

Toleration and Criminal Justice

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The Morrell Centre has stood, throughout my career, as a beacon for enlightened thinking about important moral and political issues. So I feel very deeply the honour of your invitation to deliver this year's Morrell Memorial address. But I confess also that I felt quite intimidated, as I turned to the task of writing the lecture, at the thought of joining such a distinguished list of speakers, and at the challenge of contributing to such a rich body of work. (So it was a comfort to know that my efforts would be received in the generous spirit of toleration...)

I should probably admit at the outset that I have never before drawn on toleration as a framing concept in my own work: but one of the privileges of your invitation has been to discover that the idea of toleration in fact helps to draw together and indeed to explain the links between a number of themes on which I have been working in recent years.

In August of this year, we were all disturbed by images of young people engaging in violence, criminal damage and looting in the riots which lasted for several days in London, Birmingham and a number of other cities. The origins of this troubling episode are complex, and lie well beyond the scope of my lecture this evening: suffice it to say that the idea of toleration can certainly be brought to bear on their analysis, and in particular that Lord Scarman's arguments in both his report on the Brixton disorders of 30 years ago and his own Morrell Memorial Address in 1983 (Scarman 1986, 1987) remain more relevant than he would probably have wished. My own subject, however, is not the riots themselves but rather the political response to them, which raises questions about toleration and contemporary criminal justice on which I hope to shed some light this evening.

On September 7th, the press reported that ministers were considering proposals which would allow magistrates and crown court judges to suspend the welfare benefits or tax credits of offenders.ⁱ A few weeks later, it was reported that the plans had been postponed

on the advice of civil servants.ⁱⁱ But these ideas – along with policies such as eviction of tenants, or even the families of tenants, convicted of certain offences or responsible for persistent anti-social behaviour – remain very much part of the policy agenda of the present government. They are symbols of its determination to communicate to certain groups that their behaviour will not be tolerated, and that basic welfare benefits are privileges which are conditional on observance of key social norms.

On the face of it, criminal justice may seem an unpromising terrain over which to explore the meaning and importance of toleration. Crime is, after all, conduct which it has been decided should be proscribed rather than tolerated. And few would dispute the judgment that violent riotous behaviour of the kind which we saw this summer should not be tolerated. But can the value of toleration help us to determine a morally and politically adequate response to behaviour such as that witnessed on the streets of our cities this summer? In this lecture, I shall argue that it can, and indeed that the demands of toleration are of wide relevance to the design and practice of criminal justice. I shall further suggest that key aspects of criminal justice practices, and of the moral and political frameworks in terms of which they have been structured in this country over the last thirty years, fall short of adequate standards of toleration; and I shall argue that a return to acceptable levels of toleration in criminal justice necessitates a rethinking of the relationship between blame, blameworthiness and punishment which has been associated with the revival of retributivism - a rationale for punishment which concentrates primarily on blame, desert and censure.

In what follows, I will argue that the retributive revival, in the context of rising crime and fear of crime, has fed an unacceptably intolerant dynamic in criminal justice: a dynamic in which the censure of conduct spills over into the enduring stigmatisation of persons and even of groups. Raising doubts about whether we can keep censure and stigmatisation apart in penal practice where a desert-based approach to punishment teams up with party competition over law and order, I sketch two claims. First, I argue that a concern with the consequences of punishment, and in particular of its reintegrative or reformative effects, has been sidelined too quickly and for the wrong reasons. Second, I explore the possibility that blame – the central normative concept in desert theory – should be regarded not as

entirely backward-looking, but rather as having an intrinsically regulatory component in our moral lives. The value of toleration is central to each of these arguments. Whatever the limits or the paradoxes of toleration as a value, I shall conclude, it remains a fertile source for critique and reconstruction of criminal justice in democratic societies.

Toleration in criminal justice scholarship

Criminal law is, by definition, concerned with conduct which has been determined by political institutions to be (at least presumptively) beyond toleration; and punishment is, concomitantly, all about censuring or deterring that conduct. Indeed we might say that criminalisation and punishment are quintessential forms of institutionalised intolerance. Across the circumscribed terrain of criminal law, the pluralism which gives rise to the question of toleration is officially disqualified: criminal offences have been determined to lie outside the sphere of competitive moral pluralism which Joseph Raz has argued to underpin the value of toleration (Raz 1986: 404). Although some people will inevitably regard certain instances of criminalisation as unacceptably intolerant, for the criminal justice system itself to espouse a tolerant attitude to disobedience would, in one sense, be a contradiction in terms. This perhaps explains why criminal justice scholars have been, until recently, rather little concerned with toleration as an idea, other than in areas such as sexual expression (Richards 1989) and blasphemy (Edwards 1985), to which it has an obvious and special relevance.ⁱⁱⁱ

Yet philosophers and political theorists who have pondered the virtue of toleration have remarked on what Susan Mendus has aptly called ‘the paradox of toleration’ (Mendus 1989: 18-21): toleration is only called for in relation to things which we disapprove of or dislike. As Wendy Brown puts it, ‘tolerance is necessitated by something one would prefer did not exist’ (Brown 2006: 25; see also Raz 1986: 401-7). Leaving aside intolerance stemming for our aesthetic dislikes and confining ourselves to what we might call moral toleration, it is a value or virtue which consists in a person’s forbearance towards something which she nonetheless regards as unacceptable. The more we disapprove, therefore, the sharper the moral question of whether toleration is required.

Once we view the matter in this way, we can immediately see that toleration is highly apposite to the evaluation of criminal justice. For it can serve to focus attention on two crucially important sets of questions: First, toleration bears on the question of where the line between what is and is not criminalised should be drawn: among the things we disapprove of, which may legitimately be removed by the criminal law from the scope of toleration? Second, and less obviously, toleration bears on the question of what form the institutionalised intolerance represented by punishment should take. The concept of toleration has been used to productive effect in recent criminal justice scholarship in both of these areas. For example, the value of toleration has helped to shape analyses of how far offensive as opposed to harmful conduct should be criminalised (Duff and Marshall 2006; Simester and von Hirsch 2006); it has influenced debate about whether – and why – first offenders should receive a sentencing discount, and whether this should be followed by a ‘progressive loss of mitigation’ (Roberts 2010; Ryberg 2010); and it has formed a useful framework in which to discuss, compare and evaluate the overall scope and intensity of punishment in different political societies (Downes 1988; Newburn 2006)^{iv} In what follows, I hope to extend the application of the idea of toleration into debates about the justification of punishment and in particular to explore its upshot for the forms which punishment may legitimately take.

Not all progressive political theorists, of course, regard toleration as a value unambiguously to be celebrated. In her provocative book, Regulating Aversion, Wendy Brown (2006: chapters 1-2) is surely right to remind us that toleration is a discourse of power. There is always a ‘we’ – a group which is dominant in the definition of the norms disobedience to which might be tolerated; and it is of crucial importance that the basis on which those norms are defined should be subject to critical scrutiny. Moreover Brown’s interpretation of toleration as an ambivalent attitude is relevant to seeing that a purely formal shift in the boundaries of criminalisation is far from concluding any struggle for moral acceptance. Most of those who campaigned for the decriminalisation of homosexual conduct, for example, would hardly have regarded its interpretation as ‘tolerable’ – (even though this, arguably, is precisely what was initially achieved by decriminalisation) – as a real victory. Nonetheless, I hope to show that the concept of toleration can usefully be brought to bear

on the evaluation of the mechanisms which a dominant group has selected as means of expressing intolerance, exposing them to scrutiny in terms of how far they facilitate, or obstruct, the access of those whose conduct is disapproved to full membership of the relevant group.

To see precisely how toleration bears on these issues, let us return for a moment to the idea of suspending the welfare benefits or withdrawing the housing tenure of those convicted during the riots. None of you will need reminding that we live in a time of economic crisis and of cuts in public services; and one in which welfare benefits in this country are already at - or, more likely, below – what most of us would regard as a decent subsistence level. It would be hard to dispute that housing is one of the most basic of human needs. The proposed curtailment of benefits and withdrawal of housing therefore implies the application of penalties which entail deprivation of means of subsistence which have already been determined by our democratic institutions to constitute a minimum. In concrete terms, they imply the risk of inflicting abject poverty and homelessness. Extending the marks of our collective intolerance in this way would, moreover, have consequences for every member of society. Not only do we know this sort of level of deprivation to be criminogenic, but the quality of all of our lives is affected directly and indirectly by living in a society in which the worst off lack the means to live a civilised life. The connection here with toleration is persuasively evoked by Susan Mendus in the final chapter of her classic treatment, Toleration and the Limits of Liberalism: '[T]he precise nature of the wrong done to people if they are not tolerated...is not to be explained by reference to loss of moral independence, or denial of autonomy, but by reference to the feeling of separateness and distance between the individual and the overarching society. We should tolerate –and more than tolerate – if we expect to create a society in which people can identify their good with the good of others, and come to feel that they speak through their society and that it speaks for them' (Mendus 1989: 162). [She described this holistic vision of the political value of toleration as socialist, a doctrine which some of you may dimly remember as having been pretty influential until it was lost in the mists of New Labour's more atomistic ideology...]. Note that this vision of toleration has a prudential dimension; and that to acknowledge the prudential case for toleration is not to imply that it lacks moral importance: indeed, and again I agree with Mendus here, quite the reverse.

In short, the penalties now under consideration – canvassed, one imagines, because the government expects them to be popular with key groups of voters – violate the most minimal standards of toleration which we should expect of our criminal process. In making this argument, I proceed not from any particular view about what justifies punishment, but simply from the modest premise that a commitment to basic moral and political values – basic in the sense that they are ones to which a broadly liberal society purports to sign up – implies that the conditions of criminal conviction, the framing of criminal sentences and the execution of punishment itself should, so far as possible, be designed in such a way as to respond to offenders as full moral persons, responsible for their decisions and actions. Treating people respectfully, as agents, and as presumptive members of the polity, implies in particular that we should try to create, as far as possible, non-stigmatising practices of criminalisation and punishment which do not, either materially or symbolically, exclude their subjects from the community of mutual concern and respect. This, I suggest, is the distinctive contribution of the idea of toleration to the analysis of punishment.

This principle may seem particularly clear in relation to social attitudes to an offender after her sentence has been served. But it bears also on the form which punishments takes; for there are powerful reasons to think that that form can make a long term difference to the prospects for inclusion. Branding, or indeed the scarlet letter which Hester Prynne was condemned to wear as perpetual punishment for her adultery in Nathaniel Hawthorne's eponymous novel – an eloquent exploration of the social and psychological upshot of intolerance – are good examples of unjustifiably intolerant penalties in this sense. But we might also regard deliberately degrading aspects of prison regimes such as identifying prisoners by number rather than name; or indeed the suspension of prisoners' voting rights, which deprives them of any voice in shaping the boundaries of toleration (Whitman 2003; Lazarus 2006; Pratt 2008 a and b), as unjustifiably intolerant penalties. And this, I argue, raises tricky questions about the primarily retributive tenor of current penal policy. If it turns out that, in practice, the aspiration to blame the sin but forgive the sinner is hard to deliver, it may be that the way in which we think of blame as a component of our penal practices must itself be reconsidered.

The fall and rise of retributive blame

I now turn to the task of making good my claim that there is a connection between the rise of retributive or desert-based rationales of punishment and the genesis of ‘unjustifiably intolerant’ penalties such as the suspension of welfare benefits. The idea that punishment is in some deep sense retribution for a blameworthy act or an institutionalised expression of blame has deep historical roots. Yet the fortunes of retributive theories of punishment has been a mixed one, particularly since the development of justifications for punishment premised on its good consequences, from the writings of Cesar Beccaria and Jeremy Bentham in the 18th Century to the present day. The details of this history lie well beyond the scope of this lecture. But a brief review of the relative fortunes of consequence-oriented and retributive rationales over the last 60 years is useful in identifying the connections between the prevailing rationale of punishment and the chances for achieving an adequately tolerant practice of criminal justice.

The penal practices and articulated penal policies of national governments do not, of course, mirror philosophical theories, and typically exhibit a complex mix of potentially philosophically incompatible elements: forward-looking elements such as deterrence, incapacitation, reform; backward-looking elements such as denunciation, reprobation and retribution. But some broad trends can nonetheless be identified. Retributive approaches dominated in western countries until the 18th Century, rooted in a shared religious cosmology expressing the appropriateness of blame, and further stabilised by a hierarchical social order giving wide scope for discretionary penal power exercised *de haut en bas*. But this dominance was gradually undermined by the Enlightenment rationalism of Beccaria and Bentham. In this country, modern, consequence-oriented rationales for punishment through the 19th Century were focused primarily on prevention through deterrence and incapacitation. But from the early 20th Century, and particularly after the Second World War, a distinctive form of consequentialism in punishment – widely known as the rehabilitative ideal – rapidly gained ground as a rationale for state punishment. The

argument that - as H.L.A. Hart put it in his classic text Punishment and Responsibility -the value of punishment consists in 'the authoritative expression... of moral condemnation for the moral wickedness involved in the offence' – [a form of institutionalised resentment –] was still accorded some respect. But the idea that returning suffering for evil is intrinsically good had, by the 1960s, come to be regarded as 'a mysterious piece of moral alchemy' or 'a primitive confusion' between punishment and compensation (ibid 234-5).

But the particular form of the new rehabilitative ideal threw into very sharp relief a difficulty about how punishment may be rendered compatible with adequate respect for the individual as an agent. At one level, this was simply an upshot of the forward-looking, consequentialist nature of the rehabilitative ideal: where good consequences for society can be maximised, whether through rehabilitation, deterrence or otherwise, by excessive punishment, or even by punishment of the innocent, pre-emptive 'treatment' of the 'dangerous', or criminalisation of those not fully responsible for their actions, purely consequentialist theories appear to lack the resources to explain our strong intuition that this is a gross violation of the duty to respect the individual: to put it in the Kantian terms to which John Rawls' work gave such a marked revival in the early 1970s (Rawls 1971), it amounts to treating individuals as means rather than as ends.

The rehabilitative ideal in punishment encountered this difficulty in particularly stark terms. This was because in its purest forms – represented for example in Barbara Wootton's trenchant writings (Wootton 1959, 1963) – it entailed, as Hart put it, an 'elimination of responsibility' (Hart 1968) in favour of a model not of responsibility-attribution and punishment but rather of diagnosis and treatment. Criminal conduct was to be understood as a symptom of some underlying individual or social pathology; individual responsibility for that conduct was beside the point, which was to find means of reducing crime through clinical interventions of both medical and behavioural kinds. In practical terms, this led to a rise in lengthy indeterminate sentences based on predictions of 'dangerousness' or need for treatment, and implied broad and unaccountable official discretion as to release date, based on expert judgments about treatment and cure.

It was little wonder that the excesses of this model gave rise, from the 1970s on, to a significant reaction, underpinning a remarkable revival of retributive theory under the new label – perhaps more palatable to the late 20th century liberal consciousness – of just deserts or ‘the justice model’ (von Hirsch 1976). It is accordingly on that model that I will focus my attention.

Undoubtedly, the reaction against the treatment model was based on an exaggerated view of how widely spread or fully realised its more radical manifestations were (Hudson 1987). But the important point for my purposes is the fact that a revulsion against its lack of respect for the offender’s agency was every bit as central to its demise as was growing scepticism about the effectiveness of rehabilitative programmes (Martinson 1974). Moreover, and crucially, it was that concern about respect for agency that allowed what, in the immediate post-war era, had been widely regarded as a severe, perhaps even atavistic retributive view of punishment to reinvent itself as the view most closely aligned with moderation and a respect for civil rights (von Hirsch 1976; American Friends Service Committee 1971), and to capture the imagination of policy-makers in a number of western countries. On the justice model, punishment is justified by reason of, and in proportion to, the offender’s desert. Desert in turn is premised on his or her blameworthiness, which is generally understood in terms of a combination of harmful or wrongful conduct and culpability for that conduct. Central to culpability is the fact that the offender has normal volitional, cognitive and – perhaps – emotional powers, and that these were adequately engaged at the time of the offence. By linking not only the justification but the distribution and quantum of punishment to the offender’s desert - the level of blame appropriately to be attached to the offence - the justice model appeared to offer a clear limit on state punishment, and presented itself as a progressive, humane and liberal approach, with respect for the offender’s agency at the core of its moral vision. Crucial to its liberal credentials, too, was the supposed ability of the justice model to draw a bright line between a judgement of the blameworthiness attaching to *particular conduct* for which the agent is responsible – what I will call from now on, following the work of Hanna Pickard (2010, 2011), ‘detached blame’ – and an emotional attitude of blame directed towards the *person* – what I will from now on call ‘affective blame’. To put this in terms of some of my own recent work, the justice model held out the promise of insulating evaluations of particular

conduct from a slide into to judgments of bad character which exceed that conduct and which persist in their practical ramifications beyond its ambit.

Thirty years on, the practical impact of the justice model presents a mixed picture in terms of respect for offenders and effective limits on punishment. Several of the countries in which it has had the most decisive influence on policy- notably Britain and the United States - have nonetheless seen an upswing in overall punitiveness during this era, and a continuation or even acceleration of practices, like indeterminate sentencing and preventive justice, which were thought to be agency-threatening features of the rehabilitative ideal (Garland 2001; Simon 2007; Ashworth and Zedner 2008, 2010; Lacey 2008; Reiner 2007; Pratt 2006; Zedner 2010). Of course, it would be wrong to make any sweeping claims here about causal links. Many factors are involved in shaping levels of punishment. They include trends in both crime and fear of crime, and the institutional structure of the political systems which shape penal policy (Lacey 2008, 2011; Garland 2001; Young 1999). It may be that these very forces were part of the basis for the widespread embrace of the just deserts model. Moreover not all the countries which institutionalised the justice model through sentencing reforms have seen an increase in punishment: Sweden is a key example in this respect (Pratt 2008). The precise shape of the sentencing system through which different societies and regions attempted to implement the justice model is an important variable. But in light of the upswing of punitiveness and of insecurity and concern about crime, relative to crime rates, over this period in this country, it does seem plausible to think that the return to an explicit association of punishment with blame, which was a concomitant of the return to the justice model, may have contributed to this outcome. The associated change in *zeitgeist* is nicely summed up by John Major's famous 1993 comment that, in relation to young offenders, "We must condemn a little more and understand a little less."¹ In this cultural, social and political context, institutionalising the distinction between detached and affective blame becomes very difficult, and the careful calibration of justly deserved censure all too easily spills over into a diffuse call for something closer to vengeance and exclusion.

¹ <http://www.economist.com/node/144768> (last accessed 11.8.2011)

I have argued that it is intuitively plausible that an unreflective commitment to retributivism such as that represented by John Major's statement invites a dangerous confusion between the 'detached blame' which attaches to specific conduct and 'affective blame' which attaches to persons. But this, proponents of the justice model will reasonably respond, is not to undermine that model as a moral theory. It is important to my argument, therefore, that even the subtler versions of the retributive model which the academic wing of the justice movement has thrown up - notably Andrew Von Hirsch's theory of punishment as a form of censure (von Hirsch 1993); and Antony Duff's communicative model, in which punishment amounts to a form of enforced secular penance (Duff 2001) – can be shown to have a similar vulnerability. For example, notwithstanding his explicit commitment to promoting reform and reconciliation, Duff insists that hard treatment is intrinsic to the communicative theory of punishment. As Matt Matravers (2011) has convincingly shown, this aspect of his theory is not fully justified by the contours of his argument; I would argue that the fact that it holds a central place while being inadequately justified risks that an approach which otherwise aspires to foster inclusiveness may be read as inviting gratuitously punitiveness (cf Baldwin 1999; von Hirsch 1999).² Similarly, Duff's view of mercy as extrinsic, rather than, as John Tasioulas (2011) has argued it to be, intrinsic to penal justice marks even this most humane and liberal version of retributivism as liable to foster an exclusionary punitive disposition. Other recent contributions to penal philosophy in the broadly retributive tradition have begun explicitly to embrace the idea that punishment is intrinsically exclusionary or stigmatising. For example, in a recent paper Douglas Husak (2011:9) argues that 'a state response to conduct does not qualify as punitive unless it is designed to censure *and to stigmatize*' (my emphasis). And Daniel McDermott (2001: 428-9) argues explicitly for the essentially exclusionary dynamic of retribution, and regards imprisonment as a presumptively acceptable penalty on the basis that, in something of the style of exile or ostracism, it excludes wrongdoers from the moral community. Note that this is an argument which sidelines the potentially reintegrative aspects of imprisonment, hence placing it on a spectrum with 'intolerant' forms of penalty such as banishment, branding and capital punishment.

² Arguably this is an upshot of his resistance to giving prudential or consequentialist considerations a place in his account.

The retributive revival, then, has unwittingly – and in the name of a respect for agency and for limits on punishment – fed into and encouraged an upswing in punitiveness by lending moral imprimatur to global judgments of blame. The upshot of this argument is that it is time to reaffirm the distinction between detached and affective blame, and that a key challenge is the design of institutions which can help to maintain the morally crucial line between the two. Sanctions such as deprivation of welfare benefits blur this line in decisive ways. But how can we begin to think more constructively about the way forward here?

Revisiting the treatment model?

In light of the of the decisive rejection of the treatment model in the 1970s, it may seem implausible to suggest that one way forward lies in a re-evaluation of that very model. Yet there is strong reason to think that common sense as well as humanity has been thrown out with the consequentialist bathwater, lending weight to the morally implausible view that the visiting of blame on an offender produces a moral benefit which is of such weight that it inevitably trumps any bad consequences – including the impact of stigmatisation on the chances of reintegration and reformation for offenders.

Some of the practices which developed under the aegis of the treatment model in criminal justice undeniably lacked proper respect for agency and the limits of state intervention. But a treatment model - indeed even a clinical model - need not in fact imply the effacement of responsibility. On the contrary, recent work on the nature of therapeutic practice shows that the best understanding of even the therapeutic process sets agency at its core: in fact, and contrary to the common perception, such practice *can* only go forward on the basis of an assumption of agency and responsibility. (Pickard and Lacey 2011). Once we distinguish between ‘affective’ and ‘detached’ blame, we can see that while affective blame is inimical to the therapeutic process, agency and responsibility are central to clinical practice.

If this is right, the retributive revival has been based, in part, on a misunderstanding of the conceptual structure of the treatment model. While the penal and clinical settings differ in important ways – most obviously, in that detached blame holds a larger place in the penal sphere – something can nonetheless be learnt for criminal justice from an analysis of clinical protocols designed to keep affective blame at bay. For these distinctive structures and procedures might be adapted so as to inhibit a slide from detached judgments of blameworthiness into affective and potentially stigmatising blame in criminal justice. Seeing that responsibility can be understood, and deployed in clinical and other settings, independently of affective blame, helps us to see that a forward-looking practice may be compatible with respect for agency; and it helps us to understand how some of the problems of contemporary penal systems have arisen and how – under certain institutional conditions – they might be resolved or mitigated. Judgments of detached blame are a conceptual feature of criminal justice. What we should be aiming for is to sustain judgment without sliding, in the terms used in a recent paper by Gary Watson, into judgmentalism (Watson 2011); to resist the slide from judgment of conduct or of the character exhibited in a particular piece of conduct to judgment of the person more globally. Of course, there will be difficult moral judgments at the margins. But it seems clear that penalties such as cutting welfare benefits, eviction, and publicly humiliating sanctions such as chain gangs or Hester Prynne's scarlet letter would be ruled out.

Regulative blame

It might be objected, however, that this argument is unduly rationalistic. We might see blame, in the terms of Peter Strawson's famous article 'Freedom and Resentment' (Strawson 1960), as invariably a reactive attitude, and acknowledge that reactive attitudes such as affective blame cannot in practice be evacuated from criminal justice (and in particular from the environment in which criminal justice policy formation and decision-making takes place) – least of all in a world of pervasive insecurity and substantial levels of crime. Not everyone is like Shakespeare's Prospero, who resolved to bend his fury to his 'nobler reason'. But this may not imply that the task of tempering affective blame in the penal process is a hopeless one. As we have seen, it is the backward-looking quality of attributions of blame which is usually seen as guaranteeing that the moral agency of the

offender is adequately taken into account in decisions to punish. But is this correct? Drawing on both moral philosophy and moral psychology (including a substantial amount of empirical research), philosopher Victoria McGeer (2011) has argued that this view derives from a deep misunderstanding of the role which blame plays in our moral life. Blame, she argues, is not in fact an entirely backward-looking concept; rather, in its 'good' – morally appealing – form, it has an addressive, forward-looking and even regulatory dimension. Consider this perhaps counter-intuitive argument by thinking about a quotidian example: the parental use of blame in the upbringing of children. It seems obvious that parents use blame not merely as an expression of anger, or frustration; nor merely as an articulation of a moral judgment; but also as an educational device. To test this intuition, imagine how any ordinary parent would react if convinced of the fact that systematic judgments of blame would in fact have counter-productive effects in terms of their children's acceptance of the norms to breach of which the blaming attitude reacts. Sadly, just such a collectively irrational dynamic has come to mark our public practices of punishment. When we lose sight of the addressive dimension of blame, the stigmatising aspect of blame as an adverse reaction is apt to become dominant, producing what McGeer calls 'bad blame'. Hence distinguishing between the backward- and forward-looking aspects of blame is key to determining how the most normatively attractive understanding of blame, and of the role of blame in punishment, can be rendered. My speculative suggestion is that this differentiated notion of blame has implications for the design of institutions and forms of punishment – or, perhaps better, responses to crime - which are not merely desirable but also capable of being stabilised in contemporary liberal democracies. The key challenge here is to understand how to institutionalise 'good', addressive blame while minimising the power of 'bad', stigmatising blame in penal institutions, hence ensuring that they sustain adequate standards of toleration.

In conclusion

Let me conclude by summing up my argument. Even in relation to criminalisation and punishment – that quintessential sphere of institutionalised intolerance in political societies - the idea of toleration has critical potential. It focuses our attention, first, on how a justifiable line can be drawn between that which is, and is not, to be tolerated; and second,

on the non-tolerating side of that line, it continues to speak to the question of how institutional intolerance may legitimately be expressed. There is hence a further paradox of toleration: justifiable intolerance may itself be subject to standards deriving from the value of toleration: penal institutions should be designed so as to attach strictly to conduct and to facilitate the offender's reintegration, while respecting their continued membership of the political community. Judged by this standard, I have suggested that our own penal ideas and penal practices have taken a wrong turn over the last thirty years. In an ideal world, desert attaches to persons only in relation to the conduct for which they are responsible. In the real world, it tends to follow those persons through time and space. Legitimate intolerance of disapproved conduct shades into illegitimate intolerance of persons or groups, locking us into a collectively irrational practice of counter-productive (and apparently insatiable) affective blame.

This may not be a conceptual or logical feature of retributive theory; but if it is impossible to avoid in practice, this gives us good reason to rethink the priority which we have accorded to desert and blame as opposed to the attempt to reform and reintegrate offenders in our criminal justice system. The effort at reform and reintegration, moreover, can be rendered compatible with a respect for offenders' agency: on a proper understanding of therapeutic models geared to behavioural change, responsible agency is a key assumption. Detached blame is a conceptual feature of criminal justice; but our institutions should be designed so as to minimise the risks of a slide from detached judgments of blameworthiness to affective blame which stigmatises offenders and marks out the offenders themselves, rather than their actions, as beyond toleration.

More radically, we might suggest that our very practices of blame should be understood in importantly forward-looking terms. Blaming practices may be an inevitable part of our criminal justice system, but they should be recognised as intrinsically linked to a regulative project which surely includes the goal of reintegration. One of the most unfortunate features of the suggested withdrawal of welfare benefits or exclusion from housing is their striking perversity from even the most mildly consequentialist point of view. What is assumed about what will happen to the people reduced to poverty or homelessness by such policies? The policy suggestion comprehensively fails both dignity- or autonomy-based and

prudential tests of toleration. Treating people respectfully, as agents, and as presumptive members of the polity implies that we should try to create, as far as possible, non-stigmatising practices of criminalisation and punishment which do not, either materially or symbolically, exclude their subjects from the community of mutual concern and respect. Homelessness and poverty are symbols of exclusion and abjection every bit as vivid as the scarlet letter which Hester Prynne was doomed to wear – and every bit as corrosive of the chances of reintegration into the political community. They are, in short, unjustifiably intolerant sanctions.

Can we genuinely hold offenders responsible as agents without condemning or stigmatising them as people? And if so, what are the conceptual and institutional conditions which make this possible? Might it be feasible to design institutions and practices in the criminal justice system which deploy and emphasise responsibility but either dispense with affective blame or communicate an addressive, consequence-sensitive notion of blame, hence avoiding or minimising stigma and accordingly maximising the chances of an adequately tolerant penal practice? These are difficult questions. But they are crucially important ones: and ones which a commitment to the value of toleration puts high on the agenda of penal philosophy and penal reform.

ⁱ ‘Magistrates and crown court judges could be asked to dock benefits from convicted criminals under preliminary proposals being drawn up by the government in response to the riots...: Ministers are looking hard at how benefits, or tax credits, could be taken away to show criminals that privileges provided by the state can be temporarily withdrawn’: <http://www.guardian.co.uk/uk/2011/sep/07/uk-riots-courts-dock-benefits>

ⁱⁱ ‘plans to announce that convicted criminals might lose some benefits were withdrawn after they were deemed by civil servants to be as yet impractical’; <http://www.guardian.co.uk/politics/2011/oct/05/david-cameron-households-debts-speech>

ⁱⁱⁱ Though analyses of the place of toleration within constitutional principles of course has implications for the scope of criminal law: see for example Richards 1989.

^{iv} Newburn, T. (2006). *Contrasts in Intolerance: Cultures of Control in the United States and Britain. The Politics of Crime Control*. T. Newburn and P. Rock. Oxford, Oxford University Press: 227-270

American Friends’ Service Committee (1971), *Struggle for Justice: A Report on Crime and Punishment in America*’ (Farrar Straus & Giroux)

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