

Christopher Bennett

The Apology Ritual: A Philosophical Theory of Punishment.
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Christopher Bennett argues that punishment can be justified as an ‘expression’ of what he calls ‘the retributive attitudes’. What is novel about this theory, he contends, is that ‘retributive attitudes’ are ‘necessary to do justice *to the offender*’, i.e. that the offender has a ‘right to be punished’ (8).

The Hegelian ‘right to be punished’ is, however, surely one of the strangest rights ever asserted. It is a right found in no constitutions, no bills of rights or declarations of human rights. It is a right that (with extremely rare exceptions) no one wants, no one ever asserts, and every wrongdoer would waive if he could. Furthermore, it paints an upside-down picture of a society that would really rather not punish its criminals but does so reluctantly out of concern that it not violate the rights of its criminals. As such, it seems an unlikely foundation for a theory of punishment. Bennett would no doubt reply that the real right in question is the right to be treated as a responsible member of a moral community and that the right to be punished simply follows from this prior right. But while everyone accepts the premise, the problem is how to get to the conclusion. Indeed, one might think the opposite: the only legitimate response to a moral agent is persuasion, addressing his reason rather than inflicting suffering on him or restraining his freedom. Bennett’s book spends too much time making unhelpfully vague restatements of the premise (e.g. being in a ‘relationship’ with someone requires ‘holding someone to the demands of the relationship’ [70], or ‘there is nothing unfair about holding someone to account’ for failing to meet basic duties [59]), and not enough about how to get from there to the idea of hard treatment. Indeed, a telling omission is Bennett’s failure ever to get down to details; nowhere does he mention the specifics of punishments such as imprisonment, solitary confinement, or execution.

The heart of Bennett’s argument is that society needs the retributive attitudes in order to ‘mark’ or ‘express’ the distinction between non-culpable and culpable wrongdoing (100-101). When someone commits a culpable wrong, society is obligated to express its disapproval (lest it be condoning or overlooking that wrong), and only hard treatment has the ‘symbolic adequacy’ to do so. But this notion of ‘symbolic adequacy’ is far too loose to be of much help. How are we to know what counts as a symbolically adequate response to a crime? Such an open-ended standard could justify everything and nothing: the Romans could claim that only crucifixion is adequate in response to crimes; abolitionists could claim that any hard treatment is symbolically excessive. Even more fundamentally, even if only hard treatment were symbolically adequate, that would not suffice to justify it, for it evades the prior question of whether inflicting severe suffering or deprivation on rational agents is morally justified, *even if* it is the only effective way to

symbolize one's disapproval. Conceivably a protester might correctly think that the only symbolically adequate way to express his disapproval of the Iraq War is to burn the White House down, but that would obviously not be sufficient to justify such an action.

Bennett argues that we can evade the implausible metaphors typically used by retributivists (e.g. annulling the crime) with a simple idea: punishment is best seen as a form of 'saying sorry' (111). For Bennett, punishment is an 'Apology Ritual', in which apparently the symbolically appropriate level of punishment is determined by what the offender 'would be motivated to do spontaneously were she appropriately sorry for her offence' (152). However it is not clear that very many criminals would be motivated to spontaneously commit themselves to long prison sentences even if they were genuinely sorry. But even if they were, it would simply push the question back about why hard treatment is justified: why should the wrongdoers' desire to suffer justify punishment any more than the victims' desire to see the wrongdoers suffer? (And why should we think that what the criminals want makes it symbolically appropriate?) If offenders feel that some crimes are so shameful that only suicide can atone for them (a view common in Japan, for instance), would that prove that capital punishment is justified, even required, in order to respect the rights of criminals? Perhaps what is appropriate for a rational agent is simply feeling genuine remorse and changing one's behavior.

Strangely, for Bennett the Apology Ritual has nothing to do with a genuine apology. His concerns about excessive state coercion lead him to assure us that the very last thing the Apology Ritual is intended to accomplish is to get the wrongdoer actually to apologize or feel remorse. He uses the word 'ritual' in the pejorative sense, as meaning a merely external and formal substitute for the real thing. The idea is supposed to be that by inflicting hard treatment on someone, it is as if the criminal were apologetic and imposed penance on herself. This is all a bit difficult to fathom, and it is especially ironic for a 'symbolic' theory of punishment since the word 'symbolic' could be taken in the same pejorative sense: if the apology can be merely symbolic, why can't the punishment itself also be merely symbolic and not require actual hard treatment (indeed, von Hirsch is quoted as using the word 'symbolic' in just this manner [187])? Indeed, if anything, this theory would make hard treatment even *more* difficult to justify, since it requires that we believe that it is what the remorseful wrongdoer would want to do to himself, a belief that seems rather unlikely and unsupported by any substantial evidence. It also seems misleading to characterize this theory as one grounded in the retributive attitudes, since the idea of grounding punishment in what the wrongdoer would desire has little to do with what most people would consider retribution. In the end, this theory strikes one as an attempt to evade the problem of justifying punishment by means of the (implausible) rationalization that hard treatment is permissible because it is what a criminal would (hypothetically) wish on himself.

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