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Matravers, Matt orcid.org/0000-0003-3064-0618 (2014) *Freedom and the Criminal Law*. ISRF Bulletin. pp. 31-36.

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Freedom and the Criminal Law*Matt Matravers*

Contemporary analytic legal and political philosophy is often highly technical. In most cases this is a good thing; fine conceptual distinctions are essential to clear thinking about the difficult topics these subjects confront. That said, in the thickets of the latest contribution to the literature it is possible to lose sight of the original problem. Good philosophy often starts with a puzzle prompted by some feature of the natural or social world: "how can this or that be like this?" or "how can we justify doing this or that?" and it is sometimes interesting to return to that initial puzzle to remind oneself and others what is, as it were, the point of it all. What, then, is puzzling in the relationship of freedom and the criminal law?

The criminal law is one of many mechanisms of social control. In much of it - for example, in many regulatory and strict liability offences - it resembles the other mechanisms. However, in responding to serious wrongdoing - assault, murder, some property offences, and so on - the criminal law is distinctive in that it not only imposes particularly harsh penalties on convicted offenders, but it does so as a means (or form) of blaming or censuring them. In these cases, the legitimacy of the system relies on the link between serious *legal* wrongdoing and *moral* culpability. A system of criminal law that routinely condemned the morally blameless would rightly be thought unjust and illegitimate.

Freedom is of course central to this: to warrant condemnation one must in general have acted freely. Young children, the insane, those who are acting under hypnotic influence, and so on, perform actions - and some of those actions might be both wrongful and harmful - but they are not held to be morally or criminally responsible because their actions are not, in the relevant sense, "free" or voluntary.

However, this tight connection between core forms of legal liability, moral blame, and freedom confronts us with a puzzle of the kind described above. Our personalities and actions are the results of many factors. Some - perhaps many and perhaps the most important - of those factors have their origins in things we could not have controlled and that pre-date our existence. How then can we be morally at fault - at fault in a way and to a degree that underwrites extremely serious censure and extremely harsh penalties - if our actions are the result in (large) part of such factors?

I think this is a serious puzzle that worries us when we engage in the social practice of punishing. However, for the most part, moral and legal philosophers think otherwise. They think to be worried by the mere existence of causes is an almost adolescent error. In the rest of this short piece, I will first say why that is before arguing that the proposed answer does not fully satisfy and that the puzzle and attendant worries continue to haunt not just adolescents and rogue philosophers, but also those engaged in the criminal justice system.

Anyone with children - in particular young adolescents - is familiar with the argument (I use the term loosely in this instance), "I didn't ask to be born" or "you made me; it's your fault I am this way" usually offered in response to an instance of parental blame or censure. In such a context, we do not take this seriously. Responsibility for not having tidied one's room, for example, cannot be avoided by appeal to the fact that the unwillingness to do so has some of its origins in factors over which the child had no control (even if that is true). What matters, is that the child can deliberate about whether or not to tidy her room and that she has the capability to do so (no-one is stopping her). To put the point more technically, it is not that we have "counter-causal" freedom (that is, our actions are uncaused) that matters, but rather that we possess certain capabilities and our actions are uncoerced (are "free").

The criminal law (at least in its contemporary liberal manifestation) follows in rejecting the need for counter-causal freedom in two important ways. First, criminal responsibility requires, among other things, that at the time of performing some act that violates the law, the agent must possess certain mental capacities - for example, to be able to deliberate and to understand the nature of that deliberation - and (in core cases) must have acted with an appropriate mental state (intent, recklessness or, less often, negligence). Second, the criminal law focuses on the moral quality of the *action*, not of the actor. The concern is with what the agent did (intentionally wound, for example) not with *why* the agent did it.

Thus, a person who lacks the capacity to deliberate in any meaningful sense - who, for example, believes himself to be controlled by the voices of aliens that whisper in his ear - does not "act" and is not criminally responsible. A person who does act, but whose action features some relevant quality that changes our view of its character - for example, it was performed in self-defence or under duress - has a defence. She is responsible for the act in the sense that she performed it, but she is not properly held criminally liable (not properly blamed or punished) because her action was blameless.

There, the orthodox account of the criminal law rests. Or at least, it rests in terms of responding to the initial puzzle. The literature in criminal law theory is largely in refining our understanding of mental capacity (for example, in discussions of the insanity defence) and our understanding of the moral relevance of various forms of control. Most importantly, for present purposes, when any new "threat to responsibility" appears on the horizon, it is to be headed-off by either being incorporated or shown to be incompatible with *existing* legal doctrines of duress, excuse, justification, and so on. One - perhaps slightly uncharitable - way of putting the argument below is that criminal law theorists spend their time revising and reformulating their existing accounts precisely because of the "felt threat" that causal accounts of human action will undermine the whole edifice of moral culpability and thus render legal judgements of blame vulnerable. My argument is not that this is wrongheaded (at all), but rather that the resources to which the orthodox account is restricted are sometimes inadequate to the task.

Consider, for example, the idea that there ought to be a defence of "rotten social background". Think of a young boy raised in very poor social housing by a single unemployed mother who has a succession of abusive partners. The boy engages in petty theft and is routinely dealt with by social services and youth offending teams. One does not have to think that such a child *must* end up an adult offender, but were he to do so we might think it was at least predictable in the circumstances.

Or think of recent advances in neuroscience and imagine a young man charged with assault who offers in his defence a brain scan in which the area of his brain associated with self-control is shown to be in some way damaged (or even simply less developed than is the norm). He is not incapable of self-control, but it is much harder for him not lose his temper than it is for the rest of us.

Finally, consider a woman in a long term abusive marriage whose drunk husband threatens her with yet another beating, but before he can administer it he falls asleep. She could leave the house (there are safe houses available although whenever she has gone to them before her husband has found her and convinced her to return), but she does not in this. Instead, she goes to fetch a knife, sharpens it, returns to her husband and kills him.

Cases such as these can be addressed by asking if they fit (or not) into existing doctrines. We can ask if the deprived adult and the angry man have a sufficient cognitive impairment (as a result of upbringing and brain structure respectively) so as not to know the nature and quality of their acts or so as not to be able to deliberate properly and to act on the results of that deliberation. In the abused woman case, an attempt might be made to bring the act into one or other of the categories of self-defence or provocation.

There is much to be said for this strategy (both theoretically and in practice). There are huge dangers in thinking of the disadvantaged, those whose brains can be shown to be different from the norm, and of abused women, as non-responsible; as defective persons who need treatment. Yet, incorporating (or not) cases such as these into the existing law does not do justice to the concerns that they generate. In these three cases, we feel some pressure because, *pace* the ordinary understanding of the law, we are interested not just in what was done, but in why it was done. We pause to think because it seems *unfair* to hold the person fully to blame given how they came to be the way they were when they acted.

This pressure - and the degree to which it is felt within the criminal justice system - emerges perhaps most clearly in the domestic abuse case. Provocation and self-defence both require a degree of immediacy between the provoking or attacking act and the response and, indeed, in such cases juries in England (and elsewhere) have rejected such defences. In other cases and places, what has been mooted is that such women may be suffering from a personality disorder - Battered Person Syndrome - that may be relevant in assessing provocation or diminished responsibility defences. The result, at least in English criminal law, was that the law was adjusted to allow for a defence of "loss of control" (S.54 Coroners and Justice Act 2009). This removed any requirement of "suddenness" or "immediacy", and was widely understood to be formulated precisely so as to allow a defence to long term abused women who kill their abusers. What remains, though, is a feeling that the assessment of the moral culpability of the battered woman who kills is not captured by the legal account of loss of control.

In short, what I have tried to argue is that there is a tension between two things: one the one hand, the criminal law's narrow understanding of criminal responsibility, which in the main depends on the agent possessing certain capacities to reason and so on at the time of acting and, on the other, our beliefs about moral culpability, which are much more sensitive (I believe) to matters of history and character. That is in part a matter of the nature and function of the criminal law, which *is* distinct from that of morality generally (as well as from other forms of social regulation). However, the distinctiveness of the criminal law lies not just in its needing standards of proof, procedural rules, and in its needing "to get a result" (something that moral judgements can often avoid), but as was noted at the beginning, in its *censuring* and *punishing*.

It is precisely in virtue of those features that the tension is so keenly felt: to censure and punish those who, even if they could have acted otherwise, acted as they did for reasons we can understand given the kinds of people that they are is, in many (but not all) cases, morally uncomfortable. Moreover, that discomfort will likely increase as neuro- and other behavioural sciences lay bare the causal mechanisms by which human beings operate. I have not argued that all such causes excuse, but rather that we need to be sensitive to the tension identified and aware that our current model of criminal responsibility may not be adequate to the task of quieting our troubled consciences when we censure and punish.

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