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A Truly Serious Offence? Modern Law and the Problem of 'Seriousness'

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The Gravity of Seriousness

What makes one crime worse than another, and why? This is not a purely academic question. In fact, it is at the heart of current criminal justice policy. 'Seriousness of offence' is the primary ground, in practice, for determining who is sent to prison¹. Defining 'seriousness' thus has huge implications because imprisonment is the worst thing that the State is legally allowed to do to another human being. Other reasons for sending people to prison lie close at hand (eg 'deterrence', 'rehabilitation' and 'risk to the public'). But since 1992 (when the Act came into force), the primary ground has been that of 'seriousness'. On average about 1750 people a week are committed to prison², usually because it is thought that their offence is so *serious* that only prison will do.

Underlying Values

'Seriousness of offence' is an intriguing justification for a postmodern legal culture. This is because 'seriousness' demands, by definition, that we say that one thing is 'worse' than another. In a great many cases, one might think, this is not hard to do. We can all agree that murder is 'worse' than stealing a library book (especially if the murder is in cold blood and the stolen book is not one of Shakespeare's first Folios). But there are a great many cases where our moral compass hovers rather uncertainly between 'life' and 'property'. Which is worse: pouring paint over someone's car or killing a suspected burglar in your home? In America, where surveys of crime seriousness influence the scaling of punishment, respondents averred that 'pouring paint' was more serious³. Another American survey (in fact, the largest of its kind ever conducted) found that 'robbing a victim of \$1,000 at gunpoint' was equal to 'walking into a public museum and stealing a painting worth \$1,000'⁴. After all, the same amount of money is involved.

Such responses indicate that a society's views of seriousness are ultimately shaped by its underlying values. If a society's underlying values are chiefly material, then there is no difference between 'robbery at gunpoint' and 'art theft'. But if society asserts the primacy of human life, the evaluation would be very different. It is because perceptions of seriousness reflect differing worldviews that seriousness is an 'essentially contested concept'. 'Seriousness of offence' tells us what society sees as most threatening to its survival, and what penalties are appropriate for offending. To this extent, 'seriousness' holds up a mirror to the criminal justice process. It challenges the law to identify its underlying values.

Identifying these values is a bitterly contested struggle. The Sexual Offences Amendment Act (which lowers the age of consent for anal intercourse to 16) and the current Home Office *Review of Sex Offences* are topical examples. 'Seriousness of offence' is thus a touchstone. But who, in this morally febrile climate, determines seriousness?

Modern Law

According to the Court of Appeal in *Baverstock* ([1993] 14 Cr. App. R. (S.), 477) and *Cox* ([1993] 14 Cr. App. R. (S.), 481) 'seriousness of offence' referred to "the kind of offence which when committed... would make all right thinking members of the public, knowing all the facts, feel that justice had not been done by the passing of any sentence other than a custodial one." But as Andrew Ashworth rightly observed in his Eve Saville Memorial Lecture: "Who are these people, if not the judges and magistrates themselves?"⁵ Judges and magistrates can effectively keep the content of the test to themselves⁶. Instead of treating 'seriousness' as a normative question that should be answered systematically⁷, the Court of Appeal turns it into a virtually unreviewable discretion. We have no way of knowing whether the Act is being correctly applied. It is simply an exercise in judicial discretion that is either simply unreviewable, or which can only be reviewed on an unprincipled basis⁸.

So how may we progress towards firmer criteria in sentencing? One approach might be to draw on the tradition of justice represented by Biblical law which, thanks to the influence of Christianity, has had a significant influence on the English criminal justice system⁹. Biblical law itself has a strong conception of 'seriousness.' For whilst it is true that 'sin is sin is sin,' the punishment for sin varies. In addition, Biblical law draws attention to relative rank, significance and primacy in its individual commandments. Recognising this, the later Rabbinic distinction between 'light' and 'heavy' commands gave rise to a whole exegetical tradition that distinguished between lighter and weightier, smaller and greater commandments. The problem of 'seriousness' demonstrates precisely what the prophets¹⁰ and Jesus taught¹¹; namely there are priorities to be observed in responding to God's law.

Aspects of 'Seriousness' in Biblical Law

Space precludes a fuller survey of 'seriousness of offence' in Biblical law, but to give at least a flavour of the ideas and the points at which it converges with modern law, we will make a few brief comments on some selected aspects.

First, one of the many dimensions in Biblical law that make one crime worse than another is the social status of the offender. In *Leviticus 4*, the sin of the high priest (a 'sacred' leader) is more serious than that of the chieftain (a 'secular' leader), which in turn is more serious than that of a commoner. Similarly, a sexual offence committed by a

betrothed woman was more serious than that committed by an unbetrothed woman (cf. *Deut.* 22:20-21, 23-24 with *Ex.* 22:16-17). Finally, in a vision of the prophet Ezekiel, it is indicated that the idolaters who are slaughtered at the entrance of the Temple in Jerusalem belong to a social and a spiritual élite (the 'elders of the house of Israel'; *Ezek.* 8:11,12) "For the time has come for judgement to begin with the household of God..." (1 Pet. 4:17; cf *Lk.* 12:47f.)

Communicating Wrong

Second, Biblical law has many different ways of punishing people. These include: capital punishment; corporal punishment; social exclusion; reparation; restitution, not to mention a wide variety of shaming ceremonies and sacrificial rituals. This means that 'seriousness of offence' is expressed in a wide variety of ways. It has 'semiotic valence', in other words, the form of the punishment conveys powerful messages to the person on the receiving end of the punishment, as well as to the wider audience who either see it or hear about it. This broad range of 'serious' and 'less serious' punishments meant there was ample room to 'match' the seriousness of the punishment to the seriousness of offence with considerable finesse. Something quite specific was expressed by the choice of a particular penalty for a given offence. In modern law, by contrast, 'type of punishment' is not a very nuanced 'register' of seriousness, granted our extreme dependence on imprisonment as a form of punishment. Of course, whilst fine defaulting and mass murder are both dealt with by means of custody, we register the difference in terms of the length of imprisonment. But this is not a salient register for most lay people, or even for many judges¹². The need to develop other registers is increasingly recognised by penal philosophers¹³. Reflection on the different forms of punishment in Biblical law and what they communicate about the seriousness of the offence may assist the contemporary search for alternatives to custody. In addition, the use of different jurisdictions in Biblical law (eg parents, elders, judges, the King) to communicate different senses of seriousness suggests that there is room for greater diversity of authority in modern law. We should not assume that the State is always the most appropriate agent for punishment. The criminal justice system, it can be argued, has too wide a spectrum of behaviour to deal with. This is a limiting factor in semiotic terms. If the same system deals with trivial matters that are not regarded as morally very bad, this will affect how seriously we regard its treatment of the non-trivial.

Biblical law also employs a wide range of descriptive registers. These include: characterising certain offences as “abominations” (eg *Lev.* 18:26) or “wickedness” (eg *Lev.* 18:17; *Deut.* 12:29); the use of ‘public-example’ formulae (eg *Deut.* 21:21); statements as to the purpose of the sanction (eg *Deut.* 21:21); and some indication as to whether it is a repeat offence (*Deut.* 21:18-21; 25:8f; *Lev.* 21:9). The range of descriptive registers well illustrates the Biblical practice of communicating the seriousness of the offence to as wide an audience as possible, in as many different ways as possible. By contrast, modern law assumes that statutes are written for legal specialists and not for the general public. This limits the communication of legal values. Unlike Biblical law, there is not the same expectation that legal values will have an impact on the general public. Ways should be found to maximise the communication of legal values in modern society (eg through the ‘two-document’ solution; in which one statute is written for lawyers and another is written for the general public).

Third, the impact of a crime in Biblical law is felt more widely than just its immediate victims. All offences are regarded as crimes against YHWH, not just those that appear to be directed primarily against Him (such as idolatry and blasphemy). Offences are also regarded as serious if they pose a threat to the wider community (eg Achan’s in *Josh* 7); pollute the Land (*Num.* 35:33); affect arrangements for its division (*Deut.* 25:5-10); or its inheritance (*1 Kings* 21). By contrast, modern ‘seriousness’ studies emphasise the effect of the crime upon the victim, to the extent that ‘victimless’ crimes (eg narcotics, drunkenness) are not considered serious¹⁴. Indeed, some offences that warranted the death penalty in Biblical law (eg false worship, dishonouring parents and promiscuity) would today be regarded as ‘victimless’ crimes.

‘Harm’ and ‘wrong’

Fourth, ‘seriousness of offence’ is usually seen as comprising two main dimensions: factual ‘harmfulness’ and normative ‘wrongfulness’. Some offences are seen as ‘more wrong than harmful’ (eg stealing a bicycle from a drive) whilst others are perceived as ‘more harmful than wrong’ (eg a teenager hitting an old woman in the street). In Biblical law, however, seriousness of offence is primarily defined in terms of ‘wrongfulness’ rather than ‘harmfulness’. The use of descriptive registers for what would nowadays be regarded as ‘victimless’ crimes (eg “wanton folly” for promiscuity in *Deut.* 22:13-21) indicates

the Biblical tendency to express normative, as opposed to purely factual, judgements. For example, the vision of Ezekiel expresses the horror of idolatry in terms of its wrongfulness rather than its harmfulness (indeed, the account of the destruction of Jerusalem, for example, is remarkably restrained and takes place ‘out of vision’ (*Ezek.* 9:7-11)). Whilst normative and factual judgements cannot be wholly separated in the Bible (not least given the strong Wisdom belief that all sin has harmful consequences), nonetheless the defining feature of seriousness in Biblical law is its ‘wrongfulness’ rather than ‘harmfulness’. By contrast, the results of modern seriousness studies suggests that ‘wrong’ is defined in terms of ‘harm’. Therefore, if an offence does not appear to result in measurable harm, it is not regarded as being ‘wrong’ or ‘serious’. (Whilst Biblical law rates the ‘seriousness’ of rebelling against parents very highly, modern seriousness studies rate the ‘repeated refusal to obey parents’ 128th out of 140 possible offences¹⁵).

Stigma and Character

Fifth, ‘seriousness’ appears to be related to some inherent quality or ontology of the individual in Biblical law. Legal charges and punishments in the Bible frequently stigmatise the offender’s character (eg the accusations in *Deut.* 21:18-21 of being ‘stubborn and rebellious’ and ‘a glutton and a drunkard’). The offender is not merely punished for what he has done, but for who he is. In *Deut.* 25:5-10, the offender is punished by a change of name which signifies the degeneration of his character. By contrast, in modern law, only the deed is criminalised and character is only a matter of mitigation¹⁶. Under s.66(6) of the Criminal Justice Act 1993 judges are allowed to take an offender’s previous offending history into account in determining seriousness. This may or may not be similar to the charge on which he is convicted. However, the language of s.66(6) is, conceptually at least, ‘act-oriented’ rather than ‘person-oriented’. The interest is in his previous record, not his character as such, although some penal philosophers and criminologists have recently argued that ‘character’ should play an increased role in modern criminal law¹⁷.

Moral Vacuum and Political Pressure

Why does it matter whether ‘seriousness of offence’ is couched in a moral framework or not? Why not let it be a purely pragmatic exercise, to be applied by judges as they see fit? The reason is that any attempt to define ‘seriousness’ without reference to morality leaves the question of who is

sent to prison extremely vulnerable to political pressure and even to the pressure of public opinion. In recent years, we have seen how political statements to the effect that 'prison works' have redefined the meaning of 'seriousness'. The result is that 'seriousness' has quickly become equated with how many people the Prison Service can (or ought) to hold.

This is ironic because the idea behind putting seriousness at the heart of the criminal justice process was to reduce the prison population. That was the stated policy behind the CJA 1991. Before the CJA was implemented in 1992, the prison population stood at 45,800. Now it stands at 63,450 (as of 29 January 2000)¹⁹; an increase of nearly 40%.

The Need for Transcendent Values

Is this increase the result of more people committing 'serious' crimes? In fact, the number of convictions for indictable offences has actually *fallen* during this period. What has happened is that judges and magistrates are sending more people to prison for crimes that would not have attracted a prison sentence ten years ago. Is this because our judges have acquired a new sensitivity to crime and repented of their earlier leniency? I doubt it. More likely, it is a reaction to the 1993 'law and order counter-reformation'. Judges, it would seem, are sending more people to prison for less serious offences rather than risk pillory for handing down what might be seen as a 'soft' sentence. If so, then the size of the prison population has become a question of political choice - not of justice, nor of 'seriousness'. For this reason, modern law and the problem of 'seriousness' underlines the need for transcendent values in the sentencing process. Take them away and all that is left is a programme of social exclusion and social engineering. That truly is a serious offence.

REFERENCES

- ¹ According to s. 1(2)(a) of the Criminal Justice Act (CJA) 1991.
- ² Annual Prison Statistics for England and Wales.
- ³ Cullen, Francis T. *et al.* 1982. 'The Seriousness of Crime Revisited.' *Criminology* 20; 91.
- ⁴ Hoffman, Peter B. and Patricia L. Hardyman. 1986. 'Crime seriousness scales: public perception and feedback to criminal justice policymakers.' *Journal of Criminal Justice* 14; 422.
- ⁵ Ashworth, Andrew. 1997. 'Sentencing in the 80's and 90's: The Struggle for Power.' Eighth Eve Saville Memorial Lecture, 21 May 1997. London: Institute for the Study and Treatment of Delinquency.
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- ⁷ Ashworth, A and A von Hirsch. 1997. 'Recognising elephants: the problem of the custody threshold.' *Criminal Law Review*, 189.
- ⁸ *Ibid.*, 196.
- ⁹ See, for example, Seaborne D. Davies. 1954. *The Bible in English Law*. London: Jewish Historical Society of England.
- ¹⁰ *Micah* 6:6-8; *Amos* 5:21-24; *Hosea* 6:6; *Isaiah* 1:11-17; 43:22-24; *Psalms* 51:16-19; 1 *Samuel* 15:22.
- ¹¹ E.g. *Mark* 12:28-34. Jesus instructs the Pharisees to go home and reflect on *Hosea* 6:6 if they wanted to understand the requirements of the law of Moses (cf. *Matthew* 9:13 and 12:7).
- ¹² Cf. Fitzmaurice, Catherine and Ken Pease. 1986. *The psychology of judicial sentencing*. Manchester: Manchester University Press; 104-115, drawing attention to the role of 'preferred numbers' in determining length of sentence.
- ¹³ E.g. Kleinig, John. 1991. 'Punishment and moral seriousness.' *Israel Law Review* 25; 412.
- ¹⁴ E.g. O'Connell, Michael and Anthony Whelan. 1996. 'Taking wrongs seriously.' *British Journal of Criminology* 36:299-318.
- ¹⁵ Cullen *et al* 1982, *op. cit.*, 91.
- ¹⁶ E.g. *Attorney-General's References Nos. 3, 4 and 5 of 1992 (Stephen Boyd and others)* (1993) 14 Cr. App. R. (S.), 191-5.
- ¹⁷ E.g. Bayles, Michael D. 1982. 'Character, Purpose, and Criminal Responsibility.' *Law and Philosophy* 1:5-20.
- ¹⁸ See the White Paper *Crime, Justice and Protecting the Public* on which the Act was based.
- ¹⁹ Figures courtesy of the Prison Reform Trust, London.

Books for Further Reading

- J P Burnside 'Justice, Seriousness and Relationships' (Carlisle: Paternoster, 2000)
In P Beaumont & K Wotherspoon (eds) *Law and Relationism*
- B N Kaye & G J Wenham (eds.) *Law, Morality and the Bible*. (Leicester: IVP, 1978)
- B Mitchell *Law, Morality and Religion in a Secular Society* (Oxford: OUP, 1970)

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