‘WHO’S STILL STANDING?’ A COMMENT ON ANTONY DUFF’S PRECONDITIONS OF CRIMINAL LIABILITY

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Abstract

Antony Duff has argued that an important precondition of criminal liability is that the state has the moral standing to call the offender to account. Conditions of severe social injustice, if allowed or perpetuated by the state, can undermine this standing. Duff’s argument appeals to the ordinary idea that a person’s own behaviour can sometimes negate his standing to call others to account. It is argued that this is an important issue, but that the analogy with individual standing is problematic. Moreover, Duff’s account of standing needs to address two interconnected issues: first, when and in what way the state can lose its standing to call offenders to account, and second, over what range of offences.

Keywords

criminal liability, Duff, punishment, social injustice

One of the traditional concerns of legal philosophy is whether law that emanates from an unjust state is really law at all, and so does or does not command obedience (or, perhaps, require disobedience). Such debates often take the form of asking whether Nazi laws, or the laws of Apartheid South Africa, are laws and ought to be obeyed. As part of these discussions, the issue of whether punishment can be justly applied in such conditions arises, but only as a subsidiary of the main issue.

In contrast, contemporary penal philosophers have in general not been much concerned with the consequences of general injustice for their ‘ideal’ theories of just punishment. The topic seems to surface once in a

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while, but it fails to command widespread attention. There are exceptions, though. Jeffrie Murphy’s ‘Marxism and Retribution’—a paper that is strangely titled given that almost the only connection with Marxism contained within it is in Murphy’s use of the work of a self-avowed Marxist, Willem Bonger—argues forcefully for the relevance of distributive injustice for so-called ‘fair play’ theories of punishment. More recently, Antony Duff has raised the issue in Trials and Punishments; Punishment, Communication, and Community; and in a number of papers, and it is with his arguments that this paper is concerned.

1. Duff on the Consequences of Distributive Injustice for Penal Justice

Antony Duff has developed and defended an account of punishment as moral communication. Ideally, the communication induces penitential repentance in the offender, and penal hard treatment provides a vehicle for that penance. Such an account, of course, depends on conceiving of the state as a fairly rich moral community. It also depends on the state being in a legitimate position to ‘speak’—to communicate censure based on reasons to the offender—and on the offender being in a position to ‘hear’ and understand the reasons for the censure.

In Trials and Punishments, Duff offered a rather gloomy prognosis for penal justice in present circumstances. The problems he identified included the absence of genuine moral communities, deficiencies in the trial process, and the dire state of penal institutions. The cumulative effect of these problems was, in Duff’s view, such that our community (and, by extension, those like it) could not convey the proper message in punishment; even if it could, it could not sensibly expect the offender to hear the message; and even if both of those things could be addressed, the community did not provide means of punishment that would

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3 Duff, Punishment, Communication, and Community.