

On the Impossibility of Justifying the Moral Responsibility System

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The Stubborn System of Moral Responsibility is easily one of the best philosophy books I have read and it may even be the best. Waller's writings are erudite, sharp and immensely important in a time where individuality and harshness are omnipresent. The book is a must read for anyone who is convinced that philosophy is not just about asking critical questions, but also about getting at the truth of things that matter. Inflicting (serious) harm on others without a proper justification matters whether it concerns perpetrators harming victims or the criminal justice system harming offenders and forensic patients. Questioning retributive punishment in the face of challenging criticisms is an integral part of the free will skepticism position and Waller's book adds much to this challenging philosophical debate.

In his excellent book Waller carefully explains that one of the reasons why compatibilist thinkers like Daniel Dennett argue that we should hold on to our current practices of attributing praise and blame is the worry that "the steady march of scientific understanding will erode away all the space required for free will and moral responsibility" (176). We will have nothing left. As we understand more and more about individual's formative histories, we will have more and more excuses available to argue away all attributions of competency and human agency. We will be left with a system that denies moral responsibility based on the recognition of "universal flaws and a universal denial of individual competency." (179) We will undermine personal agency, personal strength and all human achievements thereby creating a world of non-competent automatons. Without moral responsibility, philosophers fear our emotional lives will be impoverished, morality will be lost, and harsh and uncontrollable forms of "therapy" will replace punishment.

If this would follow from a free will skeptic approach to human behavior and decision-making it is troublesome indeed. In his book, Waller decisively argues that there is no reason to hold these views. Waller strongly rejects what he previously coined the "excuse-extensionist model": the idea that the denial of moral responsibility implies or necessitates a universal extension of competence-destroying excuses.³³ He correctly identifies that the denial of moral responsibility entails that *no individual* is morally responsible in a desert-based manner no matter how much or little competency that individual possesses. No matter how much or little capacity for human agency that individual possesses. The book confronts us with the implications of taking moral responsibility skepticism seriously: We can use our scientific understanding of human behavior to identify whether or not an individual has the capacity for take-charge responsibility, but not (desert-based) moral responsibility. Waller describes take-charge responsibility as "the sort of responsibility we can have for a project, a role, or enterprise; or to extend it further, the sort of responsibility we can claim for our own decision and our own lives" (182). It is about managing one's own life, making one's own decisions and following one's own path. Hence, it seems, without freedom one cannot exercise take-charge responsibility.

Although Waller is a fervent denier of moral responsibility, he does present an account of freedom / free will. Waller rejects the idea of free will as a uniquely human capacity or power that is distinct from the capacities or powers that nonhuman animals possess and explains it in a naturalistic sense. I agree that it makes no sense to draw a line between humans and nonhuman animals when faced with Waller's understanding of free will. However, his understanding of free will seems different from the way in which free will skeptics, hard

incompatibilists and libertarians typically understand free will (i.e., contra-causal). In my view, there is a difference between *free will*, as for example discussed by Sam Harris (2012) and Caruso (2013, 2016) and *freedom*, as for example defended by compatibilists such as Daniel Dennett (1978, 2003) and Fischer and Ravizza (1998). Free will skeptics argue that the relevant question is whether an offender could have acted differently in precisely those circumstances with precisely the powers and limitations he or she actually had. Could he or she *actually* have acted differently? Free will in this sense entails being the sole author of one's behavior and implies that one could genuinely have acted otherwise (as also defined by Waller in his earlier writings)³⁴ Free will skeptics hold that this is the kind of free will that is needed to attribute "moral guilt" and to justify retributive punishment and it is entirely different from compatibilist *freedom*.

Compatibilist freedom distinguishes between individuals with and without normal capacities for moral decision-making and human agency within a deterministic worldview. Such a difference is normatively relevant and may be scientifically identifiable. However, if agents with and without these capacities are considered inhabitants of a world in which behavior is fully determined by antecedent factors, can it ever be justified to purposively inflict harm on offenders on the ground that they acted *freely*? There is a huge difference between feeling (appropriately) *in charge* of one's actions on the one hand, and having the (contra-causal) capacity to make a different choice at a given moment in time if faced with exactly the same formative history on the other hand. Whereas compatibilists are willing to use such freedom as the basis of moral responsibility attributions, free will skeptics argue that this capacity cannot justify desert-based moral responsibility or a concept of legal responsibility and punishment drawing upon desert.

It therefore makes sense to draw a distinction between free will and freedom, or between free will and free behavior. Individuals can be free to a greater or lesser extent in the sense of having greater or lesser capacities for (moral) agency, reason-responsiveness, rational deliberation and behavior, self-control, self-governance, etc. (all interrelated concepts). Nonhuman animals can be free to a greater or lesser extent in line with the species-typical display and possession of their behavioral capacities. Waller seems to understand free will as "not being hampered from performing species-typical behavior," which is essentially how many compatibilist understand free will, or rather, freedom. It tracks Wakefield's understanding of "normality" with respect to psychiatric disorders in humans.³⁵ That kind of free will (i.e., freedom) does not undermine the moral responsibility system because it can operate from within the moral responsibility system. It is the contra-causal notion or rather, its absence, that undermines the moral responsibility system that Waller fiercely rejects. If contra-causal free will does not exist, and it does not, then it is fundamentally unfair to hold individuals morally responsible and retributively punish wrongdoers even if society cannot or should not completely eliminate punishment. Hence, it seems that two very distinct notions of free will are doing the conceptual work in Waller's book: the free will skeptic notion of free will that leads to the rejection of (desert-based) moral responsibility and the compatibilist notion of freedom that allows for the preservation of take-charge responsibility. If these two notions are kept separate, it might make Waller's line of reasoning even more convincing.

Freedom exists in gradations and refers to psychological capacities that can be described by our existing scientific knowledge. Compatibilist thinkers typically understand freedom as a backward-looking notion. Individuals with a normal capacity for moral decision-making and behavior are considered free and therefore morally responsible for their behavior. Free will skeptics may also attribute some notion of freedom to individuals, but their understanding of

freedom will be forward-looking. Forward-looking freedom, human agency and take-charge responsibility are interrelated concepts within a free will skeptic account. Having or lacking human agency and a capacity for take-charge responsibility implies having or lacking the freedom to change one's future behavior if given the means to do so. Whether individuals possess or lack normal capacities for human agency and take-charge responsibility is therefore important with respect to rehabilitation and leading a crime-free life. These capacities are based on cognitive, motivational and emotional processes that can be enhanced to a greater or lesser extent if found to be lacking or impaired in a given individual. The latter is the goal of moral enhancement, which can be achieved by traditional means such as education and moral upbringing or potentially by biomedical means. As individuals, we do not have the free will to act differently at a given moment in time, but we do possess the freedom or *take-charge* responsibility to change our future behavior provided adequate means to accomplish such changes are provided. Such means can focus on changing the environment by addressing structural impediments to leading a crime-free life (e.g., addressing poverty, addiction, unemployment, incarceration) or on changing the individual in question (i.e., restoring or enhancing an individuals' decision-making capacities and behavior through behavioral and/or neurobiological interventions).³⁶

If better formative histories allow for a morally better world, we clearly have strong reasons to focus on changing our societies and perhaps our genetic and biological make-up for the better. However, one could also argue that forward-looking notions of freedom are as unintelligible as backward-looking notions of freedom since all behavior is determined. Hence, whether or not our society moves towards a morally better world or a less violent world, as for example Pinker (2011) has argued, is not up to us. Can we truly make sense of a forward-looking notion of freedom if contra-causal free will and desert-based moral responsibility are lost? Can you intelligibly preserve forward-looking freedom without backward-looking freedom? Perhaps only if we acknowledge that it is just as much an illusion as backward-looking notions.

Waller wants us to discard our existing "moral responsibility system" and urges us to look for a better and more productive system. I agree with Waller. One thing that might be important to highlight is the need to be very cautious when considering the idea that prevention and/or rehabilitation measures are "better" than (retributive) punishment, especially with respect to forensic mental health treatment. The risk of undesirable ethical, social and legal consequences such as the deliberate misuse of treatment programs for social control purposes needs to be taken seriously.³⁷ Individuals receiving a psychiatric label run the risk of being stigmatized, may experience fear of rejection and mistreatment, and may be subject to discrimination and prejudice. Experiences like these make individuals prone to the development of low self-esteem and the internalization of self-blame which may prevent successful treatment outcomes in the long run. Moreover, the risk of false positives inherent to medical diagnoses in general and psychiatric diagnoses in particular urges us to be very careful when focusing on (early) detection, prevention and rehabilitation.³⁸ We should be mindful that certain behaviors are easily misclassified as behavioral indications of an underlying disorder while in reality being expressions of normal variation in personality traits and behaviors. The risk of false positives is especially worrisome when faced with children and adolescents living in low socioeconomic, deprived neighborhoods and attending schools with high-delinquency rates. Behavior that reflects normal survival and coping strategies in such environments may be misunderstood as exemplifying underlying disorders.

For Waller, denying moral responsibility is about recognizing that our desire for retribution is a guide to *unjust* behavior. In his view, the entire system of moral responsibility is flawed and in violation of basic principles of fairness. If we recognize this, then we can pave the road towards a better society. While blame and retributive punishment are lost, moral evaluation and the identification of wrong behavior as morally bad behavior remains available to us. From a broader societal and criminal justice perspective, the extent to which humans display take-charge responsibility and how this can give rise to morally good rather than morally bad behavior, is crucial. Forward-looking freedom implies that human behavior is malleable and that continuous efforts to achieve more morally good behavior are worthwhile.

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