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How Can the Ethic of Care Help Us to Understand, Define and Express the Limits of State Criminal Punishment?

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Abstract

This chapter forms part of the author's wider work-in-progress, conceptualising state criminal punishment. There are moral obligations limiting how we may treat criminal offenders when we punish them as a part of our collective, state-delivered, community response to criminal offending, if we accept that: human beings have a fundamentally equal status or moral worth grounded in their human dignity, and as such ought to be treated as equals in Dworkin's terms; and that criminal offenders do not cease to be human beings. Building on Benhabib's argument that human dignity is grounded in the differences that make us individuals (our personal perspective contexts and situations, or narratives), attending to offenders' narratives offers one way of acknowledging their status as equals whose personal perspectives matter, in criminal justice processes. Given the importance of contextual and narrative detail for the moral reasoning approach of the ethic of care, this suggests care as a strong candidate for developing normative guidelines for the processes of sentencing and application of punishment, which also meets this moral obligation. The author argues that the care perspective can provide us with what we normally expect from a theory of punishment (censuring and condemning criminal wrongs, and attempting to minimize future harms) in addition to being better able to provide guidelines and guiding values that appropriately respect the equal status of offenders as human beings.

Key Words: Punishment theory, limiting punishment, moral obligations, care ethics, sentencing guidelines.

1. Introduction

What are the normative limits of criminal punishment? How may we treat criminal offenders, in response to their offending? To answer this question, I begin with a broader set of agents, of whom criminal offenders are a subset, and consider the limits this implies for the treatment of offenders. Offenders are human beings. Not all human beings are held criminally responsible (minors, the mentally incapacitated), but all those held criminally responsible are human beings. There are moral limits on the treatment of human beings. Since offenders do not cease to be human beings, we are obliged to treat them in accordance with these moral limits. This does not mean that we may not treat them differently as a response to their offending behaviour, but this different treatment must be within the limits of morally appropriate treatment for human beings.

Although we must remember that the criminal law applies equally to citizens and non-citizens it is important to remember that many offenders are fellow citizens. As Duff observes, it is important that fellow citizen offenders are part of our community, are one of 'us,' to be treated with the concern and respect due both as human persons and as members of the community.¹ Duff argues the appropriate community of concern is the political community of citizens, not the moral community of human persons, since we may be more likely to be motivated by this stronger shared community than the community of fellow humans. Further, the civic community is particularly appropriate, since it is the state which enforces criminal law and to which we are responsible for adhering to the criminal law.² Yet, citizens are still human beings, and appropriate treatment for citizen offenders will still be limited by appropriate treatment for human persons. My claims are about the limits of the form of punishment, not the locus of our responsibility.

2. Moral Limits

Dworkin distinguishes between 'equal treatment' or an equal distribution, and a person's 'right to treatment as an equal...to be treated with the same respect and concern as anyone else.'³ Dworkin shows equal concern and respect requires us to

take account of relevant differences in personal circumstances: if there is one dose of life-saving drug and two sick children, one at death's door and one merely uncomfortable, we should treat the dying child. Dworkin explains flipping a coin (equal treatment) is inappropriate since this fails to provide equal concern and respect. This treatment misses something fundamental about the status of the children as human persons: their dignity. On the other hand, taking account of these relevant substantive differences (one child is uncomfortable, the other gravely ill) allows us to provide equal concern and respect. Dworkin argues that equal treatment can be derived from treatment as an equal, other things being equal. In order to know what treatment as equals requires, we need to know contextual details about the parties and the situation. Since the children have an equal right to life, we treat them as equals by medicating the child in mortal danger although (and because) we provide different treatment.

Contextual information helps us to identify alike and different situations (this child is sick, that child is dying). Seeking this in narrative form can help us provide appropriate treatment for equal human moral agents. Let me explain how. Benhabib argues that to understand which situations and persons are alike, we need to explore how we are concretely different, viewing 'each and every rational being as an individual with a concrete history, identity, and affective-emotional constitution.'⁴ Only when we take this a contextual perspective can we properly identify which details matter and how cases are alike, and begin to consider whether equal or different treatment meets the requirement to treat others as equals, with the same concern and respect.

Benhabib argues for understanding others as concrete, rather than abstracted and generalised. Attending to the concrete differences between us identifies us as separate individuals, whereas generalised conceptions of others abstracts the contextual detail of our lives and makes it difficult to distinguish between concrete persons.

Hence, Benhabib identifies our dignity as grounded in our substantive differences rather than our generalizable similarities, arguing that my identity and moral dignity lies in how I as a

finite, concrete, embodied individual shape and fashion the circumstances of my birth and family, linguistic, cultural and gender identity into a coherent narrative that stands as my life's story.⁵

One way of accessing contextual details is to listen to another's narrative around the issue in question. This provides a current 'snapshot' of the circumstances, people, beliefs and other details of her life, which she herself deems influential in shaping her life's course and describing her present situation. Seeking narrative information from the other and listening respectfully allows us to understand her context and in what respects this is 'like' some other position. This also provides space for the acknowledgement of her moral dignity as an equal human being and appropriate respect through recognising her concrete individuality.⁶ This has instrumental benefits since this can help to inform sentencing decision-making and facilitate more nuanced responses to offending; as well as the intrinsic benefit of allowing us to treat offenders as real concrete others, thus respecting their equal moral dignity.

3. Introducing the Ethic of Care Approach

The perspective of care is informed by some underlying expectations of human beings. Firstly, given our equally fragile bodies and minds we are, to an unpredictable and variable extent, vulnerable to misadventures which give rise to needs. Following from our vulnerability, we are interdependent on and with others. We rely on others at some point in our lives for help meeting our basic needs, as they rely on us. Secondly, as social beings we prefer to be in relationships with others. Relationships are intrinsically important to human persons, and provide access to many goods we value such as friendship, which we cannot achieve without the help of others. The care perspective values these relationships, and recognises and values the work done both to maintain relationships, and to support needs-meeting within relationships. Relationships can sometimes imply responsibilities to help meet needs. For Held, the care perspective approach is defined by the recognition of interdependent, needs-meeting, caring relationships as of primary value, and the social and relational practices of maintaining these relationships.⁷ Because relationships (across and between many individuals) are

important, we take a holistic approach. Because meeting needs (which vary according to the contextual situation and narrative of individuals) is important, our holistic reasoning must be informed by diligent gathering of as much contextual information as possible. The perspective of care however does not expect perfect needs-meeting or relationship building, since concrete contexts may include restricted resources, conflicting needs and mistakes.

When Gilligan identified the 'different voice' of care perspective reasoning, scholars worked to draw out differences with the western 'standard' mode of moral reasoning, termed 'justice'⁸ following Kohlberg, to illuminate the newly recognised perspective. These differences can be envisaged as three characteristics of care: as an attitude, a practice and as ethical values. The attitude represents the concern for the physical and emotional well-being of the care-recipient, which provides strong (usually primary) grounds for the care-giver's action. An openness to and responsive engagement with the care-recipient informs our caring, and without this contextual information from the care-receiver our ability to provide appropriate care is reduced.⁹ The practice requires awareness of the needs of those around us, taking steps to arrange for care, practical care delivery, and the response of the care-receiver as their needs are slowly met.¹⁰ The values of care are an attentiveness to the needs of those around us (informing our practice), taking or sharing responsibility for the meeting of needs, providing competent practical care (making best-efforts in good-faith to provide the best-available care), and responsiveness to the care-receivers changing needs and preferences (engaging with our practice).¹¹ Following from the 'competence' element, Tronto stresses the importance of the integrity of care or 'taken together-ness' of these symbiotic characteristics.¹² We cannot pick and choose among these characteristics: for care that counts as 'good,' we must include them all. This help us understand how the approach taken by care differs from that of 'justice,' or the 'universalist/imperialist'¹³ viewpoint most western students are taught to apply in moral reasoning. This somewhat artificial division of the care perspective can aid our understanding of these differences.

Care also provides a different approach to moral reasoning to that of justice. As a situated ethic, care depends on gathering and considering contextual information,

which as we saw in the first section is important for allowing space for recognizing and respecting individual dignity. But the 'justice' perspective, presuming an independent and rational individual, theorises interactions between persons differently. Justice perspective reasoning begins with 'blank spaces', indicating particular social roles in the abstract, and calculates what rights and duties parties filling these 'blanks' would have in hypothetical conditions, and bases actionguiding rules for the real world on our assumptions about the blank spaces.

Whoever is later slotted into the 'blank' acquires the associated rights and duties. The focus is not so much on the concrete individual filling those roles, but the 'blank spaces' themselves. The care perspective by contrast begins by examining the relationship between the particular parties involved, and their relationships with others around them. Before we can decide what response we ought to make in a particular situation, we need to know about the spread of needs and needs-meeting resources, and the particular contextual, narratively understood situation of the parties. While the justice perspective permits us to inquire after, consider and include contextual detail, the care perspective makes this compulsory.

4. Trial and Punishment

Mainstream criminal justice processes recognise offenders' narrative, contextual information as valuable for informing sentencing. Flexible community orders exist in England and Wales precisely to allow sentencers to tailor punishments to the individual offender's situation. Pre-sentence reports, prepared by Probation (or Youth Justice) workers, provide sentencers with risk assessment and some contextual information. Pre-sentence reports were to 'focus on the circumstances and reasons for the current offence.'¹⁴ But although Pre-sentence reports once provided detailed social background information about an offender, this is no longer the case.¹⁵ Pre-sentence reports are increasingly 'dominated by standardised forms and actuarial risk assessments' of criminogenic risk factors, rather than 'discursive or narrative accounts of individuals' lives.'¹⁶

These reports deny offenders the opportunity of telling their own stories. The nuances of the offender's denied narration may be lost, along with the detail's maximum value. Because the offender is no longer called upon to speak, she can

neither narrate her own story nor explain the impact of misunderstandings. This becomes a recognisable harm since

[she] is excluded from the speech community. For the wrong is the harm to which [she] cannot testify, since [s]he cannot be heard. And this is precisely the case of those to whom the right to speak to others is refused.¹⁷

The nuances of a person's own narration of their story help us to understand the information as they do themselves. This is why it is practically important, for the purposes of tailored sentencing, to explore contextual information about offenders through their narrative. Recognising her unique perspective, also acknowledges her concrete identity.

5. Punishing with Care

How can the care perspective help us understand, define and express the limits of punishment? Firstly, this helps to bring punishment within the moral limits of treatment appropriate for human beings: the care perspective's concern for an understanding of individual contextual detail makes possible the recognition and respect of individual offenders. Greater concern to obtain, understand and respond to contextual information will improve sentencer's ability to tailor sentences to the offender's needs. Due to the holistic approach of care, this contextual concern for needs-meeting and appropriate respect will also apply to victims, however this is outside the scope of this paper since our focus is punishment.

We saw above how care particularly values both relationships and the work necessary to maintain and build relationships. Criminal offending causes harms, to victims, the wider community, and offenders themselves. This could be understood in the sense that victims are exposed to new needs (replacing necessary items that have been stolen), or that existing needs are worsened (an already frail person may be further weakened following a physical attack). Harms damage relationships and give rise to needs. Since this is contradictory to the aims of care, care perspective principles of punishment will disapprove criminal conduct and seek to deter criminal behaviours. This we expect from any theory of punishment. All I aim to show here is that care can provide this basic minimum. Disapproval may not be quite the same as condemnation, understood in the sense that blame attaches to the

offender responsible. Whilst care will have no problem holding offenders legally responsible for harmful acts, permanent stigmatisation may be an unhelpful way to meet the needs of the offender and others. If we are interested in deterrence, encouraging and supporting offenders to move away from offending behaviour in future may better further this end. This however will be context dependent, and blame may be appropriate in some cases.

Following from this deterrence of criminal acts due to the harm they cause, principles of punishment drawn from the care perspective will aim to avoid causing further harms, whatever else we do. This means we must consciously avoid infantilising and excluding both offenders and victims. Meeting the needs of victims is not necessarily something we can hope to achieve through punishment of offenders, yet we might expect sentencers to be aware of the kinds of things that might be done to meet the needs of and repair harms experienced by victims of crime, and consciously avoid frustrating these civil or community attempts to meet victim's needs in their sentencing. I mentioned above that care does not expect perfect practice since sometimes the needs of separate parties will conflict. When this happens, we must prioritise our needs meeting, while also recognising where we fall short of meeting needs. While it is not necessarily the case that victims and offenders are completely different sorts of people with necessarily conflicting needs, we can expect that sometimes the needs of offenders and victims will conflict.¹⁸ In this case, it is a relevant part of the contextual information that the offender is legally responsible for causing a criminal harm, whereas the victim is not, and may often give us reason to prioritize the needs meeting of victims.

Finally, we would expect punishment principles drawn from care to be concerned with the meeting of needs and building of relationships. This requires that we take seriously the narratives of offenders and victims to respect them as equal human persons, although we treat them differently. Depending on the circumstances and the wishes of the victim and offender, restorative approaches aimed at building relationships may be appropriate. Because, following the underlying characteristics of care, we value the equal status of persons, and the meeting of needs in order to both empower individuals and to strengthen relationships, we should consider what support we might be able to provide

through our punishment responses to help to meet offender's needs. This is not to say that punishment is the same as care, but rather than there is no reason not to include care in our response to the offender. Following the principle of deterrence, we might seek to help offenders meet their needs if this supports the offender in moving away from crime. The sentencing model of desistance holds that refraining from re-offending is a process following an offender's decision rather than externally stimulated by punishment responses. This requires the engagement of her friends and family, community and the state.¹⁹ The contextual, holistic and engaged approach to reasoning of care is once again particularly appropriate here.

How can the care perspective help us understand, define and express the limits of punishment? At this early stage in my work, I have begun to outline above how care may allow us to understand and limit punishment responses to treatment morally appropriate for human beings, which current punishment practices inhibit. This is defined with reference to essential contextual and narrative details understood holistically, and expressed through deterrence, a concern to avoid causing further harms, and to meet needs associated with offending for both offender and victims. This is to recognise and treat offenders as members of the moral community of human beings, which does not preclude us from recognising them as members of political communities to which they are held responsible and accountable.

Notes

¹ R. A. Duff, *Punishment, Communication, and Community*, *Studies in Crime and Public Policy* (Oxford: Oxford University Press, 2001), 90 and 113; R. A. Duff and S. E. Marshall, 'Communicative Punishment and the Role of the Victim', *Criminal Justice Ethics* 23 (2004): 40; R. A. Duff, *Answering for Crime Responsibility and Liability in Criminal Law* (Oxford: Hart Pub., 2007), 191-193.

² Duff, *Punishment, Communication, and Community*, 70; Duff, *Answering for Crime Responsibility and Liability in Criminal Law*, 46-51.

³ Ronald Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co., 2005), 227, original emphasis.

⁴ Seyla Benhabib, 'The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory', *Praxis International* 5, No. 4 (1986):

411.

⁵ Ibid., 414.

⁶ Ibid., 416.

⁷ Virginia Held, *The Ethics of Care: Personal, Political, and Global* (Oxford and New York: Oxford University Press, 2006), 19-20.

⁸ L. Kohlberg, 'Stage and Sequence: The Cognitive-Developmental Approach to Socialization', Chicago, IL (1969).

⁹ Eva Feder Kittay, 'When Caring Is Just and Justice Is Caring', in *The Subject of Care: Feminist Perspectives on Dependency*, eds. Eva Feder Kittay and Ellen K Feder, *Feminist Constructions* (Lanham, Md.: Littlefield Publishers, 2002), 259.

¹⁰ Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993), 106-108.

¹¹ Ibid., 127-137.

¹² Ibid., 136.

¹³ Margaret Urban Walker, 'Moral Understandings: Alternative "Epistemology" for a Feminist Ethic', in *Justice and Care: Essential Readings in Feminist Ethics*, ed. Virginia Held (Boulder, CO: Westview Press, 1995), 143.

¹⁴ Fergus McNeill, Peter Raynor and Chris Trotter, eds., *Offender Supervision: New Directions in Theory, Research and Practice* (Paperback) - Routledge (Oxon: Willan Publishing, 2010), 475,
<http://www.routledge.com/books/details/9781843929352/>.

¹⁵ Barbara Hudson, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory, Crime and Justice* (Buckingham: Open University Press, 1996), 156.

¹⁶ Stewart Field, 'State, Citizen, and Character in French Criminal Process', *Journal of Law and Society* 33, No. 4 (December 1, 2006): 573.

¹⁷ Jean-Francois Lyotard, 'The Other's Rights', in *On Human Rights: The Oxford Amnesty Lectures 1993*, eds. Stephen Shute and Susan Hurley (New York, NY: Basic Books, 1993), 144, emphasis added.

¹⁸ Lawrence W Sherman and Heather Strang, *Restorative Justice the Evidence* (London: Smith Institute, 2007), 12.

¹⁹ Fergus McNeill et al., *How and Why People Stop Offending: Discovering Desistance, Discovering Desistance*, Funded by the Economic & Social Research Council (Glasgow: Institute for Research and Innovation in Social Services, 2012),

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Bibliography

Benhabib, Seyla. 'The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory'. *Praxis International* 5, No. 4 (1986): 402–424.

Duff, R. A. *Punishment, Communication, and Community*. *Studies in Crime and Public Policy*. Oxford: Oxford University Press, 2001.

———. *Answering for Crime Responsibility and Liability in Criminal Law*. Oxford: Hart Pub. 2007.

Duff, R. A., and S. E. Marshall. 'Communicative Punishment and the Role of the Victim'. *Criminal Justice Ethics* 23 (2004): 39.

Dworkin, Ronald. *Taking Rights Seriously*. London: Gerald Duckworth & Co., 2005.

Field, Stewart. 'State, Citizen, and Character in French Criminal Process'. *Journal of Law and Society* 33, No. 4 (December 1, 2006): 522–546.

Held, Virginia. *The Ethics of Care: Personal, Political, and Global*. Oxford and New York: Oxford University Press, 2006.

Hudson, Barbara. *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory*. *Crime and Justice*. Buckingham: Open University Press, 1996.

Kittay, Eva Feder. 'When Caring Is Just and Justice Is Caring'. In *The Subject of Care: Feminist Perspectives on Dependency*, edited by Eva Feder Kittay, and Ellen K. Feder, 257–276. *Feminist Constructions*. Lanham, Md.: Littlefield Publishers, 2002.

Kohlberg, L. 'Stage and Sequence: The Cognitive-developmental Approach to Socialization'. Chicago, IL (1969).

Lyotard, Jean-Francois. 'The Other's Rights'. In *On Human Rights: The Oxford Amnesty Lectures 1993*, edited by Stephen Shute, and Susan Hurley, 135–148. New York, NY: Basic Books, 1993.

McNeill, Fergus, Stephen Farrall, Claire Lightowler, and Shadd Maruna. *How and Why People Stop Offending: Discovering Desistance*. *Discovering Desistance*, Funded by the Economic & Social Research Council. Glasgow: Institute for Research and Innovation in Social Services, 2012.

McNeill, Fergus, Peter Raynor, and Chris Trotter, eds. *Offender Supervision: New*

Directions in Theory, Research and Practice (Paperback) - Routledge. Oxon:
Willan Publishing, 2010.

<http://www.routledge.com/books/details/9781843929352/>.

Sherman, Lawrence W, and Heather Strang. Restorative Justice the Evidence.
London: Smith Institute, 2007.

Tronto, Joan C. Moral Boundaries: A Political Argument for an Ethic of Care.
New York: Routledge, 1993.

Walker, Margaret Urban. 'Moral Understandings: Alternative "Epistemology" for
a Feminist Ethic'. In Justice and Care: Essential Readings in Feminist Ethics,
edited by Virginia Held, 139–152. Boulder, CO: Westview Press, 1995.

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