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Taking Responsibility for Criminal Responsibility: Comments on *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice*

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1. Criminal Responsibility as Worldmaking

As the title *Rejecting Retributivism* suggests, one of the two core aims of this impressive book is to reject retributive justice – a form of justice that trades in wrongdoing, blame and desert – and the forms of punishment it supports. The other core aim of the book is to set out and defend an alternative vision for criminal justice, one that adheres to a capabilities conception of social justice and suggests a “public health-quarantine” model for responding to crime. Although Caruso makes many valuable contributions in pursuing each of these aims, throughout this response I will mainly focus on the second one. In doing so, I do not mean to suggest that I disagree with Caruso when he says that retributive punishment demands stringent justification; nor do I want to suggest that existing forms of punishment are necessarily justified. Instead, my choice of focus reflects the substantial burden of persuasion that any alternative to retributive justice bears. As Caruso notes in several places, the intuitions that underlie the retributive ideal are powerful, widespread and tenacious.

Beyond this, it is important to consider how fully the public health-quarantine model abandons the core intuitions of retributivism, including free will, and the extent to which it can discharge its own justificatory burden. As I will set out in more detail below, I think there are two similarities between the account Caruso advances and the retributivist accounts he rejects (at least, some retributivist accounts) and that these create difficulties for him. More specifically, and as I’ll aim to show in section 3, I think there is some slippage in the degree of control over our actions that Caruso endorses. By my reading, in the second half of the book he relies on a degree of control over action that he appears to repudiate in the first half of the book. The effect is that the conception of agency assumed in each account is not as different as might be expected. Furthermore, and as I’ll aim to show in section 2, the foundational concepts in Caruso’s account and the ones in the account he rejects are similar in that they are all politically and culturally contingent.

Before fleshing these claims out, I first want to explain why this second similarity (contingency of concepts) reveals something important that can, in turn, help make sense of the first similarity (conceptions of agency). The important point that is revealed is that criminal responsibility is socially constructed. By this I mean that criminal responsibility is a concept and set of practices whose form and theoretical underpinnings are created and maintained by shared (though contestable) understandings and expectations. Another way to express the point would be to say that criminal responsibility is a form of worldmaking – the process by which contingent beliefs and values create the world we inhabit and the practices we undertake.¹ Two important consequences flow from this. First, the justifiability of criminal responsibility practices partly depends on how well they fulfil the cultural and social functions of criminal responsibility. Second, it becomes clear that these functions might be distinct from, but nevertheless related to, those of medical or extra-legal moral

¹ See Amia Srinivasan, ‘Genealogy, Epistemology and Worldmaking’ (2019) 119(2) *Proceedings of the Aristotelian Society* 127-156.

practices,² such that disparities between law and morality or law and medicine might be features rather than bugs.³ Of course, recognising this does not mean we should ignore the tensions that arise from criminal law's equivocal relationship to these associated practices,⁴ and Caruso is right to identify some of these. At the same time, we should not ignore the ways that criminal responsibility is – and can justifiably be – distinctive.

It is therefore to his credit that Caruso takes the social and cultural functions of criminal responsibility seriously by, for example, trying to show that his public-health quarantine model can serve many of these. As I have argued elsewhere, however, and as I'll come back to in section 3, these functions comprise a set of mutually-sustaining forward- and backward-facing concerns that are not easily separable.⁵ Insofar as Caruso wants to hold on to some functions of criminal responsibility while jettisoning others his account is, for that reason, not wholly convincing. With that said, many of the critiques and recommendations made in *Rejecting Retributivism* are powerful and compelling, so in concluding I will suggest that we can and should take these seriously.

2. Foundational Concepts

The foundational concepts of Caruso's public-health quarantine model are harm and risk. Responses to crime (e.g. incapacitation, monitoring) are permissible under this model only when an offender risks "harm...to others"⁶ and the response is proportionate to the risk the offender poses to "the well-being and safety of society" or "public health and safety".⁷ In keeping with the book's aims, harm and risk are presented as preferable alternatives to their retributive counterparts: wrong and blame. According to Caruso, wrong and blame are problematic because they are "wide open to subjective and cultural biases and prejudices" and, no doubt because of this, liable to generate disagreement.⁸ As Caruso puts it, "[t]here simply is no magic ledger to look to that objectively and impartially spells out a rank order of wrongs in one column and the punishment deserved for each in another".⁹ For Caruso, then, the susceptibility of wrong and blame to the 'taint' of social and cultural attitudes is one of the things that makes retributive justice unwieldy and incapable of containing the scope and severity of punishment.

The point I want to make in this section is that it is not clear that either harm or risk is any less 'tainted'. Even if we grant Caruso's assertion that retributive punishment is harder to justify than public-health quarantine responses,¹⁰ he admits that "determining

² Nicola Lacey argues something like this in 'Responsibility Without Consciousness' (2016) 36(2) *Oxford Journal of Legal Studies* 219-241.

³ Cf Gregg Caruso, *Rejecting Retributivism: Free Will, Punishment, and Criminal Justice* (Cambridge University Press 2021) 16, 128, 131.

⁴ See much work by Alan Norrie exploring this point e.g. *Crime, Reason and History: A Critical Introduction to Criminal Law* (3rd ed Cambridge University Press 2014).

⁵ Chloë Kennedy, 'Questioning Culpability: Lessons From Soterial-Legal History' (2018) 12(2) *Law and Humanities* 159-183.

⁶ Caruso (n 3) 185.

⁷ *Ibid* 190; 21, 185, 191, 192, 194 and 195 (respectively).

⁸ *Ibid* 17, 128, 141-142.

⁹ *Ibid* 141-142.

¹⁰ This assertion is based on Caruso's claim that retributive practices intend to inflict harm whereas the harms of the public-health quarantine model are merely foreseen (Caruso (n 3) 12). Though there is no space to explore the distinction between intended and foreseen harms, some might doubt its stability.

what counts as a significant threat to public health and safety is not always easy”¹¹ and that that “the harm principle has been hotly debated.”¹² Despite this, he concludes that harm might “nevertheless serve as a useful guide in the domains of public health ethics and criminal justice”.¹³ With respect, I would suggest that this underplays the challenge. For at least twenty years the harm principle has been described as so distended as to have effectively “collapsed”¹⁴ and more recent criminal justice scholarship acknowledges that the harm principle is both unspecific and conventional.¹⁵ This is not surprising if we regard criminal responsibility from a constructivist perspective, according to which its underpinnings and practices are contested and contingent. Indeed, from this point of view there is no grounding that would provide the epistemological foundation for criminal responsibility that Caruso seems to desire. Just as questions about extra-legal morality are contested, so too are questions about what counts as harm and how far we should take account of remote and risked harms.

As for risk, Caruso explains that decisions about how to deal with offenders and, in the case of incapacitated offenders, when to authorise release should be made in accordance with the risk the offender poses and the principle of least infringement (of liberty). Caruso expressly links this principle of least infringement to infectious disease management¹⁶ so, mirroring his laudable efforts to pay attention to how retributive ideals play out on the ground,¹⁷ it is worth looking at how decisions to restrict liberty in order to protect public health play out. Though perhaps an extreme example, attempts to control the ongoing coronavirus pandemic have made clear that these decisions are deeply contentious and highly politicised. Looking only at the UK, there have been multiple legal challenges to coronavirus restrictions, ostensibly made by ‘following the science’,¹⁸ and several waves of anti-lockdown protests.¹⁹ To be sure, the complexity of the coronavirus crisis distinguishes it from decisions about risks posed by individual offenders but determining an individual’s dangerousness is harder than determining their chance of transmitting disease. In practice, therefore, parole boards tend to be risk averse²⁰ and, unsurprisingly, their assessments are not free from bias or prejudice.²¹

As a final remark on the reality of public health management, it is worth noting that there is a long association between disease transmission and blame. Despite Caruso’s

¹¹ Caruso (n 3) 195.

¹² Ibid 191.

¹³ Ibid.

¹⁴ Bernard E Harcourt, ‘The Collapse of the Harm Principle’ (1999) 90 *Journal of Criminal Law and Criminology* 109-194.

¹⁵ Lindsay Farmer, *Making the Modern Criminal Law* (Oxford University Press 2016) ch 1.

¹⁶ Caruso (n 3) 186.

¹⁷ Ibid 19, 125.

¹⁸ Charles Livingston and Robin Mackintosh, ‘Judicial Review Challenges to Government Coronavirus Restrictions’ (*Brodies Insights*, 21 December 2020) <<https://brodies.com/insights/public-law-and-regulation/judicial-review-challenges-to-government-coronavirus-restrictions/>> accessed 22 March 2021.

¹⁹ E.g. ‘Covid: Arrests During Anti-Lockdown Protests in London’ (BBC News, 21 March 2021) <<https://www.bbc.co.uk/news/uk-56469687>> accessed 22 March 2021.

²⁰ Monica Barry, “Walking on Ice”: The Future of Parole in a Risk-Obsessed Society’ (2019) <https://doi-org.ezproxy.is.ed.ac.uk/10.1177/1362480619880555>.

²¹ Jeremy Isard, ‘Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity’ (2018) 105 *California Law Review* 1223-1258; Gwen van Eijk, ‘Inclusion and Exclusion Through Risk-Based Justice: Analysing Combinations of Risk Assessment From Pretrial Detention to Release’ (2020) 60 *British Journal of Criminology* 1080-1097.

assertion that “plainly, many carriers of disease are not responsible in this [basic desert] or in any other sense for having contracted these diseases”,²² in reality both individuals and groups have been blamed for the spread of communicable sicknesses.²³ It might be that some of these examples simply add weight to Caruso’s argument – they are unmerited blame ascriptions – but there is a sense in which we are all to blame for disease outbreaks. More importantly, recognising how our individual and collective choices expose us to new infections is, at least in the eyes of one expert, an essential step towards altering our conduct and potentially avoiding more catastrophes in the future.²⁴

3. *The Scope of Agency*

As the example of global health suggests, backward-facing responsibility (i.e. blame) and forward-facing responsibility (i.e. choice and control over what to do next) are commonly linked. This is because the purpose of blame is to make a person see that she has done wrong with the aim of aligning her future beliefs, reasons and, ideally, conduct with shared (legal and / or societal) moral norms.²⁵ In this section, I want to explain why, by my reading, Caruso is unable to support the forward-facing forms of responsibility he wants to endorse – rehabilitation, therapy, acknowledgement of wrongdoing – without altering his position with respect to control over action across the course of his book. Following this, I want to explain why this shift ultimately makes Caruso’s attempt to wholly insulate forward-facing responsibility from backward-facing responsibility unconvincing.

In the first half of *Rejecting Retributivism*, Caruso denies that we have the God-like powers of choice and control he deems necessary for ‘true’ blame and praise and which are, in his view, required for retributive justice. He also rejects the compatibilist view that moral responsibility is appropriate if the actions in question are voluntary, free from constraint and compulsion, and caused in the appropriate way. In rejecting the compatibilist view, Caruso recognises that it requires that agents are reasons-responsive and that their actions can be modified by rational deliberation;²⁶ but he rejects compatibilists’ attempts to distinguish scenarios involving accidental or malevolent brain interventions from more prosaic examples of causal determinism.²⁷ There is no space to rehearse the arguments here (and some are not fully expounded in the book, having been published elsewhere) but the effect, as I understand it, is that degrees of freedom are presented as unimportant to backward-facing responsibility.

When it comes to forward-facing responsibility, however, degrees of freedom do matter to Caruso and his views on control over action seem quite different. Indeed, it appears that the forward-facing practices he advocates and the capacities account of social justice with which they are paired require considerable control over beliefs and action.

²² Caruso (n 3) 20, 185.

²³ Matthew Wills, ‘Blaming People for Getting Sick Has a Long History’ (*JSTOR Daily*, 15 June 2020) <<https://daily.jstor.org/blaming-people-for-getting-sick-has-a-long-history/>> accessed 22 March 2021; Samuel K Cohn, ‘Pandemics: Waves of Disease, Waves of Hate from the Plague of Athens to A.I.D.S’ (2012) 85(230) *Historical Research* 535-555; Laëtitia Atlanti-Duault et al, ‘Tracking Online Heroisation and Blame in Epidemics’ (2020) 5(2) *The Lancet* [https://doi.org/10.1016/S2468-2667\(20\)30033-5](https://doi.org/10.1016/S2468-2667(20)30033-5).

²⁴ Jonah M Kessel, ‘Who’s to Blame for the Pandemic?’ (*The New York Times*, 1 September 2020) <<https://www.nytimes.com/2020/09/01/video/coronavirus-pandemics-causes.html>> accessed 22 March 2021.

²⁵ Miranda Fricker, ‘What’s the Point of Blame? A Paradigm Based Explanation’ (2016) 50(1) *Noûs* 165-183; Kennedy (n 5).

²⁶ Caruso (n 3) 70-71.

²⁷ *Ibid* 86-88.

Caruso acknowledges that this might appear to contradict his free will skepticism but nevertheless insists that the kind of freedom he endorses is different to the “metaphysical conception of freedom” he rejects.²⁸ I will come back to this point shortly but before that I want to note how this distinction sometimes appears to be one without much difference. For example, Caruso tells us that free will skeptics need not deny “the causal efficacy of our choices and intentions”²⁹ so long as these are understood to be constrained by circumstances. It is not clear how this claim differs from that of the retributivists who want to acknowledge that freedom comes in degrees – a claim that Caruso apparently rejects.

Moreover, where Caruso tries explicitly to square his free will skepticism with the freedom his forward-facing practices require the attempts are not always convincing. For example, though Caruso acknowledges that rational deliberation requires availability of ‘open’ options for action (i.e. options that one could take) he argues that epistemic openness alone is enough. In other words, the fact that only one path is *actually* open to the deliberator does not undermine her deliberative processes because she does not know which option is the ‘open’ one. Of course, as Caruso recognises, deliberation also requires an efficacy component; the deliberator has to believe that she can perform whichever option she chooses. Again, epistemic openness is supposed to accommodate this. As long as the deliberator does not believe it is impossible that making a choice will result in her taking the relevant action then rational deliberation is possible. I’d suggest that this is not how we tend to deliberate – we tend to believe our decisions to act are likely, maybe even very likely, to result in our taking that action. More importantly, the kind of control over one’s future beliefs and actions that therapy and rehabilitation would seem to require, i.e. actual control,³⁰ is not clearly available on Caruso’s account. If it is, or if this kind of control is not required, I think this requires explanation.

Finally, we might wonder why a freedom that could potentially ground forward-facing responsibility should not ground backward-facing responsibility as well. Here, I would again suggest that law need not, and in fact does not, deploy the kind of “guilt-in-the-eyes-of-God” knowledge³¹ or demand the kind of God-like powers of agency that Caruso associates with metaphysical freedom.³² And while Caruso is right to point out that the criminal justice system currently perpetuates the massive inequalities that exist in society and that these inequalities fuel criminal offending it is worth thinking carefully about the effects of abandoning backward-facing responsibility altogether. Though blame has to be deployed with caution, without some mechanism for securing accountability that looks like blame it is hard to see how denunciation of wrongful conduct, acknowledgement of the wrong done, or moral transformation of the wrongdoer – all of which are aims for Caruso – are possible. As Miranda Fricker has argued, blame is the mechanism through which we aim to bring moral understanding into alignment across manifold contexts and at various levels of society. For this reason, she writes, it is “very hard to imagine...a desirable withdrawal from the practices of blame on a grand societal scale”. Furthermore, she cautions that “it would seem a particularly bad idea in relation to political institutions”.³³

²⁸ Ibid 205.

²⁹ Ibid 217.

³⁰ See Nicola Lacey and Hannah Pickard, ‘From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm’ (2013) 33 *Oxford Journal of Legal Studies* 1-29.

³¹ Caruso (n 3) 122, referring to comments by Daniel Dennett.

³² On this, see RA Duff, ‘What Kind of Responsibility Must Criminal Law Presuppose?’ in Richard Swinburn (ed), *Free Will and Modern Science* (Oxford University Press 2011).

³³ Fricker (n 25) at 180.

4. *Concluding Thoughts*

It is impossible in a short response like this to do justice (of any kind!) to the important and rich insights Caruso offers in *Rejecting Retributivism*. In concluding I would therefore like to express my admiration for the book and emphasise that, despite the critical reflections offered here, I agree with many of its arguments. In particular, Caruso's arguments about the need to address material and health inequalities strike me as convincing and urgent. At the risk of stating the obvious, I would like to close by stressing that there is nothing about a constructivist reading of criminal responsibility that stops us identifying and, if possible, amending oppressive practices.³⁴ On the contrary, its worldmaking character is the foundation on which our capacity to take responsibility for criminal responsibility rests.

³⁴ Srinivasan (n 1).