

Beyond Calvin and Hobbes: Rationality and Exchange in a Theory of Moralizing Shaming

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In his generous reply to my essay, Professor Braithwaite makes a number of informative extensions and clarifications of his theory of reintegrative shaming. Although this response resolves many of our differences, I would like to briefly revisit the three issues that sparked Braithwaite's strongest reaction: my contentions (1) that use of the theory to guide public policy would sacrifice individual rights; (2) that the theory makes incompatible assumptions; and (3) that moral values best inhibit crime when reinforced by self-interest.

First, after reading his response and his recent book with Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*,¹ I concede that Braithwaite is loath to sacrifice individual rights for communitarian justice. Although I am equally reluctant to discard adversariness and liberty for Braithwaite and Pettit's "dominion," I acknowledge that rights are dearly prized in their republican theory. Readers interested in the likely practical effects of the theory on the quality of justice and the rights of participants should refer to *Not Just Deserts* and, more generally, the debate on alternative methods of dispute resolution.²

1. John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (New York: Oxford University Press, 1990). For a classical liberal response to the republican theory, see C. L. Ten's review essay, "Dominion as the Target of Criminal Justice," 10 *Criminal Just. Ethics* 40 (1992).

2. See, e.g., Susan Silbey & Austin Sarat, "Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject," 66 *Denver U.L. Rev.* 437 (1989).

Our differences on the second issue are less easily reconciled. I could address the question of incompatible assumptions by providing textbook descriptions of the constituent theories, then arguing that Braithwaite's theory leaves us straddling the fence on important issues. For example, the moralizing social control part of the theory derives from a tradition assuming the following: (1) a natural tendency to deviate; (2) a spurious role for subcultures; (3) an unambiguous inhibiting effect of informal controls; and (4) an anticrime consensus embodied in the criminal code. In contrast, the learning and subcultural portions of the theory assume that (1) crime is not natural but learned; (2) subcultures are vital causes of crime; (3) informal controls can both promote and inhibit crime; and (4) the creation and application of the criminal code are rife with conflict.

I suspect it is precisely this sort of exercise that Braithwaite has in mind when he states that his critics are glib on the incompatibility issue. Thus, it is unlikely that another iteration of this argument will reconcile Braithwaite with his critics, much less resolve the debate between the theoretical "integrationists" and the "oppositionalists." To judge whether incompatibility is a real or imagined problem, readers should consider two factors: how much of the baggage of each constituent theory Braithwaite's model must carry aboard, and how crucial each constituent theory is to the success of the voyage. In my view, the theory's opposing assumptions needlessly restrict its application to those crimes that evoke a limited range of social disapproval.

The third question, of the relative efficacy of moralizing versus utilitarian controls, seems to me a simple Hobbesian dilemma: which strategy best discourages individuals and groups from using force and fraud to satisfy their wants?³ In a classic explication of this problem of order, Desmond Ellis considers three ideal-typical answers: (1) Parsons's normative solution, which emphasizes shared values opposing force and fraud; (2) Hobbes's coercive solution, in which a legitimate state compels obedience through "the terror of some punishment;" and (3) Spencer's exchange solution, in which interdependent actors recognize that mutually beneficial relations would be jeopardized by the use of force or fraud.⁴

The theory of reintegrative shaming relies most heavily on the normative solution. My suggestion that Braithwaite extend the theory beyond moralizing social control and predatory crimes requires a shift in emphasis from the normative solution to the exchange solution. The normative so-

3. Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott ([1651] New York: Collier Books, 1962).

4. Desmond Ellis, "The Hobbesian Problem of Order: A Critical Appraisal of the Normative Solution," 36 *Am. Soc. Rev.* 692 (1971). The quotation is from Hobbes's *Leviathan* at 113. For examples of the normative and exchange approaches, see Talcott Parsons, *The Structure of Social Action* (Glencoe, Ill.: Free Press, 1937), and Herbert Spencer, *Principles of Sociology* (New York: Appleton, 1884).

lution in *Crime, Shame and Reintegration* stems from the “powerfully dominant majoritarian morality” crystallized in the criminal law protecting “persons and property” (at 13 and 41). At the societal level, reintegrative shaming is the normative mechanism for maintaining social integration and preventing force and fraud. At the individual level, Braithwaite suggests a sequence of solutions beginning with a normative strategy of moral suasion, followed by an exchange strategy of rational choice, and ultimately, a coercive strategy of incapacitation.

Unlike coercive and exchange solutions, normative solutions are better equipped to specify integrative mechanisms than to identify the origins of the norms or the processes causing societal transformations.⁵ Braithwaite identifies shame and gossip, for example, as key maintenance mechanisms in the theory. As to origins, the theory begins with something akin to a Durkheimian collective conscience from which the criminal law is derived. Because Braithwaite limits his concern to predatory crimes such as murder, he treats the origins of norms prohibiting such acts as self-evident and has little incentive to transform these norms. The origins of societal prohibitions on predatory crime, currently reflected in the law on the books, are never questioned. To reduce crime, we need only beef up the maintenance mechanisms supporting the normative solution.

Control models also offer a normative solution to the problem of order, although they imply that the relevant cultural norms originate in exchange or coercive relations.⁶ Subcultural models that view the law as a product of interest group competition are perhaps more likely to hypothesize coercive origins. Unlike both of these approaches, however, the theory of reintegrative shaming consciously avoids questions of origins and transformation. In his effort to distance the theory from utilitarian models, Braithwaite has provided a normative solution that tells us little about the norms themselves. Yet the theory could only be strengthened by invoking an exchange or coercive model to account for origins. Following Durkheim, for example, the normative solution of communitarianism may have arisen in exchange relations necessitated by an articulated division of labor.

Normative solutions are particularly attractive to criminologists because they suggest that people internalize norms and values so as to “become constitutive, rather than merely regulative of, social behavior.”⁷ As Braithwaite puts it, shaming is “both the social process which builds consciences, and the most important backstop to be used when consciences fail” (at 82). In limiting his theory to predatory crimes, or acts considered

5. Ellis, 36 *Am. Soc. Rev.* at 694–95.

6. Ruth R. Kornhauser, *Social Sources of Delinquency: An Appraisal of Analytic Models* 46 (Chicago: University of Chicago Press, 1978) (“Kornhauser, *Social Sources*”).

7. Ellis, 36 *Am. Soc. Rev.* at 693–94.

criminal by at least half of us, Braithwaite marks the borders of this normative solution.

Beyond these borders, an exchange solution may complement the normative strategy at the center of Braithwaite's theory. As his response makes clear, the two approaches spark both synergies and contradictions. Braithwaite's conceptions of interdependency and communitarianism owe as much to the exchange notion of reciprocal material relations connecting social units, as to the normative idea of moral values regulating force and fraud. Moreover, the exchange approach may be better equipped to effect Braithwaite's policy goal—the transition from a high-crime to a low-crime society.

In both the exchange and coercive solutions, rationality or expedience secures obedience to law. The normative solution, in contrast, relies on "internalized need-dispositions to conform with value-standards" and compliance with norms running counter to self-interest.⁸ Over time, of course, expedient norms established for exchange may become generalized moral norms responsive to shaming. Still, the transformation question remains: Do we orient criminal justice policy to virtue or to reason? Do we attempt to couple them as I suggest or do we design sequential enforcement pyramids as Braithwaite recommends?

My essay stresses nonmoral social sanctions to highlight the exchange portion of the theory that was not fully developed in *Crime, Shame and Reintegration*. Following anomie and opportunity theories, Braithwaite acknowledges that "the blockage of legitimate opportunities combined with the availability of illegitimate opportunities can independently increase crime" net of their effect on subcultures (at 103). Although anomie and opportunity theories have much to say about norms, each locates the source of Hobbesian disorder in the inability of some actors to enter sufficiently beneficial exchange relationships. By this logic, Kornhauser points out, crime would be reduced by greater mutuality or less inequality in exchange, with "normative controls supported by controls emanating from a satisfactory system of exchange relationships."⁹ At the very least this provides a theoretical rationale for coupling moral values and self-interest. In public policy if not criminological theory, I suspect that Braithwaite would support Elliott Currie's proposal to tie virtue to reason: moralizing shaming aside, a credible societal promise that "being good will result in doing well" may prove an effective crime control strategy in its own right.¹⁰

8. Talcott Parsons, *The Social System* (Glencoe, Ill.: Free Press, 1951) cited in Ellis, 36 *Am. Soc. Rev.* at 696.

9. Kornhauser, *Social Sources* 46.

10. Elliott Currie, *Confronting Crime: An American Challenge* 263 (New York: Pantheon, 1985).