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BLAME, MORAL STANDING AND THE LEGITIMACY OF THE CRIMINAL TRIAL

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Abstract

I begin by discussing the ways in which a would-be blamer's own prior conduct towards the person he seeks to blame can undermine his standing to blame her (to call her to account for her wrongdoing). This provides the basis for an examination of a particular kind of 'bar to trial' in the criminal law – of ways in which a state or a polity's right to put a defendant on trial can be undermined by the prior misconduct of the state or its officials. The examination of this often neglected legal phenomenon illuminates some central features of the criminal law and the criminal process, and some of the preconditions for the legitimacy of the criminal law in a liberal republic.

My concern is with blame as a second personal activity, as when Andy castigates Bertha to her face for some wrong that he alleges she did him. Perhaps he blames her for the collapse of his marriage, because she told his wife about his affair; or for breaking his treasured vase, which she threw at him during an argument. Blame begins, logically, as an accusation. Andy accuses Bertha of wrongfully destroying his marriage or his vase: he calls her to answer for that wrong, demanding an explanation and, unless the explanation is exculpatory, an apology. Failing an exculpatory explanation, what began as an accusation to be answered turns into a conclusory condemnation: Andy demands that Bertha recognise the wrong she has done, and make apologetic reparation. There are questions to be asked about the relationships between second personal blaming and other phenomena that also count as blaming: between blaming Bertha to her face and blaming her in her absence to a third party; between blaming her to her face and the kinds of judgment and attitude that such blaming purports to express. But these questions are not my present concern.[1]

[1] See G Sher, *In Praise of Blame* (Oxford: Oxford University Press, 2006); T M Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Cambridge, Mass.: Harvard University Press, 2008), ch. 4.

Discussions of the conditions that render it legitimate or illegitimate for *A* to blame *B* for *X* typically focus on conditions concerning *B* or *X*: was *B* blameworthy for *X*, or were there features of her (her capacities), of her relationship to *X* (was she really its agent), or of *X* itself (was it really wrong) that make it inappropriate for anyone to blame her for *X*? Less attention has been paid to the question of *A*'s standing in the matter: to what gives *A* the right to blame *B*, to the factors that might undermine that right.[2] That will be my focus here, as a prelude to exploring some analogous questions about what can undermine a criminal court's right to try a defendant.

1. You Can't Blame Me

When Andy castigates Bertha for destroying his marriage or his vase, there are various ways in which she might respond. She might deny that she was involved in what happened: she did not tell his wife, or throw the vase. She might admit that she played a causal role, but insist that it was merely, and non-culpably, causal: she was pushed whilst carefully handling the vase; she dropped the incriminating letters accidentally. She might admit that she played a more than merely causal role, but offer a justification or excuse: she told his wife because she owed it to her as her friend;[3] she threw the vase because he provoked her. She might admit that she culpably (perhaps intentionally) destroyed the vase or his marriage, and that she must now apologise for this wrong and make some kind of reparation – if that is possible. In all these cases, she implicitly admits that she must answer to Andy for what she has allegedly done. In the first case, her answer is that she has nothing to answer for; but she still accepts that she must answer Andy's accusation. In the other cases, she admits that she has something to answer for, and offers an answer – an answer that

[2] But see G A Cohen, 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists', (2006) 81 *Royal Institute of Philosophy Supplements* 113; Scanlon, *op. cit.* n. 1 above, 126–8, 138–51, 166–79; V Tadros, 'Poverty and Criminal Responsibility' (2009) 43 *Journal of Value Inquiry* 391. I have also learned from Y Eylon, 'Blaming and Knowing', and M Friedman, 'How to Blame' (both so far unpublished).

[3] I leave aside the question of whether, in justifying telling his wife about the affair, she would be justifying destroying his marriage, or denying that she was responsible for its destruction (on the grounds that he was wholly responsible for that, by having the affair) – and thus that she has to answer for breaking up the marriage.

either provides what she intends to be an exculpatory explanation, or constitutes an admission of guilt and acceptance of blame.

However, she might respond in a different way, by denying that she is answerable to him in this matter – that she must answer to him for what she has (allegedly) done. It is this kind of response that concerns us here.

One such response to a person who seeks to blame me for an alleged wrong, although not one that is available to Bertha, is that it is simply not his business. Perhaps I have let a friend down badly. I must answer for that to her, and to our wider circle of friends. But if a passing stranger who hears about what I have done castigates me for it, I might reasonably respond not by denying the accusation of wrongdoing, or by justifying or excusing my conduct, but by denying that the stranger has the standing to call me to answer for it: it is not her business. This response is familiar, and sometimes warranted, although its grounds are debatable. On one view, my wrongdoing is in principle the stranger's business, as it is the business of every moral agent; but whilst this gives the stranger some reason to criticise me, she has stronger reasons not to intervene in this way – reasons to do, for instance, with her lack of knowledge of the relevant facts, or with the likely effects of such an intervention. On another view, the stranger has no standing to call me to answer for what I have done: she can form a judgment on it, she can feel disgust at it and think ill of me, but she lacks the kind of relationship to me and my friend that would give her the right to call me to answer.

We cannot resolve the disagreement between these views here; what matters is what they disagree about. Blame requires a suitable relationship between blamer and blamed, as fellow members of a normative community whose business the wrong is: it is an attempt at moral communication, appealing to values by which blamer and blamed are, supposedly, mutually bound. When Fred blames Ginger for her wrong, he implies that it is something for which she must answer to him; but that is to imply that they belong to an appropriate moral community, whose values Ginger has flouted. On the first view noted above, there is ultimately just one moral community – that of moral agents, or rational beings,[4]

[4] Compare Scanlon, *op. cit.* n. 1 above, 139–40, on 'the moral relationship' that grounds the legitimacy of moral blame; this is a matter of 'the kind of mutual concern that, ideally, we all have toward other rational beings'.

or perhaps of human beings:[5] wrongs committed by any moral agent against any moral agent are in principle the business of every member of the all-embracing moral community. On the second view, there might be some wrongs for which we are answerable to all moral agents, or to all human beings, if we can see ourselves as fellow members of such an all-embracing moral community:[6] but we live most of our lives in smaller, more local and partial communities, and many of our wrongs are the business only of fellow members of those communities. I am, inter alia, a family member, a colleague, a participant in various friendships, a philosopher, a member of a darts team, a citizen, and so on. Within each of these communities, within each of these forms of life, there are wrongs that are peculiar to the community – wrongs that members commit against each other not as moral agents or as human beings, but as family, or colleagues, or friends . . . ; for such wrongs we answer to fellow members of that community, but not to others.

What matters here is not which of these views is right, but what they both accept – that if I blame someone for her wrongdoing, it is always proper to ask what makes it my business; and that it is my business only if we are fellow members of an appropriate moral community.

Suppose, however, that Ian has committed a wrong that is, in principle, Hilda's business: he lied to her; or he stole money from their flatmate. If she challenges him about this, calling him to answer for what he has done, he might argue that she has no right to do so: he need not answer to her, because her own conduct has undermined her standing to call him to account for this wrong. Two obvious grounds for such an argument are, first, that she has committed a relevant wrong herself – perhaps she recently lied to him about something just as important;[7] and, second, that she is at least partly responsible for his wrongdoing – for instance that she urged him to steal the money. In neither case does Ian deny wrongdoing, or claim that Hilda's behaviour justified or excused

[5] See R Gaita, *A Common Humanity* (London: Routledge, 2000).

[6] Compare the way in which 'crimes against humanity' are described in the Preamble to the Rome Statute of the International Criminal Court, as crimes that 'deeply shock the conscience of humanity' and are thus 'of concern to the international community as a whole' – crimes, we might say, for which the perpetrators must answer to 'humanity'. But can such talk of answering to humanity amount to anything more than rhetoric?

[7] It is in this context that talk of 'tu quoque', or of pots calling kettles black, belongs.

his; his claim is, rather, that it calls into question her standing to call him to answer to her for his wrongdoing.[8]

Her standing is called into question, but it is not undermined by the mere fact of her own past wrongdoing, or of her part in Ian's wrongdoing: whether it is undermined also depends on the manner and tone of her criticism of Ian, and most crucially on how (if at all) she deals with her own wrongdoing or her complicity in his wrongdoing.

As to its tone and manner, consider 'He that is without sin among you, let him first cast a stone at her'.[9] If this means that only the sinless may criticise others, it not only implies that no one may ever blame or be blamed; it nullifies the important role that blame can play in our moral lives, as a way of keeping ourselves and each other in touch with the moral values by which we aspire to live. To cast a stone, however, is not merely to blame: not just because it is much harsher than blame, but because of what it means. To stone the adulterer is not just to condemn her deed; it is to treat her as an outsider, or as someone who is to be despised and excluded. Something similar can be made of 'Judge not, that ye be not judged'.[10] It would be odd to tell us never to recognise another's wrongs, or never to criticise her for them; but if to judge is to claim a moral superiority (the judge sits above the offender), it would be less odd to advise us not to judge – not to sit in judgment on others as if we are superior to them (and as if it is therefore not for them to turn round and judge us). A recognition of our own sinful condition should induce a certain humility in our blame: we should blame others not as our inferiors, but as our equals. So if Hilda's criticism of Ian is, in its manner or tone, *de haut en bas* (as if she would herself never do anything like that), he would have cause for complaint; but if she addresses him as an equal, it is not clear that the mere fact of her own wrongdoing undermines her standing to criticise him.[11]

[8] There are further questions, which we cannot pursue here, about the kinds of wrongdoing that can call the would-be blamer's standing into question. Must Hilda's wrongdoing be of the same kind as, or at least as serious as, Ian's'? Must it have been against him? Must it have been relatively recent?

[9] St John's Gospel, 8.7. I should emphasise that what follows is not intended as a piece of biblical exegesis.

[10] St Matthew's Gospel, 7.1.

[11] Another question that we cannot pursue here is whether blaming must *always* address the other as an equal – and just what that means.

As to how she deals with her own wrongdoing, her standing to criticise Ian seems clearly undermined if, when he brings up her lying, or her role in his theft, she brushes that aside as irrelevant and insists on addressing only his wrongdoing. Suppose, however, that she is ready to address her own wrongdoing, as she is to address his: when he brings up her lie to him, she is prepared to answer to him for it – explaining it, justifying it, or apologising for it; when he points out her role in his theft she is prepared either to engage in mutual self-criticism of *their* wrongdoing (as opposed to one-way criticism of *his* wrongdoing), or to explain her role in a way that shows her not to be implicated in his wrongdoing. Perhaps it would have been better had she cleared the moral decks first, answering for her own wrong before criticising Ian for his;[12] but so long as she is prepared to address her conduct now, and to answer to Ian for her wrongdoing as she demands that he answer to her, her standing seems not to be undermined.

But *why* should Hilda's own wrongdoing, or her role in Ian's wrongdoing, undermine her standing to blame him? She can justifiably judge that he has done wrong: why may she not express that judgment to him, by criticising him? One answer is that it is hypocritical for her to condemn him without condemning herself – to apply moral standards to him that she does not apply to herself.[13] But this need not be what she is doing in refusing to answer to Ian. For, first, she could have condemned her own wrongdoing in the privacy of her own conscience: but that does not entitle her to blame Ian whilst refusing to answer to him. Second, she might rightly believe that her lie to him was justified, whereas his lie to her was not: but that still does not entitle her to criticise him without being prepared to answer to him for her lie.

What makes it improper for Hilda to criticise Ian, whilst refusing to answer to him, is that this denies the fellowship on which her criticism depends for its legitimacy. In criticising Ian, she must purport to address him as a fellow member of a normative community to which the wrong belongs: as a friend, as a colleague, as a flat-mate. . . . But members are answerable to each other: if she is to treat Ian as a fellow member who must answer to her, she

[12] This is perhaps most important when her wrong was clearly worse than his: when it is not merely a matter of the pot admitting that it is just as black as the kettle, but of the blamer dealing with the beam in his own eye before attending to the mote in the other's eye.

[13] See e.g. Tadros, *op. cit.* n. 2 above.

must also be ready to answer to him. She might have an exculpatory answer to offer, for instance that her lie was justified; but she must be ready to offer that answer if she is to demand that he answer to her. What matters is thus not blame in itself, but the process of calling to answer of which blame is one dimension. What undermines Hilda's standing to blame Ian is not the fact that she is herself blameworthy for some wrong that she did to him, or for her role in inciting his wrongdoing. indeed, she might rightly believe that she is not blameworthy for what she did. Rather, her standing is undermined if she demands that Ian answer to her (which is what she does in blaming him), whilst refusing to answer to him for what she has done. Calling others to answer must be a reciprocal activity – if they must answer to me, I must be ready to answer to them; it is the lack of such reciprocity that would undermine Hilda's standing to blame Ian.

We have noted two grounds on which Ian might rightly argue that Hilda must answer to him if she is to demand that he answer to her for the wrong that he committed: that she had herself wronged him, and that she had herself incited his wrongdoing. Before we turn to the criminal trial, we should note that the case of direct incitement is just one example of a larger class of cases in which Ian could argue that Hilda was partly responsible for his wrongdoing. The scope of that class of cases is controversial, since the question of when someone can be held responsible for another's wrongdoing is controversial. Is it enough, for instance, that Hilda acted in a way that she realised might or facilitate Ian's wrongdoing (perhaps, knowing his larcenous tendencies, she mentioned to him that their flatmate had a large amount of cash in her room)?[14] Or is something more necessary – for instance that Hilda provoked Ian to act as he did, or that she acted in such a way as to leave him no reasonable alternative.[15] We will return to this question in the context of criminal law; all we need note here is that, insofar as it is appropriate for Ian to say that Hilda was

[14] Perhaps the flatmate could then call Hilda to account for her carelessness, but Ian seems ill-placed to do so, even if Hilda castigates him for his theft: this might be because for Ian to criticise Hilda for telling him would be to portray himself not as a responsible agent, who could decide for himself whether to steal the money, but as the helpless victim of kleptomania.

[15] For useful discussion of these and other possibilities, see Cohen, *op. cit.* n. 2 above on such claims as 'You made me do it' and 'You started it', and cases in which the conduct of the person being blamed can be seen as a response to some legitimate grievance created by the would-be blamer; and Tadros, *op. cit.* n. 2 above, on complicity.

partly responsible for his wrongdoing, he can also appropriately argue that if he is to answer to her for it, she must answer to him (and that they must both answer to whoever else has standing in the matter).

There is much more to be said about the conditions under which it is or is not appropriate for us to call each other to account for the wrongs that we have allegedly committed. I have simply sketched an explanation of two conditions that can undermine the would-be blamer's standing to blame: one concerning his prior misconduct towards the person whom he would now blame, and one concerning his role in her commission of the wrong for which he would now blame her. I turn now to the criminal law, to see whether we find there any analogues to this moral phenomenon; my answer (unsurprisingly) is that we do.

2. Bars to Trial

When a defendant is put on trial he is expected to plead to the charge: either 'Guilty', thus formally admitting his culpable commission of the offence; or 'Not Guilty', thus challenging the prosecution to prove his guilt. To enter either plea is to accept the court's authority to try him. My concern here, however, is with some of the grounds on which a defendant can refuse to enter either plea, because he denies that the court has the authority to try his case.

The trial can be seen as a formal, legal analogue of the informal, moral process of calling another to answer for an alleged wrong, and blaming her for it if she cannot offer a suitably exculpatory answer.[16] The defendant is called to answer to the charge, by entering a plea: he is called to answer by the court, to his fellow citizens (to the whole polity), in whose names the court acts and with a breach of whose laws he is charged; if the prosecution proves that he committed the crime, he is required to answer for that crime, either by offering a defence that exculpates him, or by accepting conviction and condemnation. So, just as in moral contexts someone whom I criticise for an alleged wrong might

[16] For a fuller account and defence of this conception of the criminal trial, and discussion of its implications, see R A Duff, L Farmer, S E Marshall, V Tadros, *The Trial on Trial (3): Towards a Normative Theory of the Criminal Trial* (Oxford: Hart Publishing, 2007), especially ch. 3; also R A Duff, *Answering for Crime* (Oxford: Hart Publishing, 2007), ch. 8.

respond, not by denying the wrong or justifying or excusing herself, but by denying that I have the standing to call her to account; a defendant might refuse to plead to the charge, and instead argue that there is a 'bar to trial' – that this court lacks the right or the standing to try him.[17]

The law recognises a range of such bars. Some concern the defendant's condition, most obviously that he is now 'unfit to plead': a defendant who is now so mentally disordered that he cannot understand or play any part in the trial cannot be tried, even if he was sane at the time of his alleged crime;[18] since he is not competent to answer to the charge, he cannot be called to answer to it. Others concern the court's jurisdiction: the defendant might argue that the alleged crime falls outside the territorial or temporal limitations of the court's authority – that it was committed abroad,[19] or so long ago that it falls under a statute of limitations;[20] or that he has already been tried for this offence, so that to try him now would constitute double jeopardy.[21] The defendant might assert a political or moral, rather than a legal, bar: one who rejects the authority of the state, and so *a fortiori* of its laws and its courts, might express that rejection by refusing to plead; for to enter a plea would be to recognise the very authority that he denies. I will focus here, however, on a different kind of bar to trial – that which consists in some prior misconduct towards the defendant by the state, by the polity, or by its officials.

Suppose, for instance, that the defendant is present in court only because he was illegally brought back to the country to face trial. English courts have treated this as a bar to trial: such serious defects in the process that brought the defendant to court can undermine the trial's legitimacy. The 'propriety of procedure in regard to the liberty of any who are brought within our jurisdiction is transcendent'; the court should 'inquire into the circumstances by which a person has been brought within the

[17] See P H Robinson, *Criminal Law Defenses* (St Paul: West Group, 1984), vol. I, 179–87; vol. II, 460–543.

[18] See Robinson, *op. cit.* n. 17 above, vol. II, 501–8; J Sprack, *A Practical Approach to Criminal Procedure* (11th ed; Oxford: Oxford University Press, 2006) 287–8.

[19] Though this is not always a bar to trial: e.g. Criminal Justice Act 1988 s 134 (*R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* [2000] 1 AC 147); Sex Offenders Act 1997 s. 7). See M Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford: Oxford University Press, 2003), chs 1, 5.

[20] See e.g. the American Model Penal Code, s 1.06.

[21] See Criminal Procedure and Investigations Act 1996, s 54; Criminal Justice Act 2003, Pt 10.

jurisdiction', and if necessary 'stay the prosecution' and free the defendant.[22] Courts talk in such contexts, given serious pre-trial wrongdoing by state agents, of the 'integrity' of the criminal process, or of a trial as an 'abuse of process'.[23]

Cases of this kind are admittedly unlike the moral cases discussed above: not just because they involve more serious wrongdoing, but because that wrongdoing is differently related to the process that it undermines. What matters is not just that the defendant was maltreated by, or with the connivance of, state officials, but that that mistreatment was part of the process that brought him to trial. The wrongdoing, as the court saw it, infected and thus vitiated the whole criminal process of which it was part:[24] a process that includes kidnapping, or torture, cannot be one of doing justice under the rule of law – which is what a trial is supposed to be. This then is one way in which misconduct by a state or its officials can undermine the right of its courts to call a defendant to answer.[25]

Closer analogues of the case in which Ian responds to Hilda's criticism of his lying might seem unlikely in the context of the criminal law. If a defendant who is charged with fraud, for instance, argues that he cannot legitimately be tried because a state official defrauded him in the recent but unconnected past; or if someone charged with wounding argued that a police officer had in the recent but unconnected past illegally injured him: they would, predictably, not succeed. The obvious reason is that the court could properly say to such a defendant that this trial is about *his* alleged wrongdoing, and that there is an alternative route through which he can pursue his complaint about the wrong that he suffered – an argument not available to Ian. For, first, there are

[22] *R v Horseferry Road Magistrates' Court, ex p Bennett* (1994) 98 Cr App Rep 114. Contrast *US v Alvarez-Machain* 504 US 655 (1992). The Eichmann case is clearly also relevant, though we cannot discuss it further here.

[23] See also the law lords' comments on the inadmissibility of evidence obtained by the use of torture, in *A and Others v Secretary of State for the Home Department* [2005] UKHL 71. See more generally A J Ashworth, 'Testing Fidelity to Legal Values: Official Involvement and Criminal Justice', in S Shute and AP Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (Oxford: Oxford University Press, 2002) 299; I H Dennis, *The Law of Evidence* (3rd ed.; London: Sweet and Maxwell, 2007), ch. 2E.

[24] Which was why it did not matter, in the case of evidence obtained by torture, whether the torture had been used on the defendant or on others; it was the use of torture that corrupted the process.

[25] We cannot pursue here the question of whether the trial would also be rendered illegitimate if the wrongs were committed not by or with the connivance of state officials, but by private individuals.

no such formally separate fora in his dealings with Hilda, as there are in the state's dealings with defendants. Second, the state can disown an official's actions in a way that Ian cannot disown his own actions: if this defendant was defrauded or assaulted by a state official, there is room to claim that he was not acting in the name of the state; the state can therefore still try this defendant, so long as it is also ready to prosecute the official.

But there is room for defendants to mount moral arguments that have some resemblance to Ian's response to Hilda. Two examples will illustrate this.

The first concerns complicity in the crime. Entrapment occurs when someone is induced to commit a crime by a state official who conceals his official status, as when police officers induce a suspected drug dealer to sell them prohibited drugs. Entrapment is puzzling.[26] It can be a defence in American law, although there is disagreement about how this defence should be rationalised, and when it should be allowed.[27] Defences, however, typically exculpate the defendant, by showing that what he did was permissible, or that he was not culpable in doing it; but how can the fact that the person inducing the crime was (unknown to the defendant) a police officer render a criminal action permissible, or reduce its culpability? On the other hand, we should surely be uneasy about convicting someone for an offence that he committed only because induced to do so by a police officer who was out to arrest and prosecute him.

English courts offer what might be a more plausible approach. Whilst entrapment is not a defence, certain kinds of entrapment might constitute bars to trial. Courts should

> balance the need to uphold the rule of law by convicting and punishing those who committed crimes and the need to prevent law enforcement agencies from acting in a manner

[26] See A L-T Choo, *Abuse of Process and Judicial Stay of Criminal Proceedings* (Oxford: Oxford University Press, 1993), ch. 6; Ashworth, *op.cit.* n. 23 above, and 'Redrawing the Boundaries of Entrapment' (2002) *Criminal Law Review* 159; D Squires, 'The Problem with Entrapment' (2006) 26 *Oxford Journal of Legal Studies* 351; G Dworkin, 'The Serpent Beguiled Me and I did Eat: Entrapment and the Creation of Crime' in his *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988); Duff et al, *op.cit.* n. 16 above, ch. 8.3.1.

[27] See W R LaFave, *Criminal Law* (4th ed.; St Paul: West Publishing, 2003), 501–21; R H McAdams, 'The Political Economy of Entrapment' (2005) 96 *Journal of Criminal Law and Criminology* 107.

> which constituted an affront to the public conscience or offended ordinary notions of fairness. . . . [T]he principle to be applied was that it would be unfair and an abuse of process if a person had been lured, incited or pressurised into committing a crime which he would not otherwise have committed; but that it would not be objectionable if a law enforcement officer, behaving as an ordinary member of the public would, gave a person an unexceptional opportunity to commit a crime, and that person freely took advantage of the opportunity.[28]

If the state itself, through its officials, induces the commission of the crime, it is ill-placed to hold to account the person who committed the crime. Or so it might be argued, by analogy with the moral case of Ian and Hilda. But there are two problems with this suggestion.

First, what Hilda's role in Ian's wrongdoing rendered illegitimate was not her blaming Ian per se, but her blaming Ian without being ready to answer for her own role in the affair. So why should we not say, analogously, that it would be wrong for the state to prosecute the entrapped defendant unless it also called its officials to answer for their role in the affair – either at the same trial, or in a separate process. As we saw in Ian and Hilda's case, to answer for one's role need not be to accept blame: perhaps the entrappers could argue either that their actions did not amount to process-corrupting entrapment; or that although they did constitute entrapment, they were justified. Whether or not their actions could be justified, however, the proper outcome would surely be for both the defendant and the officers to face trial for what they did.

Second, this suggestion gains force if we think not of the typical kinds of entrapment case (those involving the supply or purchase of drugs, or handling stolen goods, or other offences that, in the particular commission that the officials induced, posed no danger to anyone),[29] but of cases in which the crime does or threatens serious harm. Suppose, for instance, that police officers encourage someone whom they suspect to be a violent racist to attack an immigrant family, in order to be able to prosecute him: they

[28] *Looseley*; *Attorney General's Reference (No 3 of 2000)* [2001] 1 WLR 2060.

[29] See the examples, e.g. of selling individual cans of lager, or of operating a taxi outside the area for which it was licensed, in *Loosely* (n. 28 above), at 2064.

intend to arrest him before he completes the attack, but the plan goes wrong and the attack is carried out.[30] The attacker should surely not be able to avoid trial and conviction by pointing out that, unknown to him, those who incited him were police officers; and the officers should face trial for their role in the affair.[31]

So can we say that entrapment should neither bar prosecution, nor be a defence (unless it involves pressure that amounts to duress)? But that does not do justice to the unease we may still feel about the conviction of someone who commits a harmless offence only because he was induced to do so by a police officer. Perhaps, however, we could argue that in such cases (unlike those in which an identifiable victim is harmed) there is no real crime: conduct that is 'induced' by entrapment 'lies outside the purview' of the relevant criminal statute.[32] For there is something spurious about a crime that is induced, and wholly controlled, by the police, for the sole purpose of prosecuting its perpetrator: someone who supplies drugs to an undercover officer who will arrest the seller and destroy the drugs, or who purchases stolen goods from an undercover officer who will retrieve them, does not perpetrate the kind of action against which the criminal law is aimed; to punish him would be to punish him not for what he did, but for the criminal disposition that his action revealed – whereas it is a sound principle of a liberal criminal law that we should be liable to conviction and punishment only for what we do, not for what we are. The defendant's action displayed his criminal proclivities, and no doubt warrants an inference that he would commit such an offence 'for real': luckily for him, however, this commission was not real but imaginary.[33] Entrapment is not a defence, since it does not provide an exculpatory explanation for the commission of a genuine crime; nor is it a bar to trial, since there is still a prima

[30] This example will seem absurd; it is no coincidence that entrapment usually concerns offences that threaten no harm. However, we might think about the roles that undercover officers can find themselves playing in criminal organisations that they infiltrate; and about the use of 'decoys' to catch suspected offenders.

[31] Whether this would involve the state disowning the entrapper's actions, or engaging in self-criticism, will depend on how far the entrapment was officially sanctioned.

[32] *Sorrels v US* 287 US 435 (1932), at 448.

[33] Such cases resemble those 'impossible attempts' in which someone mistakenly believes she is committing an offence (for instance, she mistakenly believes that the goods she is buying are stolen): see R A Duff, *Criminal Attempts* (Oxford: Oxford University Press, 1996), 98–106, 206–19. On the claim that we should be punished only for our criminal actions, see Duff, *op.cit.* n. 16 above, ch. 5.

facie offence for which the perpetrator should have to answer: it is more like a negation of a crucial element of the offence.

Entrapment might not, therefore, provide a close analogue to Ian's dealings with Hilda, in so far as it is still unclear how our doubts about convicting the person who is entrapped into handling stolen goods as part of a sting operation should best be explained.[34] But I turn now to another possible moral (if not legal) bar to trial that is more closely analogous to Ian and Hilda's case.

Theorists and practitioners of criminal justice are often concerned about the possibility of doing penal justice in contexts of serious social injustice. Suppose that the criminal law itself, viewed (as far as this is possible) independently of its social and political context, meets the requirements of justice: it defines as criminal only wrongful kinds of conduct that do properly concern the polity; its procedures structure a process that calls alleged wrongdoers to account, that gives them a real opportunity to answer, and that convicts them only given certain proof of their guilt; the punishments it prescribes are humane and proportionate. Most importantly, the criminal law treats all those subject to it (at least formally) as equals: neither in its content nor in its procedures does it discriminate against any group. However, the society's broader social, political and economic structures involve various kinds of serious, systemic injustice. Certain groups (identified by race, class, or income) suffer serious, unjust disadvantages: they are excluded from many rights and benefits that others enjoy in virtue of their membership of the polity – educational or vocational opportunities, welfare provision, political participation, and so on.[35] It is also (and, of course, non-coincidentally) true that a large proportion of those who appear in the criminal courts belong to these groups; we should surely be worried about the justice of convicting and punishing them for their crimes.

Various explanations are offered for such worries. In extreme cases, one could argue that neither the law nor the polity whose law it is can claim legitimate authority over those who are thus

[34] Our doubts about convicting the entrapped drug seller might be reinforced by doubts about the justifiability of our drug laws.

[35] This is of course empirically implausible: these kinds of social injustice will probably also be reflected in the criminal justice system. But it is worth making this implausible assumption to bring out more clearly the way in which injustices external to the law can undermine the legitimacy of its processes.

disadvantaged – in which case its courts can have no authority to try them. In other cases the unjust conditions from which the crime flowed might constitute a justification for the crime, akin to a necessity defence: this might apply most plausibly to crimes of dishonest acquisition committed by those in serious (and unjustly caused) need. In other cases it might be argued that the law should recognise an excuse (total or partial), on the grounds that such disadvantages made it unreasonably hard to refrain from the crime.[36]

There are contexts in which each of these explanations would be plausible. But there are other contexts, including perhaps our own, in which none of them will be plausible: contexts in which the injustice is not so profound as to undermine the legitimacy of the state and its laws; in which it is not plausible to say that the crimes (often committed against others who are equally disadvantaged) are justified; and in which to argue that those who commit them should be excused would be to deny their responsible agency and the respect that it demands. But we should still be uneasy about their conviction and punishment, and my concern here is to explain that surviving unease.

The explanation I suggest is (unsurprisingly) that even when the injustices suffered by a defendant do not negate the state's authority over him, or ground a justification or excuse for his crime; even when he committed a public wrong for which he should have to answer: those injustices might undermine the polity's standing to call him to answer before a criminal court. But how can that be? Could he argue, for instance, that those injustices left him no acceptable choice but to commit his crimes; or that the polity is responsible for the unjust conditions that he suffers, and is therefore also partly responsible for the crimes to which – as we must know – such conditions give rise?[37] But the first claim is not plausible for many defendants, in the way that claims of justification or excuse are often implausible, while the second claim would involve settling some difficult questions about the scope of responsibility for foreseen effects of one's wrongful conduct. A simpler, more plausible explanation takes us back to another aspect of Hilda's dealings with Ian: that in calling him to

[36] For a useful collection of readings, and further references, see W C Heffernan and J Kleinig, *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford: Oxford University Press, 2000).

[37] Compare respectively Cohen, *op. cit.* n. 2 above; Tadros, *op. cit.* n. 2 above.

account for his wrongs against her, whilst refusing to answer to him for her wrongs against him, she fails to treat him as a fellow member of the normative community – although that shared membership is essential to the legitimacy of her blame.

To put a person on trial is to call him to answer: to answer to a charge, and (if the charge is proved) to answer for his wrongdoing. He must answer to his fellow citizens, to the polity of which he is a member, for a wrong that, as a public wrong, is their collective business. In calling him thus to answer, the court, and the polity in whose name the court acts, address him as a member of that normative community, who is bound and protected by its values. But there is more to being a member of such a community than being answerable to your fellows in its criminal courts. First, to be a member is to have the standing to call other members to account for their public wrongs – as a citizen who takes part in the criminal process,[38] or as an individual responding informally to one's fellows' behaviour. Second, to be a member is to be entitled to appropriate respect and concern from one's fellow citizens both collectively and individually – to, in a liberal polity, equal concern and respect.[39] But that is just what this defendant has not received from his fellow citizens: rather than being included, as an equal participant, in the rights and benefits of citizenship, he has been systematically excluded from significant aspects of them; those who would now call him to account as a fellow citizen have notably failed to treat him as a fellow citizen in their dealings with him outside the criminal law. But citizenship cannot be divided: that failure to treat him as a citizen outside the court cannot be dismissed as irrelevant to the legitimacy of his trial; it would be reasonable for him to argue that the polity that has failed hitherto to treat him as a citizen cannot legitimately or with integrity now insist that he must answer in this court for his wrongdoing. This would not be to deny that he did wrong, or that he should answer for it (at least to its victims). It would rather be to deny the standing of this court to call him to answer to this charge.

That cannot be quite right, however, since to say simply that this court cannot call him to account would be to ignore the

[38] The role of lay citizens in the criminal process, as jurors, magistrates or witnesses, is important here: see S Clark, 'The Courage of Our Convictions' (1999) 97 *Michigan Law Review* 2381; I've also learned from A W Dzur, 'Democracy Inside and Out: The Jury and Public Deliberation' (unpublished).

[39] See R M Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985).

victim's claim that the wrong done to him be recognised and be responded to appropriately: we cannot simply say to the victim of an assault or a theft that we cannot prosecute her attacker, since our failure to treat him as a citizen has undermined our standing to do so (especially if his victim has suffered disadvantages as serious and unjust as those he has suffered). We saw in Hilda's case, however, that her past misdeeds rendered illegitimate, not her calling Ian to account, but her calling him to account *without being ready to answer to him for what she had done*. So could we say something similar in this case: what would be illegitimate would be to try the defendant for his wrongs, *whilst refusing to answer to him for the wrongs that he has suffered (and still suffers) at our collective hands*. For what denies his equal citizenship, in a way that undermines our standing to call him to account, is not the injustice that he has suffered by itself, but that injustice plus our refusal or failure to recognise it, to answer to him for it, and to try to provide some appropriate remedy.[40]

We can say that, but what follows? How could we answer collectively to an offender who has suffered such injustice, whilst still calling him to answer for his crimes? Could the court say that there are other, political fora in which his justified complaint should be pursued, and insist that his trial should deal only with the particular charge against him? If the court could say that truly, the trial might be legitimate: but the exclusionary injustices that the defendant has suffered probably included effective exclusion from the fora in which such charges of social injustice could be pursued. Nor could the court say that it has its job to do within the political system, and that it cannot concern itself with the failings of other parts of the system, or allow those failings to negate its authority. For the court claims to be a court of justice; and the argument is that we cannot separate penal justice from social justice in this way.

If criminal trials in contexts of serious social injustice are to become legitimate, what is needed is the development of fora in which unjustly disadvantaged citizens can pursue their legitimate grievances; but also (especially when those fora do not yet exist)

[40] Are there perhaps some kinds of wrong so serious that they do undermine the wrongdoer's right to call the victim to account for his wrongs, whether or not the wrongdoer is ready to answer for them? Perhaps there are, in both personal and political realms – perhaps wrongs, if such there are, that cannot be forgiven; this is another issue that we cannot discuss here.

provision within the criminal process of a space in which such issues can be addressed: not because this might affect the verdict or sentence (though it might figure in a sentencing discussion), but because only then could the trial claim legitimacy, as a process that calls citizens to answer to their fellows for alleged wrongdoing. I cannot here pursue the question of just how this might be achieved; but I hope to have said enough to show that it is a question that must be addressed by anyone who takes seriously the legitimacy of the criminal process, and who recognises the unjust disadvantages that so many defendants in our courts have suffered.

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