

The Prerequisites of Responsibility: Comments on Antony Duff

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In this essay, Antony Duff takes up, amidst a variety of other issues, two particularly important ones involving the prerequisites of criminal responsibility.¹ The capacity requirement is the first of these; something one might call the “relationship requirement” is the second. The capacity requirement is about the mental capacities someone must exhibit to be a fit subject of criminal responsibility. The “relationship requirement” is about the relationship he must have to an unfortunate state of affairs, to be held responsible for it. I shall have something to say about each.

I.

First, the capacity requirement. Antony Duff’s interest in the capacity requirement is of long standing. In his book on criminal responsibility, *Trials and Punishments*,² he used the capacity requirement to reveal some extremely surprising gaps in our understanding of the purposes of punishment. He convincingly showed that none of the customarily invoked purposes of punishment (retribution, deterrence, reform, incapacitation) could explain a basic feature of the punishment process, namely that we refuse to try or to punish a person who has gone mad since committing his crime, but was not yet mad when he committed it. From the point of view of either retribution, deterrence, reform, or incapacitation, there really is no problem punishing the mad. According to retributivism, wrongdoers should be made to suffer in proportion to their wrong. Whether they have gone mad or not, as long as they are capable of suffering, it seems a retributivist should not object to their being punished. Deterrence, too, would be served if we punished the mad: it surely adds to deterrence if we are able to tell all potential wrongdoers that they will be punished whether or not they manage to go mad after they have committed their crime. And the same sort of argument could be made to those who think punishment is simply there to reform or incapacitate the criminal. Madness does not preclude either the possibility of reform or the need for incapacitation. What this means is that if we want to account for our intuition that those who have gone mad after committing a crime should not be punished, something other than the traditional purposes of punishment needs to be invoked. Duff then proposes what he calls the communicative theory of

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¹ R.A. Duff, *Who is Responsible, for What, to Whom?*, 2 OHIO ST. J. CRIM. L. 441 (2005).

² R.A. DUFF, *TRIALS AND PUNISHMENT* (1986).

punishment as an alternative to the traditional panoply of punishment purposes.

In the present essay, Duff focuses on the defendant who lacks capacity at the time of the crime, rather than during his trial or punishment. While there is general agreement that neither infants nor the insane ought to be punished, the question persists as to why they are not responsible for their misconduct.

Duff suggests we take our cue from recent advances in philosophers' understanding of practical reasons. He suggests we think of the responsible actor as someone who is capable of responding to certain sorts of reasons, responsiveness to which leads him to refrain from committing a crime. As Duff notes, this might strike many at first as a very strange way of characterizing the responsible actor.

Take the deeply depressed person who kills his family and then tries to kill himself. Duff wants to treat him as non-responsible. But many will wonder how it is that he is supposed to be lacking practical reasoning abilities. Certainly he has to be pretty good at instrumental reasoning in order to pull off his plan. Duff wants to say that although his instrumental reasoning abilities may be unimpaired, the desires that he uses it to fulfill are what are irrational. But one might wonder, how so? What if he killed his wife because she has been unfaithful, his children because they are ungrateful, and himself because he sees nothing more to live for? Who is to say that that is an irrational assessment, since it seems, at least at first blush, like the product of a perfectly plausible chain of reasoning. There is nothing obviously irrational about it.

Duff, however, wants to reject such "rampant subjectivism . . . in favor of a modestly objectivist conception of emotion and value, which recognizes rational constraints on what we can, or must, recognize as a reason."³ He writes that, as to "[a] person who is so depressed by the loss of his job that he kills himself and his family; a person who never feels remorse for anything he has done, or is never moved by others' needs or sufferings,"⁴

[w]e [should] be ready to conclude in the end that [such a] person is rationally incapacitated: for we recognize that, just as there are disorders and incapacities in the context of empirical or factual thought, so there are in the context of values and emotions; there are standards of reason, and someone who has lost, or never gained, touch with those standards is not a responsible agent. Such people cannot participate in the practices of deliberation, action and explanation that are structured by such reasons: we cannot hold them responsible, since we cannot address them as fellow participants in such practices.⁵

This is the point at which many will register their strongest objections to

³ Duff, *supra* note 1, at 450.

⁴ *Id.* at 449.

⁵ *Id.* at 450.

Duff's reason-based account of responsibility, on the *de gustibus non est disputandum* grounds I just described. But there is in fact a great deal in recent moral philosophy to support Duff's claim about the irrationality of certain desires. Derek Parfit's *Reasons and Persons*⁶ most immediately comes to mind. Duff is exceedingly astute in realizing that this alteration in our understanding of rationality will have significant repercussions for our understanding of those concepts of responsibility theory that depend in one way or another on the concept of rationality. Indeed it is probably the case that this strategy of his can be generalized to refine many more concepts of responsibility theory than just the capacity requirement. If Duff were to pursue this strategy with the same relentlessness he displayed in the vaguely analogous project of *Trials and Punishments*, it is likely to generate equally surprising results as that earlier project.

It would not be unnatural for me to try to anticipate some of those results in this comment, but that is not in fact what I shall do. What I want to do instead is to register a somewhat more subsidiary, if not uninteresting, disagreement with Duff's views about the capacity requirement. The disagreement relates less to the particulars of his argument than to a general assumption on the basis of which he proceeds. It is an assumption he shares with most criminal law scholars—namely that there ought to be such a thing as a capacity requirement.

At first this will seem like a ridiculous suggestion. Of course we need a capacity requirement. How else are we going to avoid punishing infants or the insane? Or am I perhaps suggesting that we actually punish them? No, I am not suggesting that. But absent a capacity requirement, how can we possibly avoid doing so? If all we have to work with are the traditional mental state requirements (i.e., that the defendant must have acted either intentionally, or knowingly, or recklessly) and the various act requirements (i.e., that the defendant have acted voluntarily, that he have done more than let something happen, that he have precipitated the result proximately) and so on, then it seems many a child and many a manifestly mad person will be held responsible. The child who kills will typically meet all of the responsibility requirements—except the capacity requirement, so long as we have one.

As I said, I agree that we should not punish children and should not punish the insane. I also agree that current doctrines of responsibility—what we call the General Part of the criminal law—do not preclude punishing them except through some kind of capacity requirement as embodied in the insanity doctrine and the infancy exception. What I am suggesting, however, is that it may be that the doctrines we need to preclude punishing children and the insane are of a different sort than Duff suggests. What we may need is not a capacity requirement of the refined sort Duff suggests, but something else altogether in its stead that will perform the work currently done by the capacity requirement, as well as performing some extra work that the capacity requirement fails to do.

⁶ DEREK PARFIT, *REASONS AND PERSONS* (1984).

Let me explain what I have in mind. Consider the old *M'Naghten* case,⁷ from which derives the *M'Naghten* definition of insanity. McNaghten tried to kill the British prime minister, but ended up killing the prime minister's secretary instead. His reason for doing so was that he had a psychotic delusion that the Tories had conspired to persecute him and that the prime minister was the head of that conspiracy. I do not know what exactly McNaghten thought the Tories were trying to do to him. One possibility is that he thought they were trying to kill him. If so, we do not, strictly speaking, need a capacity requirement—or, more conventionally put, an insanity defense—to get him off. A sufficiently enlightened version of the self-defense doctrine will do. McNaghten thought he was defending his life against imminent attack by killing the prime minister and thus acted in putative self-defense. To be sure, he was unreasonable in this belief, but that only makes him negligent. He was unaware of the unreasonableness of what he was doing and so he was not reckless and deserves to be acquitted.

So far, so good. Where things get interesting is if we suppose that McNaghten suffered from a different kind of delusion. Suppose what he thought the Tories were engaged in was not a conspiracy to kill him but merely a conspiracy to harass him. Every mishap that has recently befallen him—from his failure to get hired for a certain job, to a recent bout of hay fever, to the breakdown of his sister's marriage—he thinks is due to a grand Tory conspiracy that has as its sole object to make him, Daniel McNaghten, miserable by annoying him either directly or indirectly through mishaps inflicted on his relatives and friends. Self-defense, of course, can no longer be invoked to exonerate him. And yet, I suspect most of us would still want to exonerate him and thus something like a capacity requirement appears to be necessary to accomplish that end.

Now the McNaghten we have considered so far held his various bizarre beliefs because he was psychotic. But it is not strictly speaking necessary, at least not as a matter of logic, that these bizarre beliefs be the result of a psychosis. Imagine he had suffered from no psychosis whatsoever. Imagine also that a group of determined enemies of his had elaborately contrived to set things up so that even a perfectly reasonable person would come to the conclusions McNaghten came to—namely that all his recent seemingly unrelated mishaps were the product of a grand Tory conspiracy with the prime minister as its head. How would we, and how should we, treat this hypothetical, sane McNaghten counterpart? Under conventional doctrine, we would have to convict him. No conventional defense for him exists. Yet if we thought the insane McNaghten, who suffered from identically bizarre beliefs but had them inflicted by a mental disease rather than the machinations of his enemies, deserved exoneration, then so it seems does this one. If the conventional doctrine does not provide him with the grounds for an acquittal, all that demonstrates is that the conventional doctrine has a gap in it.

I used to think, confronted with this pair of cases, that the solution is to punish both the sane and the insane McNaghten, in the version of the case in which he

⁷ *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

cannot be described as acting in self-defense. And that may seem like the right solution to others as well. What made me change my mind was thinking about infants. Consider the “Sandbox Case”:⁸ Infant Jack takes Jill’s bucket and shovel, and when Jill tries to stop him, he viciously punches her until she gives up. All the requirements of a robbery seem met; certainly there are no General Part responsibility requirements that are lacking. And yet most of us recoil from doling out criminal punishment to Jack. This seems to pretty clearly demonstrate that it is possible for someone to meet all the usual prerequisites for responsibility and still not deserve to be held responsible. Presumably this is because there are some extra prerequisites that he does not meet. Jack does not meet them because of his infancy. It seems quite possible, that others, like McNaghten, might not meet them because of some mental disease.

Now Duff and the traditional view of the matter would use a capacity requirement to prevent the punishment of Jack and of McNaghten. The traditional view would not be too clear on exactly why they would not meet it. Duff would employ his refined, objectivist understanding of rationality to argue that they are so incapable of reasoning and being reasoned with on the basis of rational emotions and values—“we cannot address them as fellow participants in [our responsibility-related] practices”⁹—that they are not capable of being held responsible either.

But my variations on the *McNaghten* case suggest that this may be much too narrow and unprincipled a basis for relieving them of responsibility. Defendants can find themselves in positions indistinguishable from that of McNaghten or from Jack (in the Sandbox Case) without being either insane or a child. If we want to exonerate those defendants, we can only do so by supplementing our responsibility principles by further principles having nothing to do with capacity or incapacity.

What I am suggesting is that our General Part is highly incomplete, that it has some enormous gaps, that it is missing a wide range of principles needed to avoid imposing responsibility in a vast range of cases of which those of infancy and insanity are just a tiny segment. This is something many people are going to find implausible. To most people the set of principles making up our General Part looks virtually immutable. They find it hard to believe that there should be any important category of cases that it could have left undealt with. But they are wrong. Not infrequently scholars do come up with principles that quite clearly are needed to supplement the General Part. I would view Duff’s own “communicative theory” of punishment as one example of such a principle. Another is Roy Sorensen and Christopher Boorse’s discovery of the distinction between “ducking” and “shielding,”¹⁰ a distinction that is analogous to, but distinct from, the act-omission distinction. What my sanitized versions of the insanity cases should tell us is that there are many more such principles to be found, and that a good strategy for uncovering them might be to think about a lot of these insanity cases, construct

⁸ Posed and so named by Claire Finkelstein.

⁹ Duff, *supra* note 1, at 450.

¹⁰ Christopher Boorse & Roy A. Sorenson, *Ducking Harm*, 85 J. PHIL. 115 (1988).

for each of them a sanitized counterpart, and make that the basis for a new principle of responsibility.

My argument also has a practical corollary. Even under current doctrine we often face cases in which we are not sure whether someone who is pleading insanity, and who is manifestly suffering from a mental disease, therefore should be exonerated. The reason we typically are not sure is that we cannot quite tell whether the defendant's mental condition was sufficiently intertwined with his particular crime to serve as a ground for exoneration. After all, when someone who is intermittently plagued by psychosis steals some money to supplement his welfare checks, his crime is connected with his mental condition, but not in the sort of way that would make us excuse him. But this is an easy case. Many such cases are hard. A good way to think them through might be to construct "sanitized" version of them, in which the defendant behaves exactly as he did, but not because of some mental condition, but because of some external circumstances that play the functionally identical role to a mental condition. Only if we are willing to exonerate this hypothetical defendant should we exonerate the real one.

II.

Let us now turn to the second prerequisite of responsibility that Duff takes up in his essay, what I have called the "relationship requirement." Here Duff tries to discern whether there are any, as he puts it, "quite general conditions or constraints, logical or normative, on what we can be properly held responsible for."¹¹ That relationship requirement, as Duff sees it, has two components.

The first component is the requirement of control. Someone should only be held responsible for what he can control. Duff explores different possible interpretations of this requirement, and concludes that the choice of interpretation leaves us with an unfortunate dilemma: We can interpret the control requirement in a very substantive way, that is, give it a lot of content; but then it precludes punishment in lots of cases where we want to punish. Or, in the alternative, we can interpret it in a very vague way, so that it precludes very little, but then of course it becomes almost inconsequential.

He then proposes that we go with the vague version of the control requirement and look for supplementary principles to narrow the range of things one can be held criminally responsible for. In particular he suggests we look at the debate about criminalization for such principles. A plausible principle he extracts from that debate is the distinction between public and private wrongs. He then suggests that we pursue the refinement of that distinction as a way of nailing down more precisely the prerequisites of responsibility.¹²

¹¹ Duff, *supra* note 1, at 452.

¹² As an aside, I should note that I am a bit puzzled by the mental map Duff draws of the responsibility terrain. As I am used to thinking of it, the basic principles of responsibility are articulated in the General Part of the criminal law, i.e., the doctrines concerning intention, knowledge, recklessness, acts and omissions, causation, complicity, attempts, the various defenses,

Duff seems to me indisputably correct in noting that the approaches currently being considered to the question of what should be criminalized are highly inadequate. Something like his proposed principle might well be just what is needed to construct a proper theory of criminalization. But *this* topic seems to me rather separate from the topic of responsibility. The doctrines of responsibility, act, omission, intention, causation, etc., seem to have no particular affinity with the questions raised under the heading of criminalization, such as whether we should make self-injurious behavior or anticompetitive conduct crimes.

What is the difference, you might ask, of whether we think of them as one or two topics? Only this: What Duff thinks criminal law scholarship ought to do, so as to bring our intuitions about responsibility in line with our actual principles for ascribing responsibility is to work at refining his proposed principle concerning the public-versus-private wrongs distinction. He seems to think that no more principles akin to the act-omission distinction, or the proximate cause requirement, are to be found; that the only plausible place to find further restrictions on the scope of responsibility is in this criminalization arena. But as I already argued in connection with the capacity requirement, there are a great many such principles that have yet to be discovered. It is by exploring *those* principles that we are most likely to bring our intuitions about responsibility in line with our principles. Of course whether I am right in so thinking will ultimately only be settled when more such responsibility-restricting principles are found. Duff presumably doubts that they exist, whereas I am obviously more hopeful.

III.

In sum, my criticisms of the first two parts of Duff's essay come down to the same point. I think that the theory of responsibility is potentially somewhat richer than he thinks, and that an adequate elaboration of it will make superfluous the more complex capacity-defining and criminalization-limiting principles he thinks we need to develop, or indeed allow us to dispense with some of those we already have.

and all that. The concept of control seems to play no explicit role in these. The impossibility of formulating a control principle of the sort he wants thus seems to have no special bearing on these principles. To be sure, it is a feature of the General Part that defendants are generally not held liable for what they cannot control, but this feature simply falls out of all the other requirements. There is no special control requirement. I am surmising that what Duff has in mind here is for the control principle to function as a sort of meta-principle that helps us explicate and interpret what the slightly lower-level principles of responsibility are meant to accomplish. He concludes that it does not perform that function very well.