practice; the moral way of redeeming himself is by saying sorry [Bennett (2008), p. 110]. And, when an apology is sincere, it expresses suffering, and involves a disposition or an expectancy of receiving it, which is equivalent to the acceptance of 'making some amends'. That is why our practice of punishing can be morally justified: this practice is justified because it represents or symbolizes this virtuous performance of our moral practices. It is useless to reply that most of our criminals do not intend to say sincerely sorry, or to object that, by presuming apologies or urges of redemption, we are taking for granted a strong moral consensus which is far from our contemporary pluralistic societies, where we do not appreciate social denunciation of all the crimes [Nino (1980), p. 277]. We reconstruct a theory of punishment from a virtuous example of moral practice, one that works out correctly the principles, demands and expectations that inspire it. The result is a normative procedure, a protocol or a ritual of imposing punishments that perfectly represents these principles, demands and expectations. Bennett's theory is not constructed from the point of view of the victim, because it does not forget the offender.[10] However, it is not made either from the point of view of the 'bad man': it is made from the point of view of a real moral agent in a moral

practice that, in the case of the offender, is named the 'virtuous offender' [Bennett (2008), p. 177].

I will start precisely with this point of view of the virtuous offender to challenge the adequacy of the theory in the legal domain. This model assumes in the offender not just the expression of a claim of forgiveness; if an apology is morally sincere, it must be the result of an internal attitude including an acknowledgment of the wrongness of the behaviour and some sincere states of shame, guilt and affliction. The virtuous offender does not only do the right thing (to express an apology): he does it from the right psychological impulses. The problem is that, as it is remarked from Kant, law is only concerned with the *forum externum*, and not with the *forum internum* [Kant (1907-1914), p. 214].[11] To obey a legal rule is related to external actions, and it does not include conditions such as the performance for the right reasons, or the personal adherence to the content of the rule. *Sensu contrario*, it does not require from the offender to recognize that he made a wrong action, or the mental states of guilt, shame... basically, we cannot construct a fitting theory of punishment on the presupposition of a sincere apology. Any theory dependent on internal states does not fit with the fact that many of our criminals are unable to satisfy these internal conditions. It could be replied that Bennett's theory is a normative theory constructed from what we demand morally each other, and we would not treat the offenders morally if we would not expect and demand from them these attitudes. But the answer is that legal practice cannot and actually does not demand these attitudes, and it does enough to respect citizens as moral agents just by demanding an external action of conformity and punishing them when this action is not performed. Two illustrations could show that legal practice cannot either expect or demand these internal attitudes. The first one is the offender we could define as recalcitrant or incorrigible: it is not that he wrongly abstains from showing the required feelings; he is in fact unable to show them, and it is unlikely to presume them. The second is clearer, and consists in cases where we can detect an incompatibility between the morally virtuous offender – from whom Bennett constructs his theory – and obedience to law. As we know, we live in very pluralistic societies respecting morality and conceptions of the good, so that our laws are in a substantial part a kind of overlapping consensus called for many authors a merely 'political' consensus. It is not an exceptional case – on the contrary, as our pluralism is deeper and deeper, it is a more and more frequent situation – that there is a serious discontinuity between the personal conception of the moral life and the demands of law.[12] Of course, I am not suggesting that all these individuals make a good exercise of practical reason by disobeying law; the only implication is that we cannot likely expect or demand from them sincere feelings of shame, guilt or sincere claims of apology. It could be true for many people that our emotional attachments are deeper respecting the public political values than the conceptions of the good

life, but I do not think we can generalize this assumption, and to construct a theory around it. Even in the most ideal of the contexts, you cannot expect or represent a sincere apology from a doctor that, for moral reasons, practices an abortion where it is a crime, or vice versa, or from an objector of conscience, or from a civil disobedient, or from any case belonging to the growing package of conflicts between law and moral conception of the good.[13]

Leaving aside the problems of elementary fitness with our legal practice, the complex framework of internal feelings and mental dispositions involves the theory in some ambiguities and conflicts that could have been avoided in a more economical model.

Bennett says emphatically that his theory does not pursue the offender's repentance as a psychological fact. More specifically, he says that his theory does not look for repentance because it is not a 'communicative' theory, a message to the offender in order that he can understand the reasons of the punishment and adopt the proper attitudes: it is simply an 'expressive' theory in which we try to represent the right terms of the relationship between state and offender. Bennett's precautions with the concept of repentance are explainable: some authors, even retributivists, hesitate to punish the repented offender,[14] and some others, because they link clearly 'punishment' to 'external imposition', consider that the central model of punishment does not involve the cases where there is repentance and voluntary disposition to make amends.[15] However, we heard before that Bennett's theory represents what he called the normative expectations and the emotional structure derived from the wrongdoing considering the virtuous participants in moral practice. If one of my normative expectations is that you should say sorry, why should a theory of punishment dispense with repentance? Which would in this case be the role played by the 'virtuous' offender? We know that often it is not realistic to expect from the offender a sincere repentance. However, 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. Probably, this aim would require a dialogue with the offender and her active participation, as well as institutional arrangements to implement these demands. The conclusion is that the principles of Bennett's theory push the institutional demands much closer to the restorative models than Bennett avows. Nevertheless, Bennett tries to escape from a general and broad commitment in practice with the restorative models, and his elusive strategy is to adopt an expressive theory in which we simply represent 'the adequate symbols for condemnation' rather than the search for repentance, reform and reconciliation as 'something actually to be achieved' [Bennett (2008), p. 197]. But the first question is, once again, what would be the use of this 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 [Sigler (2010),

p. 386]. The second question is how we are going to claim the frustration of a normative expectation if it is not through a communication, a message addressed to the offender. If our legal system is a set of general norms, it is because our legal practice is an exchange of reasons where our actions and positions must be accounted for with the right reasons, with norms previously recognized as valid and binding. When the action consists in removing some fundamental rights and downgrading the status of one of our co-participants in a social practice, our duties of accountability are even more demanding. It means that this practical decision must be especially reasoned and supported with general arguments previously recognized by the own offender as rules of the game, and not just with simple expressions. We condemn with rules because we have a duty of accounting for and justifying our decision, and rules play this role because they are abbreviations of moral reasoning. An expressive theory jeopardizes the whole enterprise of justifying punishment, of giving appropriate reasons to the question 'why punish'. Against Bennett, it is apparent that a communicative theory is unavoidable; but a communicative theory does not need to go more deeply into the *forum internum* of the offender: it can restrict itself with the point of view of the sender of the message, regardless of the attitudes of the recipient. I think the purely denunciatory theory agrees better with this simple communication of a denunciatory message from the sender – the authority – to the wrongdoer.

Bennett's theory also embraces the concept of suffering as a necessary ingredient. To represent what we may call a sincere apology means to represent a mental state of affliction in which the wrongdoer accepts some unpleasant burdens [Bennett (2008), p. 121]. Punishment is not for Bennett a simple return of suffering: he only sustains that, morally speaking, a disposition to suffering is a necessary part in the ritual we call the practice of punishment. However, once again, the theory's internalism brings some problems. Especially in a legal practice, punishment is a deprivation of some rights, and if this normative and objective deprivation is subjectively or psychologically viewed by the criminal as a suffering is a contingent matter. We can assume that it will happen in most of the cases, but it might not happen in some others. At least for the recalcitrant offenders, punishment is the lesser of two evils, because for them it is worthwhile to keep on offending despite being punished, so punishment cannot be interpreted as a utility loss. Modern legal systems avoid degrading punishments; however, even when they forget this aspiration, they avoid presenting them as mere exhibitions of suffering and pain: lethal injection aspires to be a painless execution of a sadly degrading penalty. Punishment is not administered thinking about the infliction of subjective or empirical pain: it makes justice, estimates and imposes the right price or the right payment owed to society in terms of its legal measures of value; to add an ingredient of suffering in this description is unnecessary.

Finally, the internalism of Bennett's theory has further unwelcome consequences. For example, a theory of punishment coherently inserted in a whole theory of state coercion is preferable to another one in which principles of criminal law would be substantially different to the principles ruling the security and public order. Obviously, we are talking about different activities. But, although different, there are clear similarities: they both consist in limitations of rights for disturbances in the exercise of other people's rights and for which state does not have to compensate economically; repression must be proportionate to these disturbances, and we reject any instrumentalist view of public order in which the goal could legitimate any mean: on the contrary, these activities are surveyed later by the judges, who check if repression was proportionate and justified. However, because Bennett's theory of punishment is overburdened with internal attitudes, it has to separate drastically the practice of punishment and activities of public order: as Bennett cannot distinguish attitudes of sorry and shame in the last examples, he even compares these activities with the public decision of keeping some individuals in quarantine for medical reasons [Bennett (2008), p. 196]. This depiction reduces public order operations to crude instrumentalism.

The conclusion is that Bennett's theory does not provide a complete structure of reasons to justify legal punishments. The question 'why deprive the offender of some fundamental rights instead of simply expressing our disapproval?' still remains.

We said before that, respecting its institutional consequences, Bennett's concepts should lead to a more restorative theory he declares. In fact, restorative theory is the most important partner of Bennet's theory. However, this partnership is unable to solve the problems of denunciatory theories.

III. Bennett's Non-Retributivism

In Bennett's Introduction we can read an unambiguous statement: punitive legal system should be 'as restorative as possible' [Bennett (2008), p. 5]. However, Bennett's doctrine is substantially different to the restorative versions we are accustomed to read: it is formalised, centralised and coercive, feels uneasy with the hypothesis of shows of repentance from the victim [Bennett (2008), pp. 139, 148], and does not leave a broad space for private arrangements in which state agents are just mediators.[16]

Bennett represents what we would call a deep application of restorativism in criminal institutions under the label *laissez-faire conceptions of restorative justice*. He rules out these conceptions as fundamental criminal answer; but, even when he rejects them, he remarks some advantages involved in its implementation: a) it enlarges our experience and information: for example, the offender is able to know the offensive consequences of his actions, and the

amends he could make; b) it promotes the recognition of the other [Bennett (2008), p. 176]. These advantages explain why he reserves a non trivial role to private arrangements between victim and offender, concretely the specification of the *quantum* of punishment: the judge could indicate the broad margins of the penalty, and victim and offender could privately pinpoint the exact amount within these margins [Bennett (2008), p. 180]. Finally, what underlies these concessions is the mediation of another view of punishment not exactly fitting with the retributivist one, and for which the aim of punishment is essentially restorative, because it tries to repair the relationships broken by the offense [Bennett (2008), p. 154].

Sadly, the marriage with restorative punishments reveals again important problems of adequacy with legal practice. We talk about making 'amends', which basically means to fix or to repair some damage, either the private damage inflicted to the victim or the public damage consisting in the loss of confidence in public relationships. The problem with this conception, especially regarding the relationships with the victim, is that it is a departure from the public nature of criminal institutions, and it is more like an approach to civil compensation that we can find in tort law. This restorative interpretation of punishment fits with the private law principles of corrective or restitutive justice, but not with retributive justice. In this interpretation, punishment is a way of compensating for damages. However, the wrongness of the criminal offence is not linked to a material or subjective harm, but to an objective violation of rights, or, in other words, an attack against the most important moral values of the community. The second problem, especially regarding the relationships with the community, is that the theory comes dangerously close to instrumentalism: at least the *quantum* of punishment does not look to the past, but the future, because how much we have to punish is a function of our purpose of re-establishing the relationships of confidence between offender and community, and not strictly the seriousness of the offence.[17]

Once this restorative view of punishment is rebutted, both supposed advantages of the *laissez-faire* models are not available. In a public law like criminal law and in public procedures like criminal procedures is a mistake to suppose that the more we hear from the interests of the victim the more we know of the crime and the most appropriate will be the punishment. These considerations are relevant for the civil compensation of a material damage, but not for a public criminal matter consisting essentially in the transgression of a community value. As we know, it is quite possible that the private victim did not suffer any damage,[18] did not feel any offence at all,[19] or felt the offence, but forgave the offender... and, despite all these circumstances, the criminal process starts and finishes with a punishment.[20] Bennett shows knowledge of these circumstances [Bennett, 2008, p. 136], but he does not take them properly into account: there is no room in the criminal context for the 'restitution contracts' talked about by the restorative theories [Zehr (1990), p. 164], a

category in which we could include the contracts on *quantum* of punishment suggested by Bennett.

This public nature of punishment and criminal procedure makes Bennett's concessions to dialogue and communication between private victim and offender irrelevant. As we have seen, the subjective feelings of victims are often misleading respecting the violation of law. In the example of Judith, Bennett regrets that, with our current methods, she would be involved in a very unpleasant duty of proving the culpability of the offender. I do not see how a process of face to face debate with the offender could be less unpleasant. Finally, a long discussion about nature of rules could be brought out here. It is only possible to hint that rules work as exclusionary or pre-emptive reasons [Raz (1979), pp. 21-23],[21] and, unlike other kind of norms, their application blocks any deliberation on their underlying moral reasons: as we said before, rules are the abbreviations and conclusions of a moral reasoning, and that is why they satisfy a need of accountability and justification; however, they also are conclusions because, due to the institutional dimension of law, they conclude the moral debate. A new debate within a court about the reasons of the rightness of the rules and the offensive nature of the behaviour is in my view completely at odds with a system of rules like criminal law.

As well as a conflict with the public nature of criminal law, to empower the victim with an entitlement to determine the *quantum* of punishment jeopardizes the strict interpretation of the rule of law in criminal law, captured by the principle *nullum crimen, nulla poena sine lege*. Restorative theories are a grievous departure from this principle.[22] We have to remember here that any return to 'private' justice blurs the differences between revenge and punishment [Nozick (1980), p. 368]: determination of punishment is a historical conquest of justice against public and private abuses, and any surrender to private agreements or to the imagination of the judge would be a step back in justice leading to different punishment in identical cases, Mikado style punishments,[23] incoherence and arbitrariness. Bennett avows some of these dangers in his *limited devolution model*, but accepts them as a price worth paying [Bennett (2008), p. 180]. In his Introduction, he judges as a danger our tendency to reduce punishments to jail and fines [Bennett (2008), p. 9]. However, we have reasons to be happy with the strict determination, and even with the historical process that contradicts his judgment: the unification and convergence of punishments in a small list.

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NOTES

[1] In my view, Michael Moore's theory is a clear example of this procedure. Moore also assumes a perfectionist theory of law and state according to which 'because an action is morally wrong there is always a legitimate reason to prohibit it with criminal legislation' [Moore (1997), p. 70]. Therefore, he willingly accepts a very disturbing consequence: there are reasons that moral misdemeanours or minor peccadilloes, such as family lies, should be punished by the state. It is true that other considerations can defeat the need of punishment, but this need is undoubtedly binding [Ibid. 640 y ss].

[2] Hart [(1968), p. 236], for example, is supposed to provide a purely normative theory; however, he refutes some views of the theory of responsibility offering a single argument: the existence of a positive and highly controversial institution of English law, the crimes of strict liability. For a 'normative' refutation of this figure, see Nino (1980), pp. 183 y ss.

[3] As the famous 'Jacques the Fatalist' said, 'rewards are just illusions of goodhearted people, and punishments the expression of fear of the mean people' [Diderot (2008), p. 229 (my translation)].

[4] Flew (1954), pp. 291 ss.; Hart (1968), pp. 4-5.

[5] 'Censure-theories are the most promising way of developing the retributivist tradition' [Bennett (2008), p. 186].

[6] Therefore, he does not consider other important objections. It could be said, for example, that denunciatory theories jeopardize the legal principle of retroactivity because immorality exists before and after the enactment of the legal rule. It could be said too that, being the only justification of punishment, these theories bear reasons to relax the principle *nulla poena sine lege* when moral condemnation in a particular crime would be especially and unpredictably intense.

[7] Feinberg (1970), p. 101; Hanna (2009), p. 242.

[8] For example, to say that punishment is necessary to reinforce social solidarity or to give cohesion to the moral practices turns the theory into a variety of instrumentalism in which we graduate the scale of punishment according to a prospective goal, and we view denunciation as a kind of stimulus to induce obedient behaviour [Hart (1968), p. 235; Moore (1997), p. 90]. Other versions search for a different goal: moral improvement of offender; they are included by Nozick in 'teleological retributivism' [Nozick (1981), p. 371]. Other ways of filling this gap between 'denunciation' and 'infliction of pain' are not more satisfying. To say that punishment works as a symbol of communitarian condemnation does not explain its necessity: Nino (1980), pp. 205-6. Some authors have given up any hope of a self-sufficient retributivist theory, and confess that, answering this question, retributivism must be completed with an instrumentalist model of general prevention [Von Hirsch (1998), pp. 39ff.].

[9] Following Hart's theory, we would add that primary social rules (rules imposing duties) require analytically a secondary rule imposing punishments to the breakers of primary duties.

[10] Von Hirsch (1998), pp. 28-9, warns against theories that interpret practice of punishment as something *we* do against *them.*

[11] Bennett separates his rituals from the exhibitions of 'inner attitudes' [Bennett (2008), p. 154]. However, his ritual is constructed on assumptions about appropriate

feelings and expected psychological attitudes: 'But it draws its symbols from emotions and expectations that are deeply intuitive' [Ibid., p. 149].

[12] On these concepts see Rawls (1991), pp. i-xxvii, 35-40, 133-168.

[13] The list of counter-examples is not vulnerable to the accusation of not being a list of central cases of legal punishment. It could be admitted if punishment were controversial in some or all of these situations. And it is true that a minority of these cases is controversial, but controversy is not about why punish, but about how much. Even in civil disobedience it is commonly required the disposition to accept the punishment as a bond or guarantee of the civility of the action, so that the disobedient could obtain a diminished penalty [Bedau (1961), p. 661; Nozick (1981), p. 390; Rawls (1969), p. 247; Wasserstrom (1963), p. 796].

[14] What Nozick calls 'teleological retributivism' is in trouble to justify this punishment, and the the rest of retributivists, according to Nozick, are uncomfortable justifying it [Nozick (1980), p. 365].

[15] Lucas (1980), p.125; Betegón (1990), p. 195.

[16] 'Restorative justice would not be the major or fundamental criminal justice response' [Bennett, (2008), p. 144]. Immediately after, he judges his theory as 'an alternative to restorative justice' [Ibid., p. 146].

[17] 'After all, restorative justice is in some way forward-looking' [Bennett (2008), p. 22].

[18] See 'profound offences' [Feinberg (1985), Vol. II, pp.50ff.].

[19] Feinberg enhances that *wrong* is an objective concept attached to a violation of rights, [Feinberg (1985), III, p. 2]. We see examples of a pro-active defense of the offender by his victims in many of the so called 'domestic violence' cases.

[20] There is an important exception in the so called Spanish law 'private' and 'semi-private' crimes. In the first ones (slander and libel), charges must be submitted to the tribunal by the victim (not by the public prosecutor), and punishment is excluded if she pardons the offender [see 215, 1 of Spanish Criminal Code]. However, these crimes are not less public in nature than the rest; what is private is the mean of proof: it happens that a third person cannot proof the happening of a real slander, and we need an action from the victim to confirm it.

[21] Even Dworkin [(1986), p.143] acknowledges that the exclusion of underlying moral reasons must be radical in a peculiar department: criminal law.

[22] [Zehr (1990), pp. 185-6)] even rejects the concept of crime, and suggest the broader concept of 'harmful behaviour'. The most, he adds, we can accept 'crime', although not in technical legal terms, but in full context: moral, social, economic, political, etc.

[23] This danger is visible when Bennett demands community services 'with symbolic link to the nature of the offence' [Bennett (2008), p. 178]. He even let restorative justice outweigh the demands of legal consistency in many situations [Ibid., p. 181].

References

BEDAU, H. A. (1961), "On Civil Disobedience", *The Journal of Philosophy*, vol. LVIII, pp. 653-664.

BENNETT, C. (2008), *The Apology Ritual. A Philosophical Theory of Punishment*, Cambridge, Cambridge University Press.
BETEGÓN, J. (1990), *La justificación del castigo*, Madrid, Centro de Estudios Constitucionales. .
DIDEROT, D. (2008), *Jacques el fatalista*, Madrid, Santillana.
DWORKIN, R. (1986), *Law's Empire*, Oxford, Hart Publishing.
FEINBERG, J. (1970), 'The Expressive Function of Punishment', in *Doing & Deserving: Essays in the Theory of Responsability*, Princeton, Princeton University Press, pp. 95-118
— (1985), *The Moral Limits of the Criminal Law*, Oxford, Oxford University Press.
FLEW, A. (1954), 'The Justification of Punishment', *Philosophy*, vol. 29, pp.291-307
HANNA, N. (2009), 'The Passions of Punishment', *Pacific Philosophical Quaterly*, vol.90, pp. 232-250.
HART, H. L. A. (1968), *Punishment and Responsability*, Oxford, Clarendon Press.
HIRSCH, A. VON (1998), *Censurar y castigar*, Madrid, Trotta.
KANT, I. (1907-1914), *Die Metaphysik der Sitten*, P. Natorp (ed.), VI, Berlin, Berlin Akademie.
KELSEN, H. (1960), *Reine Rechtslehre*, Vienna, Franz Deutick.
LUCAS, J. R. (1980), *On Justice*, Oxford, Oxford University Press.
MACCORMICK, N. (2008), 'Sanctions, Punishment, Justice', in *H.L.A. Hart*, Second edition, Stanford, Stanford University press, pp. 168-185.
MOORE, M. (1997), *Placing the Blame*, Oxford, Clarendon Press.
NINO, C. S. (1980), *Los límites de la responsabilidad penal*, Buenos Aires, Astrea.
NOZICK, R. (1981), *Philosophical Explanations*, Oxford, Clarendon Press.
RAWLS, J. (1969), 'The Justification of Civil Disobedience', in Bedau, H. A. (ed.) *Civil Disobedience: Theory and Practice*, Indiannapolis, Pegasus, pp. 240-256.
— (1993), *Political Liberalism*, New York, Columbia University Press.
RAZ, J. (1979), *The Authority of Law*, Oxford, Clarendon Press.
SIGLER, M. (2010), 'Review to 'The Apology Ritual', *Ethics*, vol. 120, pp. 382-386.
WASSERSTROM, R. (1963), 'The Obligation to Obey the Law', *Los Angeles Review*, vol.X, pp. 790-797.
ZEHR, H. (1990), *Changing Lenses*, Scottdale, Herald Press.

Dignity

ITS HISTORY

AND MEANING

MICHAEL ROSEN

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Penal Coercion and the Apology Ritual

Antony Duff

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.

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The Limits of Apology in a Democratic Criminal Justice
Some Remarks on Bennett's *The Apology Ritual*

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RESUMEN

Este artículo plantea cuatro observaciones o comentarios sobre el libro *The Apology Ritual* de Christopher Bennett. Primero, defiende la existencia de diversos conceptos de disculpa, todos ellos relevantes, que sin embargo no aparecen suficientemente distinguidos en el libro. Segundo, sostiene que no resulta claro el por qué la disculpa debería desempeñar un papel tan central en los ámbitos jurídicos, y estar conceptualmente relacionado con la idea de castigo, especialmente cuando al menos en los casos paradigmáticos desarrollados de la práctica de la disculpa, que tienen lugar en ámbitos no jurídicos, la disculpa y el castigo parecen excluirse mutuamente. Tercero, objeta la idea de ritualidad, afirmando que nuestros sistemas jurídicos penales no deberían abstenerse de requerir, al menos idealmente, sinceridad y firme convicción en la práctica de pedir disculpas por parte del que comete un delito. Y, finalmente, se opone a la argumentación de Bennett sobre lo que una democracia liberal puede hacer legítimamente a la hora de intervenir sobre las razones, actitudes u opiniones de sus ciudadanos.

PALABRAS CLAVE: *justicia penal, castigo, disculpas, democracia, legitimidad.*

ABSTRACT

This paper sets out four brief remarks or comments on Christopher Bennett's book *The Apology Ritual*. First, it argues that there are different relevant concepts of apology, which are not differentiated in the book. Second, it claims that it is not clear why the role for apology in legal contexts needs to be so central and conceptually related to punishment, especially when, at least in its paradigmatic cases developed in non-institutional contexts, apology and punishment seem to be inimical. Third, it argues against rituality, stating that our penal systems should not refrain from requiring, at least ideally, sincerity and firm conviction in apologies by the offender. And it finally opposes Bennett in the idea of what a legitimate liberal democracy is allowed to do in terms of intervening in its citizens' reasons, attitudes or opinions.

KEYWORDS: *Criminal Justice, Punishment, Apology, Democracy, Legitimacy.*

Christopher Bennett's *The Apology Ritual* is an engaging, persuasive and thought-provoking book [Bennett (2008)]. In a highly worked and reworked field such as the theory of punishment, it is stimulating to read ambitious and general theories like the one advocated by Bennett. This book brings some fresh air, even when it is significantly and admittedly grounded or aligned with Antony Duff's communicative theory of punishment [cfr. Duff (2001, 2007, 2010)].

Bennett's main argument is Hegelian – and Duffian – in inspiration: punishment is justified because it is something we owe *to the offender* in order to treat her as an autonomous person and to restore her status as a full member of our political community [Bennett (2008), p. 8]. It should be based on "a cycle of blame and apology," and more concretely on a ritual of apology. When someone commits a crime this is violating one of the most central rules in a democratic society, but she still deserves respect as a fully autonomous citizen. We must therefore express our censure for what she did; otherwise we would be treating her as a child who is unworthy of any explanation of our reaction, not as an autonomous person [Bennett (2008), p. 8]. And since the practice of blaming seems pointless unless we inflict some punishment, what we owe the offender is also some kind of "symbolically adequate" and proportionate punishment, even if it is some kind of hard treatment.

As Bennett suggests, "the appropriate symbols are to be found in the practice of apology." In other words, "expressing the need for apology is the central motivation of punishment" [Bennett (2008), p. 8]. The adequate amount and kind of punishment is, ideally, the one that a wrongdoer who sincerely apologizes to the victim expressing her guilt and repentance would deem and make an appropriate amend for her crime. And this entails, in almost all cases, hard treatment. A simply symbolic or formal expression of censure or blame would be insufficient. That is why, again, for Bennett the basis for punishment must be an adequate cycle of blame and apology. Apology is "our fundamental means to 'make things right' in the face of having done wrong" [Bennett (2008), p. 7].

Although I agree with much of what Bennett maintains in this book, the aim of this comment is to introduce, not necessarily criticism, but at least some points for discussion. Thus, with no other introduction, I will present my four different and brief remarks.

I. The Concept of Apology

My first remark has to do with the concept of apology itself. The term "apology" is not univocal, but rather it seems to refer to two different concepts, or two variants of the same concept. The difference between them lies in the intention or the purpose associated with apology, and is relevant to my comments

below. The first concept, which I will call "expressive," views apology as something that the apologizer needs to do for herself without expecting or requesting any particular reaction from the addressee of that apology. Thus, assuming its sincerity, apology would serve the purpose of expressing the sort of remorseful feelings that its author possesses about what she intentionally or negligently did wrong. These feelings can be of sorrow, guilt, remorse, regret or even repentance – a list of emotions that appear without being distinguished from one another indistinctly in several parts of Bennett's book. Apology so understood is an act of communication because it contains a message that the apologizer wants to be made known to the addressee of the apology, but it does not require any specific response from the addressee. It is only unidirectional communication. Apology serves here purely expressive purposes. And this practice has some value, we may accept, independently of whether the addressee accepts the apologies or not, whether he forgives the offender or not.

In contrast, sometimes we apologize with a different purpose: we attempt to generate or provoke a particular response in the addressee. This is the case, for example, when we apologize and request forgiveness from the victim, something that could be called a "requesting apology," since it requests the addressee to say or do something in particular. In cases of a "requesting apology," we may also find expressions of sorrow, guilt or repentance on behalf of the apologizer. But they are not necessary. Perhaps, we may concede, that the offender actually have feelings of guilt or remorse is a necessary condition of a sincere apology, but the *expression* of such feelings, at least for this second concept, remains nevertheless contingent. Sometimes it will be convenient to express such feelings as a means to achieve the aim of obtaining a requested response, but at times this may be even counterproductive.

There is also communication in this second concept of apology, but one of a different kind: bidirectional or interactive communication. The requesting element introduces the expectation of a response from the addressee. He can, of course, accept or reject the apology, forgive or not forgive the wrongdoer, but he is invited to say something in response. It is interesting to note that in the case in which the apologizer is looking for forgiveness and the addressee of the apology does not forgive the wrongdoer, we can affirm that the apology has been somehow frustrated.

Finally, two conditions of requesting an apology will be important for another of my comments later on. First, in contrast to the purpose of expressive apologies, the final aim of a sincere requesting apology from the point of view of the apologizer must be some sort of reconciliation, or at least some improvement in her personal relationship with the addressee. Second, both the apologizer and the addressee of the apology need to enjoy a minimal degree of autonomy. A completely insane individual cannot meaningfully apologize. Similarly, a non-minimally-autonomous person cannot be the addressee of a request, since only a minimally autonomous person may respond

in a meaningful way. This required degree of autonomy, though, might be *very* minimal. My 3-year-old Pablo is not a fully autonomous person, but he certainly is the author of some wrongdoings. And I believe, and try to teach him, that he has the duty to apologize for them, as well as the right to receive apologies from me when I do something wrong which harms him.

Now, Bennett does not distinguish between these two concepts of apology. He seems to presuppose that the expressive element is always present in the practice of apology, but his main argument in the book depends entirely on the second concept of apology, more concretely, on a particular variant of it. The ideal of apology envisaged by Bennett is one in which the apologizer not only feels and expresses sorrow, guilt, remorse and repentance, and not only asks the victim for forgiveness, but she also proposes to make some kind of amend or penitence to compensate for the wrong she committed in order to recover her status as a full member of a particular community. The request, then, goes beyond the mere asking for forgiveness. Apology, so understood, looks for some kind of acceptance from the addressee about the appropriateness of the proposed penitence – what according to Bennett would constitute the ideal punishment that can rightly be inflicted on the wrongdoer.

In this variant of the second concept, the addressee might consistently respond by denying his forgiveness for the wrong committed, and accepting at the same time the proposed penitence or punishment. For the same reason, the apologizer might request the addressee to accept his amends or punishment in compensation for the produced harm, without accompanying this request with the expression of certain feelings of guilt or repentance, or without asking for forgiveness. What is more, a wrongdoer might well say, a) that she does not feel sorrow, nor guilt, nor remorse, nor repentance; b) that she is accordingly not looking for forgiveness of any kind; but c) that she recognizes that she did something that produced harm and is willing to compensate the victim for that harm. The question is, though, if this constitutes a case of apology. And I do not think it does.

This case will preserve the central element in Bennett's argument on the justification and determination of punishment under ideal conditions, which include the wrongdoer's recognition of having produced harm and her disposition to somehow compensate the victim for it, on the one hand, and the victim's acceptance of such amends, on the other. But this is not necessarily connected to the practice of apology. If this is true, apology – actual or ritual – has only a contingent role to play in the justification of punishment.

II. The Extension of Apology to Legal Contexts

We have developed our practice of apology in non-institutional or non-legal contexts. Apology seems in general a good starting point in any process

of communication between the author of a wrongdoing and the victim of it, especially in contexts in which legal institutions are absent. When someone commits a wrong harming someone else, if they minimally respect each other, and especially if they care about the future of their relationship, it may certainly be adequate to begin to talk about what happened with an apology. This is true in cases in which the committed wrongdoing is moral in kind, even when it does not have any legal relevance. But it seems also appropriate in other cases with no moral relevance at all, as in most of the situations in which I want my son Pablo to apologize. I take these non-institutional cases to be the paradigmatic cases of our social practice of apology, since it is in these contexts in which such practice has developed and is statistically more frequent.

The absence of institutionalized response gives apology a centrality that virtually disappears as soon as some kind of legal institution intervenes. In private moral relations with no legal relevance, there is no other punishment or sanction apart from social reprobation or the victim's negative reaction. In these cases, a requesting apology seems especially important. It may be precisely intended to avoid such social reprobation or such victim's reaction. Thus, at least in these cases, apology seems an instrument to avoid punishment, rather than a vehicle conducive to, or a justification of, such punishment. Consider the case of my son Pablo again. I normally punish him when he does not want to apologize. And I exonerate him from punishment as soon as he truly apologizes and repents. We might therefore conclude that at least in these paradigmatic cases apology seems inimical, rather than congenial, to punishment.

Now, Bennett proposes extending the practice of apology from these non-institutional cases to the legal processes of criminal responsibility, in which they currently play no role at all. What is more, he wants to give it a central role in the justification and determination of punishment. So, he needs to provide a double argument. First, he needs to prove that it may be desirable to extend this practice to legal cases, and more specifically to criminal legal cases. Let us concede that point. I agree with Bennett on the importance of leaving some room for apology in legal contexts. I would defend its application to help solve conflicts of both private and public law, for instance, like those concerning a tort law liability case, or a breach of contract, or a traffic violation, or tax evasion. And I am willing to accept its role in criminal justice processes too.

But Bennett needs to provide an argument for a second claim: that the ritual of apology must have a central role in criminal justice, and that far from being inimical to punishment, as it seems to be in the paradigmatic cases of the practice of apology, here it lies at the basis of the justification and determination of punishment.

Now, whatever the reason may be for extending the practice of apology to legal contexts such as those mentioned two paragraphs above, it does not seem to be necessarily related to punishment, since there is no punishment in private law cases nor in many public law ones. Even in the context of criminal justice, if it seems appropriate to leave some room for the practice of apology, it is apparently so regardless of the presence or absence of punishment. The example Bennett uses to open his book, the Bryson and Judith case, is compelling to show why we should leave some room for apology in many legal contexts, but it still does not show why the ritual of apology occupies such a central role that would make it worthy of justifying and determining criminal punishment.

III. The Rituality of Apology

Imagine that Bennett is right in placing apology at the center of our justification of criminal punishment. What he defends is nevertheless a *ritual* view of apology, not necessarily an *actual* one. And this produces some important ambiguity in his theory. Part of his examples try to show why we should introduce some room for apologies in our criminal justice processes, like the Bryson case. But he also states in several parts of the book that apology does not need to be even present in our actual processes of responsibility. The book's title itself claims for some ritualistic view of the importance of apology. But this leads to an obvious question: what does ritual apology mean here?

According to Bennett, we need apology as a ground for determining the symbolically adequate blaming reactions that we owe to a wrongdoer [Bennett (2008), p. 8]. An ideal wrongdoer who sincerely feels guilt and repentance would freely make the kind of amends and accept the just penitence that would achieve atonement. And this is consequently the kind of punishment we owe to such a wrongdoer. A ritual apology would be, therefore, nothing other than a heuristic device 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. We do not expect real wrongdoers to apologize and to themselves propose the punishment they have the right to receive. Neither do we expect also the public to explicitly express its outrage towards the wrongdoing that she committed. That's why the Apology Ritual "is an artificial and symbolic procedure" [Bennett (2008), p. 149]. Moreover, Bennett is explicit in saying that:

> this account is compatible with freedom of conscience in that, although it focuses on making offenders undertake apologetic action, the action has to be such that it is possible successfully to complete it regardless of whether or not it

> is sincere. It is for this latter reason that the view is called the Apology Ritual: rituals are often castigated as empty and formal because they need not engage 'inner' attitudes, but it is precisely this vice that is a virtue in this context, since – it might be argued – the state […] has no business giving our sentences the explicit aim of which is to make offenders genuinely penitent [Bennett (2008), p. 154; see also p. 172ff].

I disagree with Bennett, though, in this respect: I think the idea of ritual here is not a virtue but as much of a vice as in some other contexts. But let me first ask again what this rituality means. Although this quote is quite explicit, it still does not completely disambiguate Bennett's theory. Is the Apology Ritual just a counterfactual procedure, as Bennett sometimes qualifies it, that officials – legislators and judges, mainly – need to follow to justify and determine punishment? Is it only a heuristic device? If so, no specific rituality must take place in actual criminal justice processes. Or is it a ritual procedure that offenders need to follow, doing and saying certain things, even if they are not sincerely felt?

If it 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 in several parts of the book on the idea 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 [Bennett (2008), p. 175-183]. Or why he uses the Bryson case to convince us of the appropriateness of leaving some room for actual apology to occur in criminal justice processes.

If, on the contrary, apology needs to be importantly present in our actual processes of criminal responsibility, in the form of something that the offender is encouraged or required to say to the victim, I do not see then why the rituality might be considered a virtue rather than a vice. When I teach my son Pablo to apologize for something he did, I need to make him understand that apology has value only if he is sincere in his expression of sorrow and guilt. Insincere apology seems a perversion of such value, and instrumentalization of the practice of apology in the wrongdoer's benefit, that far from helping reconciliation, far from restoring the previous relationship or status, far from fixing things, may make them much worse if detected. Thus, the practice of apology in real processes of criminal responsibility cannot be merely ritual.

Finally, if it is actual apology the one which is valuable, and not a ritual one, why can Bennett affirm that apology is the key element to justify and determine punishment? He is certainly not claiming that we need to impose those punishments which are actually proposed by the offenders when they

apologize. He is aware that we cannot rely on this actual procedure to determine sanctions. But this leads us to the counterfactual or heuristic procedure to be used by the judge again. And this means that either Bennett is right in emphasizing the rituality dimension, in which case apology becomes nothing more than a device of counterfactual reasoning that loses an important part of its relevance, or else apology itself is really valuable, in which case we must drop or at least lessen the idea of rituality and we lose its connection with the determination of punishment.

My hunch is that Bennett emphasizes the idea of rituality because of a wrong view of what liberal legitimacy requires. This is, at least, what I understand from his response to the objection I reproduce here [Bennett (2008), pp. 172-173]. He seems to presuppose that requiring sincerity to apologizers would be a form of interference in their freedom of conscience. He says that "to make offenders genuinely penitent" is not the state's business [Bennett (2008), p. 154], and that "the state must regard the offender restored simply by virtue of having completed the sentence" [Bennett (2008), p. 173]. But this is not, in my opinion, what a liberal view of legitimacy and freedom of conscience requires, which leads me to my next and final remark.

IV. Democracy, Legitimacy and a Sense of Justice

Republicans and many liberals, among others, have stressed the idea that for the democratic state to survive it is necessary that citizens display a certain degree of civic dispositions or virtues. As the republican view – which I favor – may turn out to be more controversial in this respect, let me just outline a typical liberal response to this problem. A liberal state must remain neutral regarding the conceptions of the good advanced by its citizens to be legitimate [Rawls (1971), pp. 27-30, 392-394]. To express it in Rawlsian popular terms, the law and the state must refrain from adopting any particular comprehensive doctrine [cfr. Rawls (1993), Lectures IV and V]. Any state that violates this principle will be operating as a perfectionist state and cannot be legitimate. Among other implications of this anti-perfectionist view, some basic freedoms such as freedom of conscience or freedom of religion must be guaranteed by the law. Liberal legitimacy, consequently, will prohibit any attempt of the state's institutions to force their citizens to adopt any particular moral view, and more precisely any particular conception of the good.

Now, this does not mean that the state cannot intervene at any rate to favor or even impose a particular conception of the right. On the contrary, from the liberal point of view legal coercion it is legitimate to enforce precisely those principles which comprise the liberal conception of the right, or the content of a political overlapping consensus among reasonable comprehensive doctrines. The state is certainly entitled to coerce its citizens in order

to make them behave rightly. This is exactly what a legitimate criminal law must do. But it is not only this. The liberal state is also allowed to use appropriate means to make it possible for citizens to understand and accept the reasons why this particular conception of the right needs to be enforced, as well as the personal disposition to act according to it. It needs to promote such a minimal and shared sense of justice among its citizens, as Rawls has called it, since otherwise it would not have stability, which is in turn a further condition of its political legitimacy [Rawls (1971), pp. 41, 236, 274-275, 295-296, 442, and (1993), p. 19, 35, 77, 141].

True, direct coercion cannot rank as "appropriate means" in order to promote such sense of justice. Moreover, personal autonomy would somehow be compromised if we tried to do this. But only because part of what it is valuable in having such dispositions and beliefs is the fact that one has achieved them autonomously. Instruments like education seem much more acceptable – and effective. But we should not restrict the idea of education to something that happens within the walls of schools, or even colleges and universities. Why should our criminal justice processes not incorporate an educational dimension articulated through not mere rituality, but through a truly and sincere exchange of beliefs and opinions?

In effect, the state cannot legitimately aim to have its citizens oppose murder *because* of a particular moral or religious conception of the sacredness of human life. But the state of course can require not only that its citizens not commit murder, but that they understand and accept the reasons why murder is forbidden; which are, in short, the reasons why it is legitimate to forbid murder, or even, the reasons why murder is a public wrong. From this point of view, the liberal state is entitled to seek that citizens' recognize it 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. I am not saying that the state may legitimately force the offenders to sincerely apologize. As I said, that would violate their autonomy, and would be ineffective too. But why should it not leave some room for sincere apology and congratulate it when it does happen?

Bennett states that "Whether [the offender] is genuinely remorseful or not is not relevant to his relations with the state" [Bennett (1998), p. 173]. But it is one thing to say that the state cannot coercively impose such remorse and quite another that having it is irrelevant for his relations with the state, which is, by the way, one of the victims of the public wrong. The state might well welcome sincere apologies from the offender by, for instance, lessening or reducing the punishment. And, in any case, the state is certainly allowed to promote the conditions under which all citizens may share a minimal sense of justice and understand and accept the reasons why the overlapping consensus is the basis of their political legitimacy.

Let me expand a little bit this last idea. In a fully democratic community, the use of coercion to ensure the respect and obedience to law is legitimate, since this is what legitimacy precisely means. If a citizen commits a public wrong, we – as a community – need reasons to justify the imposition of punishment. These reasons, of course, depend ultimately on a particular theory of legitimacy as well as on a justificatory theory of punishment. But I do not need to enter now into such complexities. If the criminal law is legitimate, then by definition we possess reasons to justify its imposition. What we owe to the offender, before punishing her, is to offer her such reasons, that is, to provide her a public justification of the measures to be taken.

Now, offering reasons to the wrongdoer about the legitimacy of the punishment we are going to inflict involves some kind of deliberative process. It cannot be only unidirectional communication from the judge to the offender, in which the former "ritualistically" reads some section of the law, with no care about whether the offender endorses or accepts, or even understands, what she is being told. It entails a much richer notion of what a process of criminal responsibility aims at. It means to transform such a process into a genuinely deliberative procedure; a procedure in which the offender, the state and the direct victim of the public wrong actively participate, having the chance to expose and discuss their respective views.

Of course, such a deliberative process must leave a privileged role for the expression of censure or blame towards the committed public wrong. What is more: being involved in a deliberative process as such does not mean that the judge needs to be disposed to be convinced by the offender, for instance, of the illegitimacy of the criminal code. The offender has the right to receive explanations of the reasons why such a code as well as the punishment to be imposed are legitimate. But the criminal justice process is not the institutional moment to challenge the legitimacy of the law.

In any case, I am convinced that in criminal justice processes like this one an important place for apology must be reserved. The expression of guilt, remorse and repentance by the offender may turn out to be very important for achieving a mutual understanding of the wrong committed and the legitimacy of the punishment to be inflicted. But apology only has value in this context when it is actual, not ritual, and honest or sincere. I am not denying that some elements of rituality may help to make things easier. Judicial processes in general are highly ritualized, and for good reasons. But the central value of an apology in a legal process, as in the most paradigmatic cases developed in non-institutional contexts, depends entirely on its sincerity, among other things.

To recognize this does not compromise liberal legitimacy. It does not entail adopting a perfectionist view. It does not violate state's liberal neutrality. To take care of the sincerity of the offender's claims during a trial, even of those related to her personal feelings and attitudes, is not "interfering in her freedom of conscience," at least when they are related to a public wrong.

To take care not only of its citizens' behavior, but also of their beliefs and attitudes towards the conception of the right (or towards those public wrongs), *is* the state's business.*

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NOTES

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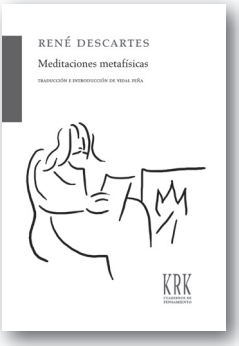
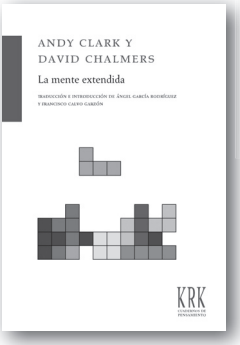
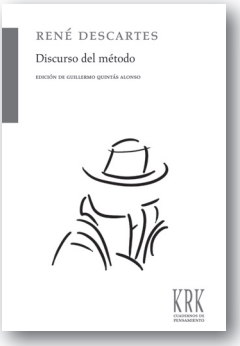
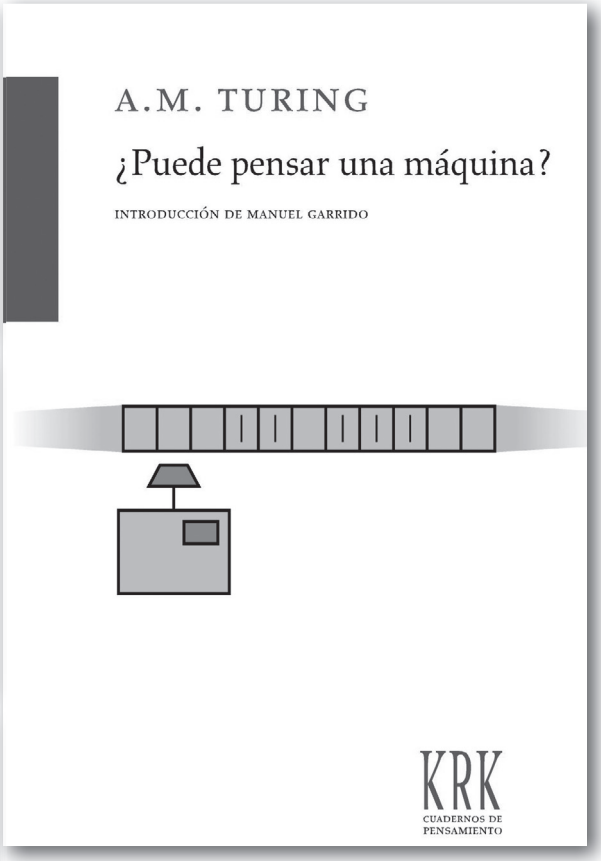
REFERENCES

BENNETT, C. (2008), *The Apology Ritual. A Philosophical Theory of Punishment*, Cambridge, Cambridge University Press.
DUFF, R.A. (2001), *Punishment, Communication, and Community*, Oxford, Oxford University Press.
— (2007), *Answering from Crime*, Oxford, Hart.
— (2010), 'Inaugural Address: Towards a Theory of Criminal Law?', *Proceedings of the Aristotelian Society*, Supplementary Volume LXXXIV, pp. 1-28.
RAWLS, J. (1971) [1999], *A Theory of Justice*, 2nd ed., Cambridge (Mass.), The Belknap Press of Harvard University Press.
— (1993), *Political Liberalism*, New York, Columbia University Press.









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Responding to Wrongdoing: Comments on Christopher Bennett's *The Apology Ritual*

Sergi Rosell

RESUMEN

En este artículo se presentan tres dificultades principales para la posición de Bennett. En primer lugar, ¿no está el retributivismo en una situación peor si se admite (como hace Bennett) que aquello por lo que somos moralmente responsables, y culpables, está en gran medida sujeto a la suerte? En segundo lugar, nuestras prácticas morales incluyen reacciones a las malas acciones, que consideramos apropiadas y a menudo admirables, en las que no parece haber presente ningún elemento de hostilidad. Finalmente, existen diferencias importantes entre la censura y el castigo que ponen en cuestión la meta de entender y justificar el castigo legal como una mera proyección de la censura.

PALABRAS CLAVE: *censura, castigo, retribución, responsabilidad moral, suerte*.

ABSTRACT

I present here three main difficulties for Bennett's account. First, it seems that retributivism is in a worse position if we admit (as Bennett does) that that for which we are morally responsible, and blameable, is to some extent subject to luck. Second, our moral practices include reactions to wrongdoing in which no vindictive element seems to be present, and we still regard them as appropriate and often admirable. Finally, there are important differences between blame and punishment that make problematic the aim of understanding and justifying legal punishment as a mere projection of blame.

KEYWORDS: *Blame, Punishment, Retribution, Moral Responsibility, Luck.*

Christopher Bennett's aim in *The Apology Ritual* (2008) is to put forward a philosophical theory of punishment which is fundamentally retributivist, although it also includes significant insights from restorative justice. In particular, he offers an account of legal punishment modelled on the ordinary practices of blame and apology. So, a first key point is for him to show that there is an appropriate link between legal (formal, state) punishment and the

ordinary notions of blame (as a kind of moral or interpersonal sanction) and apology (as the wrongdoer's morally expected response to her own wrong in interpersonal contexts). Additionally, Bennett argues that blame involves adverse reactive attitudes by whose expression we withdraw our goodwill or respect to the wrongdoer, which in turn involves a commitment to retribution, i.e. to hard treatment or to making the wrongdoer suffer. On this view, when we genuinely blame someone, we are necessarily treating her harshly or intending to make her suffer, as something we owe to her. So, a second key point is for him to convincingly argue that blame is non-contingently connected to the idea of hard treatment or the willingness to see the offender suffer (in response to wrongdoing), since this connection seems essential for a theory to count as retributivist. Both points are crucial for the success of the book's overall argument.

I have to confess that I tend to sympathise with much of what Bennett has to say, especially regarding his account of moral responsibility and his reply to the sceptical Argument from Luck. But beyond this general sympathy, I have some particular reservations regarding the two crucial steps of his account that I have mentioned — i.e. the analogy between ordinary blame and apology, and state punishment, on the one hand; and the commitment to hard treatment, on the other — on which I want to press here. I will start by commenting on Bennett's answer to the luck argument and will then move on to discuss his account of blame, and will finish with the issue of the projection of this account to legal punishment.

I. 'The Argument from Luck'

Both Bennett's articulation of the sceptical argument against moral responsibility and his answer to it are quite remarkable. Instead of framing the discussion about the possibility of moral responsibility in the traditional terms of whether this is or is not compatible with determinism, Bennett shifts the scenery and rephrases the debate in terms of luck — or lack of control, luck and control being antithetical. This has an evident advantage, which is the inclusion of cases of agents acting in indeterministic scenarios in which control is also absent. The real issue, at the end of the day, is the challenge that lack of (full) control poses on moral responsibility. Interestingly too, he puts the challenge in terms of fairness: 'only if we had ultimate control over ourselves could it be just or morally appropriate to treat us in that way: the presence of luck makes that [hard] treatment unjust' [p. 50].

In answering this challenge, Bennett puts forwards a novel defence of Peter Strawson's (1962) account of moral responsibility which relies on the idea of the wrongdoer's 'right to be punished' and is also an argument for the need of retribution. I will discuss this argument in the next section. At present

I want to propose a distinction regarding the role of luck in moral responsibility judgments which, subsequently, I will apply to Bennett's reply to the Argument from Luck.

One evident way in which the presence of luck is disturbing regarding moral responsibility is that it could undermine the kind of freedom or control required for moral responsibility. This is what is typically at issue in the sceptical challenges to moral responsibility and the point is that if we lack the kind of freedom or control required for moral responsibility we are not morally responsible at all, with the result that moral responsibility is an illusion. But there is another way in which luck can interfere in moral responsibility, which is the way involved in the so-called issue of *moral luck*. Even if we were morally responsible agents who were real originators of our actions and character, some accidental or circumstantial factors could still interfere with our actions and even our character, so that cases of moral luck could anyhow be presented. Take for instance the case of an influent libertarian like Robert Kane [see esp. Kane (1996)], who must accept that, in his self-determining and self-forming willings and actions, what action the agent specifically ends up performing is partially a matter of luck, even though she had good reasons for willing and performing any of the different actions at stake and is no doubt morally responsible for the one actually performed, independently of which one it is. Of course, compatibilists are in general supposed to be more ready to accept the existence of (at least, some kinds of) moral luck. The issues of moral responsibility scepticism and moral luck are thus partially independent, despite the fact that both questions are connected and the further back we go in uncovering aspects of agents' actions and character, the closer the sceptical challenge to moral responsibility and the moral luck issue become — to the extent that, at some point, both questions may rest on the same issue.

Now, it seems to me that Bennett mainly focuses on the first issue — his Argument from Luck is certainly a reformulation of the sceptical argument — and does not clearly address the second — the moral luck issue. But this second issue is also a potential problem for the fairness of retribution, independently of the first one. Let us accept that his reply to the Argument from Luck is sound (as I mainly regard it to be). Nevertheless it seems that moral luck — particularly, in the circumstances we face and in the consequences of our actions — raises extra doubts about the fairness of retributive responses, since agents may still not be equally in control of their actions and character or may be more or less lucky in the circumstances that they have to face or in the results of what they do.

I find difficult to infer from what Bennett says in the book what his position concerning moral luck (in its different kinds) is. Maybe we should conjecture from his answer to the sceptical argument (especially after its restatement on pages 59 to 62) a favourable disposition to endorse moral luck, given his acknowledgement that there is room for luck in the extent to

which people will be subject to the reactive attitudes, since these are responsive to the agent's exhibition of the character trait that reflects her response to the moral demands and having this trait or not may not be her fault [pp. 61-2]. Another clue, though it is not clear to me where it points to, comes from his remarks about the need to take some account of luck, in order to discount accidental action, action from ignorance and the like, or the lack of the capacity for full engagement in interpersonal relationships and moral capacities. The rationale for discounting these cases is that luck is conditioning features which are irrelevant to the assessment of *the quality's of a person's will* [p. 62]. So, in a plausible interpretation, this account would not exclude circumstantial moral luck, but would surely reject consequential moral luck, since consequences (at least those unforeseeable) may be supposed to be irrelevant to assess one's quality of will.

To restate my main point in this section, even if Bennett has successfully showed that the sceptical argument illegitimately infers from our absence of ultimate control that we are not morally responsible at all, he has acknowledged that a lot of luck enters into the sphere of moral agency; so that his opponent could just say: 'Ok, I accept that (a certain amount of) luck does not preclude moral responsibility, but it definitely calls for a milder reaction to wrongdoing, since luck is unequally distributed.' Therefore, a successful reply to the sceptic is still far from paving the way for retribution. I move on then to Bennett's direct argument for retributivism.

II. Blame and Retribution

Building on Strawson's insights, Bennett argues for retributivism by presenting an interpretation and defence of the idea that a wrongdoer has 'the right to be punished' — or, more exactly, 'the right to be evaluated as a member of moral relationships' [p. 62]. Each of us, as rational and morally capable agents, has the right to be *taken seriously* as a member of moral relationships, and this involves not suspending expectations and demands toward someone who does not meet previous expectations or demands, but rather holding her accountable for her deeds. So, the proper reaction to wrongdoing is to *withdraw our goodwill*, which is the way we have of showing our disapproval of this person's not meeting the relationship's demands. Not to blame wrongdoers would amount to fail to recognise or respect them as full members of valuable social relationships. Moreover, we express this withdrawal through adverse reactive attitudes, such as indignation and resentment. And these reactive attitudes are retributive in nature. Thus, Bennett reconstructs Strawson's account as 'a normative argument in favour of retributivism, or at least in favour of certain emotional attitudes that we can see as the basis of our sense of retributive justice' [p. 51].

I tend to agree with most of this story. However, my doubt is whether it is not possible for us to blame (or to judge morally blameworthy) someone, without expressing (or just feeling) any kind of suffering-aimed adverse emotional reactivity towards her. Indeed some historical morally admirable figures, like Mahatma Gandhi and Martin Luther King, are supposed to have maintained this kind of non-vindictive response to wrongdoing — at least in certain crucial occasions. It is assumed that their condemnation of their oppressors or opponents lacked any adverse reactivity in the way retributivism requires. They apparently attempted to change their oppressors' behaviour by appealing to their conscience, i.e. through dialogue and mere moral argument, avoiding any wish of making them suffer.

Bennett presents a dilemma in understanding King's and Gandhi's attitudes: either their responses were retributive in a minimal sense, and this is the only way of recognising their adversaries as qualified members of some shared moral relationship; or they were not retributive at all, but then they were disrespectful to those towards whom they were addressed [pp. 109-110]. Certainly, this last interpretation would imply that Gandhi and King considered themselves as morally superior to their adversaries, but this seems contrary to our natural understanding of their conducts and the admiration they generate. So, it may seem that the first interpretation is the right one.

I agree that the second interpretation is inappropriate — it clearly contradicts our intuitions about the case — but also is Bennett's final judgment that King's and Gandhi's attitudes involved a minimal retributive aspect. The crucial point is whether we can interpret their attitudes as expressing the right respect owed to qualified members of the relationship, i.e. as taking seriously enough their actions as self-governing, without these attitudes having to involve any retributive element. On a non-vindictive view of blame, King and Gandhi did change their attitudes toward their oppressors, as a response to their abuse or deterioration of the relationship, but they did it with no need of expressing any retributive attitudes. If this characterization is plausible (and this is the issue), it seems that it clearly fits better with our shared understanding of King and Gandhi's attitudes and the merit we confer to them.

Let us consider the following speech, from Anton Chekhov's short story *New Villa*, which I take as representing a clear case of the kind of non-vindictive blame that I have in mind. The engineer Kutcherov and his wife arrive at a little village with the governmental mission of building a bridge. Once there, they get captivated by the countryside charm and decide to build their own house near the village. The Kutcherovs want to establish a good relationship with the villagers, but the villagers misuse the Kutcherovs' good will and, after some time of unfruitful trying, the engineer goes to meet the villagers and addresses them:

> I've been waiting to talk to you for some time, lads,' he went on. 'The thing is, your cattle have been in my garden and woods every day since early spring. It's all been trampled up. Your pigs have dug up the meadow, they've ruining the vegetable plot, and I've lost all the saplings in my wood. I can't get on with your shepherds, they bite your head off if you ask them anything. You trespass on my land every day, but I do nothing, I don't get you fined, I don't complain. Now you've taken my horses and bull — *and* my five roubles.
> 'Is it fair, is it neighbourly?' he went on, his voice soft and pleading, his glance anything but stern. 'Is this how decent men behave? One of you cut down two young oaks in my wood a week ago. You've dug up the Yeresnevo road, and now I have to go two miles out of my way. Why are you always injuring me? What harm have I done you? For God's sake, tell me! My wife and I do our utmost to live with you in peace and harmony; we help the peasants as we can. My wife is a kind, warm-hearted woman; she never refuses to help. That is her dream—to be of use to you and your children. You reward us with evil for our good. You are unjust, my friends. Think of that. I ask you earnestly to think over it. We treat you humanely; repay us with the same coin.
> […] Rodion, who always understood everything that was said to him in some peculiar way of his own, heaved a sigh and said: We must pay. "Repay in coin, my friends"… he said [Chekhov (1998), pp. 210-1].

It is clear in the story that Rodion the blacksmith — leader of this side of the villagers — does not really understand what he and his fellows are being told. Kutcherov does not seem to be looking for retribution, but is just prompting them to think about all the wrong things they have been doing to him. Some may say that this is more a sort of complaint than proper blame, but it definitely appears to be a reaction that is responsive to the wrong done, but non-vindictive at all. My point is not that this kind of non-retributive response is the only appropriate one ever, but that non-retributive blame is also a genuine kind of blame, together with retributive blame.[1] And if this is so, then blame is not *necessarily* retributive (nor *characteristically* retributive, since cases like this are significant), although it might still be *typically* or *more frequently* retributive. Kutcherov just wants them to realize how badly they have been acting, and then to stop acting like that. I can't find this disrespectful to them as full, qualified members of the relationship.[2]

In short, I find Bennett's answer to the challenge arisen by King and Gandhi cases unappealing because either our praise for them is due to the kind of non-retributive dialogue that they propose; or, if this praise could be made compatible with a minimal retributive factor, then it would be a somewhat trivial one, in order for the case not to lose its intuitive appeal — an appeal which lies in the contrast between their *calm* attitudes (or low tone in adverse feelings where the retributive element, if any, is definitely negligible), and clearly overt retributive responses or 'vindictive sentiments.' It seems to me then that Bennett, in accordance with his own account, should rather conclude that the attitudes displayed by King and Gandhi are not ex-

amples of a superior or even appropriate form of blaming behaviour which merits imitation — or that Kutcherov's second reaction (see footnote 1) is always more appropriate than the first one. If our responses to wrongdoing ought to be proportional, in terms of showing the right amount of retributive reactivity or of making the wrongdoer suffer, then King and Gandhi responses are clearly inadequate.

An additional reason that Bennett offers for considering King and Gandhi's response as retributive is their thinking that their oppressors had the obligation to put things right in order to redeem themselves, 'for this would be a sign that, however they expressed it, they did blame their enemies in the sense of seeing distance between them that had to be made up before they could treat one another normally' [p. 111]. But this argument is unacceptably assuming that any recognition of an offence and of the obligation of *putting things right* involves a commitment to retribution. It sounds like taking for granted that only the presence of retributive aspects can make the difference, when we are precisely investigating whether a kind of blame that dispenses with retribution is viable.

III. From Blame to Punishment

The final point that I want to address is that of the continuity between the notions of blame and apology, and state punishment — as an institutional version of the former [p. 152 ff]. Certainly, there exist both important analogies and disanalogies between them, and actually Bennett's argument relies on a shared general structure, modelled upon ordinary blame and apology, but it also stresses important differences which mean that that structure should be only ritualistically projected to legal punishment — resulting all together, it is fair to say, in a nicely and robustly articulated account.[3] However, it is still true that a crucial difference between them could turn out to be fatal for the project of grounding legal punishment on an account of ordinary blame and apology, so that they may require independent and distinct justifications. I will conclude, therefore, by putting forward a possible crucial difference regarding the distinct effect of blame and punishment on their receiver.

I find it plausible to assume that blame and punishment have different sorts of *success* or *felicity conditions*. In particular, I am thinking of the different role played by the recipient in blame and punishment. Even if blame and punishment are both ways of responding to wrongdoing, blame seems to depend upon the recipient's attitude in a way that punishment does not. This is because, in order to actually *impact* on the recipient, blame needs to be acknowledged by her. I do not mean that a person cannot actually be blamed unless she acknowledges the blame, but just that blame does not affect the blamed person if she does not perceive it as just or justified.[4] If someone in-

tends to blame me, but I regard this blame as unjust, I will not typically feel blamed. Punishment, however, does not depend to the same extent on the receiver's response to it. A person will be punished — in the sense that she will be hard treated, as retributive punishment implies — even if she does not recognise this punishment as justified. In this sense, and very roughly put, blame is subjective (or requires some kind of rational endorsement by part of the recipient), whereas punishment is objective (i.e. it is independent of the subject's appraisal). And this is surely related to the fact that blame calls for a kind of internal response to wrongdoing, which appeals to reason; whereas punishment is only externally connected to wrongdoing and not in the space of reasons.

Of course, there are some complications here. It is true that the same objective punishment can be differently experienced by different people, bringing about lower or higher rates of suffering. In addition, blame can also have a social force independent of an individual's endorsement. But putting these complications aside, the point generally holds: blame does not impose by itself a burden on the wrongdoer; it rather requires the addressee's grasping of its moral force, leaving it up (to a significant extent) to the wrongdoer's conscience coming to accept it or not.

Now, the consequence that I want to draw is that, because legal punishment has a more objective, externally imposed impact on the recipient than blame, which makes it potentially more harmful and less rationally controllable by its recipient, it is then not unreasonable to think that its justification cannot be a mere projection of the very justification of blame, but it rather requires a distinctive ground. If this is so, then Bennett's (and other blame-based punishment theorists') agenda should be radically amended.[5]

There is definitely a lot to praise in Chris Bennett's sophisticated book, which is much richer than what can surely be inferred from my comments here — featuring notable arguments for the importance of the restorative part of the cycle of blame and apology, or the ritualistic and expressive aspects of his account. I hope these comments may prompt him to further clarify some fundamental aspects of his view.[6]

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NOTES

[1] In fact, after this first reproach proving useless, Kutcherov will utter a more outraged kind of blame some days later:

> He fixed his indignant gaze on Rodion. 'My wife and I have treated you as human beings, as equals,' he went on. 'But what about you? Oh — what's the use of talking? We shall end up looking down on you, very likely — what else can we do?' Making an effort to keep his temper, in case he said too much, he turned on his heel and marched off [Chekhov (1998), p. 216].

Very likely, this is a more typical or overt blaming response, but I can't see why here the blaming person is more respectful to the addressee's standing in their relationship. Indeed, in this case no further expectation in recovering the relationship seems to be present, what surely makes more difficult subsequent apology and reconciliation.

[2] This sort of blame should not be simply understood as merely aiming at moral (re)education. In my view, the most plausible interpretation of Gandhi and King's appeal to conscience is as aiming at moral improvement, which can be construed as a cooperative task between equals, in which qualified participants are not prevented from engaging.

[3] Exploring and accounting for these analogies and disanalogies is Bennett's main task in Part III.

[4] I am not referring to the felicity conditions of the very speech act (of blaming) — i.e. those conditions that must hold for a speech act of a particular kind to count as such — but to the further conditions for the success of the particular kind of moral address which blame consists in.

[5] Bennett might acknowledge this disanalogy and consider it as actually conferring more support to the necessity of a merely ritualistic implementation of the blame model for punishment. My worry with this is that an account that takes every analogy as giving support to the projection and every disanalogy as supporting the different (ritualistic/non-ritualistic) implementation of the common model would be a non-falsifiable account.

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References

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

CHEKHOV, A. (1998), 'New Villa,' in his *The Steppe and Other Stories*; translation and edition by Ronald Hingley, Oxford, Oxford University Press.

KANE, R. (1996), *The Significance of Free Will*, Oxford & New York, Oxford University Press.

STRAWSON, P. (1962). 'Freedom and Resentment', *Proceedings of the British Academy*, 48: 1-25. Reprinted in his *Freedom and Resentment and Other Essays*, London & NewYork, Routledge, 2008.

EUGEN FINK

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The Public Expression of Penitence

Constantine Sandis

RESUMEN

Este trabajo explora críticamente la comprensión expresivista del castigo que está en el corazón del libro de Christopher Bennett, *The Apology Ritual*. Parece haber una tensión en el tratamiento simultáneo por parte de Bennett de los delincuentes como gente a la que, por un lado, se le ofrece la oportunidad de ejercer su derecho a reparar el daño y, por otro, como sujetos que son sentenciados por mor de una expresión apropiada de su condena. Defiendo, en cambio, que el castigo infligido por el estado no puede realizar la función de purga, que quienes cometen un delito no lo necesitan para redimirse y que no confiere la redención, automáticamente, como algo que fuera de suyo, a alguien que no se arrepiente. Si, como Bennett parece sugerir, el 'derecho a ser castigado' tiene que incluir una dimensión ética, no puede ser simplemente un derecho a sufrir por lo que uno ha hecho, pues la reacción éticamente apropiada al crimen tiene que respetar también el derecho que uno tiene a ser reconocido como el criminal que fue y a que se le dé ocasión de reparar públicamente el daño que causó.

PALABRAS CLAVE: *penitencia, justicia restauradora, derecho al castigo, castigo comunicativo, restauración.*

ABSTRACT

This paper critically explores the expressivist understanding of punishment which lies at the heart of Christopher Bennett's book *The Apology Ritual.* There seems to be a tension in Bennett's simultaneous treatment of offenders as people who are, on the one hand, being offered the opportunity to exercise their right to make amends and, on the other, being sentenced for the sake of an appropriate expression of their condemnation. I propose instead that state-inflicted punishment cannot easily serve a purging function, that offenders do not need it to redeem themselves, and that it does not automatically bestow redemption on the unrepentant as a matter of course. If, as Bennett seems to suggest, the 'right to punishment' is to include an ethical dimension, it cannot simply be a right to suffer for one's deeds, for the ethically appropriate reaction to crime must also respect one's right to be recognised as the criminal that one is, and be given a chance to make public amends for it.

KEYWORDS: *Penitence, Restorative Justice, Right to Punishment, Communicative Punishment, Restoration.*

> The notion of obligations comes before that of rights, which is subordinate and relative to the former.
>
> SIMONE WEIL, *The Need for Roots*, 1942-3.

I. DECENT OFFENDERS AND THE DUTY TO PUNISH

Christopher Bennett's *The Apology Ritual* is motivated by an important yet frequently neglected concern regarding the obstacles that certain legal procedures create for decent offenders who wish to apologise for their crimes and make appropriate amends. Bennett illustrates this with the following narrative:

> When taken away by the police car, Bryson was in the middle of an apology to the victim, an apology that he no doubt sees as inadequate to the situation, but which he feels compelled to make nevertheless...Under our present system, the police bundle Bryson off and from that point on he has little or no chance to have contact with Judith...the severity of the sanction may make it less likely that he ever expresses how sorry he is to his victim [Bennett (2008), p. 4].

According to Bennett, the problem is best addressed by striking a balance between retributive and restorative theories of justice by means of state-sanctioned apologies which respect wrongdoers as agents whose actions are subject to moral and rational evaluation [Ibid, p. 41ff].This is to be achieved, he suggests, by sentencing them to serve whatever punishment decent people – such as Bryson in the example above – would freely choose for themselves.[1] Such apology rituals enforce criminals to act *as if* they are sorry, regardless of whether or not they actually are so.

Bennett's proposal is intended to respect the fact that we have a duty to punish offenders and consequently wrong them if we pardon crimes against their wishes, compelling them to accept an unwanted gift. *Inter alia*, Bennett argues not only that apology rituals enable us to express a condemnation owed to offenders, but that such expression is the chief purpose of punishment:

> [...] a good way to express how wrong we think an act is would be by making the offender do what we think someone who was sorry enough for their offence would feel it necessary to undertake by making amends [Bennett (2008), p. 146] [...] the fundamental job of the criminal sanction [...] is simply to express proportionate condemnation [Ibid, p. 148] [...] the main purpose of punishment is condemnation of the offender for a "public wrong"' [Ibid, p. 152] [...] Setting

> an amount of amends is an 'intuitive way of expressing condemnation' [Ibid, p. 174] [...] there is a role for the criminal sanction – understood as what I have called the apology ritual – as an expression of collective condemnation of crimes [Ibid, p. 175].

This expressivist understanding of punishment lies at the heart of Bennett's suggestion that state-sanctioned apologies should be ritualistic. Yet there is a tension in the simultaneous treatment of offenders as people who are, on the one hand, being offered the opportunity to exercise their right to make amends and, on the other, being sentenced for the mere sake *of* an appropriate expression of their condemnation. The extent to which this tension can be relieved hangs on the precise sense that we give to the elusive notion of a 'right to punishment'.[2] What follows is an exploration of certain details of Bennett's proposed account, offered on the premise that the spirit of his law can only be strengthened through criticisms of its letter.

II. Exercising the Right to Communicate Remorse

All rights are *de facto* limited by recipients' lack of power to waive any correlative obligations. According to an influential legal tradition, rights are thereby akin to liberties whose exercise we may *but need not* pursue, having 'some measure of control over the correlative obligation' [Holmes (1881), p. 214; cf. Hart (1955), pp. 180-3 & (1973), pp. 171ff.]. So conceived, the right of offenders – decent or otherwise – to be treated as autonomous agents entails a *choice* to be punished, and an opportunity to input into what the punishment should be [see, for example, Morris (1968)].[3]

In opposition to this tradition, it has been proposed that there are 'rights which do not leave [the bearer] free to waive anything at all', such as that of a team's right to a throw-in [White (1984), p. 108]. But is it not misleading to claim the team has a *right* to a throw-in if it has no choice but to take one? A team may have the right to claim a throw-in when none was given, but only if they were equally within their rights not to claim one. Similarly, an offender has a right to be punished if no sentence is given. In the case of a compulsory sentence, however, it seems misleading to insist that she had a right to it. At most, to have something that one is entitled to forced upon one is to have a right that one is prevented to exercise. *A fortiori*, if the reason for making punishment compulsory is to be that offenders have some kind of right to it, the right in question can only be one whose exercise they are denied a two-way power over.

One possible move here, inspired by Hegel, would be to maintain that in choosing to do something which they know they will be punished for offenders are already choosing to be punished [cf. Hegel (1821), § 99R].[4] This

position presumes a somewhat distorted notion of choice, eliciting responses such as the following one by John Deigh:

> At most, one who chooses to commit a criminal offense chooses to place himself in jeopardy of being punished or, if determination of his guilt is a foregone conclusion, to incur a liability to punishment [Deigh (1984), p.197].[5]

Perhaps the correct conclusion to reach is that no theory of why state-sanctioned punishment is necessary can be built solely upon the notion of a 'right to punishment'. For it may be that what offenders have a right to is not punishment *per se* but, rather, the choice of publically condemning themselves. This is not to defend abolitionism, but merely to recognise the ethically significant difference between (a) making offenders do what they would choose to do if they were decent and (b) offering them a genuine opportunity to freely make amends, over and above whatever condemnation is expressed by the state. Conversely, victims have a right to receive genuine apologies, and this too can only happen if offenders are given the agential space to make their *own* amends.

A valuable strategy between (a) and (b) is that of attempting to ensure that the offender *realises* that she needs to make amends. In Antony Duff's conception of it, a political community:

> owes it to the victim, whose wrong it shares, and to the offender as a member of the normative community, to try to get the offender to recognize that wrong and to make a suitable apology for it...We owe it to victims and to offenders to make the attempt to secure repentance, self-reform, and reconciliation...that attempt is worth making even if it is often likely to fail, since in making it we show that we do take crime seriously as a public wrong and address the offender as someone who is not beyond redemption. [Duff (2001), pp. 114-5].[6]

There are numerous *different* ways of trying to facilitate such a recognition, some more orthodox than others. In the films *The Yes Men* and *Yes Men Fix the World*, for example, political activists Andy Bichlbaum and Mike Bonanno pose as CEOs of organisations such as DOW Chemical and Shell making public apologies on their behalf. They 'accept' full responsibility for the past actions of the companies they pretend to represent, 'offering' vast sums in compensation to the victims of disasters which the companies have been implicated in. The intended effect of these stunts is to put the organisations in question in the difficult position of having to either disassociate themselves from the offers made in their name, thereby worsening their public images, or allow themselves to be manipulated into parting with huge amounts of money, with the possible benefit of improving their ethical reputations (they always choose the former). There is, however, a third option available to the

CEOs, namely that of wholeheartedly endorsing the apology made on their behalf, adding that they should have been pro-active of their own volition. To sincerely respond this way is to freely exercise the right to make amends.

Victims are unlikely to be persuaded by apologies shown to have triggered by hoaxes and will even less impressed in cases were apologies sanctioned by the state, on pain of further punishment. Could offenders in such circumstances truly choose to be punished? According to Duff the answer is 'yes', so long as we make the punitive procedure a form of inclusionary moral communication, allowing offenders the opportunity to fully co-operate in any legal action taken. Duff argues that, if administered correctly, a penitential punishment that is *communicative* – as opposed to merely expressive – can retain a distance which infringes neither the autonomy nor the emotional privacy of those punished [Duff (2001), ch. 3.2ff; cf. Duff (1986), p. 240ff.]. On this view, offenders are free to *treat* their punishment as they please: a penance, a prudential deterrent, a cost they are happy to pay etc. [ibid, pp. 125-6]. After all, the argument goes, there is no such thing as forcing someone to apologise *sincerely*. It is up to them to decide what kind of punishee they are to become.

In the first of his 2009 Reith lectures Michael Sandel describes the practice of treating a fine as a fee:

> A study of some Israeli childcare centres offers a good real world example of how market incentives can crowd out non-market norms...parents sometimes came late to pick up their children, and so a teacher had to stay with the children until the tardy parents arrived. To solve this problem, the childcare centres imposed a fine for late pick-ups. What do you suppose happened? Late pick-ups actually increased [...] Introducing the fine changed the norms. Before, parents who came late felt guilty; they were imposing an inconvenience on the teachers. Now parents considered a late arrival a service for which they were willing to pay [...] Part of the problem here is that the parents treated the fine as a fee. It's worth pondering the distinction. Fines register moral disapproval, whereas fees are simply prices that imply no moral judgement. When we impose a fine for littering, we're saying that littering is wrong. Tossing a beer can into the Grand Canyon not only imposes clean-up costs; it reflects a bad attitude that we want to discourage. Suppose the fine is 100 dollars and a wealthy hiker decides it's worth the convenience. He treats the fine as a fee and tosses his beer can into the Grand Canyon. Even if he pays up, we consider that he's done something wrong. By treating the Grand Canyon as an expensive dumpster, he's failed to appreciate it in an appropriate way [Sandel (2009), lecture 1].

We sometimes talk of 'paying the price' for our mistakes. But a person who literally views all penalties as prices is doomed to conclude that one can never be punished for breaking the law because, strictly speaking, one can never break it. Such a person may well choose to be 'punished' in choosing to commit a crime, but only does so because she misperceives the law as

nothing more than a list of the rates (monetary or otherwise) of performing certain actions or, even worse, the cost of being *caught* performing them. So construed, the law doesn't say 'don't do A' but 'A will cost you *x* amount of time and/or money'. If nothing counts as breaking a law then, to paraphrase Wittgenstein, nothing could count as following it either, in which case it's no law at all [Wittgenstein (1953), § 201].

The state may communicate to citizens its wish that penalties be treated as deserved punishments rather than advertised costs, but it cannot force them to treat them so. Offenders may apologise voluntarily for a variety of reasons (from true remorse to the hope of leniency through 'good behaviour'), but they may also refuse to do so, thereby requiring authorities to threaten with further penalties or invoke force. As Harry Frankfurt's initial scenario of Jones being threatened to do something which he had already decided to do 'no matter what' demonstrates, not being able to do otherwise (in the relevant sense) does not in itself relieve one of the responsibility for doing what one is made to do [Frankfurt (1969), p. 3ff.]. It can, however, deprive the agent of autonomy. Not treating offenders as mere 'dogs' does not alone suffice to give them the 'freedom and respect' they are due [cf. Hegel (1821), § 99A].

One further worry with both Bennett and Duff's proposals is that it is often impossible for the victim to know which motive the offender is acting from (carrot, stick, or remorse), at least until after any eventual release. Indeed, the more sincere the offender, the less satisfied she will be with non-voluntary punishment. As Bennett himself maintains:

> [a]n apology works when it is sincere: that is, when it expresses the wrongdoer's acceptance that what she did was wrong and her repudiation of it...the apology has to express the fact that the wrongdoer understands her action as wrong, that it matters to her [Bennett (2008), p. 115].

The above view is stated within the context of a discussion of informal restoration, Bennett arguing further on that:

> the state [...] has no business giving out sentences the explicit aim of which is to make offenders genuinely penitent [Bennett (2008), p. 154-5].

Be that as it may, the opportunity to publically express genuine penitence is one owed to the offender, yet threatened by enforced ritualistic amends. The criteria for whether an offender has repented are counterfactual ones: what would the offender have done if the penalty hadn't been enforced, and/or her sentence could not have been shortened for good behaviour? Ideally, offenders should have the opportunity to make amends which are legally supererogatory. Bennett's favoured penal system does not prevent them from doing so, of course, but one which actively provides them with a means of commu-

nicating and effecting any desire to make amends in a way that is beneficial to the community harmed, as well as to the victim, would arguably be preferable.

III. The Expiation of Guilt

One of the many virtues of *The Apology Ritual* is that it presents a legal notion of punishment that is sensitive to moral concerns. Accordingly, Bennett conceives of the 'right to punishment' to include the inward-looking possibility of redeeming oneself through suffering and guilt for blameworthy actions or omissions [Bennett (2008), pp. 115ff.].[7] He is here in broad agreement with A. I. Melden, who writes:

> [...] what is important about the claim that there is a human right to punishment is...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. Punishment as the means adopted to purge persons of their guilt is, in fact, a mark of the respect we have for those to whom it is applied, for even the guilty who need to be punished in order to be redeemed are to be respected for the rights that they have [Melden (1977), pp. 183-4].

This redemptive theme, familiar from Dostoyevsky's *Crime and Punishment*, is explored in Woody Allen's trilogy on unpunished murder, with unsettling results. In the first film, *Crimes and Misdemeanours*, the atheist life-saving and charity-donating doctor Judah Rosenthal literally gets away with murder. Initially 'plagued by deep-rooted guilt' and soon 'on the verge of a mental collapse-an inch away from confessing the whole thing to the police', he one day awakens to find that 'his life is completely back to normal'. Once in a while he has a bad moment, but 'the killing gets attributed to another person-a drifter who has a number of other murders to his credit' and 'in time, it all fades'. Or so it seems. For the murderer finds himself in quasi-confession, the above quotations all taken from a purported idea for a film that which he offers to an aspiring film maker he meets at a cocktail party. The latter is unconvinced:

> Here's what I would do: I would have him turn himself in, because then your story assumes tragic proportions, because in the absence of a god, or something, he is forced to assume responsibility himself. Then you have tragedy [Allen (1989)].

'But that's fiction' the murderer replies, 'you've seen too many movies'. In Gus Van Sant's movie adaptation of Blake Nelson's *Paranoid Park*, teenager Alex accidentally kills a security guard and keeps it secret until his guilt compels him to make a confession, though (here again) not to the authorities.

Like Raskolnikov, and Allen's modern-day variations on his type, Alex falls seriously short of being decent *qua* offender. Regardless of this, the question of whether and if so how he is to be purged is not one which can be answered in terms of necessary and sufficient conditions.

The second film in Allen's series, *Match Point*, opens with the following narration by the Dostoyevsky-reading murderer Chris Wilton[8]:

> The man who said "I'd rather be lucky than good" saw deeply into life. People are afraid to face how great a part of life is dependent on luck. It's scary to think so much is out of one's control. There are moments in a match when the ball hits the top of the net, and for a split second, it can either go forward or fall back. With a little luck, it goes forward, and you win. Or maybe it doesn't, and you lose [Allen (2005)].

The visual accompaniment shows a tennis ball hitting the top of the net; the frame freezes and we do not see which side the ball comes down on. Towards the end of the film, Chris throws the incriminating evidence (some jewellery) into the river Thames, but a ring hits the top of a rail and bounces onto the road. If this were a game of tennis, the 'match point' would have been lost.

As it happens, the result precipitates Chris' not getting caught (the ring is picked up by a drug dealer who is soon after killed in a feud). But it does not follow that he has won the match point. Indeed, it is not clear what, if anything, could count as 'winning' here, inviting the viewer to question the view that being lucky amounts to having it easy and/or 'getting away' with things.

Chris attempts convince the apparitions of his two victims that he did what he did out of necessity, and is consequently able to suppress his guilt, telling them that 'you have to learn to push the guilt under the rug and move on, otherwise it overwhelms you'. This is soon followed with him the followed, however, with the following confessional statement:

> It would be fitting if I were apprehended [...] and punished. At least there would be some small sign of justice – some small measure of hope for the possibility of meaning [Allen (2005)].

One may cause an offender to suffer by refusing him official punishment. But such an act could only serve to purge his guilt if it is itself understood as an act of punishment. In not being caught or sentenced, Chris has lost the chance to receive the punishment he deserves (and has a right to), a victim of the fact that he is not decent enough to immediately turn himself in. The film's final shot of him at a complete emotional loss makes it clear that this weakness will continue to plague him.

Melden characterises the poverty of such a stance well:

> the individual, blemished as he is, would be dishonest with others if, were he to live with them as he did before the blemish was revealed in his offence, and dishonest with himself were he to adopt the usual methods of concealing the moral flaw from himself. For such a person there is the need to suffer the punishment and only in this way to do the penance that is required. Remorse is not enough. What is required is the constant reminder of the fault manifested in the misdeed in order that the individual may attain that moral ratification within himself that is the expiation of his guilt [Melden (1977), p. 182].

In the final part of the trilogy, *Cassandra's Dream*, one of two murdering brothers, Terry, considers suicide but ultimately decides that the only way to 'wipe the slate clean' and 'straighten it out' is to turn himself in and serve his punishment. Somewhat paradoxically, Melden paradoxically hold that the very suffering which causes offenders like Terry to seek punishment is itself punishment enough if the need for it is unmet:

> To demand one's punishment as a matter of one's right may well demonstrate that one has no moral need for, and ought not to be given, the punishment for which one clamours. For one who cries out for the punishment he deserves as a matter of right is already suffering the pangs of remorse and suffering the contrition of heart and repentance that punishment itself is designed to secure but which in that instance is sheer suffering that serves no useful purpose [Melden (1977), p.181].

Peter Winch considers a similar objection to the attempt to tie punishment to repentance:

> [...] if the offender truly has repented when he comes to be punished, then there is nothing more for the punishment to achieve in that regard. On the other hand, if the offender is not repentant, then whatever happens to him is not punishment (in the 'ethical' sense of the word I have tried to develop) [Winch (1972), p. 219].

While the objection is onto something, Winch rightly notes that there is also something amiss with it. He illustrates through the following passage from Simone Weil, quoted with approval:

> In the life of the individual, the innocent must always suffer for the guilty; because punishment is expiation only if it is preceded by repentance. The penitent, having become innocent, suffers for the guilty, whom the repentance has abolished.
>
> Humanity, regarded as a single being, sinned in Adam and expiated in Christ.
>
> Only innocence expiates. Crime suffers in quite a different way [Weil (1970), pp. 115-16].

The upshot of all this is that state-inflicted punishment cannot easily serve a purging function. Offenders do not need it to redeem themselves and it does not automatically bestow redemption on the unrepentant as a matter of course (though it is certainly possible for a ritualistic simulation to activate the real thing).[9] If, as Bennett seems to suggest, the 'right to punishment' is to include an ethical dimension of the sort alluded to be Winch and Weil, then it cannot simply be a right to suffer for one's deeds. The ethically appropriate reaction to crime must also respect one's right to be recognised as the criminal that one is, and be given a chance to voluntarily make public amends for it.[10]

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NOTES

[1] Being decent is a matter of degree rather than kind. Duff (2001) distinguishes between the morally persuaded offender [pp. 116-7], the shamed offender [pp. 117-8], the already repentant offender [pp. 118-120], and the defiant offender [pp. 121-25]. All but the last may qualify as relatively decent.

[2] Bennett keeps the phrase in scare quotes throughout his book. In what follows I shall consider certain understandings of it, but it would take a much lengthier piece (if not a book) to present anything that even approximates an exhaustive analysis of the main contenders.

[3] Morris takes the right to be treated as a person to be and 'inalienable' right acquired simply 'by virtue of being human' [p. 127]. I do not agree, but none of what follows rests on either of us being right.

[4] This is not the place to engage in Hegel exegesis Still, it is worth noting that Hegel's use of 'Recht' is much looser than any notion standardly associated with the term 'right'.

[5] I return to a further possibility further below.

[6] As Duff subsequently notes, this is not an all-or-nothing question, and the appropriate extent of resources to be devoted to such efforts will vary from case to case.

[7] Like Bennett, I leave aside here the issue of the appropriateness of apologising for things one is not to blame for, save to register that there is no reason to think that such apologies are purely a matter of etiquette and thereby immune from any guilt-related norms [see Sandis (2010)].

[8] At one point in the film we even see him consulting the *Cambridge Companion to Dostoyevskii*.

[9] The question is an empirical one and results will doubtlessly vary from one individual to another. No specific sentence can in itself be identical to the punishment that an offender has a right to.

[10] This paper was first presented at the 5th Nomos Conference, on *The Apology Ritual*, University of Valencia, 27-8 January 2011. Many thanks to all the participants, especially Christopher Bennett, Josep Corbí, Fabian Dorsch, Antony Duff, Jules Holroyd, and Sandra Marshall for their incredibly helpful questions, criticisms, and suggestions. Thanks also to David Dolby, Max de Gaynesford, Arto Laitinen, and Berta Pérez for very fruitful conversations and, especially, to Edgar Maraguat for insightful comments which helped to improve an earlier draft.

REFERENCES

ALLEN, W. (1989), *Crimes and Misdemeanors*, New York, Orion Pictures.
— (2005), *Match Point*, London, BBC Films & Dreamworks.
— (2007), *Cassandra's Dream*, New York, The Weinstein Company.
BENNETT, C. (2008), *The Apology Ritual: A Philosophical Theory of Punishment*, Cambridge: Cambridge University Press.
BICHLBAUM, A., BONANNO, M., & ENGFEHR, K. (2009), *Yes Men Fix The World*, New York, HBO.
DEIGH, J. (1984), 'On the Right to Be Punished: Some Doubts', *Ethics*, 94, pp.191-211.
DOSTOYEVSKY, F. (1866/1952), *Crime and Punishment*, trns. tr. D. Magarshack, London, Penguin.
DUFF, A. R. (1986), *Trials and Punishments*, Cambridge, Cambridge University Press.
— (2001), *Punishment, Communication, and Community*, Oxford, Oxford University Press.
FRANKFURT, H. G. (1969), 'Alternate Possibilities and Moral Responsibility', *Journal of Philosophy*, LXVI, No. 23. Reprinted in his *The Importance of What We Care About*, Cambridge, Cambridge University Press, 1988, pp. 1-10, to which any page numbers given refer.
HART, H. L. A. (1955), 'Are there any Natural Rights?', *Philosophical Review*, 64, pp. 175-91.
— (1973), 'Bentham on Legal Rights', in Simpson, A. W. B. (ed.),*Oxford Essays in Jurisprudence II*, Oxford: Oxford University Press, pp. 171-201.
HEGEL, G. F. W. (1821/1952), *The Philosophy of Right*, trns. T.M. Knox, Oxford: Oxford University Press.
HOLMES, O.W. (1881), *On the Common Law*, Boston, Little, Brown, and Co.
LEATHERBARROW, W.J. (ed.) (2002), *Cambridge Companion to Dostoevskii*, Cambridge, Cambridge University Press.
MELDEN, A. I. (1977), *Rights and Persons*, Oxford, Blackwell.
Morris, H. (1968), 'Persons and Punishment', *The Monist*, Vol. 52, No. 4, pp. 475-501. Reprinted in (ed.) A. I. Melden, *Human Rights*, California, Wadsworth, 1970, pp.111-134, to which any page numbers given refer.
NELSON, B. (2006), *Paranoid Park*, New York, Viking Press.
OLLMAN, D., PRICE, S., & SMITH, C. (2004), *The Yes Men*, New York, United Artists.
SANDEL, M. (2009), *A New Citizenship: The Reith Lectures*, London, BBC Radio Four.

SANDIS, C. (2010), 'The Man Who Mistook his Handlung for a Tat: Hegel on Oedipus and Other Tragic Thebans', *Bulletin of the Hegel Society of Great Britain*, 62, pp. 1-18.
VAN SANT, G. (2007), *Paranoid Park*, New York, ICF Films.
WEIL, S. (1970), *First and Last Notebooks*, Oxford, Oxford University Press.
WHITE, A. R. (1984), *Rights*, Oxford, Clarendon Press.
WINCH, P. (1972), *Ethics and Action*, London, Routledge & Kegan Paul.
WITTGENSTEIN, L. (1953/2009), *Philosophical Investigations*, 4th edition, tr. G.E.M. Anscombe, P. M. S. Hacker, & J. Schulte, Oxford, Wiley-Blackwell.

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Replies to My Commentators

Christopher Bennett

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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REFERENCES

BARNETT, R. (1977), "Restitution: A New Paradigm of Criminal Justice", *Ethics* 87, pp. 279-301.

BENNETT, C. (2002), "The Varieties of Retributive Experience", *Philosophical Quarterly* 52, pp. 145-163.

DEIGH, J. (1984), "The Right to be Punished: Some Doubts", *Ethics*, 94, pp. 191-211.

NUSSBAUM, M. (1993), "Equity and Mercy", *Philosophy and Public Affairs* 22 (2), pp. 83-125.

WILLIAMS, B. (1993), *Shame and Necessity*, Berkeley: University of California Press.