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978-0-521-88072-5 - The Apology Ritual: A Philosophical Theory of Punishment

Christopher Bennett

Excerpt

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Introduction

an everyday story

After a hard day at the office Bryson gives in to the cajoling of a couple of his colleagues and decides to join them for a drink. Stretching out his legs in the pub he savours the atmosphere, the chat and the sheer leisure of having nothing to do until the next morning, while the alcohol courses into his blood and makes the world appear that little bit rosier. The only problem is, he drives to work, and will need to drive home again. This fact hovers constantly more or less into focus in his mind, and he makes it clear to his mates that he will not be staying with them for long. Nevertheless, as he is about to get up to leave, having had as much to drink as he ought to in the situation, they persuade him to stay for one more. It is not that Bryson is naturally reckless or that he does not care about the danger he might be to others when he is under the influence: this fact has been more or less present to his mind all along. It is just that, after he has had a couple of drinks, this aspect of the situation slips out of his awareness under pressure from his friends. In the delicious relaxation of the moment he assures himself that he is not really going to be a danger to anyone.

Eventually Bryson does get to his car. He is nowhere near legless, but he should not be driving. But at this point he is feeling good and in control of all situations. As he sets off, he puts on the car stereo and winds down the window. Soon he is driving, with care but unjustified confidence, past rows of tenement blocks along the busy and often congested roads that lead out of the city. Having queued for what seems like ages he is suddenly presented with a stretch of relatively open road and he puts his foot down. In his sporty car he is soon up to 40 mph; but this is a 30 mph limit, and other road users are expecting cars to be moving slowly. When the cyclist swings out across the road she assumes that she can complete her manoeuvre before Bryson catches her. But she misses

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her pedal at the crucial moment and falters, leaving her momentarily stranded in the middle of the road. He is travelling too fast, and her sudden pause catches him unawares. Despite his confidence his reactions do not come quickly enough. Though he brakes and tries to steer away, he cannot help but catch her squarely and knock her from her bike.

Fortunately for Bryson, the cyclist sprawled on the pavement – call her Judith – is very much alive. But she is seriously injured, with broken legs and shattered hips. Judith will probably walk again, but not without difficulty. As a shocked Bryson gets from his car and goes over to his victim, a bystander calls the police and ambulance. Bryson's immediate unthinking reaction is to say sorry, though he is aware that that cannot be enough. He tries – clumsily in his shocked state – to find something that he can do for this woman who has become his victim. A bystander better informed about first aid shoos him away, but he hovers close by, his tense posture expressing his wish that everything could be all right. Soon Bryson's nervous attempts to help Judith are interrupted and he is bundled into a police car, while an ambulance rushes the cyclist to casualty.

dealing with crime: two scenarios

What should happen to Bryson as a result of what he has (recklessly) done to the cyclist? What happens in our society at the moment is that, with the arrival of the police car, Bryson is taken away from contact with his victim and enters into a system with its own procedures, assumptions and language: in short its own culture or way of doing things. He will meet police officers, prison warders, solicitors, lawyers, probation officers: various agents of the state and others with official status in the system. But the system will shield him from any contact with Judith. He will be charged, tried if need be, and then sentenced. The charge might be the fairly serious one of dangerous driving. The sentence might be custodial or he might get a fine. In some cases he might be sentenced to community service.

But why do we think that this is what should happen to Bryson? 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 quite inadequate to the situation, but which he feels compelled to make nevertheless. He is immediately and strongly concerned for Judith, and it is inarticulately but fundamentally apparent to him that he owes her something of which an apology is only the start. More than anything, his whole impulse at this

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point is to do something for her. Indeed we can all recognise the appropriateness of this kind of response. It is because Bryson feels compelled to make it that we can regard him as, despite his misdeemeanour, a basically decent human being.

Some theorists have criticised our criminal justice system because it severs rather than builds on this disposition in the decent offender.¹ 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, or to act on his impulse to do something for her. But the system also has features that militate against the victim getting anything from the offender. First of all, we have a range of such severe and disruptive sanctions that they give offenders strong incentive to deny the offence. By doing so it encourages the offender to think self-interestedly rather than morally, and the criminal justice process turns into one of opposing 'sides' attempting to manipulate each other in order to get the result they want, rather than an arena in which all parties attempt to deal together with the aftermath of the offence.² The offender is threatened with a sanction that, sorry as he is, will be severe enough and cause sufficient havoc to his life (particularly if it involves a custodial sentence) that he will do what he can to evade the charge. Thus the severity of the sanction may make it less likely that he ever expresses how sorry he is to his victim when they do come face-to-face in court, and provides offenders with a strong incentive to disguise rather than show their remorse. Secondly, the severity of what will be done to Bryson should he be convicted means that we need a high standard of proof before inflicting this sanction. The charge must be proven beyond reasonable doubt before the whole terrible weight of the state apparatus comes down on an offender. Again, this means that it is less likely that the victim will get the satisfaction that comes from a conviction.³

On the basis of features such as these, critics claim that the present criminal justice system neglects victims and treats crimes as though they

¹ For instance proponents of restorative justice, see e.g. N. Christie, 'Conflicts as Property', *British Journal of Criminology* 17 (1977), pp. 1–15; J. Braithwaite, *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press, 1989); H. Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, Pa.: Herald Press, 1990); M. Wright, *Justice for Victims and Offenders: A Restorative Response to Crime*, 2nd edn (Winchester: Waterside Press, 1996); G. Johnstone, *Restorative Justice: Ideas, Values, Debates* (Cullompton: Willan, 2002).

² The latter part of this sentence draws on a widely quoted formulation of restorative justice. See T. Marshall, 'Restorative Justice: An Overview', in G. Johnstone (ed.), *A Restorative Justice Reader* (Cullompton: Willan, 2001), pp. 28–46.

³ Johnstone, *Restorative Justice: Ideas, Values, Debates*, p. 69. Johnstone attributes this point to Martin Wright.

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were only the business of the state. Rather than the incident described above fundamentally involving Bryson and Judith, it is rather the state that must take action. And rather than taking action to ameliorate the situation, it narrowly takes action against Bryson. The concern of the state is simply to ascertain whether Bryson has done something for which he can be punished. That – according to the narrative that underpins our criminal justice institutions – is the overriding interest in this situation. The official line is that there is a public interest in dealing with crime that overrides individual interests. And indeed, this is the way the system seems to explain itself. Criminal cases are ‘*R. v. Jones*’ rather than ‘*Smith v. Jones*’ (even the ‘v.’ indicates the assumed adversarial rather than collaborative nature of the process). And even if there is a conviction, what Bryson will end up doing is what is described appropriately as ‘being detained at Her Majesty’s pleasure’: he will end up doing something for the crown rather than for Judith. Furthermore, what he will end up doing for the crown will not have much to do with any sense of remorse he may still have. In other words, sitting in a cell or paying a fine to the state will not appear to him a particularly meaningful way of expressing his remorse or making amends. What he wants to do, if he is feeling bad for what he has done, is to do something for the victim. But the criticism is that the punitive system corrupts and stifles that important impulse and leaves the claims of victims unaddressed.

As a result, critics say, the experiences of those like Bryson and Judith in the criminal justice system end up being meaningful only in the most attenuated sense. What happens is that, once what takes place between Bryson and Judith is defined as a crime, the situation is taken out of their hands. Bryson is driven away in the police car, contact between victim and offender is severed, and the bureaucratic machinery of the state lumbers into action. Police and lawyers get involved, with their own languages and procedures, their own institutional perceptions of the parties involved; Bryson and Judith may well feel that they are being carried along by the bureaucracy and its own ends – a tiny part of a huge machine. They become bit players in their own story, rather than at the centre of the narrative. And yet, when Bryson gets out of his car and steps over to Judith to begin a shocked apology, his victim and his response to her *is* the centre of his world: this is all, at that moment, that matters to him.

Imagine, then, an alternative form of justice: one in which the response of offender to victim *is* put at the heart of things. On such a view, let us say, if Bryson pleads guilty when charged, he enters into a process in

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which he is able to make good on that initial impulse to apologise; he attends a meeting with his victim when he is able to have an exchange with her, and when she can tell him what effect the offence has had on her, and he can make the necessary response. Such a process might be an element of what is called *restorative justice*.⁴ The basic idea behind restorative justice is often thought to be the following: it is a process in which the 'stakeholders' to some offence get together and decide what has to be done in its aftermath.⁵ In other words, those actually affected by what has been done are able to decide how the action ought to be addressed. Rather than the victim and offender being taken up by a bureaucracy that has its own momentum and its own culture, they are able to keep themselves at the centre of the story. In the language sometimes used by its proponents, in restorative justice they retain *ownership* of the process: it is the direct concern of those who are most affected, not the business of the crown in which they have only a narrowly circumscribed role. They can 'own' the process in a way that the formal procedures of the present system make impossible.⁶

On this restorative alternative, Bryson and Judith should be given a chance to have such a meeting, though proponents of this alternative usually stress that any involvement in this process has to be voluntary. Also involved in – or invited to – this meeting can be other interested parties. For instance, although the obvious and direct victim of the crime is Judith, the character of the offence is such that members of the local community could also count themselves as having a legitimate claim to have been harmed by the offence. For although they were not themselves hit by the car, they (and their children or their elderly relatives) were unjustifiably put at risk by Bryson's recklessness. And because of this they have a legitimate complaint to make of him. And further, the character of their neighbourhood is changed if people drive fast down their main street: crossing such a road becomes an increasingly risky business (particularly if one is in any way vulnerable, such as the young or the elderly or the disabled), and one side of the road thus becomes effectively cut off from the other. The 30 mph limit is in place to protect the residents' legitimate interests in not being put at risk and in not having their

⁴ My understanding of restorative justice has been greatly furthered by Daniel Van Ness's extraordinary attempt to imagine what a city might look like if it attempted to respond 'as restoratively as possible to all crimes, all victims and all offenders.' See www.rjcity.org.

⁵ See e.g. the widely quoted definition in Marshall, 'Restorative Justice: An Overview'.

⁶ For an account of the aims and realities of restorative justice, see e.g. J. Shapland *et al.*, 'Situating Restorative Justice in Criminal Justice', *Theoretical Criminology* 11 (2006), pp. 505–32.

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neighbourhood cut in two by a fast road. The harm that Bryson does to *these* interests is of a less dramatic character than what he does to the cyclist, but it is an aspect of the crime, and so there are good grounds for allowing representatives of the local community a place at the meeting. As usually conceived, there should also be an official at the meeting who is charged with facilitating the discussion, keeping order, and leading the discussion through its various stages (crudely, perhaps, from recrimination to agreement on reparation).

Imagine then that such a process is really staged. In the meeting, Bryson listens to what the various parties have to say about the impact the offence has had on them (or in the case of the representatives of the local community, the effect of widespread speeding on their community), and gains an insight into his behaviour as seen and felt from the outside. When it is his turn to speak, he is moved by what he has heard, and is able to make it clear to Judith how badly he feels about what he has done to her; and to make it clear to the group that he intends never again to get into a car drunk or to drive recklessly over the limit. His experience, he can tell them, has given him a new insight into the importance of the speed limit: before he had just thought of it as a busybody rule it was fine to ignore. As a group, the meeting can then decide on a course of action whereby Bryson can make reparation to the cyclist and, if this is appropriate, to the local community. Of course, he can never put things back to the way they were or undo the harm caused by his offence. But he can do something that expresses his wish that he could. Thus he might agree, for instance, to pay for some equipment that aids the cyclist's efforts to relearn to walk, or that helps her cope with impaired mobility; and he might agree to give a programme of talks to schoolchildren on the dangers of reckless driving. Thus he expresses his wish that he had never done what he did by doing something that helps his victims, perhaps in ways related to the harm caused by his offence. He is able to make some kind of reparation for what he has done in a way that benefits the victims.

Proponents of restorative justice argue that this sort of procedure, based as it is on the fundamental impulse to apologise and make amends when one has wrongfully caused harm, can be more meaningful to victims, offenders and the local community than the current system of trial and imprisonment.⁷ Such theorists often conceive of restorative justice as

⁷ See Zehr, *Changing Lenses*; H. Strang, 'Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration', in Johnstone, *A Restorative Justice Reader*, pp. 286–93. Not all proponents of something like restorative justice base it in conceptions of apology: see e.g. R. Barnett, 'Restitution: A New Paradigm for Criminal Justice', *Ethics* 87 (1977), pp. 279–301.

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an alternative, not just to the trial and imprisonment scenario I described briefly above, but also to retributive justice and to punishment more generally conceived. Retributive punishment, it is said, is backward-looking and concerned with making the offender suffer for what he or she has done; whereas restorative justice would be concerned with making things better for all parties for the future. The restorative justice alternative raises a number of important questions. What, if anything, would be lost if criminal justice became a form of restorative justice, taking the alternative scenario briefly sketched above? Is there a sense in which crimes *are* actions that are a legitimate and necessary concern of the state and hence should not just be regarded as the business of private individuals? And is the ritual of apology really as free from retributive ideas of justice as is sometimes imagined? Is restorative justice necessarily all that different from retributive justice?⁸

retributive, restorative and criminal justice

In this book I am concerned with these questions of the proper role of apology in criminal justice. Like some proponents of restorative justice, I see apology as our fundamental means to ‘make things right’ in the face of having done wrong. However, unlike many proponents of restorative justice, I believe that the right theory of the importance of apology will lead us to understand properly the importance of *punitive* responses to wrongdoing. On my view, understanding apology will give us an answer to the question of why hard treatment is a necessary part of a response to wrongdoing. Thus I will depart from those who think of restorative justice as being a non-punitive response to crime.

I will also depart from those who think that restorative justice is different from punishment in being an essentially informal response to crime rather than one delivered by the state. I am sympathetic to the idea that criminal justice would do well to harness the power of our informal reactions to wrongdoing, but I see this as being part of a state system of censure of crime rather than a form of community justice.⁹ I argue that

⁸ We address these questions as we go on. But see K. Daly, ‘Restorative Justice: The Real Story’, *Punishment and Society* 4 (2002), pp. 55–79, for some sceptical issues relating to the claims of restorative justice.

⁹ For the idea that the state has a duty to issue authoritative condemnation of crimes, see e.g. J. Feinberg, ‘The Expressive Function of Punishment’, in his *Doing and Deserving* (London: Princeton University Press, 1970), pp. 95–118; A. von Hirsch, *Censure and Sanctions* (Oxford: Oxford University Press, 1993); R. A. Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001).

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collective censure of wrongdoing is a necessary action of the state; and that we should resist the view on which crime becomes a private ‘conflict’ between two individuals rather than something that is of appropriate concern to their fellow citizens as a whole. In chapter 6 we will see the problems that arise for the restorative alternative when it has to deal with offenders who – unlike Bryson – do not willingly comply with the restorative process. Any justice system needs to say what it is going to do with such non-compliant offenders. Trying to give a satisfactory answer to this question will lead us to see that there has to be more to justice than the restorative alternative tends to allow.

What this book sets out, therefore, is a retributive theory of punishment, but one that pays attention to the challenge presented by restorative justice. In the end I agree with those who argue that there is a legitimate public interest in censuring crime. However, I argue that in order to do its job such censure has to be *symbolically adequate*. And I argue that the appropriate symbols are to be found in the practice of apology. My account of the punishment and retribution is therefore based in the importance of apology, and for this reason it shares something with restorative justice. But it argues that in the end the imposition of proportionate sanction on offenders is a morally necessary response to those actions that are crimes.

So why, on my account, is hard treatment a necessary part of responding to wrongdoing? My defence of retribution is distinctive because I claim that retributive reactions are necessary to do justice *to the offender*. In part II of this book I offer an interpretation of the Hegelian idea that the wrongdoer has a ‘right to be punished’. This is to say that punishment is *owed to* the wrongdoer; in the absence of punishment we would be failing to respect the status of the wrongdoer as a moral agent. The key intuition, on my account, is that sometimes ‘making allowances’ for a person – not subjecting them to a range of retributive reactions – is incompatible with maintaining a valuable sort of relationship with them. Making allowances – when it is taken too far – can involve a failure to take the person seriously as someone of whom certain behaviour can legitimately be expected. Other things being equal, then, we owe it to wrongdoers to blame them and to expect them to apologise. Expressing the need for apology is the central motivation of punishment, an account of which I give in part III.

In everyday life a meaningful apology has to be one that is made sincerely and of the offender’s own free will as an expression of remorse or guilt. But punishment is obviously something the state imposes on

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offenders regardless of their willingness to accept it as deserved. And one might think that it would be unacceptable to insist on genuine remorse (that is, demonstrably genuine remorse) before we allow that an offender has adequately ‘done her time’. Therefore punishment can only ever be *modelled* on the process of apology: there is a limit to the extent to which the state can require offenders actually to apologise. However, this is why I call my account the Apology Ritual. A ritual, in this usage, is an act the form of which expresses the attitude that a participant ought to have in performing it (think of kneeling in order to pray). The idea is that, by requiring offenders to undertake the sort of reparative action that they would be motivated to undertake were they genuinely sorry for what they have done, the state condemns crimes in a way that is symbolically adequate and hence more meaningful than simple imprisonment or fining.

The theory of punishment that we end up with provides a critical perspective both on criminal justice as conventionally understood, and on restorative justice. In order to know *how* justice ought to be carried out, I argue, we need to know *why* it needs to be carried out: this practical question implies a philosophical foundation. However, it is a corollary of this that when we ask the philosophical question about why we punish, our answers will be blinkered if we have a narrow view of what sort of thing we count as punishment – for instance, if we only have in mind imprisonment or fining. Whether punishment is justified depends on what we mean to do to an offender by way of punishing: the why question implies something about the how. Thus I will argue – and attempt to exemplify the claim – that an argument about punishment has to pay attention to the practical question of how punishment is to be carried out, just as claims about our practical arrangements for carrying out criminal justice rest on deeper assumptions about the purpose of the institutions and the nature of the human beings who can be made accountable to such institutions.

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PART I

Justifying punishment