

Penal Censure

Engagements Within and Beyond Desert Theory

Edited by
Antje du Bois-Pedain
and
Anthony E Bottoms

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Introduction

ANTJE DU BOIS-PEDAIN AND ANTHONY E BOTTOMS

IN INTRODUCING A book on penal censure, it is valuable to remind ourselves that all societies censure some acts. Indeed, Colin Sumner has argued that, sociologically, ‘social censures have a profound existence: at the heart of intense emotional patterns, in the centre of politically and economically significant moral-ideological formations ... they are vital forces in the constitution of societies’.¹ If this is correct, social censures are clearly open both to sociological analysis (for example: ‘How did this censure arise? ‘What role does it currently play in our society?’) and to critical normative analysis and evaluation (for example: ‘Is it justified to maintain this censure?’; ‘Should we not be formally censuring [a particular activity]?’).² The principal concern of this volume lies in the field of critical normative analysis and evaluation, applied to the special field of criminal punishment. In developed societies, the criminal law is always a major vehicle (although of course not the only vehicle) through which social censure is conveyed; and normatively speaking, criminal censures need to be understood as a special kind of social censure, in respect of which analysts must be especially sensitive to the general terms of the relationship between citizens and the state.

Given the above, it is not surprising that the concept of censure now plays a major role in theorisation about criminal punishment. What is much more surprising is that this was not at all the case 40 or 50 years ago, when utilitarian justifications of punishment were dominant both in the academy³ and, at least in some influential jurisdictions, in practice also.⁴ An important basic difference

¹ C Sumner, ‘Rethinking Deviance: Towards a Sociology of Censure’ in C Sumner (ed), *Censure, Politics and Criminal Justice* (Milton Keynes, Open University Press, 1990), 15 at 28–29. For more on Sumner on censure, see A Amatrudo (ed), *Social Censure and Critical Criminology: After Sumner* (London, Palgrave Macmillan, 2017).

² It follows, of course, that views about what should be censured can change over time. For example, in England and Wales, the criminal censure of drink-driving is now universally accepted, and homosexual couples may marry. But just over half a century ago (before the Road Safety Act 1967 and the Sexual Offences Act 1967), there was no law against drink-driving unless one was incapable drunk, and a fully consensual homosexual act between adult males was a criminal offence.

³ See for example T Honderich, *Punishment: the Supposed Justifications*, revd edn (Harmondsworth, Penguin Books, 1976).

⁴ Especially in the United States. See the short survey of the sentencing regimes of different states in the 1950s in PW Tappan, ‘Sentencing under the Model Penal Code’ (1958) 23 *Law and Contemporary Problems* 528. Note especially Tappan’s summary of the objectives underpinning the sentencing provisions of the American Law Institute’s Model Penal Code at that time: these ‘provisions ... are

between censure-based and utilitarian approaches to punishment is, of course, that censure theories justify punishment primarily by looking back to a wrongful act in order to censure it, whereas for utilitarian theorists punishment is justified by looking forward to its (on balance) perceived good consequences.⁵ Perhaps surprisingly to contemporary ears, in the penology of the 1960s and 1970s the main utilitarian focus was not on deterrence but on rehabilitation; and in consequence, the penal policies of that era are often described as espousing ‘the rehabilitative ideal’.⁶ One very practical result of the adoption of such policies was the widespread enactment (particularly in the United States) of so-called ‘indeterminate’ prison sentences, in which the court pronounced simply a minimum and maximum term (for example, ‘five to ten years’). Within that set range, a parole board (or similar body) would then decide when the prisoner would be released, based on his/her perceived response to the treatment or training offered. In such a system, therefore, the actual time served could depend more upon the prisoner’s response to the sentence than on the seriousness of the crime committed.

The ‘rehabilitative ideal’ was forcefully challenged in the United States in the 1970s, on two separate grounds. First, influential overviews of empirical research findings strongly challenged the success of rehabilitative treatments, leading to a long-running academic debate which is still with us (although it is now much more sophisticated than it was in the 1970s).⁷ But secondly, and just as importantly, some scholars and policy analysts developed a theoretical critique which, in a nutshell, claimed that the rehabilitative ideal, by playing down the importance of the offence(s) of conviction, and giving substantial discretionary power to parole boards, led to significant *injustices*. Among other complaints, it was pointed out that this system could and did allow situations whereby a person (P), who had been convicted of a relatively minor offence but who then reacted negatively to the prison regime, could serve significantly more time than another inmate (Q) who had committed a more serious offence but was subsequently a model prisoner. There was also a clear risk that the eventual duration of the punishment of a recalcitrant offender would cease to bear any reasonable relation to the seriousness of his offence.

predicated on the assumption that the law should endeavor to protect society as fully as may reasonably be possible, both by measures of general and individual prevention and by the rehabilitation of offenders’ (at 528).

⁵ We are aware that this is only a broad-brush statement. As will be seen later, some censure theorists have argued that such theories necessarily have a forward-looking dimension (although this is not seen as instrumental, unlike the utilitarian view). Moreover, in the literature there are many ‘mixed’ theories, with both backward-looking and forward-looking dimensions.

⁶ FA Allen, *The Decline of the Rehabilitative Ideal* (New Haven, Yale University Press, 1981).

⁷ The major 1970s text was D Lipton, R Martinson and J Wilks, *Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (Springfield MA, Praeger, 1975), which was preceded by the now notorious short article by R Martinson, ‘What Works?: Questions and Answers about Prison Reform’ (1974) 35 *Public Interest* 22. For a balanced overview of more recent studies, see F Lösel, ‘Offender Treatment and Rehabilitation: What Works?’ in M Maguire, R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology*, 5th edn (Oxford, Oxford University Press, 2012) 986.

The reports of two non-official committees in the US were particularly influential in making this second (justice-based) challenge. First, in 1971, came a report from the American Friends Service Committee (AFSC),⁸ which robustly declared that the ‘individualized treatment model’ (or rehabilitative ideal) was ‘theoretically faulty, systematically discriminatory in application, and inconsistent with some of our most basic concepts of justice’.⁹ In the same year, the Field Foundation set up an ad hoc Committee for the Study of Incarceration, chaired by a former US Senator and with a prestigious membership including academic luminaries such as the lawyer Alan Dershowitz, the historian of asylums David Rothman, the sociologist Erving Goffman and criminologists Stanton Wheeler and Leslie Wilkins. After four years’ work, including 20 full committee sessions, the committee approved its final report (*Doing Justice*), which had two unusual characteristics. First, it was explicitly stated that the report had been written by the Committee’s senior staff member (Executive Director Andrew von Hirsch)¹⁰; and secondly, alongside the main report the committee published several comments by members of the Committee which, while not disavowing the report, were certainly less than enthusiastic about it. (They indicated, broadly speaking, that the conclusions of the report could be supported only because they seemed to constitute the least worst option).¹¹

Despite these lukewarm initial endorsements, *Doing Justice* has had a substantially longer shelf life than the AFSC report, and indeed it is widely perceived to have opened up a fresh set of issues in academic theorisation about punishment, based on the concept of ‘penal desert’.¹² There is little doubt that at least some of this subsequent attention is attributable to the fact that the Committee for the Study of Incarceration had chosen an exceptionally talented Executive Director, who went on to work up the embryonic ideas in *Doing Justice* into a much more

⁸ American Friends Service Committee, *Struggle for Justice: A Report on Crime and Punishment in America* (New York, Hill and Wang, 1971). The American Society of Friends (Quakers) had a standing Service Committee; they appointed a Working Party to prepare the report, which the AFSC then endorsed. The Working Party included several members who had served prison terms, and two criminologists (David Greenberg and John Irwin) whose later writings on penal issues were to be influential.

⁹ *Ibid* at 12. All this was so, the text added, notwithstanding that this approach was one ‘towards which reformers have been urging us for at least a century’. Other comments were equally hard-hitting: for example, ‘[accepted correctional practice] is dominated by indoctrination in white Anglo-Saxon middle-class values’ (at 43); and (referring to sentencing and release decisions), ‘criminal justice is the [last] surviving bastion of absolute legal discretion’ (at 46).

¹⁰ A von Hirsch, *Doing Justice: The Choice of Punishments* (Report of the Committee for the Study of Incarceration) (New York, Hill and Wang, 1976; reprint edn, Boston, Northeastern University Press, 1986). The author was then known as ‘Andrew von Hirsch’, but is now ‘Andreas von Hirsch’.

¹¹ *Ibid*. See for example the Introduction by W Gaylin and D J Rothman (‘our solution is one of despair, not hope’: at xxxix) and the comment by Leslie Wilkins (‘I cannot do other than add my signature to the report, but I do so without enthusiasm’: at 177).

¹² It is important to note that *Doing Justice* was not the first 1970s text to discuss desert theory – see in particular J Kleinig, *Punishment and Desert* (The Hague, Martinus Nijhoff, 1973). But for various reasons *Doing Justice* attracted more subsequent attention.

sophisticated set of texts on penal theory.¹³ As part of this process, Andrew von Hirsch developed the concept of censure (which is scarcely mentioned in *Doing Justice*)¹⁴ as a key conceptual element within his overall theory of punishment¹⁵ – both as regards the justification for state punishment systems, and as regards decisions about how, and how much, individual offenders should be punished.

Von Hirsch therefore played a key pioneering role in the development of modern censure theory, but – as he would be the first to point out – he is by no means the only contemporary penal philosopher who places censure centre-stage in their theorisation. Others who have done so with distinction include John Kleinig,¹⁶ Antony Duff,¹⁷ John Tasioulas¹⁸ and Christopher Bennett,¹⁹ as well as (more recently) younger scholars such as Hannah Maslen.²⁰ However, the fact that all these writers endorse and indeed emphasise communicative censure as a key feature of an adequate punishment theory does not mean that they agree on all features of such a theory; readers of their work will quickly discover many significant and thought-provoking differences of emphasis between them.

This brings us to the present volume, which has both a celebratory and an analytical dimension. The celebratory dimension is that, in September 2016, all the contributors to this volume attended a workshop that was organised to mark the fortieth anniversary of the publication of *Doing Justice*. It was the privilege of the current editors to organise that workshop on behalf of the Centre for Penal Theory and Penal Ethics at Cambridge, which Andreas von Hirsch had founded in 2000.²¹ But the workshop was certainly not intended to be merely ceremonial. Although the concept of censure has now for some time been a

¹³ See in particular A von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester, Manchester University Press, 1986); A von Hirsch, *Censure and Sanctions* (Oxford, Oxford University Press, 1993) and A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford, Oxford University Press, 2005). For a recent summary restatement of the approach, see A von Hirsch, *Deserved Criminal Sentences: An Overview* (Oxford, Hart/Bloomsbury, 2017).

¹⁴ John Kleinig (in n 2 of his chapter in this volume) points out that the word ‘censure’ appears only twice in *Doing Justice*.

¹⁵ See in particular *Censure and Sanctions*, above n 13.

¹⁶ Kleinig, above n 12; J Kleinig, ‘Punishment and Moral Seriousness’ (1993) 25 *Israel Law Review* 401; J Kleinig, *Ethics in Criminal Justice: An Introduction* (Cambridge, Cambridge University Press, 2008) chs 11 and 12.

¹⁷ RA Duff, *Punishment, Communication and Community* (Oxford, Oxford University Press, 2001).

¹⁸ J Tasioulas, ‘Punishment and Repentance’ (2006) 81 *Philosophy* 279.

¹⁹ C Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge, Cambridge University Press, 2008).

²⁰ H Maslen, *Remorse, Penal Theory and Sentencing* (Oxford, Hart, 2015).

²¹ The Centre for Penal Theory and Penal Ethics is one of several topic-based research centres within the Institute of Criminology, University of Cambridge. It was founded in 2000 at the suggestion of Andreas von Hirsch, and with the enthusiastic support of the then Director of the Institute of Criminology, Michael Tonry. Andreas von Hirsch was the first Director of the Centre, and remained so (latterly as Co-Director) until 2016, when the two present authors took over the direction of the Centre. During his time as Director, Andreas also founded the book series ‘Studies in Penal Theory and Penal Ethics’, of which this volume is a part.

central concept in the theorisation of punishment, there remain many issues that require serious analysis. Among these topics are:

- (a) The precise meaning of ‘censure’;
- (b) How censure can be justified as a core concept within punishment theory, and whether that justification differs when one is considering the separate questions of: (i) the justification of a punishment system; and (ii) what punishments individual offenders should receive;
- (c) The relationship of censure to other important concepts within punishment theory, such as ‘hard treatment’, deterrence, remorse and rehabilitation;
- (d) Whether the censure for a given wrongful act can be justifiably different at different points in time;
- (e) The role of censure within penal systems understood sociologically; and in particular whether – as some have claimed – the explicit adoption of the concept of ‘censure’ within a penal system tends to lead to harsher sentencing;
- (f) What scope there might legitimately be, alongside a primarily censure-based penal system, for exceptional sentences intended to incapacitate offenders regarded as dangerous.

It is the hope of the editors that the chapters of this volume will, collectively, take forward the debates on some of these topics.

I. THE INDIVIDUAL CONTRIBUTIONS

We have arranged the 14 contributions into three main parts. Part one, *Censure: Mapping the Conceptual Territory*, deals with some core issues relating to the meaning and justification of censure within a state penal system. Part two, *Censure and Just Deserts Revisited: Issues for Desert Theory*, offers some distinctively fresh insights relating to a number of topics that have, in one way or another, already featured in the literature on desert theory. Part three, *Censure, Desert and the Jurisprudence of Punishment*, covers some important wider issues, including for example the role of victims’ rights in punishment theory, and whether ‘historic’ offences (those punished many years after the crime itself) should receive the same punishment as a recently-committed crime.

A. *Censure: Mapping the Conceptual Territory*

The opening chapter, by John Kleinig, explores what he describes as the conceptual ‘architecture of censure’. Kleinig identifies three dimensions to censure: a performative one, in which censure brings about a change in social status; an expressive one, in which censure rebukes or expresses condemnation; and a communicative one, in which what is conveyed to the offender is the seriousness

of what he has done. He also argues that censure and sanction do not represent separate elements in a practice, but stand simply as distinguishable foci in a single practice that has a condemnatory as well as a sanctioning (or ‘hard treatment’) function. Kleinig’s analysis further entails that censure – as a performative act – requires a certain social standing for the person conveying the censure, of a kind that only arises in institutional settings. Censure is therefore to be distinguished from, for example, expressions of blame among friends.

The next two chapters in the preliminary conceptual section are more concerned with psychological and sociological issues. Chapter two, by Jonathan Jacobs – a moral philosopher who is especially interested in issues of moral psychology – attempts to explicate a morally sound role for resentment, and for retributivist considerations in the understanding of censure and criminal sanction, building especially on the work of Adam Smith. Among other things, Jacobs highlights the significance of both the morally educative potential of civil society, and the importance of resentment in the moral economy of human interaction. One role of moral education is then to learn how to calibrate resentment appropriately. Jacobs’ argument thus links the importance of resentment and its proper calibration to practices of censure, including state-imposed punishment. It holds that censure and sanction can be understood as appropriate responses to criminal conduct, provided that the responses are to be ordered and measured by a concern with justice within civil society.

In chapter three, Liat Levanon engages with censure from a different perspective, based on developmental psychology. In an individual-developmental context, censure (in its positive form) functions as a mechanism through which wrongdoing can be ‘contained’, that is to say, turned into an isolated instance of past behaviour that does not define or rule the wrongdoer. This containment is achieved through an interaction between the wrongdoer and the censuring authority. For this process to succeed, the censuring authority must act with critical self-reflection. Acknowledging the manifold differences between the educational-developmental settings for child development and the public-institutional settings of state punishment, Levanon points to ways in which an understanding of censure grounded in developmental theory can nevertheless inform penal practice, particularly through the use at the sentencing stage of some of the tools and techniques offered by restorative justice approaches.

Chapter four, by Christopher Bennett, like that of John Kleinig, undertakes a formal conceptual analysis, in Bennett’s case focused on the question of how one can mount a justifiable argument for a censure theory of punishment. He argues that a successful penal censure theory will need to explain, first, why it is *prima facie* wrong not to censure wrongdoing; secondly, since it is not always wrong not to censure wrongdoing, what distinguishes cases where it is wrong from those where it is not wrong; and thirdly, how all this relates to punishment in real criminal justice systems. Bennett describes this approach as an attempt to outline a ‘positive role for censure’ within criminal justice, and he suggests that von Hirsch’s writings, fruitful as they are, need to be supplemented by the

provision of a fuller ‘positive’ account, for which the notion of ‘disassociating’ the political community from the wrong committed by the offender, is crucial.

B. Censure and Just Deserts Revisited: Issues for Desert Theory

Part two opens, in chapter five, with a short but important chapter by Andreas von Hirsch, in which he amends his previously published account of the General Justifying Aim of a penal system.²² That previous account offered two separate, although linked, justifications for punishment, namely censure and crime prevention. However, the so-called ‘hard treatment’ element of punishment (loss of liberty through imprisonment; loss of resources through being fined, etc) was seen as contributing to the General Justifying Aim by furnishing a deterrent against injurious conduct, rather than through the dimension of censure. The revised account suggests that hard treatment also, and indeed principally, contributes to the General Justifying Aim through its *amplifying* and *grading* functions, which are dimensions of censure. Given the wide influence of von Hirsch’s theory, this significant revision will no doubt generate considerable discussion among penal theorists.

Andrew Ashworth has worked closely with Andreas von Hirsch on issues relating to censure theory, notably in their joint book *Proportionate Sentencing*, published in 2005.²³ In chapter six, he focuses on one particular aspect of theories based on deserved censure – their relationship with principles of penal restraint. Do such theories *require* penal restraint; or is it simply that desert theories are usually held by liberals who also subscribe to principles of penal restraint? If the latter is true, could desert theories also be supported by those who believe that more severe sentencing is called for? In pursuit of answers to these questions, the chapter examines four ‘restraining’ arguments that have been put forward in Andreas von Hirsch’s writings – the so-called ‘drowning out’ argument; progressive loss of mitigation for repeat offenders; the principle of parsimony; and decrementalism. The question is then raised whether these principles provide von Hirsch with adequate defences against those who favour enhanced severity in sentencing.

An important controversy within communicative censure theory has concerned the possible role of repentance within a justified penal system. Two major penal philosophers, Antony Duff and John Tasioulas, have – in different ways – defended a significant role for repentance, but Andreas von Hirsch has dissented from this view, particularly because of his doubts about ‘the state’s

²² For a summary of von Hirsch’s previous position, see *Deserved Criminal Sentences*, above n 13, ch 3. On the concept of the General Justifying Aim of a penal system, see HLA Hart, ‘Prolegomenon to the Principles of Punishment’ (1960) 60 *Proceedings of the Aristotelian Society (New Series)* 1, reprinted in HLA Hart, *Punishment and Responsibility*, 2nd edn edited by J Gardner (Oxford, Oxford University Press, 2008).

²³ Von Hirsch and Ashworth, above n 13.

proper standing to delve so deeply into moral attitudes'.²⁴ In chapter seven, Anthony Bottoms revisits this controversy. He argues that the issue cannot be resolved without a full discussion of what is meant by 'repentance', about which Duff and Tasioulas differ. Bottoms then explores a third meaning of the term, derived from within the Christian tradition, namely that of 'repentance as turning around'. He argues that this concept of repentance can be fully defended within a liberal penal system. Moreover, although this definition is different from that utilised by Duff, it is fully congruent with Duff's important argument that censure, properly understood, has a non-instrumental forward-looking dimension, as well as its more obvious backward-looking dimension.

Unlike the preceding three chapters, chapter eight by Julian Roberts and Netanel Dagan does not revisit an existing issue within the literature of desert and censure theory; instead, it focuses on what the authors consider to be an important evolution over time in retributive theorising, reflected – as they see it – in the terminological shift from 'desert' to 'penal censure' (see above). They argue that this shift has consequences for legal punishment that have not yet been sufficiently explored, and these consequences are captured in the sub-title of their chapter – 'from static desert to responsive penal censure'. They argue that early desert theory (articulated for example in *Doing Justice*) was relatively 'static', seeing the offender's desert (based on harm and culpability) as in effect 'sealed' from the moment of the offence. By contrast, more recent censure theory presents a more dynamic aspect, seeing penal censure as something that permits a positive reaction from the offender, and subsequent response from the state. Welcoming this shift, the authors go on to suggest some possible practical implications of it, including a 'second-look' sentence review to examine altered culpability in light of post-sentence events. Such reviews are seen as particularly apposite for those serving lengthy terms of custody.

Chapter nine, the final chapter in part two, by Alessandro Corda, addresses the issue of whether, and if so to what extent, increases in sentences beyond the censure-based deserved amount can be justified for offenders engaging in pre-inchoate terrorist activities. There has been previous controversy within desert theory about whether and when predictions of future dangerousness might justify the use of disproportionately severe punishments for offenders with a history of serious violence.²⁵ Here, however, the focus is different, because the offences in question (which have been recently created in many Western jurisdictions) often involve minor harm, yet they are defined as preparatory to terrorist acts, and thus considered dangerous. Corda argues that, in such situations, the potential impact of the ultimate harm cannot alone justify the imposition of extremely severe sentences. Judges should instead carefully assess whether in

²⁴ Von Hirsch, *Deserved Criminal Sentences*, above n 13 at 43.

²⁵ See AE Bottoms and R Brownsword, 'Dangerousness and Rights' in JW Hinton (ed), *Dangerousness: Problems of Assessment and Prediction* (London, George Allen and Unwin, 1983) 9; von Hirsch and Ashworth, *Proportionate Sentencing*, above n 13, ch 4.

practical terms the preparatory acts increase the likelihood of terrorist acts, and pay greater attention to the defendant's strength of intention.

C. Censure, Desert and the Jurisprudence of Punishment

The chapters in part three place desert theory within wider jurisprudential-penological concerns and debates on censure. Chapter ten, by Matt Matravers, is perhaps for censure theorists the most challenging in the volume. Entitled 'Rootless Desert and Unanchored Censure', it opens with a quotation from an early book review of *Doing Justice*, which wondered whether that Report's 'blatant and unembarrassed defense of desert by those concerned about the present severity of punishment may become perverted by those who think present punishment too lenient'.²⁶ For Matravers, this comment was all too prescient, not because the arguments of *Doing Justice* (or desert theory more generally) caused or were directly responsible for subsequent significant rises in punishment in many Western countries, but rather because desert theory leaves the question of cardinal desert to be settled ultimately by social convention.²⁷ This in turn, he argues, renders desert theory 'rootless' and thus unable to contain rising punishment levels in a post-anthropomorphic, post-theocentric, post-Nietzschean world.

Censure theorists typically emphasise that state punishment is different from punishment in other social contexts, and they also focus on punishment as a state-offender interaction. In chapter eleven, Tatjana Hörnle agrees with the first of these points, but she argues that the second is too restrictive, and that it is necessary to develop a more prominent role for victims within theories of state punishment. Rejecting the project of a one-size-fits-all punishment theory for victimising and non-victimising crimes, Hörnle contends that the victims of crimes against individuals (that is, crimes that have violated individuals' rights to non-intervention, such as the right to life, physical integrity, sexual autonomy and property) have a prima facie right to obtain a statement about the wrong done to them, in the form of a criminal court's condemnatory message. However, this prima facie right must be weighed against other appropriate legal considerations, so it does not follow from the analysis that states must necessarily grant victims a stronger position than at present in criminal proceedings

²⁶ MR Gardner, 'The Renaissance of Retribution – An Examination of *Doing Justice*' (1976) 3 *Wisconsin Law Review* 781 at 791.

²⁷ Von Hirsch's desert theory distinguishes between 'ordinal desert' (creating an ordinal list of offences, in descending order of seriousness) and 'cardinal desert' (which concerns settling questions about the anchoring points of the punishment scale, and questions concerning 'how much punishment should actually be given to an offence of a specified seriousness?'). It is conceded that there is no objective way of calibrating cardinal desert, hence 'when judged in absolute rather than comparative terms ... the censure expressed through penal deprivation is in part a convention': von Hirsch, *Deserved Criminal Sentences*, above n 13 at 60.

(including sentencing proceedings). This chapter is therefore a balanced call for victims' rights to be taken more seriously by censure theorists.

In chapter twelve, Antje du Bois-Pedain addresses the question how – if at all – the mere passage of time influences how much punishment an offender deserves. She focuses, in particular, on how the two main determinants of desert – wrongful harm and culpability – are affected over time. She argues that subsequent events can affect both of these components in either direction. A wrongful harm is not on a unidirectional slide towards 'historicisation' but can experience 'diachronic spikes' in its significance. The agent's culpability is importantly influenced by how he/she incorporates the crime into his/her personal history. Most importantly, the fact that penal desert claims are made in respect of spatially and temporally extended beings that qualify as agents means that it matters for the question of desert when – and with how much delay – punishment for crime is imposed in the life course of an offender.

We have seen above that a key aspect of *Doing Justice* was its contestation of central features of 'the rehabilitative ideal'. An important question therefore arises as to whether censure theory can be formulated in a way that positively affirms a role for rehabilitation in punishment theory. This question is answered positively by Rob Canton, who argues in chapter thirteen that censure theory must not rest content with attention to the pronouncement of sentence, its weight or even its form. Rather, Hannah Maslen's concept of responsive censure²⁸ should be built upon to explore a continuing process of dialogue between the state and the offender that moves through remorse and apology to reconciliation. Canton argues that the traditional disputes between proponents of rehabilitation and of 'doing justice' need to be reframed to take account of developments in rehabilitation theory. Rehabilitation is more than the 'corrections' that attracted the criticism of an earlier generation and, in the more rounded conception advanced by Fergus McNeill,²⁹ it is not only compatible with censure theory but required by it. Moreover, the state and civil society have active duties towards the offender if reconciliation is to be achieved and justice done.

The volume concludes in chapter fourteen with a significant overview of punishment theory, including censure theory, by Michael Tonry. Tonry argues that the retributive conception of punishment as a process for censuring blame-worthy conduct is an important component of a complete theory of punitive justice, but by itself is not enough; and neither are 'mixed' theories that incorporate traditional retributive ideas as constraints on the pursuit of consequentialist crime prevention goals. If punishment were unidimensional, involving only first offenders convicted of a single offence, and based solely on censuring blame-worthy behaviour, theorising would be easier. Such theorising would, however,

²⁸ Maslen, above n 20.

²⁹ F McNeill, 'Four forms of "offender" rehabilitation' (2012) 17 *Legal and Criminological Psychology* 18.

ignore the reality that (as Isaiah Berlin observed) difficult problems almost always implicate competing normative principles.³⁰ We need to recognise that punishment implicates not only blameworthiness, crime prevention, and norm reinforcement, but also fairness, equality and human dignity. In his final section, Tonry therefore suggests a normative framework for just punishment that incorporates retributive ideas within a wider set of values. Ordinal proportionality based on offence seriousness is a fundamental component; it provides tools for inter-offence comparisons, and sets intelligible limits on just punishments. So, however, independently, do fairness, equality, and human dignity.

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³⁰On Berlin's value pluralism, see the editorial introduction by H Hardy in I Berlin, *Liberty* (Oxford University Press, 2002) at ix–x.

How Should We Argue for a Censure Theory of Punishment?

CHRISTOPHER BENNETT

ANDREAS VON HIRSCH was one of the first to defend an idea that has since become very popular: the idea that punishment can be justified, in part at least, as censure.¹ There are now many different types of censure theory – some labelled communicative; some called expressive; some hybrid and so on.² But many show the influence of von Hirsch’s view. In this chapter I bring together some of the basic questions that a censure theory would have to answer – a number of which questions von Hirsch himself has brought to our attention and discussed in detail. I will ask what a censure theory has to be like in order to give satisfactory answers to these questions. I will then look briefly at von Hirsch’s own version of the theory, and assess the answers that von Hirsch has previously given to the questions I have raised, and the answers that might be given on his behalf. I will suggest that thinking about the most adequate way to answer these questions delivers a censure theory that is different in some respects from the one that he puts forward.³ Nevertheless, the theory that I will recommend can be seen to take inspiration from the important work that von Hirsch has done on censure theory over the past 40 years.

I. WHY A CENSURE ACCOUNT OF PUNISHMENT?

The turn to censure theory in the philosophy of punishment could be seen as having its genesis in two sources. First of all, there was growing suspicion of

¹ A von Hirsch, *Censure and Sanctions* (Oxford, Oxford University Press, 1993).

² T Metz, ‘Censure Theory and Intuitions About Punishment’ (2002) 19 *Law and Philosophy* 491.

³ For the censure account that I have defended previously, see C Bennett, *The Apology Ritual: A Philosophical Theory of Punishment* (Cambridge, Cambridge University Press, 2008). For a recent re-statement, see my ‘Punishment as an Apology Ritual’ in C Flanders and Z Hoskins (eds), *The New Philosophy of Criminal Law* (Lanham, Rowman and Littlefield, 2016) 213.

the rehabilitative paradigm in punishment.⁴ As well as increasing uncertainty about whether we possessed sufficient psychological knowledge to rehabilitate psychologically complex offenders, there were also ethical worries about open-ended punishments, about intrusive state intervention, and about coerced social conformity. In addition, there was a concern that purely rehabilitative responses to crime overlooked something that was an important part of human dignity and respect, namely that a person's actions are something for which he can be asked to answer. As a result of these concerns there was a turn towards responses to crime that were proportionate and external.

Secondly, there was the result of the Hart-Devlin debate.⁵ In an important paper that could be thought of as dealing with what he would later call the 'unswept debris' of the Hart-Devlin debate,⁶ Joel Feinberg suggested that punishment could be seen as a kind of authoritative collective condemnation of wrongdoing, and that there would be something missing in any view of punishment that left that out.⁷ The result of these two sources was a view of punishment as an attempt to address the offender as a moral agent, responsible for his actions, with an authoritative judgement that his action was unacceptable.

Some would add a third, in some ways connected strand to these two sources of censure theory. This third strand had to do with a growing perception that a feature of modern societies is that major areas of social life are annexed by state bureaucracies in a way that alienates people from official forms of decision-making. This theme, associated in the UK with the New Left amongst other groups, emerges in phenomena such as the restorative justice movement, and in Nils Christie's famous paper, 'Conflicts as Property', in which he argues that the state has stolen conflicts from participants who would be better left to sort them out for themselves.⁸ These views are often morally serious about crime, and are concerned with recovering a sense of the moral significance of wrongdoing for its main participants. The thought is that the moral seriousness of crime, its moral reality, can be lost when it is appropriated by a state concerned purely with the efficient solving of social problems. Some versions of this critique are explicitly anti-statist. But for others, it is not so much the state that is the problem, as the fact that the particular procedures the state deploys to deal with important areas of social life such as crime are concerned only with the efficient overall management of human resources, and thus distort their importance, emptying them of meaning. Important human dramas, Christie argued, become mired in procedures that fail to resonate with the significance their original participants would

⁴ A von Hirsch, *Doing Justice: The Choice of Punishments* (Report of the Committee for the Study of Incarceration) (New York, Hill and Wang, 1976).

⁵ See P Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press, 1965); HLA Hart, *Law, Liberty and Morality* (Oxford, Clarendon Press, 1963).

⁶ J Feinberg, 'Some Unswept Debris From the Hart-Devlin Debate' (1987) 72 *Synthese* 249.

⁷ J Feinberg, 'The Expressive Function of Punishment' (1965) 49 *The Monist* 397.

⁸ N Christie, 'Conflicts as Property' (1977) 17 *British Journal of Criminology* 1.

have ascribed to them. The state deals with these issues as problems of efficient social management, whereas for their ‘stakeholders’ they are problems about building and maintaining relationships, and taking seriously the values inherent in such relationships. I say that this is a possible source of censure theory, because theories that make censure central to their account of punishment might share this aspiration of ‘humanising’ state institutions by insisting that they need not be simply driven by technical matters of behaviour management, but can be a vehicle to reflect people’s deep considered views about the moral significance of crime.

II. QUESTIONS THAT A CENSURE THEORY MUST ANSWER

However promising the turn to censure theory might be, any such theory will nevertheless have to give satisfactory answers to a number of questions. First, why is it important for the state to express censure, and in particular through punishment? Should censure be what Hart called the general justifying aim of punishment, and if so why?⁹ Why is it worth setting up a huge and costly state apparatus in order to censure people? One sceptical view is that censure is all very well as a method of social control for small-scale groups, but that it will not do as an account of state punishment, where the job of defending individual and societal interests against threats of harm is far more urgent and people cannot always be expected to be stopped by a quiet word or an appeal to conscience. Another view, more accommodating of censure but nevertheless giving it only an instrumental and subsidiary role, might say that censure is all well and good because, in our particular social conditions, it is (one of) the best available means to reduce crime.¹⁰ But this instrumentalist view does not give censure a distinctive justificatory role in its own right. That is, it is not committed to the claim that the state has sufficient reason, independently of crime-reduction aims, to operate an institution of censure. It does not see censure as a legitimate and important state aim in its own right. In this essay I will think of censure theories as those that *do* take censure to be a sufficiently important end for the state in its own right. Such theories need to explain why it is that (certain forms of) wrongdoing should be censured by the state.

Secondly, there are questions about the relation between the goal of censure and the form that such censuring takes in the operation of the system. Can censure be simply verbal? Or is the punishment itself required in order for

⁹HLA Hart, ‘Prolegomenon to the Principles of Punishment’ (1960) 60 *Proceedings of the Aristotelian Society (New Series)* 1; reprinted in HLA Hart, *Punishment and Responsibility*, 2nd edn edited by J Gardner (Oxford, Oxford University Press, 2008).

¹⁰Cf J Braithwaite and P Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford, Oxford University Press, 1993).

censure to be meaningful? If the latter, why is punishment the only, or the most adequate, way to express moral disapproval? These are questions in particular about the justification of the use of hard treatment in censure, and whether the need for hard treatment is internal to the goal of censure (so that a successful justification of censure will itself justify the use of hard treatment, perhaps as a condition of the meaningfulness of the censure), or whether the use of hard treatment needs its own separate justification in terms other than censure.¹¹

Thirdly, what is the relation between state censure and our interpersonal moral practices of holding one another to account, of criticising unacceptable behaviour, of blaming, apologising and forgiving? One of the apparently attractive things about the censure view is that it treats the offender as a moral agent. But treating someone as a moral agent means treating him as someone whose acts have the moral consequences that we take them to have in everyday practice – that when you wrong someone you become liable to blame, anger, withdrawal and so on, to expectations that you will apologise, to requiring some kind of re-acceptance and reconciliation. So does the censure view seek to connect state punishment to those practices?

Fourthly, given that one of the apparent attractions of censure theory is its provision of determinate, proportionate punishments that fit the crime rather than the criminal, how does the censure theory deal with proportionality? There are perhaps two aspects to this question. One is what the censure theory's view is of the basis of proportionality judgements. And the other is how precise proportionality judgements are capable of being, if they are to do the work of censure, and to what extent precision matters. Connected with this point is the question whether censure theory is capable of providing determinate guidance for sentencing theory, and whether it should take itself to be in that business.

III. VON HIRSCH'S CENSURE THEORY

The spirit of von Hirsch's answers to these questions could perhaps be summed as follows (and here I draw largely on the account given in *Censure and Sanctions*).¹² The point of censure is that the institutions of social control must recognise our

¹¹For engagement with the issues raised in this paragraph, see especially the chapters by Kleinig and von Hirsch in this volume.

¹²See von Hirsch, above n 1, esp at 9–19. It is important to note that, although this remains the canonical statement of it, von Hirsch's position has altered in subtle ways since this publication. An example is in his contribution to the present volume, where different levels of hard treatment are now treated as essential to being able to express different levels of censure (ie for more or less serious crimes). While acknowledging these alterations, I thought it important to set out and discuss the position in *Censure and Sanctions* in this part of my chapter. The canonical position is still so influential that it is worth discussing in its own right. But also it is in part through understanding the tensions in the canonical position that we can evaluate the subsequent alterations – that is, from the perspective of my own argument, we can see why eg giving hard treatment a tighter relation to the goal of censure, in order to accommodate proportionality, is a positive development.

identity as moral agents rather than just engaging in ‘tiger control’. The importance of censure is not simply reducible to its being the best available means for social control, as on the instrumentalist view. Rather, censure has an important role in its own right. Censure recognises criminal action as wrongdoing and therefore also has the benefit that it vindicates victims, and acknowledges that what was done to them was unjustifiable. However, censure does not have to be expressed through punishment; it could equally well be expressed symbolically or verbally. The fact that we do express it through hard treatment is because we recognise the benefits of the threat of hard treatment in lowering crime. Were there no such preventive benefits this would not make the institution of censure redundant, since censure has an importance in its own right; but if this were to be the case there would be no reason for the expression of censure to involve hard treatment at all. However, the fact that the use of hard treatment is ‘optional’ does not prevent different levels of hard treatment expressing different degrees of censure (that is, for different degrees of seriousness of wrongdoing). The more serious the wrongdoing, the more severe the punishment. The gauging of the seriousness of crimes, however, is not simply a matter of intuition but a function of culpability and of the harm caused; and the harm component at least can be quantified to some extent on the basis that it concerns the impact of the crime on a person’s ‘living standard’. This is the basis of ordinal proportionality, or of the ranking of crimes from least serious to most serious, with sufficient spacing in between (and consistency across relevantly similar cases). We can make such ordinal judgements reasonably determinate. The living standard analysis also provides a basis on which we can make some quantification of punishments, and in such a way we can make judgements about punishments being excessive. However, cardinal proportionality – the correlation between a particular crime and a particular level of punishment – is conventional, though not without general moral limits such that we could recognise some punitive regimes as being excessively draconian.

How does von Hirsch’s theory answer our key questions for censure theory? Let me leave the first question for last, since I think it is not straightforward to address. However, what is clearer is that in answer to the second question – what form does censure have to take – von Hirsch’s answer is that the only necessary form that it has to take is something that will communicate a judgement of disapproval of wrongdoing. No other particular symbolic form is required. It is clearly possible, on von Hirsch’s view, to communicate censure by proportionate punishment, and where varying the hard treatment varies the level of censure. But he thinks nothing morally important would be lost if we did not use hard treatment. On the third question, about the relation between punitive state censure and our practices of accountability (blame, apology and forgiveness), von Hirsch is largely agnostic. He certainly doesn’t have the view that it is the perspective of these practices that is at the root of our sense that some actions require censure by the state. To answer the fourth question, about the basis of proportionality and the importance of precision, it seems clear that von Hirsch

has always attempted to formulate his account in a way that will provide guidance for sentencing theory. This is an important and admirable goal. And clearly any theory of punishment has practical implications. Nevertheless, we should also recognise that this aspiration might push us to neglect the limitations of censure theory. It may be that censure theory *by itself* provides at best wide and indeterminate guidance about proportionality, and that, if precision is desired, it can only be achieved by supplementing the censure view, either explicitly or implicitly. So what is the basis of proportionality on von Hirsch's view? The official answer is that proportionality is required by the goals of censure.¹³ That is all very well. But what the goals of censure are is not yet settled. To settle the issue we will really need to return to the first question, that of why we should have an institution of state censure in the first place. Without an answer to that question we don't really know what censure is doing and what demands it needs to satisfy. As a way of getting at this question, we might ask what is wrong, in von Hirsch's view, with disproportionate punishments. What is wrong with excessive, cardinally disproportionate punishments is clear: that the offender's interests are set back more than they needed to be. But what about failures of ordinal proportionality? If two offenders who have committed the same crimes are treated differently – if there is a failure of parity – then there is an unfairness done to (one of) the offenders. But what if there were insufficient spacing, or a mistaken rank ordering? We can't say what would be wrong with mistaken rank ordering until we have explained why proportionate censure is something the state is required to mete out. That takes us back to the first question.

So why does von Hirsch think that the state should be in the business of censuring crime? In one way the answer to this might seem obvious. Criminals are blameworthy – what they have done merits censure. However, that answer by itself is in fact insufficient, since there are blameworthy actions going on all the time that we don't censure, and don't expect the state to censure. Furthermore, it is not clear that this yet provides an answer to the question of what would be amiss if the state did not have an institution of censure. Does von Hirsch have an answer to that?

IV. WHY SHOULD THE STATE CENSURE WRONGDOING?

The idea of punishment as censure, particularly in von Hirsch's hands, could be seen as a way to recover and articulate something that was important in the retributive tradition of thinking about punishment, but which got lost in the blaze of criticism over retributivism's apparent commitment to the intrinsic goodness of the suffering of the morally bad. This important idea is that punishment responds to offenders (and suspects) as moral agents, that it treats

¹³ And this is certainly the answer given in von Hirsch's chapter in the present collection.

them as accountable, as having acted for reasons, and therefore as having the kind of control over and responsibility for action that we take for granted in our everyday interpersonal dealings.¹⁴ When I am trying to arrange a meeting with you, or write a paper with you, or run a family with you, or buy something from you, I am not just treating you as a system of inputs and behavioural outputs that I attempt to manipulate in order to bring about the best (for myself or for society as a whole).

One doesn't have to be a retributivist, of course, to agree that human agents are more than systems of inputs and outputs, and should be respected as such. However, the retributive tradition – at least in what has been called its positive strand – has sometimes drawn on this presumed fact about our responsiveness to reasons to argue that there is also some reason in its own right that wrongdoers should get their just deserts; and that by extension the state, if it is best placed to do so, should be the one to carry this out. The corollary of this in censure theory would be the view that wrongdoers should receive 'just censure' – and it is this view that I propose to consider here. On this view, there would be something lacking in a state that did not have an institution of censure, whether or not it was also an institution of punishment.

What could be the argument for this positive version of censure theory? The argument, very briefly sketched, might go something like this. In both our thinking and our action, we are responsive to reasons. This is not to say that we always comply with those reasons, but that those reasons state a standard to which our thought and action has to answer. Furthermore, our reason-responsiveness is not merely internal. We are the sort of reason-responsive creatures who are capable of engaging in interpersonal thought and discussion about which reasons we should take seriously and act on; and when we act on bad reasons, we can appropriately be held accountable, and subject to criticism in which our faulty thinking is pointed out. To be treated as one who cannot be subject to criticism would be to be treated as an agent who is not responsive to reasons. Assuming that moral reasons are amongst the reasons to which we are responsive, we can therefore be subject to moral criticism. Not all faults should be subject to criticism, of course – that would lead to a stultifying culture of judgementalism, and moralism in the pejorative sense. But in some contexts, and for some wrongs, it *can* be important to express moral criticism. And although

¹⁴The idea that this is an important part of the retributive tradition can be traced back to H Morris, 'Persons and Punishment' (1968) 52 *Monist* 475, and to the way Morris's view was taken up by eg JG Murphy, 'Marxism and Retribution' (1973) 2 *Philosophy and Public Affairs* 217 and J Finnis, 'The Restoration of Retribution' (1972) 32 *Analysis* 131. It was a Morris-type view of retribution as a restoration of a fair balance of benefits and burdens that informed von Hirsch's early work, such as *Doing Justice*, above n 4; however, this view was subjected to an influential set of criticisms by RA Duff in the development of his communicative theory of punishment in *Trials and Punishments* (Cambridge, Cambridge University Press, 1986). By the time of *Censure and Sanctions* (above n 1), von Hirsch had moved decisively to the censure model. It is a censure theory justification of the view that I sketch below, rather than a fair balance version.

sometimes we criticise people only when there is some further end we seek to achieve by doing so, sometimes the faults are such that their deservingness of censure itself, or the need to mark or acknowledge the gravity of the wrong, is sufficient reason to give expression to the criticism. Therefore it can sometimes be neglectful of the seriousness of wrongdoing, and of the perpetrator's identity as an agent competent to respond to moral reasons, if we do not subject him to moral criticism.

Now, von Hirsch doesn't advert explicitly to this positive version of the thesis. His way of making this point tends rather to be negative, arguing that wrongdoers are properly seen as blameworthy, and that on this basis punishment needs to be more than just 'tiger control'. This is a negative version of the thesis because it is to argue for respecting moral agency as a *constraint* on other goals rather than as a goal in its own right. It is to resist having to argue for what I earlier said was the characteristic claim of censure theory, namely, that censure is a sufficiently important goal of the state.

Nevertheless, for reasons that we shall now see, it seems wrong to classify von Hirsch as holding only the negative thesis. I will argue that von Hirsch is committed to the positive argument that the state has a sufficient reason to have an institution of censure, but that his writings have not addressed the justification for this claim that his position requires. The main reason for thinking that von Hirsch is committed to the positive thesis is that the negative thesis is compatible with all sorts of ways of respecting the offender as a moral agent, whereas von Hirsch's view emphasises censure, and takes it that only by having a censure aspect can a deterrent or protective institution of punishment be made compatible with respect for moral agency. The negative thesis is that respect for moral agency is only a constraint on goals such as that of social control. If von Hirsch held only the negative thesis then all he could consistently claim is that social control needs to be carried out in such a way as to respect moral agency, but where it is an open question in any situation what will be necessary to respect moral agency. However, that is not his view. Rather his view is that *censure* in particular is necessary as a response to certain kinds of wrongdoing. It is not an open question, for von Hirsch, what treatment of *offenders* is necessary to respect their moral agency, for he thinks the answer is that censure is necessary. Yet because von Hirsch does not explicitly give us something like the positive argument for censure that I sketched above, this claim goes undefended.

To press the point, consider the possibility that there might be ways in which social control could be carried out that would respect those involved as moral agents, but that would not involve the expression of censure. The burden of von Hirsch's criticism of pure deterrent or social control views is that being subjected to purely deterrent or incapacitative treatment would be insulting to the offender by ignoring his/her identity as a moral agent, that is, as one capable of understanding and reasoning practically about moral rules and values. But would it always be insulting to treat someone simply as a danger and not as a moral agent? For instance, say you are carrying an infectious disease, which you

don't know about; but I know, and I urgently need to get you into quarantine. Is it not permissible for, or even required of, me to do everything within my power to stop you infecting other innocent people, even if I can't get you to understand the necessity for the quarantine?¹⁵ In urgent situations where there is no time to explain the reasons, it seems that it might be quite proportionate simply to bundle you into quarantine. Would that be like tiger control? Well, maybe. But what is wrong or disrespectful in subjecting a person to what amounts to tiger control in such a high-stakes time-limited situation? Assuming that deterrent punishment could – at least in some cases – be precisely that kind of appropriate response to a high-stakes time-limited situation, what would be wrong or disrespectful in these cases in subjecting someone to deterrent punishment? Or maybe one thinks that in order for an intervention not to be tiger control there has to be at least some attempt to *justify* what one is doing to the other person; that there must be some attempt to explain to him the reasons for it, and why such treatment is necessary (since moral agents are precisely those who are amenable to grasping such justifications and seeing their force). But then, applied to punishment, if a person were punished purely for preventive or deterrent reasons, it surely wouldn't simply be tiger control if they had it explained to them why it was necessary to treat them in that way. Either way, then, it seems that persons could be punished for social control reasons, and yet at the same time be perfectly well respected as moral agents, but without their having to be subject to moral criticism for their behaviour.

The problem we are considering can be summarised as follows. If von Hirsch were to treat respect for moral agency merely as a constraint on otherwise warranted deterrent or preventive interventions, he would be unable to justify his conclusion that, in the context of criminal justice, such interventions would be disrespectful unless they also involved censure. For while there are ways of imposing deterrent or preventive treatment that *are* disrespectful, it seems that in certain circumstances such interventions might be perfectly compatible with the demands of respect. Yet it is clear from his writings that von Hirsch does believe that censure is a necessary component of criminal justice measures, the component that redeems them and makes them compatible with respect for moral agency. To arrive at the conclusions von Hirsch defends, we need to show why it would be disrespectful to offenders not to subject them to censure, and not to mark the difference between cases of culpable and non-culpable harm-creation. Thus we need to fill the gap in von Hirsch's stated view by providing a positive account of the role of accountability relations in our interpersonal dealing. This, I believe, would be to argue that there are some contexts in which we

¹⁵In a joint paper with Antony Duff, von Hirsch argues in similar terms that the state may 'coercively quarantine a carrier of a dangerously contagious disease' and that in this, and certain other, contexts, 'the state's use of its coercive power is not constrained by responsibility requirements to the degree it is in the criminal law': see A Duff and A von Hirsch, 'Responsibility, Retribution and the "Voluntary": A Response to Williams' (1997) 56 *Cambridge Law Journal* 103 at 104.

owe it to a person to respond to him in ways that hold him to account for what he has done. If, in these contexts, one simply treated the offender as a danger to be neutralised one would then be failing to treat him as one should – one would be failing to see him and deal with him in the way that should have been most salient in that context, ie as an accountable agent. If one could make this positive argument one would have a way of articulating the intuition that adopting a purely deterrent or preventive approach would involve losing something of value, without being saddled with the implausible view that any action that has preventive or deterrent aims, and which leaves out censure, is impermissible and insulting.

In order to do that we would need a sympathetic articulation of the meaning and value of our practices of accountability: for example, of what underpins our sense that people ought to apologise for their wrongful actions; that they can stand in need of forgiveness before everyday business with them can be resumed; that reactions like distancing or, by contrast, angry confrontation, can be necessary when the wrongdoer is not prepared to apologise and try to put things right. By articulating the value of relating to people in the ways constituted by this set of accountability reactions, we would then have an explanation of what is wrong when these accountability reactions are ignored or displaced by the purely preventive – when the person is left out or excluded from the community defined by normative expectations and obligations to answer for one's conduct. This suggests that the way to plug the gap in von Hirsch's account is for censure theorists to think more carefully about my question number three: the link between state censure of crime and censure as it operates in our everyday practices of accountability, where liability to censure figures as a marker of inclusion within those practices. A successful censure theory needs some attempt to articulate the value of these practices and the value of inclusion within them.

V. ELEMENTS OF A POSITIVE VON HIRSCHIAN CENSURE THEORY

As I have understood it here, a censure theory that follows von Hirsch's lead has to articulate a positive role for censure that does not see it simply as a means to crime reduction goals, as the instrumentalist does, or as nothing more than a constraint on the pursuit of such goals, as the purely negative thesis does. However, such a censure theory also has to disprove the null hypothesis, as it were. It has to explain why in any situation there is something wrong with doing nothing. As we noted above in sketching the positive argument in favour of censure, it is too simple to think that we should criticise one another for all our failures of reasoning, or that morality requires us to censure all moral wrongdoing. If we are always on the look-out for one another's failings, and quick to call one another out, this would lead to a culture of mutual suspicion, mistrust, and a lack of individual privacy and room for authenticity, spontaneity and experimentation. Thus it is not always one's business to concern oneself

with others' moral character, and not always even with the way they treat others (though there can be a point at which protecting the vulnerable trumps the need to respect others' rights to be left alone). My wrongdoing is not always your business. But this suggests that doing nothing in the face of wrongdoing is a real option, and perhaps often the right option. We therefore need some account of when it is wrong to do nothing in the face of wrongdoing, and why in those circumstances it is wrong; and we need an account specifically of why censure is necessary in those circumstances, and thus of why it would be wrong not to censure.

The kind of account that censure theory is looking for will therefore have to explain three things. First, it has to explain the character of the wrong involved in failing to censure. Secondly, it will have to explain something about the kinds of circumstances in which it is wrong not to censure, and what makes those circumstances special. And thirdly, it will have to explain how all this relates to punishment and the actual operation of sentencing in a criminal justice system.

If this is the right way for a von Hirschian account to proceed, we have to bear in mind that the account of what is wrong with failing to censure cannot be an instrumentalist one. According to the instrumentalist, the point of censuring is only to further certain independent goals to which censuring is the best available means. The instrumentalist therefore has an answer to the question of when it is wrong to fail to censure. It is wrong to fail to censure, on the instrumentalist view, whenever one's censure would have led to the production of benefits, or the avoidance of harms, which could not have been produced/avoided in any more cost-effective way. If censure is justified simply in terms of its tendency to inhibit harmful behaviour then it is wrong not to express censure in those circumstances in which it would have been cost-effective in doing so. While the censure theory we are thinking of here can avail itself of foreseen benefits such as this, the production of benefits and avoidance of harm cannot be the whole story in the justification of censure. To put it in terms of a well-known dichotomy, the instrumentalist account gives a purely forward-looking account of the explanation of what is wrong with failing to censure, appealing to benefits and harms that are independent of the offence but might be produced by various ways of responding to the offence; whereas the censure account is fundamentally backward-looking, and has to do, in some sense, with the offence itself.

Once we have put the matter this way, however, it might look as though the censure theorist has not left herself very much room for manoeuvre. What kind of story can we appeal to that will explain what is wrong with failing to censure, but where this explanation appeals simply to 'the offence itself'? In order to fill out this positive account, I think, we need to turn to another neglected aspect of the retributive tradition. Again, this has nothing to do with the supposed importance of making bad people suffer. Rather it has to do with the need not to acquiesce in the wrongdoing of others. In other words, the backward-looking view does not quite take its starting point from 'the offence itself,' but from the relation that the person censuring (or not) has to the offence, and whether that

relation is a permissible one or not. Central to the retributive tradition is the thought that, as a non-contingent matter, it can be wrong not to make certain kinds of responses to wrongdoing. On a simple form of retributivism, this might be the view that it is somehow wrong not to pursue the suffering of the perpetrator, and to avenge oneself or the victim on him. But more sophisticated forms of retributivism will have the same structure: they simply involve more sophisticated views about what the appropriate responses to wrongdoing can be (for instance, distancing the wrongdoer or altering one's relationship with him; the wrongdoer feeling guilty, or making amends, etc). These more sophisticated forms of retributivism will still take it to be wrong, as a non-contingent matter, not to engage in those appropriate responses. But what kind of wrong can that be, which is not contingent on the harms or benefits that might stem from one's action or inaction? My thought is that it must be a wrong that involves a failure to stand in the right relation to the offence and to the offender: that sometimes when we fail to censure wrongdoing, we are effectively consenting to it, acquiescing in it, condoning it, and hence becoming complicit in it. The central thought on this aspect of the retributive tradition is that it is wrong to allow the original offence to persist, unanswered. When it does, we are implicated in the wrongdoing unless we do something to dissociate ourselves from it; and it is the act of censure that does the dissociating.

As we have seen, however, it is not *always* wrong not to censure wrongdoing; for it is not always the case that we are implicated in the wrongdoing unless we dissociate ourselves from it. Sometimes the null hypothesis is quite right. Indeed, the default position may well be that wrongdoing places us under no particular duty to dissociate ourselves from it. There is wrongdoing going on all over the place as I write and yet here I am blithely typing away. More plausibly, then, it is because of some special relation that one has to the circumstances of the offence and to those involved in it that one would be implicated in the wrongdoing if one were not to dissociate oneself from it. Yet sometimes there are such special relations, and in those cases one has reasons to dissociate.

The view that we have reasons to avoid complicity in the wrongdoing of others, and that these can be the most fundamental reasons that we have to censure others, to which instrumental reasons are additional, might raise some concerns. One likely worry is that this view sounds like moral self-indulgence.¹⁶ Is the concern to have 'the right relation' to the offence not a self-centred matter of keeping one's hands clean? And does that not distract attention from the real matter of concern, which is how the victims have been treated?¹⁷

¹⁶ Thanks to Antje du Bois-Pedain and Tatjana Hörnle for forcefully raising this concern.

¹⁷ It is worth noting that this is the basic form of one influential criticism that consequentialists make of non-consequentialist ethics. It is characteristic of non-consequentialism that it demands that agents 'draw a line', as it were, and refuse to do certain things, no matter what the consequences. Maybe I think, for instance, that we should never launch a nuclear weapon that will kill indiscriminately even if doing so were the only recourse we had against an unjust attack that would

Although I agree that it is the victims that should be the central matter of concern, I find these criticisms unpersuasive. As I understand it, it is a fundamental moral task for each of us to determine where we stand on the things that go on around us, and whether we are prepared to live with them or not. The decision to censure can simply be an expression of revolt against some event, something in us that says that we cannot accept it, and that we stand against it. I think this is a familiar and morally important experience. Furthermore, it is not enough to see such reactions as simply our letting off steam. This would be an explanation of these reactions that was psychological rather than moral – that pointed to the quirks of our individual psychology, as if it would have been acceptable just to have been a bit more patient, or a bit less hot-headed. Of course, sometimes our reactions are simply letting off steam, or grandstanding, or signalling to those whose respect we desire. Sometimes, however, they are virtuous, and not self-absorbed: for instance, when we have to express our inability to tolerate even those things that we cannot change. More adequate, therefore, is the view that what is going on in such situations is that we are faced with some moral necessity not to treat wrongs as though they were permissible, and that it is constitutive of treating them as impermissible that we censure them. We withdraw our consent from those things, as it were, opposing them even when we cannot now change them, by expressing our censure.

Therefore the view that we can have weighty reasons to dissociate ourselves from wrongdoing by censuring it does not call on us to replace concern for the victim of wrongdoing with concern for one's own moral character. Rather the need for dissociation is an expression of revolt at the way the victim was treated, and an inability – a moral inability – to stand by and treat it as something that just happens, or is someone else's business. Therefore one's feeling of complicity in the offence, should one say nothing, is intimately bound up with the sense that, with one's silence, one would be letting the victim down.

Furthermore, it is also worth noting that there is an important sense in which a failure to censure can involve letting the wrongdoer down. To treat a wrongdoer as if her actions can cause us to be complicit is to treat her as someone whose actions can have an impact on us. We do not choose that others should do wrong, but sometimes they do; and on the view being put forward here,

kill, just as indiscriminately, an even larger number of victims on our side. Such weapons are so evil in their destructive power that I want nothing to do with them. My position is therefore non-consequentialist in the sense that it refuses to see the beneficial consequences as justifying the use of nuclear weapons. But, the consequentialist might say, when you say you want nothing to do with nuclear weapons, aren't you simply keeping your hands clean? Well, am I? Or is it rather that, as Bernard Williams thought, there is a virtue (of integrity) in standing for something, and that the consequence of having integrity is that one feel oneself unable to cross certain lines? (See B Williams, 'A Critique of Utilitarianism' in JJC Smart and B Williams, *Utilitarianism: For and Against* (Cambridge, Cambridge University Press, 1973) 77 at 93–118.) Because I don't find the consequentialist criticism of non-consequentialism very persuasive, I am not too troubled by the related criticism of my claims about complicity.

even though we cannot change the fact that they did what they did, we sometimes have an obligation to do the next best thing, which is to express our opposition to what they did, the result of which is that we can have duties, unbidden, to dissociate ourselves from those actions. That means that the actions of (some) others can have an impact on us, independently of whether we choose them to. To regard someone as one whose actions can have an impact on one in this way is to regard them as being in some kind of community with one; to disregard that, and to act as though there is not complicity in question, is to repudiate such community. This is the sense in which the failure to react to the offender by dissociating from her action can be to exclude her: for it is to treat her as though there was no community existing between you such that her actions would have any call on you.

I have argued that a successful censure theory – as we have understood it here as a positive but non-instrumental justification for a censuring response to crime – rests on an account of the need for dissociation from wrongdoing. Now readers who have followed the argument up to this point might agree that the phenomenon of complicity and dissociation that I have attempted to evoke is a recognisable part of the moral life. However, they might say, it seems a big step from this to the claim that this is also what is going on in the fundamental justification of a society's criminal justice system. Some might worry that claiming that the state, or its citizens, would be complicit in wrongdoing if they did not censure wrongdoing, might seem little better than metaphorical. How are we to make that conclusion plausible? Of course, one way to go would be to acknowledge that the criminal justice system as envisaged by the censure theory, although it makes sense, is not particularly important as a part of a modern polity. However, although I think we should always have that possibility before our eyes when dealing with any questions about the institution of punishment, it may be that this defeatist conclusion is too quick. So let us turn to our second question, that of the circumstances in which we can become complicit in others' wrongdoing. We are not always in the kind of community with others such that responsibilities arise for us to take a stand on their wrongdoing. But sometimes we are. One such case is worth briefly mentioning here, as it is directly relevant to the case of punishment, and to censure as the justifying purpose of punishment.

The worry might be that complicity can only come about from direct engagement with wrongdoing ('aiding and abetting, counselling or procuring', as the law has it), and therefore that the claim that the state or citizens would be complicit in wrongdoing were they not to censure cannot be sustained. Nevertheless, the law seems not to agree. At any rate, as Andrew Ashworth and Jeremy Horder note, the law does seem to recognise cases of what we might call complicity through normative control;¹⁸ and I want to argue that such cases can

¹⁸ J Horder, *Ashworth's Principles of Criminal Law*, 8th edn (Oxford, Oxford University Press, 2016) 440.

form a basis for a reasonable theory of the need for dissociation. In such cases, the wrongdoing of the complicit parties does not consist in their having direct control over an outcome – as one does who actually passes a murder weapon to the principal, or who distracts the security guard so that a crime can occur – but rather in their having authority over some domain in which the crime is committed, and hence control over whether the criminal act is done with their permission or not. An example is the case of a car owner who permits another to engage in reckless behaviour while driving the car.¹⁹ It need not necessarily be the case that the owner could have prevented the reckless driving. Hence it is not necessary that the owner had physical control over whether the crime came about. The owner's wrong is not therefore a failure to exercise such physical control. The wrong rather centres on the fact that the owner could and should have made it clear that the reckless behaviour was not happening with his permission. He should have withdrawn his consent from it, a power he had as the owner of the car with normative control over the domain in which the crime was committed.

Now, we can draw a line between this kind of case and the claim that citizens and state can indeed be complicit in individuals' wrongdoing, as the same structural features are in place in both cases. One aspect of the circumstances of modern political community is that the state (or citizens as a whole where the state is a democratic one) has authority over the domain in which crimes are committed. This is not the case for every form of life, but applies to what are recognisably law-governed societies. What I mean by authority is simply that the state has a legal power through which it can determine whether some act is (legally) permissible or impermissible. The law is an apparatus by which the state can mark acts as impermissible, putting citizens under a legal obligation not to perform them. If we assume that the state does in fact possess authority in making such acts impermissible, then we can say that by virtue of these structures of legal regulation, the state now has a legal power to determine whether criminal actions are done with its permission or not. If this seems plausible, we can say that, wherever the state does not mark some act as impermissible, it regards it as permissible. It does not always have the power to prevent wrongdoing from occurring, but it has the power to determine whether the wrongdoing happens with its permission or not. Now, on the assumption that there are principles governing which acts it should mark as impermissible and which not, it can be complicit in allowing some acts to be permissible where it should have made them impermissible. In such a case there is something very much like complicity that comes about through a failure to criminalise, and the same argument applies (in principle at least) to a failure to censure violations of criminal law. The obligation to censure comes about as a result of the need to mark violations

¹⁹*Du Cros v Lambourne* [1907] 1 KB 40.

of the criminal law as cases of wrongdoing that were done without the state's permission: it would be complicity through the state's failure to make clear its attitude of disapproval of certain acts by marking them as impermissible. Here the state would indeed have duties to censure, and would be complicit in virtue of acquiescing in wrongdoing over which it had normative control. If the citizens of the state can intelligibly be seen as joint holders of the legal power to mark acts as impermissible, then they can also be seen as implicated in the failure to censure. If this sounds plausible, the idea of the state being under a duty to dissociate may at least be one that is worth further exploration.²⁰

VI. SOME IMPLICATIONS OF RECONSTRUCTING VON HIRSCH'S VIEW

I have claimed that von Hirsch's view must be supplemented by an attempt to explain why there is a positive role for censure. The answer I have suggested is that censure is necessary because – but only insofar as – if there were no censure we would be complicit in the actions of others, and we must dissociate ourselves from them by marking those acts as wrong, and distancing ourselves from them. We are at risk of such complicity when we stand in certain kinds of relations of community with the wrongdoer, such that we would be acquiescing in her action if we were not to dissociate ourselves from it. Censure does that distancing. If this account is successful, it provides something lacking from, but needed by von Hirsch's account.

Some implications of the foregoing should quickly be noted, relating to the second, third and fourth questions raised in section II. First of all, in relation to the question of whether we should follow von Hirsch in thinking that the form that censure takes can be merely verbal, I think we have found reasons to dispute this. From the point of view of the theory developed in section V, the question is, 'What form does censure have to take if it is to dissociate the state from the wrongdoing?' Can a purely verbal expression of censure be enough? My reason for doubting this is that words are cheap, and that the crucial thing when expressing dissociation is to *show the way in which the wrongdoing matters*. It may be that for minor wrongdoing simply verbal censure would be enough, but more significant cases require something more to mark the moral breach involved. This relates to the question of the relation between state punishment and our everyday moral practices of accountability. Dissociation unavoidably takes place through action that is expressive and symbolic, and the state must find a symbolic language for marking the action as wrong: but where else could it find such a thing other than in our fundamental practices of accountability? Censure that does not appeal to the ways in which we understand dissociation to come about in our practices of accountability would lack meaning, will not

²⁰ C Bennett, 'Complicity, Legal Power and Normative Control' (unpublished manuscript).

be capable of showing the way in which the wrongdoing matters, and will not be capable of dissociating the political community from wrongdoing. State censure can therefore be seen ideally as an institutional expression of accountability practices that structure everyday life in the polity. In that way the reconstructed censure view whose contours I have sketched here can perhaps lay a greater claim to speak to what I called in section I of this essay the third source of motivation for censure views, that they should ‘humanise’ state institutions and restore a sense of the moral significance of crime. Nevertheless, despite this connection to moral practice, it is not clear to me that the censure view would be suitable only for a small-scale or rather homogenous society, and unsuitable for large-scale political societies: the account is suitable for a society whose members understand themselves to be bound closely enough that what one person does impacts on others, not just by directly affecting them, but in a sense that they have to take a stand on whether such actions are going to be acceptable.

What, then, should censure theory say about proportionality? As with the basic understanding of what dissociation involves, the censure view we are now imagining takes the root source of our understanding of proportionality to be the moral practices that structure the everyday life of the polity. I take it that we have some understanding of how to answer such questions – enough to structure a practice in which we deliberate about what to do, discuss with others whether some suggested response is enough, criticise people for not doing enough (or too much), and have regrets about not doing enough. But the understanding we have is likely to be highly context-sensitive and perhaps uncodifiable. It may come more in the shape of responses to examples than in general principles. Furthermore, proportionality in responses to wrongdoing is contestable, and no doubt subject to reasonable disagreement and cultural difference. I think censure theory has to be fairly open about the lack of determinacy in our judgements of proportionality. That’s not the end of the story, however. It simply raises the question of what the pros and cons are of allowing discretion at the point of sentencing. Or perhaps one job of democratic politics is to formulate reasonably precise standards of ‘what fits the crime’ in the shape of sentencing guidelines. At any rate, concerns that a censure theory does not give us a clear account of proportionality do not seem to me to point to a fatal flaw in the account. Many questions about proportionality simply cannot be decided without detailed examination of cases, and it may be that they have to be left to the discretion of an appropriately constructed and supervised sentencing process.

VII. CONCLUSION

In this paper I have attempted to do justice to Andreas von Hirsch’s fertile writings on the topic of censure theory. I have assessed von Hirsch’s view in terms of the questions that a censure theory has to have answers for, and as a result I have found it necessary to supplement a von Hirschian approach in some important

ways. I have argued that von Hirsch's view pays too little attention to the question of what the moral basis of an institution of censure is, and that as a result we are ultimately left unable to give full answers to the other questions that a censure theory has to deal with. I think that once we fill the gaps we have reason to draw some implications from censure theory that challenge some of the conclusions that von Hirsch himself draws. Nevertheless, the theory that we have ended up with is one that, I believe, recognisably takes inspiration from von Hirsch's seminal work.