

Hating Criminals

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The eminent English judge and jurist Sir James Fitzjames Stephen once famously said that it was desirable that criminals should be hated, and that the punishments inflicted on them should be contrived so as to give expression to that hatred, and to justify it in so far as the public provision of means for expressing and gratifying a “healthy natural sentiment” could justify and encourage it. But what is involved in this sentiment and to what extent is Stephen justified in trying to encourage it?

The essence of Stephen’s argument is that the purpose of the criminal law is not merely to deter criminals, but also to give what he calls a “definite expression and a solemn ratification and justification” to the hatred which is excited by the commission of the offence. Thus for Stephen punishment serves an important expressive function, providing a legitimate outlet for hatred and other vindictive feelings entertained towards the offender by victims and by members of the public at large. Indeed, he goes on to say that the criminal justice system stands to such feelings in the same relation as marriage to sexual passion. But what are these feelings and what are the emotions involved in them?

According to Lacey (1988), one of the most important functions of state punishment is to provide a way of appeasing and satisfying the “grievance-desires” of victims, so as to forestall self-help and to demonstrate that the community takes seriously the harm done. In the same way, Simon (2010) talks of “penal heat”, and O’Hear (2011) speaks of the “retributive urge” (though such sentiments are not necessarily retributive in the strict sense). They are the sentiments to which the phenomenon of “populist punitiveness” as described by Bottoms (1995), is designed as a response. But are there perhaps other and better responses that could be made?

One way of exploring this question is to analyse precisely what emotions are involved in the hatred of criminals. According to Ben-Ze’ev (2000), the essence of hatred is a “global negative attitude towards an individual towards a person or class considered possessing fundamentally evil traits”, which clearly encompasses sentiments of the kind discussed by Stephen. However, there are clearly other emotions involved as well. One is anger, described by Oatley, Kelner and Jenkins (2006) in terms of a response to a “demeaning offence” against the subject in question. Another is fear, identified by Darwin (1872) as a response to being hunted, (hence perhaps the references in the media to offenders as “predators”). Another possible element in the mix is the emotion of resentment, identified by Stets and Turner (2005) as the emotion that arises when one person perceives that another “gains power or prestige that is not deserved or that violates the cultural rules of justice”. “We” are not allowed to get away with such conduct, so why should “they”?

The existence of these emotions cannot be denied; they can be demonstrated by media analysis, by scientific experiments such as those of Darley (2010), and not least by introspection. But how should the law respond to them? If the penal process is to have legitimacy in the eyes of the public, it must as Lacey says (1988) go some way towards satisfying the grievance desires of victims and indeed of others. On the other hand, there are clearly dangers in allowing emotions of this sort to influence the penal process; as Wallace points out (1995), this may lead to punishments that are disproportionate, unfocussed, and based on ignorance of many of the facts. Stephen may have been right in saying that the criminal law stands to the passion of revenge in much the

same relation as marriage to the sexual appetite, but it cannot be right for politicians or the courts to indulge in penal promiscuity.

One possible way out of this dilemma is follow Duff (2005) in his analysis of punishment in terms of “censure” and “penance”. For punishment to be effective in these terms, the offender must be made to face up to the reality of what he or she has done, which inevitably involves a strong element of denunciation. Here the sentiments identified by Stephen clearly have an important part to play. This need not necessarily lead to a punishment that is severe in itself; what is necessary is that it communicates abhorrence of the conduct in question. Here the insights of Garapon (1997), van Hoeke (2002) and others have a lot to teach us; in the words of the old song, it’s not what you do, it’s the way that you do it—that what gets results.

However, as Duff goes on to say, the process must then allow for repentance, reform and reconciliation. It is here that the sentiments identified by Stephen can be a hindrance; hating criminals implies exclusion rather than reconciliation. Rather, the offender must be seen as a moral agent, and as a member of the community who has done wrong but can be offered the chance of reintegration. Changing attitudes in this area is by no means easy, but Braithwaite (1989) and others have demonstrated the effectiveness of restorative justice in assuaging the anger of victims and in promoting the reintegration of offenders into the community. And studies by Hough (2005) and others have shown that greater information about crime and the criminal justice system can lead to a decrease in punitive sentiments even on the part of members of the wider public.

As Stephen says, the hatred of criminals is a natural sentiment, and it would be naive to suppose that it could ever be eliminated. He may also be right in saying that punishments should be contrived, at least in part, so as to give expression to that hatred, or at least to hatred of the conduct involved. But this is only half the story. Psychological studies by Kennedy-Moore and Watson (1999) have suggested that the expression of negative emotions has no therapeutic value in itself, and that it is only worthwhile if it leads to constructive action. Could the same not be said of the hatred of criminals?

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