In Defence of the Responsible Subject

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It is conventional wisdom that law and legal institutions define and set the conditions of appropriate responsible behaviour. Law's role is to set the standards of responsibility and in a manner which reflects social values. Law must make those standards clear to the public and call to account and blame only those who fail to meet these standards. It must discriminate effectively but also fairly between the responsible and the irresponsible and provide just mechanisms for identifying and dealing with those who thus stray from the righteous path.

The central argument of Scott Veitch's *Law and Responsibility* is that, in truth, law and legal institutions do the very opposite: they legitimise irresponsibility and countenance human suffering and on a vast scale. As a prominent example of such 'asymmetries between harms suffered and responsibility for them', (13) Veitch invokes 'the sanctions regime' imposed on Iraq by the United States and the United Kingdom and the civilian casualties which ensued. The law (here a variety of international law) therefore lived a lie. It was not doing what it was understood to do and what it was meant to do. Instead there was what Veitch calls 'organised irresponsibility'. (21)

The book argues, further, that there is a curious blindness to this troubling state of affairs, to this disavowal rather than imposition of responsibility, even among the most eminent legal theorists. Veitch claims that 'there is today, like no other previous time, a clamour for responsibility'.(34) In fact 'the idea of responsibility has come...to play a central role in how contemporary societies think about and organise their interpersonal relations.' (34) For example, Peter Cane is observed to make recently the supposedly 'grandiose claim' that 'The desire to understand the truth of responsibility grows...out of a need...to discover the meaning of...what it means to be human.'[1] But to Veitch such a quest for truth, this working out of the terms of real responsibility, perhaps from first principles, is not likely to be productive, especially if it is conducted independently of social practices which necessarily change over time.

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1 From Peter Cane, *Responsibility in Law and Morality* (2002) 283.

Veitch, concedes that 'such reflection is [not] entirely barren: it may offer some clarificatory insights, but most likely these will be of a type within which understanding of, indeed dependence on, dominant social forms is left unexamined.' (39-40) In short it will be socially naïve and unhelpfully abstract.

Among certain legal scholars, a contradictory intellectual position is maintained, according to Veitch. On the one hand, there is a genuine belief in, and commitment to, the notion that law and its institutions can, should and do set the terms of responsible behaviour and play a vital role in calling all to account for their departures from that responsible behaviour. In this way, the law is said to treat people as equal moral agents: as rational choosers who can be held accountable for their decisions to behave badly, to behave irresponsibly. In other words, there is faith in law. On the other hand, there is recognition of the unfortunate social reality that far too often law and the state depart from this ideal and that law permits and sanctions great social inequality which enables the most responsible to evade responsibility. Yet all this does not generate a crisis of legal legitimacy. Rather somehow the two positions (that law does and doesn't call people to account for their wrongs) coexist and are sustained. This seems to be an important, interesting and provocative strand of Veitch's argument

Ronald Dworkin, for example, is cited as such a contradictory thinker. He is said to deliver 'the standard political line' (70) that the state must show equal concern for all, if it is to be legitimate, even though it is manifestly obvious that it does not. Yet Dworkin, like most other 'contemporary theorists', finds no crisis of legitimacy. Implicitly (to Veitch) he shows a naïve faith in the state to deliver justice, to bring the irresponsible to justice, though he concedes that the state has a job to do in explaining to the poor the reasons for their plight and convincing them that the state is equally concerned for them. (71)

To Veitch, what he terms 'the moderns' (an expansive and unfortunately vague term), the modern interpreters and defenders of legal responsibility, are getting a number of things wrong. They are giving too much emphasis to a notional moral agent, the responsible subject, who is conceived of prior to the social practices in which he is to engage; who is supposedly master of his fate, and who can therefore be held personally accountable for his wrongs. This exaggerates individual human choice and gives too little recognition to the way in which individuals are socially manipulated in their thinking and choosing by 'dominant institutions'. The 'moderns' are also too willing to find legal conditions which will excuse wrongdoers: which will allow them to disavow responsibility. Further, they pay too little attention to the way large-scale wrongdoers are rarely, effectively, held to account, and

they do not permit such departures from accountability to undermine their fundamental faith in the legal process as a means of assigning responsibility.

In the course of his analysis, Veitch invokes briefly the work of criminal law theorist John Gardner on the nature of criminal responsibility.[2] Gardner is indeed interesting as an exemplar of an influential group of modern criminal law theorists who still believe in the central importance of the concept of individual responsibility, are still seeking to pin down the conditions of that responsibility and in a manner to which Veitch implicitly objects. Leading criminal law scholars, such as Gardner,[3] Anthony Duff,[4] Andrew Ashworth[5] and Victor Tadros[6] could all be said to be in this mould. They seem to have a deep faith in the ability of the criminal law to do justice – that is to name true wrongs and wrongdoers (moral agents or subjects)[7] and to call true wrongdoers to account. They are determined to reinforce and improve this perceived ability of law to identify the true conditions of responsibility and irresponsibility. They take this to be the true purpose of criminal law. Though they admit the shortcomings of the criminal law in identifying the supposedly true conditions of responsibility, they tend to take it as a given that in a rough-and-ready manner the state already names and punishes wrongs and wrongdoers in a suitably calibrated manner, at least when it concerns the central, core serious criminal wrongs.[8]

However, *contra* Veitch, such scholars are not blind to the fact that the persons named by criminal law, who are brought before the courts, are often anything but responsible choosers (though their theories seem to depend on this ability for choice) and that the criminal law can also play a role in helping those who are actually responsible to duck or diminish their responsibility,

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2 John Gardner, 'The Mark of Responsibility' 23(2) (2003) *Oxford J Leg Studies* 157.

3 See also John Gardner & Timothy Macklem, 'No Provocation without Responsibility: A Reply to Mackay and Mitchell' (2004) *Crim Law Rev* 213; John Gardner, 'The Gist of Excuses' (1998) 1 *Buff Crim Law Rev* 575.

4 RA Duff, *Trials and Punishments* (1986); RA Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (1990).

5 Andrew Ashworth, *Principles of Criminal Law* (2003).

6 Victor Tadros, *Criminal Responsibility* (2005) 2.

7 As Gardner and Shute explain, 'the criminal law has a role in requiring us to reason acceptably', in John Gardner and Stephen Shute, 'The Wrongness of Rape' in J Horder (ed), *Oxford Essays in jurisprudence* (2000) 214.

8 Such scholars, however, are increasingly concerned about the extension of state power and the growing number of criminal wrongs which fail to observe the traditional principles of criminal responsibility and its implicit calibrations of wrongdoing. See for example Douglas Husak 'Criminal Law Theory' in Goldring and Edmundson (eds), *The Blackwell Guide to Philosophy and Legal Theory* (2005) 118.

through various defences and through negotiated guilty pleas for lesser wrongs.[9] They know also that prisons are full of the most disadvantaged people whose life choices are severely constrained, rather than the systematically bad rational choosers who are most morally blameworthy. These scholars are also aware that the wrongs they name as the most egregious can be all but impossible to prosecute effectively. They know, for example, that the vast majority of rapists are not brought to account.[10]

They are also socially informed and politicised in the sense that they are highly critical of states (such as Australia, the United Kingdom and the United States) that are willing to make laws which do not adhere to the standard principles of criminal responsibility including proof of fault and wrongful conduct. They are deeply concerned about what they see as egregious departures from classical thinking about responsibility: laws and legal practices which give the state too much power to criminalise and insufficiently protect the fundamental rights of accused persons, as rational choosers, as moral agents.[11]

In some ways this is a converse concern from the one that preoccupies Veitch. The mainstream criminal law theorists remonstrate with governments that depart from traditional criminal legal principles of blaming and hence overcriminalise individuals. Specifically they are concerned about states which, in the name of state security, do not require proof of actual criminal conduct, which reverse burdens of proof, abandon requirements of proof of criminal intent and so on.[12] Veitch, by contrast, is particularly concerned with undercriminalisation and the legal disavowal of responsibility, especially when the wrongdoers are powerful actors. But both sets of concerns are highly practical and engage with real contemporary social, political and legal problems.

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9 Gardner makes just this point in: John Gardner, above n 3.

10 John Gardner and Stephen Shute effectively concedes this of the core crime of rape in: John Gardner and Stephen Shute, 'The Wrongness of Rape' in J Horder (ed), *Oxford Essays in jurisprudence* (2000) 214.

11 As Simester and Sullivan observe, 'the sheer variety of conduct that has been designated a criminal wrong defies reduction to any "essential" minimum. ...The criminal law has been used – indeed overused – as a regulatory device, and consequently can extend to conduct that can lack any inherent moral turpitude whatsoever': AP Simester and GR Sullivan, *Criminal Law Theory and Doctrine* (2000) 3.

12 For a recent collection of criminal law writings which demonstrate precisely these concerns see Bernadette McSherry, Alan W Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (2009).

Critics of the (supposedly) orthodox scholars, such as Veitch, seem to suggest that they are naïve, antisociological or historical, that they place themselves at a remove from these realities of crime and criminals, and so protect their theories. Veitch says in an aside, for example, that Gardner makes claims which are 'unclouded by sociological curiosity'. (59) Veitch declares that 'the moderns' have 'gifted themselves a noble place for responsibility' even though the state constantly permits its disavowal. (59) I have made similar criticisms of these defenders of state responsibility who seem to produce ennobling theories of responsibility which can seem to have little bearing on the empirical realities of criminal justice.[13]

In reply to Veitch, I want to defend this apparently contradictory way of thinking about the state's role in assigning responsibility and to reinforce the importance of retaining the idea within law of the responsible chooser, as law's central subject, and the ideal of law as setting the conditions of responsibility for that responsible chooser, even when it patently fails in so many ways in this exercise.

To defend this idea, one does not have to make deep metaphysical claims about the essential nature of human beings. One does not have to pursue the Kantian or Aristotelian line (as does Gardner, for example) that our true human natures are defined by our rationality and that the task of law is to reflect this true nature.[14] Nor does one have to deny the empirical realities of the great shortcomings of justice, especially its failures to link responsible beings to their wrongs. (And rarely do these theorists fail to recognise that justice is often poorly realised.)

But one can point to the vital strategic and political importance of the idea of the responsible citizen and the role of the state in recognising that responsibility and calling the individual to account. Veitch asks us to concede the reality that the citizen is in fact overdetermined. In this view, the individual is surrounded with choices not of his own making. He is no longer in control of his fate and seems to have lost all sense of personal responsibility. He is a 'moral imbecile' and the state countenances this imbecility. (59) His human agency is a fiction and it is a fiction which does damage because it stops us

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13 See Ngaire Naffine, 'The Moral Certainties of Rape and Murder' in Bernadette McSherry, Alan W Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (2009).

14 Though this is a line that has been pursued by John Gardner, in Garner, above n 2 and rejected by Anthony Duff in R.A. Duff, 'Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?' (2002) 6 *Buff Crim L Rev* 147.

facing the harsh truth of what is really going on: the perpetuation of large scale suffering and inequality.

Whether we regard the idea of the individual as responsible chooser as metaphysical fact or legal fiction, it remains a vital idea and ideal for lawyers, philosophers and in fact all citizens. The idea that the state must not treat us as ciphers (as 'moral imbeciles') but must engage with us as rational responsible choosers represents an important brake on state power, as the criminal law theorists have clearly intuited.[15] It is also dignifying. As Andrew Ashworth has argued, 'individuals should be respected and treated as agents capable of choosing their actions and omissions and...without recognising individuals as capable of independent agency [we] could hardly be regarded as moral persons.'[16]

We should be talked to and not talked at or talked about. This idea of the responsible subject, which is still at the heart of contemporary criminal law theory, is importantly ennobling and we should be very worried about its loss. It is vital that each person is regarded as a human agent, a rational individual, who is capable of personal responsibility and who can be reasoned with and should be reasoned with, not treated like a child or an animal. This is an ideal we should retain and we should endeavour to find ways of obliging the state to do a far better job of making it real.[17]

The last quote in Veitch's book, which comes from Hart, goes to support this defence of the traditional ideal of the responsible subject. Hart reminds us of the dangers of a state and a society in which its members are 'sheeplike'. He points out that in such a society 'the sheep might end in the slaughter-house'.[18]

Certainly, this leaves the theorists of responsibility and their theories in tension, but one which I suspect is unavoidable. They wish to retain an ennobling idea of the state and its citizens and to set themselves the task of developing theories which identify the true conditions of responsibility and set the limits of state power. But they also recognise the great departures from this idea and ideal. This does not mean that they are naïve or bloody minded. It does mean that they are dealing with possibly intractable fundamental problems at the heart of law and their theories of justice.

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15 HLA Hart presented one of the most influential accounts of law as a choosing system. See his HLA Hart, *Punishment and Responsibility* (1968).

16 Andrew Ashworth, *Principles of Criminal Law* (2003) 29.

17 For an extended discussion of the responsible subject of criminal law see Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (2009).

18 HLHart, *The Concept of Law* (1961) 114.