

R.A. Duff, *Punishment, Communication and Community*, Oxford and New York: Oxford University Press, 2001, xx + 245pp

Antony Duff's work in the 1980s and early 1990s did much to revive scholarly interest in the moral philosophy of criminal law and criminal justice. In more recent work – consolidated and harmonized in this new book – he has focused his attention on issues in *political* philosophy that bear on the same topics. In particular: What gives the state the right to be the prosecutor of wrongs and the exactor of punishments? The issue is pressing for Duff because his way of justifying the prosecution of wrongs relies on the value of reciprocal talking and listening, and his way of justifying the exacting of punishment relies on the value of sincere remorse and correspondingly expressive penance. In comparison with, say, friends and families, the state might strike one as peculiarly ill-equipped to serve these values. If prosecution and punishment are such highly personal transactions as Duff says they are, why choose such a decidedly impersonal agent as the state to take charge of them?

One might expect the answer to involve Duff in defending a perfectionist view of the state, i.e. a view according to which the state is no less concerned with our moral virtues and moral vices than our friends and families are. But that is not the way Duff goes. In fact he moves *away* from the kind of state perfectionism that was hinted at in his earlier work, by embracing a rather hard-line version of Mill's 'harm principle' that would entirely exclude the offender's moral salvation from the goals of the criminal justice system (p. 90). In place of such perfectionism, Duff devotes his considerable philosophical talents to explaining the conditions under which a non-perfectionist state might legitimately claim to stand in the right kind of relationship to an alleged wrongdoer that the alleged wrongdoer should submit to the state's prosecutorial and punitive authority. These conditions, as I understand them, fall into three broad categories. First there

are those bearing on the state's relationship with the political community over which it presides, in particular its claim to represent that community. Secondly there are those connected with the offender's place in that community, in particular her not being systematically excluded from it (e.g. by prejudice or extreme poverty). Finally there are those connected with the prosecutorial and punitive apparatus itself, in particular that it have a reconciliatory and reintegrative emphasis. In short, and simplifying greatly, the legitimacy of the state's criminal-justice role is challenged if (a) the state doesn't really represent the community, or if (b) the alleged wrongdoer is excluded from membership of that community quite apart from her alleged wrongs, or if (c) the criminal justice system isn't orientated towards reaffirming and reinstating her community membership to the extent that it has been undercut by her alleged wrongs.

So rather than having perfectionist goals Duff's state, *qua* prosecutor and punisher, has *communitarian* goals. It is not a concern with the wrongdoer's moral virtue but an orthogonal concern with her continuing membership of the community that makes the state a fit agent to persuade her to see the error of her ways and to repent – in other words, fit to engage in Duff-style prosecution and punishment. Contrary to received wisdom, Duff insists, this communitarian objective is perfectly consistent with a traditional liberal emphasis on the protection of personal freedom. The community that the state legitimately represents and cultivates through its criminal justice system is not just any old community. It is one that regards people as autonomous human beings who can speak for themselves and are entitled to determine their own fates. Duff's endorsement of a relatively hard-line version of the harm principle is only the most striking declaration of his continuing affection for this liberal ideal. He also continues to stand up for the rule of law, the separation of powers, the ban on cruel and unusual punishment, the right to privacy, and many other familiar liberal doctrines.

Duff is surely right to regard these liberal doctrines as compatible with the recognition of intrinsic value in the membership of (some) communities, and hence to reject the easy identification of liberalism with uncompromising individualism. And yet one may still wonder whether such an intrinsic value in community membership can really be, as Duff argues, the basis and determinant of the liberal state's moral mandate to prosecute and punish. It is one thing to recognize that social exclusion is an evil in its own right, but it is quite another to equate social *inclusion* with participation in the mainstream political community that is aptly represented by the state. Those who decline allegiance to this particular community are often labeled 'anti-social'. And yet many are leading notably *social* lives by comparison with the rest of us – as members of traveller communities, as participants in direct action campaigns and dissident social movements, as inhabitants of alternative internet bulletin boards and chatrooms, and so forth. Should we regard inclusion in these fringe communities, which may positively *demand* exclusion from the mainstream political community, as a less intrinsically valuable kind of inclusion, as something to be regretted by communitarians rather than celebrated? I see no general reason to think so. So I see no general reason to regard the reintegration of such people into the mainstream (through the criminal justice system or otherwise) as a net communitarian gain. At the same time I see no general reason to conclude that members of these fringe communities should be exempt from the regular criminal law. Quite the contrary. These relatively self-contained communities may well be among those that most need the bureaucratic interventions of the criminal law to displace and control the ugly forms of 'community justice' that tend to spring up when relations break down in confined social spaces. There is a contemporary tendency to idealize informal dispute resolution conducted at the level of the neighborhood or village, and to regard the criminal law's bureaucratic control of prosecution and punishment as a kind of colonization of 'our' problems. But the

lynch mob was informal dispute resolution conducted at the level of the neighborhood or village. We need the criminal law partly to put a stop to such punitive atrocities as are often otherwise conducted in the name – and not uncommonly with the approval – of some community or other. Here the legitimating point of the criminal law is not to *represent* the community (except to the extent needed to mollify it). When the community turns to spite, pettiness and hate, the legitimating point of the criminal law is rather to *protect people from it*.

I am not suggesting that Duff is insensitive to this consideration. He is extremely measured and circumspect in his support for mediation schemes, restorative justice projects, and similar communitarian-inspired alternatives to traditional criminal-law prosecution and punishment. He makes it clear time and again that the proper task of the criminal justice system includes controlling these measures as well as supporting them, and in particular keeping them within the liberal limits of the rule of law, the harm principle, basic human rights, etc. It still struck me, however, that he is somewhat prone to the dewy-eyed romanticism about communities that leads people to idealize localized informal dispute resolution at the expense of the rule of law, the harm principle, basic human rights, etc.

His choice of the thriving university as the model of a liberal community (p. 42) was one that I found particularly telling. As ever, Duff is cautious and circumspect about the virtues of the university itself (like other communities, universities have to exclude in order to include) and about the aptness of the analogy between the academic community and the political community (for most of us the former is at most an option, while the latter attempts to force itself upon us without offering any genuine exit). Yet Duff says little about the most striking difference between modern universities and modern political communities, namely that (in spite of widespread Philistine political attacks) the former largely remain liberal-monocultural while the latter do not. Academics and students still enjoy the luxury of many shared

objectives and assumptions, most of them liberal-minded. One is unlikely to opt for a university life, or at any rate to thrive in one, if one craves something other than open-minded and vigorous debate, independent inquiry, experimental endeavour, etc. But there is no reason to suppose that the liberal state has this luxury of presiding over the lives only of relatively like-minded people, still less those whose relative like-mindedness is so morally unobjectionable as this. The job of the liberal state includes coping with a great deal of thought and behaviour fundamentally at odds with its own. On the one hand this includes thought and behaviour that is morally valuable but does not include any identification with the state or any sharing of mainstream cultural values. This the liberal state has no business obstructing or discouraging. On the other hand it includes a great deal of mean-spirited and brutal thought and behaviour even among people who do identify with the state and who do inhabit the mainstream. This the liberal state has no business encouraging or idealizing or pandering to (except to the extent necessary to bamboozle the mean-spirited and brutal people).

Duff's invocation of the university as a model made me think that he gives too much credence to the modern state's increasingly hollow claims to represent us all in common under a 'Big Tent'. From these claims, as we who live in New Britain under New Labour have learnt to our cost, it is a short step to an illiberal prizing of allegiance to the political community and the state (under the name of 'citizenship'), and a corresponding resentment of cultural outsiders (rough sleepers, travellers, asylum-seekers, organized political protesters – and now even 'liberal elites'), never mind that they too live morally upstanding lives. Duff himself clearly does not share these sad resentments. But he is not immune from the romantic myths about allegiance to the state and 'the people' that tend to give succour to them.

In Duff's earlier work I found much to disagree with. But I always shared his sense that to understand the justification for trials and punishments, including those administered by the state,

one must first understand the values of addressing one's wrongs in dialogue with others, and sincerely coming to regret and repent them as appropriate. I never shared, and still do not share, the view of those critics who objected that these ideals for personal catharsis could not have any legitimate bearing on the imperfect and impersonal world of criminal justice administered by the state. But Duff's latest book has made me much more wary of the ideals themselves, as he sees them. Personally I think it was a serious wrong turning for him to rely mainly on communitarian considerations to justify and shape the state's involvement in the prosecution and punishment of wrongs. The quite different perfectionist route, from which he has now distanced himself, had much more to offer. On the other hand, this new book is a major contribution to our understanding of criminal justice and its contemporary politics. For every word in the book that gives succour to today's alarming trends in criminal justice policy, there are ten more that expose cant, ignorance, and confusion. For a philosophical work to engage so closely with current politics and practice without sacrificing philosophical quality is a rare achievement indeed.