

University of Dundee

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Giddens, Thomas

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# Criminal Responsibility and the Living Self<sup>1</sup>

*Thomas Giddens*

## The Abstract and Living Self

Behaviour, including criminal behaviour, takes place in lived contexts of embodied action and experience. If an individual is modelled as abstracted from this 'living' context, then that individual cannot be 'ethically' linked with his or her behaviour, and thus cannot justly be understood as responsible. The primary issue with this ethical injustice relates to the division between a self that is abstractly autonomous and a self that exists in a lived context of emotionally embodied reality. This issue is central in the 'ethical-other' debate (see Barron 2002, 1072-1077). Starting from the moral philosophy of Immanuel Kant, the basic claim is that dominant approaches to understanding individuals focus on their supposedly 'universal' attributes (reason, rights, autonomy), whilst 'real' individuals are far more complex and unique than Kant's abstract vision suggests:

...from the Kantian perspective a person only deserves respect insofar as s/he can assume the position of the moral subject, and since the moral subject is premised upon a denial that human difference has any moral relevance (except as an impediment to moral action), Kantian respect comes to be seen as a kind of disrespect: a disrespect for the radical 'otherness', or 'alterity', or unique particularity, of persons. Kantian justice thus reduces the other to the same, and is inconceivable without this reduction. (Barron 2002, 1073)

This ethical injustice in the understanding of individuals, it is claimed, needs to be rectified: models of the moral self must 'do justice' to the fullness and alterity of unique, living humans; they must treat the other 'as other', and not as 'the same' (see Stacy 2001, 161-164). This article is concerned with expounding this central issue in the ethics of modelling the moral self with respect to criminal responsibility in legal theory (that is, examining the limitations of criminal responsibility vis-à-vis the 'living self'), and proposing a phenomenological approach that may increase our ability to ethically comprehend the self-as-responsible.

Ernest Weinrib argues that Kant's 'right' is grounded in the formal relationship between free willing agents and ties together the entirety of law as a coherent 'idea of reason' (Weinrib 1987). Adam Gearey also observes how Kant's idea of reason 'allows a rational jurisprudence to account for the origins of civil society without reference to anything extrinsic to reason itself' (Gearey 2001, 6). Rooting out Kantian influence more broadly, Ian

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Ward traces many seemingly counterpoised schools of moral, political, and critical legal thought back to Kant's philosophical system (Ward 1997). Specifically related to criminal theory, Samuel Pillsbury links the retributive framework of Western criminal justice to key dimensions of Kantian philosophy (respect for persons based on their capacity for free moral choices, and punishment based upon that respect) which, he argues, inspire the tendency towards dispassionate, unemotional judgement (Pillsbury 1989, 658-667). Similarly, Alan Norrie claims the simple penal equation 'crime plus responsibility equals punishment' has informed our social control practices for 200 years (Norrie 1996, 540), and that both 'criminal law theory and the philosophy of punishment possess the same Kantian, retributive emphasis on individual responsibility as the proper basis for legitimate punishment' (Norrie 2000, 3). Such claims suggest a correspondence between criminal justice and Kantian moral philosophy. But perhaps one of the most notable philosophies this correspondence excludes is utilitarianism, deriving from theorists such as Jeremy Bentham. Whilst Kant is oriented against it, utilitarianism has clearly impacted significantly upon Western criminal justice.<sup>2</sup> Bentham positioned the legal institution as the primary instrument for influencing people's actions (and thus society) for the better through the use of criminal sanctions that played on the binary human drives of pleasure and pain (Morrison 1997, 186-198).<sup>3</sup> Although Bentham's work is important for criminal justice more broadly, encountering debates on punishment-versus-rehabilitation and the social role of the criminal justice system, rational actor models like Bentham's binary calculus are limited with respect to the complexities of individual responsibility. Kantian philosophy, although with its own limitations in relation to the deterrent, rehabilitative, or otherwise utilitarian functions of criminal justice systems, considers questions of individual responsibility in detail and is thus highly relevant to theoretical issues relating to our ethical understanding of the moral self. Put simply, Western criminal justice systems are not purely Kantian, but examining Kantian moral philosophy is an important dimension of understanding criminal (moreover *individual*) responsibility.

Kant defines autonomy as being bound by our purely rational will, rather than being constrained by some non-universal interest (Kant 1959, 51). He argues that the supreme principle of morality can only be found in pure reason, which is separate from the empirical world (Kant 1959, 22-25, 60-61; 1997, 51-54); to base *universal* morality on empirical (and thus contingent) knowledge is flawed—only pure reason is able to ground universal morality, as only pure reason is common to all rational beings. To the extent that we have the capacity of reason we are rational beings separate from the contingent world of sense; it is this innate faculty which we must follow if we hope to achieve universally moral actions (Kant 1959, 72-73), and similarly which must form the basis of universal moral judgments (1959, 58). If we

<sup>2</sup> Indeed, both retributive ('punishment') and utilitarian ('deterrence', 'rehabilitation') ideals are expressly stated as guiding concerns for sentencing in English criminal justice: see s142(1) Criminal Justice Act 2003; see also Ashworth (2006, 19).

<sup>3</sup> Note also the work of Beccaria, which focuses upon the issue of deterrence (as opposed to retributive punishment): see Norrie (1993, 19). On the oppositional relationship between this type of utilitarianism and Kant's retributive ideals, see Morrison (1997, 146-149).

follow our inclinations and desires, or are affected by empirical outcomes and sensory influences, we can never achieve universal morality (see Kant 1997, 69). The justification for punishment stems from our *innate capacity* to follow our free will rather than contingent influences (Kant 1997, 132). In this line of thinking the tension can clearly be seen between the self as abstract and independent, able to freely will and reject contingent impulses ('abstract autonomy'), and the self as embedded in contexts of human feeling, following subjective inclinations and desires (the 'living self'). Within this split, responsibility is linked to the abstract, autonomous self (see generally, Kant 1959). As others who analyse Kantian abstract autonomy have observed (see, for example, Kneller, 174-175; Norrie 2000), this reading of Kant denigrates embodied, emotional experience in relation to morality. When we undertake a course of behaviour we do so within lived contexts of action and influence, in relation to those people who influence, and are influenced by, our behaviour. Our 'choice' to act, or not to act, may not necessarily derive simply from our ability to use reason, but may stem from other factors that impinge upon or exist within ourselves as 'living' humans; the standard of abstract autonomy in the responsible self works by the abstract dictates of a *universal* moral law, and thus overlooks these 'living' dimensions.

Although the 'ethical-other' issue may have connotations in many areas of law, it is of primary importance with respect to criminal responsibility; how we understand individuals relates directly to our ability to hold them morally or legally responsible,<sup>4</sup> underpinning the whole structure of criminal justice. In order to ethically hold individuals criminally responsible, we need an ethical understanding of individuals that can shape an ethical theory of criminal responsibility and underpin the attribution of responsibility in more practical or substantive contexts. Although some practical issues are mentioned, the primary argument of this article focuses on the underlying theoretical issue, and suggests a potential way of achieving this more 'ethical' understanding; it does this in four main sections. The first section shows that criminal responsibility theory generally adheres to a model of rational choice that commits the same abstraction as Kantian abstract autonomy, although not to the same extremes. In the second section, attempts to go beyond rational choice in both Kantian philosophy (namely via his aesthetics) and the criminal justice theory of Alan Norrie are analysed; both are argued to be problematic with respect to the living self. As an alternative, the third section moves towards a phenomenological approach, inspired by cultural criminology and the work of Jonathan Wender. Wender's aesthetic criminology highlights the irreducibility and excessive nature of the world of lived experience of which we must retain

<sup>4</sup> In general, 'responsibility' relates to the wider realm of human behaviour, be it proscribed or lauded, whilst 'liability' is more closely associated with unwanted immoral or illegal behaviour (see Cane 2002, 1-2; Duff 2007, 15-16). In practical terms, the two are linked: finding responsibility may not entail a normative, moral, or legal judgment, but how the wider self-as-responsible is understood informs more specific understandings of the self-as-liable which *are* interlinked with such judgments (Tadros 2005, 1-3, 24-27). In examining how we model the self-as-responsible, our concern is with how individuals are understood as responsible in general, not with specific examples of behaviour contained in legal or moral codes. (What 'should' make up the content of legal and moral codes is obviously a very expansive and highly debated topic in itself; for an in depth discussion on this issue, see, for example, Chapters 4, 5, and 6 of Duff 2007.)

awareness as we attempt to enrich our theoretical comprehension of embodied human experience in relation to criminality. The final section briefly considers the effect of such an approach on criminal responsibility, suggesting that a kind of 'restlessness' will necessarily permeate ethical criminal categories, precluding settled models of the moral self and promoting the need for constant theoretical (re)engagement with the living dimensions of human experience.

### **Rational Choice in Criminal Responsibility Theory**

The Kantian division of the self into two binary aspects—one contingent (and immoral) and one abstract (and moral)—is an extreme position. The models of self found in criminal responsibility theory, although more nuanced, generally adhere to a similar division, and can thus be seen as an emanation of this 'Kantian' tension and its related ethical 'disrespect' for alterity. Norrie (1993) claims there are two major tensions underlying criminal categories, one being an emanation of the self-context tension just outlined in Kant and the other being between the protection of universal individual equality and the needs of the State to maintain social order (Norrie 1993, 27-33). In relation to the tension which primarily concerns us (between the abstract and living self), the criminal doctrine pertaining to intention involves the abstract individualism required to show *mens rea* on the one hand, and on the other admits discretion at the sentencing stage in order to temper that abstraction by taking 'motive' into account. But this discretion undermines the legitimacy of convictions secured through processes of abstraction, and reflects criminal law's attempts to manage self-context tensions without actually dealing with the problems they pose for responsibility (Norrie 1993, 36-58).

Moreover, Norrie claims there is a Kantian focus in criminal justice more generally, deriving from its ideological foundations of, and emphasis on, the abstract juridical individual (Norrie 2000, 3). Although we can question whether criminal justice is broadly Kantian, the importance of Kant's philosophy in understanding responsibility shores up Norrie's potentially problematic starting point. Norrie argues that important dimensions of the lived moral context of criminal behaviour are excluded from questions of guilt (see, for example, Norrie 2000, 102, 180), and this deficiency stems from the Kantian ideology that shapes criminal justice.

Legal categories presuppose an individual subject in whom responsibility is fixed by mental characteristics relating to the cognitive control of actions. These characteristics establish what seems to be a discrete, fixed, stable individual subject, but what if subjects are not like that? What if identity... [is] located in significant measure beyond the individual in the social realm, and [is] therefore fluid and changing? (Norrie 2000, 12)

This configuration of the self-context tension seems set to undermine the whole edifice of criminal responsibility by locating responsibility outside the individual, thus disabling the attribution of blame (Norrie 2000, 38-39). And this, Norrie claims, is why other critical attempts to move beyond Kantian individualism have invariably failed (2000, 21-42), instead

maintaining 'false but necessary' separations between individuals and their social contexts. 'False' because we, as individuals, are not completely disconnected from the social contexts and communities we exist and act within, and 'necessary' because without such a separation of individuals from their context we cannot securely attach blame to them (2000, 38-39).

It is the existence and particular identity of the [responsible] legal subject that gives the law the basis for its rationalizing and systematizing practices. It follows that the basis must be reasonably fixed and stable for legal logic to be possible. If the core entity to be rationalized were in itself unstable, conflicted or in some other way 'fuzzy', legal reasoning would suffer the same defects. (Norrie 2000, 68)

Accordingly, Norrie claims that the abstracted, seemingly objective conceptions of moral identity underlying criminal codes are actually highly unstable, their seeming certainty being disrupted by the 'fuzziness' of the living individual (2000, 80-81, 102). The responsible individual is removed from his or her social context of substantive morality and isolated in purely formal descriptions, an isolation that both enables abstract categories of criminality to be pinned to a responsible subject as an abstracted and rationally choosing moral agent, and commits an ethical injustice in relation to the alterity and lived reality of that individual.

Although there may be little evidence to suggest that criminal theory sustains such an extreme caricature of responsible agents as that proposed by Kant (see Horder 2004, 128-130),<sup>5</sup> this abstraction can be seen to permeate criminal theory more broadly, with its primary 'rational choice' model of responsibility. A succinct explanation of the general role of rationality in criminal responsibility can be found in the work of Anthony Duff:

It is a matter of rationality, both practical and theoretical—we are responsible agents insofar as we are rational agents. But rationality in this context involves more than purely intellectual capacities: a rational agent is one whose emotions and desires or other conative dispositions, as well as [his or] her beliefs, are responsible to reasons. (Duff 2007, 39)

This point is important: the rationality of the responsible self in criminal theory is not the pure reason of idealised caricatures such as Kant's abstract autonomy, but is something more nuanced. Although we are emotional, feeling, desiring beings, with urges as well as thoughts, we generally do things for particular motives or aims; rationality guides our responses to our more fluid or indeterminate impulses. We are not taken to be abstract, freely willing individuals, judged only by the standard of a priori reason. Victor Tadros (2005), for example, argues that agents can only be responsible if their actions relate to them 'qua agent' (that is, in a way appropriate to responsibility), thus holding closely to the idea that criminal responsibility is only attributable if an act fits with the settled character of an agent (Tadros 2005, 49-54; see also Horder 2004, 118-125). But although Tadros grounds responsibility in

<sup>5</sup> But note, for example, simplistic 'rational choice' theories based on individuals' use of 'cost-benefit' type analyses, which share much with Bentham's behavioural matrix of pleasure and pain. For a brief introduction, see Hopkins Burke (2005, 40-50); see also, for example, Clarke (2005).

his 'agent qua agent' reading of *character*, he argues that characters and lives, as well as desires and values, are underpinned by one's ability to make *choices*: our ability to control our thoughts in light of normative reasons, and make plans and put them into action (Tadros 2005, 37-40, 97-98). Further:

In attributing responsibility to an agent for an action, we are interested not in what an agent had the capacity to do. Nor are we interested in what options that agent had. We are interested in the *actual processes of reasoning* that were involved in performance of the action. It is those actual processes that connect the action to the agent. (Tadros 2005, 69, emphasis added)

And it is with Tadros that we find an explicit definition of the standard of rationality that criminal responsibility requires of these 'processes of reasoning': 'rationality' is related to the general coherence and normative accuracy of an individual's beliefs about the world (Tadros 2005, 55-56).

To the extent that we are 'rational' we are also able to 'choose' what we do (or think, or feel, or believe). This model of 'rational choice' does not suggest that every single aspect of the self is rationally directed, but that the responsible agent has a *general* ability to rationally guide his or her various dimensions, and it is this rationality that attracts responsibility.<sup>6</sup> Returning to Duff, he argues that there are two elements to responsibility: control over the object of responsibility and an awareness of relevant facts (Duff 2007, 57-58). Duff's control element effectively requires that:

I was active as an agent in causing the relevant outcome, and that I had the capacity to act in a way that would have prevented it. That capacity to act differently requires the physical capacities for control over one's movements (and the opportunity to exercise those capacities)... [and] *the rational capacities... of recognising and responding to reasons for action*. (Duff 2007, 72, emphasis added)

Even where liability seems to be accepted ostensibly without a control element (see Horder 2004, 128), Duff argues that at some point in the past the agent may have had sufficient control to have avoided the harm, and the question is whether it is reasonable to hold that this earlier control existed (Duff 2007, 58-60).<sup>7</sup> Like Tadros, Duff maintains that we are able to be held responsible for our thoughts, emotions, and character traits—but to the extent that we can *control* them: one can direct one's thoughts, or avoid thinking things by avoiding certain stimuli; one can control one's emotions by avoiding particular situations, or not dwelling on particular things; and one can direct the development of one's character to a certain extent, through things like breaking habits or working towards particular goals (Duff

<sup>6</sup> It should be noted that there are exceptions to this feature of the normal moral self, deriving from the existence of excusatory conditions that may undermine the capacity for rational choice. For a detailed account of excuses, see Horder (2004).

<sup>7</sup> This argument is essentially a version of the 'originalism' discussed in free will debates: see, for example, Honderich (2002).

2007, 61-62). For Duff, the 'rationality' of our choices is related to our ability to recognise and respond to reasons or considerations for (or against) undertaking courses of behaviour (Duff 2007, 39). In a similar vein, John Gardner observes a distinction between internal, subjective, or 'explanatory reasons', and external, objective, or 'guiding reasons', for action. He argues that our explanatory reasons (rational motives or aims) should be found within the guiding reasons that operate in our behavioural context (Gardner 2007). More specifically, for an action to be justified our explanatory reasons must be 'undefeated': if the reason for action is defeated or contradicted by some guiding reason then there is a reason *not* to act in that way (Gardner 2007, 100-103). Gardner's model takes practical rationality as a tool that enables us to ensure our actions match as closely as possible any relevant set of guiding reasons, for example a criminal code (Gardner 2007, 100-101), but like Duff and Tadros he also notes that reasons can operate upon traditionally 'irrational' elements of the self such as our emotions (Gardner 2007, 98).

This is what is meant by 'rational choice' in criminal responsibility theory: the general ability to rationally direct or respond to the living dimensions of the self. As already suggested, this dominant concept of criminal identity is more sensitive to the indeterminate dimensions of the self than the extremes of Kant's abstract autonomy. But although human feeling is taken into account, it is not given a position of legitimacy or great moral significance in understanding responsibility; it is made subservient to the legitimate control of the rational will. As with Kant, it is our ability to employ our rational will in choosing our behaviour that underpins our responsibility, with the effect that 'misfortunes should not be blamed on fate, change or other unknown and uncontrollable forces, but on the *acts or omissions of the individual*' (Douzinas and Gearey 2005, 345, emphasis added). Rational choice is one dimension of the self, abstracted away from the emotional realities and indeterminate dimensions of the living individual. The prioritisation of rational choice over other indeterminate or experiential influences engenders at least a partial abstraction of the 'Kantian' type, rendering criminal identity incomplete or inaccurate, and unable to ethically comprehend the self's indeterminate or fluid dimensions.

### **Contextualising the Moral Self**

Nicola Lacey highlights a critical issue in distinguishing self from context when she notes the inevitability of the criminal justice system having 'to draw lines around the contextual factors it is willing to take into account if it is to function, as it must if it is to exist at all, as a system which enunciates normative judgments about socially acceptable conduct' (Lacey 1994, 266). Although Lacey does not give much detail on the issue, it is worth exploring a little. Suppose, for example, we broadly conceive of 'social context' as that traditionally separate from us as individuals but potentially influencing our behaviour. The world around us is not monolithic, and there are multiple layers of experience which could influence us, from the amorphous clouds of culture down to the physically embodied world. Religion, cultural history, physical location, sub-cultural identification, national identity, our social, communal, and interpersonal relationships—all these things, and undoubtedly many others, affect the way we



feel, behave, and interact, and do so in different ways and amounts. Yet the necessity for delineating self and context in criminal responsibility can readily be seen, for example, in the context of causation, where criminal doctrine generally blocks consideration of contributing factors beyond an individual's freely willed causative behaviour (see Ashworth 2006, 122-127). And similar issues arise in the theoretical context of how responsible we are for more distant consequences of our actions, as Paul Ricoeur observes in his essay on 'The Concept of Responsibility' (Ricoeur 2000, 11-35): extending the concept of responsibility too far means we become responsible for everything and nothing, thus robbing us of any meaningful authorship of those results and accordingly our ability to be held morally responsible for them (see Ricoeur 2000, 29-30). Although Ricoeur's work taps into other related concerns, a key part of his response to this problem exposes an important living dimension of our responsibility for consequences. This can be found, he argues, in the work of Hegel, which suggests that there is a phenomenological limit to our responsibility for the consequences of behaviour because many of the effects of our actions exceed our express intentions and become entangled in the intricacies of the external world (Ricoeur 2000, 32-33).

Similarly concerned with the divide between self and context, Norrie argues that aspects of our moral responsibility may be connected to the social world in which we live, thus transcending the artificial abstraction of individuals from their lived environment (Norrie 2000, 202).

Responsibility lies with individuals *and* with [the] societies of which they are a part, so that, neither individualized nor denied, it is shared. It traverses a space *between* the individual and the social, constituting a blaming relation. (Norrie 2000, 220-221, emphasis in original)

Norrie's concern with things that are 'beyond the individual' (12), is primarily social; he talks of 'social relations' (79) and 'social structure, institutions, [and] culture' (199). It is via the social psychology of Rom Harré that he attempts to navigate a middle-way through the enduring debate between individualists and constructivists, wanting neither to collapse the self into monadic individual autonomy nor evaporate it into social construction (Norrie 2000, 202-213). Harré's understanding describes the social 'conversations' that take place between various groups and institutions within, and activities of public role-playing that help constitute, the broad structure of society (see, for example, Norrie 2000, 209), thus placing our understanding of the moral choices made by individuals within their social context. Although Norrie's approach is important and insightful, and may encounter many of the dimensions mentioned above, his focus on our psychological relationship with a primarily *social* context arguably lacks engagement with the embodied, emotional, living and otherwise richly *phenomenological* aspects of moral choice as part of complex human reality.

Beyond this self-context divide, we have already seen that Norrie characterises Kant as being associated with an abstractly autonomous model of the individual, and distinguishes that from the individual as unavoidably existing *within* a social context (see, for example, Norrie 2000, 197-221). However, Kant says that we are not *only* autonomous, rational beings,

but that we are *also sensual, emotional, and physical beings*, with desires and feelings, and thus susceptible to influence from empirical forces; but because we have the inherent capacity to act *as though* we are purely rational, abstract autonomy is the standard by which our actions must be judged in relation to *universal* morality. This is easily reduced to the practical notion that we can autonomously choose what we do, and are thus responsible for our actions, irrespective of living context. If we then criticise this 'Kantian' notion of responsibility on the basis that it reduces the self to being purely abstract, we are misunderstanding Kant's moral position. Although Norrie's argument expressly claims that it is the *abstract autonomy* of Kant that structures criminal responsibility, we can still retain the spirit of Norrie's thesis by referring his critical view to the *partial* abstraction found in criminal theory's models of 'rational choice' in the previous section. The problem with Norrie's work, once read in this light, is not the broad conclusion he reaches (that criminal theory prioritises abstract rationality over lived context), but that the reading of Kant upon which he bases his argument overlooks important dimensions of Kantian philosophy. This is especially so given Norrie's own admission that he wants to maintain what is valuable in Kantian philosophy: namely what it can tell us about individual moral agency that structuralist and post-structuralist accounts destroy (Norrie 2000, 197-198).

In his *Critique of the Power of Judgment*, 'Kant described a method of understanding that took account of social and historical context' (Stacy 2001, 24). Kant's metaphysical split between the *noumenal* and the *phenomenal* describes a world that is subjectively constructed by the experiences and judgments of the self. As Ian Ward puts it:

The critical moral philosophy which Kant bequeathed was, then, one based finally upon reflective judgment. No longer was there any object out there, a 'thing in itself', separate from our perception of it. There was simply our perception. (Ward 1997, 16)

The phenomenal world is that which we can experience through our senses, it is a function of how and what it is possible to know; the noumenal, on the other hand, is that which is beyond our knowledge and experience, the non-contingent world of the 'thing-in-itself' (see Kant 1959, 69-70; Morrison 1997, 135). Insofar as the world is phenomenal, Ward's description is sufficient: the phenomenal world is a product of our perception. In Kantian autonomy, however, although we cannot even know if the noumenal exists, we need to *assume* that it does and identify ourselves as noumenal beings. Christine Korsgaard explains why (see also Battersby 2007, 52):

[As] members of the... phenomenal world, we regard everything about ourselves, including... our own thoughts and choices, as parts of [that] world, and therefore as governed by its causal laws. But insofar as we are rational beings, we also regard ourselves as the *authors* of our own thoughts and choices... [and] necessarily think of ourselves as members of the noumenal world... The conception of ourselves as members of the [noumenal] world... is a conception of ourselves... as autonomous or moral beings. (Korsgaard 1998, xxvii-xxix)

Although Kant argues that we should assume the noumenal exists, and that it grounds our autonomous will, he does not think that we can ever actually attain true morality (see Kant 1959, 23-24). A key area of Kant's philosophy that highlights this extreme difficulty in acting 'freely' is his aesthetics of the sublime, which is associated with the experience of the might and infinity of nature—the night sky, storms, overhanging cliffs, raging seas—and the challenge such things pose to our rational ability to comprehend the world. At its heart, the Kantian experience of the sublime is a discord, or conflict, between our rational understanding and our sensory experience. The power of reason operates within this conflict to posit the existence of the noumenal and thus restore order to our understanding of the world (see Kant 2000, 128-151). The experience of the sublime reveals to the self its free, 'unlimited' noumenal dimension (i.e. one's capacity to use universal reason, and thus be autonomous), and this capacity can only be recognised through experiencing the limitations of conceptual understanding in the face of the sublime (Kant 2000, 142). Accordingly, within Kant's system, the experience of the sublime is concomitant with our ability to be truly moral (see also Richardson 2007, 233-234). The locations in nature where Kant perceives the operation of the sublime highlight the extremes that we have to go to in order to begin to understand that there is a pure noumenal realm beyond what we can experience, and hence access our capacity for moral autonomy.

With the suggestion that truly moral actions may be impossible, coupled with the extremity associated with achieving Kant's idealised moral autonomy, we can open the door for legitimate doubt around whether Kant's notoriously narrow standard of universal morality is an acceptable standard for *non*-universal criminal responsibility. Put differently, the a priori *formal* quality of Kant's abstract autonomy is arguably inappropriate for the *practical* or *phenomenal* quality of a criminal justice system in a contingent human world. Despite this, the interrelationship between feelings and rationality, and our ability to listen to our feelings in our experience of the world around us, is important in becoming moral beings, even in the extremely narrow sense of Kant's universal morality; we must experience the *feeling* of the sublime in order to access our *rational* moral autonomy. Although our access to morality is drastically limited by the extremes we have to witness even to *posit* the existence of the noumenal,<sup>8</sup> it is still the case, as Jane Kneller argues, that Kant's 'aesthetic theory opened up the possibility of feelings that play a positive role in the development of moral subjectivity' (Kneller 1997, 184; see also Barron 2002, 1061-1063). For Kant then, against what the abstract autonomy reading may suggest, our nature as humans embedded in the world of sense and experience is not something that we must ignore in our assessment of moral behaviour—it is a part of how we can move towards universal morality, through the (aesthetic) experience of the sublime.

It is this navigation of the central tension within the Kantian sublime which makes it significant to the concerns with alterity, particularly the discrepancy between the abstract

<sup>8</sup> Kant also limits access to particular types of people, his most notable exclusion being women. See Battersby (2007), particularly Chapters 4 and 5.

and the living self. Although it may be debateable whether Kant's philosophy accurately or comprehensively captures the 'reality' or 'truth' of human moral experience, or is an appropriate measure to employ in the context of practical criminal justice, the sublime is nevertheless symbolic of the tension between the messy dynamics of life and the rational order of human knowledge systems. The abstraction inherent in the development of knowledge, as has been discussed in the context of 'rational choice' above, overlooks the complexities of living human meaning. Similarly, the movement in the Kantian sublime requires that we sacrifice our experiences to the supremacy of rational explanation—we must still follow reason if we are to be moral. Despite its consideration of the aesthetics of sensory experience, if anything the sublime reinforces the hegemony of the rational by arguing that our sensual faculties cannot comprehend that which reason can: our experiences break down when we are faced with the infinity of the night sky, or the huge power of a thunder storm, but reason steps in to explain and order those things, thus (re)securing our position in the world (Battersby 2007, 29-30). The sublime ultimately sacrifices phenomenal experience to the abstract rationality of the noumenal, thus denigrating the moral validity of the living self as against rational autonomy, and failing to achieve the escape from the ethical injustice of abstraction that a turn to aesthetic experience may initially signal.

### **'The Return to Astonishment'**

To clarify, the use of Kantian aesthetics in this context is not an attempt to configure this dimension of his philosophy in way that would make it applicable to political judgment.<sup>9</sup> Nor is Kant's aesthetics being applied to law in a way that would ground legal decisions within a reconfigured Kantian framework. Rather, the concern here is to expose the limits of rationalisation and the importance of the experiential and fluid dimensions of the living self in the context of attributing responsibility for criminal (and other) behaviour. As has been outlined above, not only is Kant's moral philosophy important for understanding the moral self in general, but the sublime is a key dimension of his system where the problematic limits of rationality with respect to the ethical comprehension of living sensuality are encountered and exposed. In response to these problems, we can deepen our theoretical engagement with moral selfhood by adopting a phenomenological approach to criminal responsibility and aesthetic experience. Navigating a similar line to Norrie—between a 'Kantian' self, isolated from its context, and the self as a socio-narrative construct, subsumed into its context—Dan Zahavi observes a phenomenal self:

To be conscious of oneself... is not to capture a pure self that exists in separation from the stream of consciousness, but rather... is a question of having first-personal access to one's own experiential life... [Accordingly] the self is conceived neither as an ineffable transcendental precondition [Kant], nor as a mere social construct that evolves through

<sup>9</sup> For a detailed discussion of the move from aesthetic to political judgment following Kant in the work of Hannah Arendt, for example, see Ricoeur (2000, 94-108).

time; it is taken to be an integral part of our conscious life with an immediate experiential reality. (Zahavi 2005, 106)

Since behaviour, including criminal behaviour, takes place in lived contexts of experience, and is undertaken by living beings with their own 'first-personal' life, an 'ethical' understanding of responsibility may necessarily entail approaching this phenomenological dimension of the moral self. On a philosophical level, subsuming the complexities of individual experience and emotion under the direction of the rational will, as criminal theory does, arguably fails in this regard. As has been indicated, although some theory attempts to temper this ethical shortcoming—through a nuanced understanding of 'rationality' or through Norrie's relational blaming—ironically it appears to be a shortcoming that is required if we are to have a *practicable* justice system. A line needs to be drawn between what is and is not taken into account in making legal judgments in order for those judgments to be made in the first place. The move to phenomenology proposed by this article is not attempting to destroy this line in a practical context (although there may be practical ways in which the lived experience of a defendant or victim might be more meaningfully considered, such as in-depth interviews), but to test the limits of responsibility theory's ability to understand moral agents. As we have seen, the dominant rational choice model is limited in the way it subsumes the living context of action under an abstract idea of choice. Maintaining our focus on the philosophical level of responsibility theory, a more detailed and sensitive understanding of living morality can be approached.

Cultural criminology can be taken as a starting point, as it is a field that works to empirically access the lived realities of human agents without relying exclusively, or even heavily, upon the orthodox approaches of the social sciences. Cultural criminologists argue that to better understand crime in our late modern world, we need to move beyond narrow categories of crime and criminal justice, and broaden our focus to include the symbolic, emotional, and experiential aspects of criminality and its consequences (Ferrell et al. 2008, 2). Cultural criminology's focus of enquiry is aimed 'at precisely those points where norms are imposed and threatened, laws enacted and broken, [and] rules negotiated and renegotiated' (Ferrell et al. 2008, 4). Cultural criminology is thus open, fluid, and dynamic; its theoretical underpinnings are key in considering how we understand the living world of human conduct. The priorities of cultural criminology are the sensuality and meaning of criminal experience and everyday life, as opposed to orthodox or positivist criminology which is preoccupied with the attempted 'scientific' or statistical study of human behaviour.<sup>10</sup> This distrust of statistical method as an appropriate and capable tool for understanding the complex dynamics of living crime fuels a 'healthy disrespect' (Ferrell et al. 2008, 161) for orthodox knowledge, an abandonment of 'the old social scientific hierarchy of content over form', (of word over

<sup>10</sup> For more detailed discussion of criminological and cultural criminological method, see Ferrell et al. (2008, 158-194). See also, for a damning attack on the prevalence of statistics in criminal and social research, Young (2004). For an extended analysis of the sensuality and 'seduction' of criminality, see Katz (1988). For a detailed introduction to the more orthodox methods of criminology, see Coleman & Moynihan (1996).

image<sup>11</sup>) and an almost exclusive shift towards qualitative and ethnographic methods of research (Ferrell et al. 2008, 174-194). Moreover:

Certainly, the 'cultural' in cultural criminology denotes in one sense a particular analytic focus: an approach that addresses class and crime as lived experience, a model that highlights meaning and representation in the construction of transgression... But the 'cultural' in cultural criminology denotes something else, too: the conviction that it is shared human agency and symbolic action that shape the world. (Ferrell et al. 2008, 20)

Cultural criminology's priorities, then, are the activities of human actors, as embodied moral agents, that negotiate codes and transgressions in a context of lived symbolic meaning. We act in particular cultural settings, where our actions have specific sets of meanings integrally linked with our cultural framework and the world around us, and if we are to hope to understand human behaviour—its causes, its effects, its moral value—then a focus on this cultural context of action and experience is important and necessary. The meaning of action, of crime, cannot be found in endless tables of statistics or abstract models of rational choice, but in the dynamic world of transgression and cultural navigation.

This kind of open-textured approach to the lived dimensions of human action is given a profoundly phenomenological twist in the work of Jonathan Wender. Although not directly concerned with criminal responsibility, Wender tackles important issues relating to abstraction in his attempt to promote what he terms a '*phenomenological aesthetics of encounter*' (Wender 2004, 49, emphasis in original; see also Wender 2008). Wender configures the 'abstract-living' tension in understandings of the self as a division between 'intersubjectivity' and 'co-presence':

Regarded as moments of intersubjectivity, human encounters are interpreted as discrete events of intersection between atomistic, isolated 'subjects'. By contrast, to understand encounters in terms of co-presence is to acknowledge that by virtue of the mode of their existence, human beings are always already meaningfully present to one another. (Wender 2008, 16)

For Wender, the phenomenological aesthetics of an encounter is where a person partakes in expressive, meaningful activity; behaviour is embedded in living reality and is thus richly significant. It is in astonishing reality that the 'fullness and mystery of human existence' is to be, for want of a better word, 'found' (Wender 2004, 50). More specifically, Wender highlights how rational 'solutions' serve only to obfuscate criminal experience and meaning. Taking his analysis back to his experiences on the streets as a police officer, Wender criticises the problematisation of human being:

<sup>11</sup> For an analysis of the importance of studying the visual dimensions of crime in cultural criminology, see Hayward (2010). Regarding the general denigration of the visual in criminology and sociology, note page 5 of Hayward's work. See also Ferrell et al. (2008, 175). See also, for an examination of the usefulness to legal theory of visual-textual *interaction* examined via the medium of comics, Giddens (2012).

## *Criminal Responsibility and the Living Self*

To encounter someone as a 'problem' depends on processes of reification and abstraction that efface human presence and translate it into an entity available for scientific analysis and methodical control. So it is that modernity's bold claim to have substituted 'objectivity and neutrality' for avowedly moral praxis withers before the gaze of the troubled faces encountered by the police. (Wender 2008, 4)

The practical functions of criminal justice (for Wender, the bureaucracy of policing), are grounded upon processes of abstraction, upon the reification of the self into a 'knowable' structure of reason, that have the effect of simplifying, obscuring, or otherwise effacing the complexities and irreducibilities of lived existence and the structures of human experience. Although, as we have seen, this may be a practical necessity, where exactly we draw the line is debatable; back to the streets again:

...the defining qualities of the human condition at its best and worst—love, hate, redemption, betrayal, jealousy, revenge, forgiveness, greed, sacrifice, hope—all unfold in the remarkable sequence of events that constitutes a patrol shift... [and] may be regarded as *moments of poetry*—lived creations of meaning in which human beings struggle to make sense of the mystery of their own existence, and the existence of others. (Wender 2008, 2)

Abstract descriptions and categories will not be able to fully capture this existential mystery; rather, it is what abstraction denies, and to what we need to return (see Wender 2004, 58-59).

What Wender argues is not the notion that we may be psychologically affected by aspects of some one- or two-dimensional 'social context', but that it is in the concrete, ontological phenomena of a (criminal) act that meaning is made, and that we must be sensitive to its 'aesthetic' (or sensually experienced) dimensions in order to appreciate this. It is precisely through the abstraction of criminal justice processes that the symbolic and contextual meanings embedded within and around a criminal act are negated, denied, and lost. In the context of criminal responsibility, this may suggest that we can move the 'line' of practical abstraction closer to phenomenal reality than allowed by the present limits of rational choice. But Wender's point is not about capturing more of the self and its context in order to answer the question of where to locate responsibility, as though blame can be pinned in the 'correct' place, but rather to accept that 'astonishing' reality *cannot be completely understood, captured, or categorised*, least of all in any 'rational' sense. This does not mean that the complex dynamics of life are a complete lacuna, but that, as the subjective priorities of phenomenology indicate, behaviour and meaning are experienced and mediated through the experiences of a living self. And this recognition, in turn, challenges the primacy of an abstract order of rational knowledge in understanding the world and the individuals who inhabit it.

Importantly, recognising these lived dimensions of human behaviour does not mean an action is perceived to be 'beautiful' or 'wonderful', but simply that it is *astonishing* in that it escapes rational comprehension and can only be meaningfully approached by recognising its

location within lived experience; it is beyond abstract conceptualisation or generalised linguistic description. Wender gives a particularly horrific example, again from his experiences on the streets:

...in striving to comprehend the wicked act of one human being's trampling on the head of another, bureaucrats and criminologists cannot ignore... what is unquestioningly taken for granted when we conceive of trampling on someone's head as a straightforward 'matter of fact'... [Yet the] actual scene of the crime is always already more than the bureaucrat or social scientist will ever see. To 'unleash'... thought would be to free it to engage this otherwise unseen reality. (Wender 2004, 58)

Whilst Kant's aesthetics would (re)employ rationality as a means of giving order to this 'rupture' or 'limit' of rational understanding, accordingly grounding the autonomous self in the use of reason, phenomenology instead 'challenges the modern, post-Cartesian vision of the isolated ego or subject standing over against the world... [and aims to restore] attentiveness to the elemental primacy of lived experience' (Wender 2008, 20)—it attempts to *unleash* thought.

### **Astonishment and Criminal Responsibility**

Although ostensibly concerned with policing, Wender's thesis suggests an important response to the ethical deficiency in both abstract autonomy and rational choice as theoretical models of criminal identity. The things Wender experienced on his patrol shifts, and more besides, are all elements in the complex matrix of the living self and how that self relates to and makes the world. Subsuming these vast complexities under the general guidance of rationality profoundly limits our ability to understand how the self operates in general; but more specifically it limits our understanding of the behaviours that people undertake and how those behaviours relate to the constitution or operation of the self-as-responsible, and thus our ability to attribute responsibility to that self for those behaviours in a meaningful or ethical manner (that is, the links between the living self and its lived behaviour). If we are to overcome these limitations we need to reconfigure the relationship between the abstract and the living self through a phenomenological lens, and thus produce a way of approaching the self that can engage with astonishing living humans *restlessly*<sup>12</sup>—that is, without assuming the primacy of rationality or tending towards generalised and settled concepts of selfhood. Moreover, such an approach should attribute responsibility not simply via the 'rational choice' of the individual, but to the fluid and indeterminate dimensions of that human being which feed into his or her patterns of *living* behaviour. It is important to clarify that this argument is aimed specifically at how moral theory constructs the *idea* of the responsible self; it is not directly proposing a practical change in criminal justice processes or categories. This shift in theoretical approach, however, may have

<sup>12</sup> Note that the idea of 'restlessness' has been argued to be important for legal theory in general, in relation the shifting of values and society over time and law's ability to respond to the uncertainty of the future. See Golder and Fitzpatrick (2009).



important ramifications for the more practical elements of criminal justice, and some indication of these will be given below.

By accepting a determinative role in people's behaviour for influences and drives that are not under the control of our general ability for 'rational direction', it may instantly appear that the attribution of responsibility is undermined. If we lose our ability to 'control' our actions because our rational will is undermined, because our actions stem from 'irrational' feelings or experiences, then responsibility cannot be securely pinned to us as individuals and the very idea of responsibility becomes meaningless. This nihilistic threat can be couched more broadly as a threat to the very idea of justice. Richard Sherwin (2000), in his analysis of the film *Cape Fear*, observes how the limitations of the legal system may have changed between the original 1962 film and its 1991 remake. The ending, in particular, highlights the potential role of 'fate' or 'chance' in the outcomes of specific events and the bearing this has on the operation of justice. In 1962, the film depicted a heroic ending where the protagonist refuses to kill the man who had been harassing his family, instead surrendering his fate to the justice of law. In the remake, however, this same protagonist smashes a rock onto the head of the antagonist, only to have his 'victim' swept away by the currents of a river before the stone can strike.<sup>13</sup> Sherwin describes the repercussions of such a vision:

Today we must depend upon purely circumstantial forces, a wind, a current—something more in keeping with a theory of chaos than of rational order. In the end we are left with fateful justice, justice as chance, justice as contingent upon irrational forces beyond our control. But what kind of justice is that? (Sherwin 2000, 182)<sup>14</sup>

The indeterminacy of phenomenological life, however, does not have to be understood as a radical challenge to the very idea of justice or our ability to attribute responsibility for behaviour. Theoretical engagement with the phenomenological dimensions of individual human beings does not necessarily mean that these individuals are no longer responsible for what they do, but that when we think about the self-as-responsible we need to think about it in a radically different way from what the limited models of rational choice can allow.

As Wender's work makes clear, the complexity and chaotics of living individuals and their embodied reality is irreducible; if it is to be ethically approached, this cannot be forgotten. What this means is that the complexities and unique and infinite variety of lived, subjective experience cannot be synthesised into stable, unitary forms. The term *restlessness* directly relates to this astonishing nature of lived experience, and expressly promotes a constant need for (re)engagement with the living world. Rather than examining our responsibility for behaviour (in however much detail) and producing a settled model of moral selfhood, astonishment implies a constant dynamic change and flow of meaning and experience. It is

<sup>13</sup> There are many other alterations, too, that undermine the seeming stability and 'justice' of the 1962 version: see, for his full analysis, Sherwin (2000, 172-185).

<sup>14</sup> Paul Ricoeur makes similar, if more general, observations when he argues that seeking justice or reparation in terms of 'risk' removes any individual from the sphere of responsibility, thus pushing us into fatalism rather than responsibility (Ricoeur 2000:25-26).

this unsettled nature of things which the concept of restless tries to 'capture' or, perhaps more accurately, indicate. And this 'restlessness' means that settled categories and concepts are inadequate or inappropriate bases from which to develop an ethical understanding of moral selfhood. Rational, stable forms cannot meaningfully encounter the complex dynamics and experiential depth of the living self or its related world(s). They cannot capture the constant shift and flow of life. In order to do so, our models and understandings need to be more adaptive, able to adjust and be endlessly reconfigured as different and varied meanings are encountered within the lived experience of moral choice and behaviour. A constant (re)engagement with the subjective experiences of the living self. Such a shifting and changing foundation will undoubtedly mean our understandings can never be settled or stable, rather remaining *restless*, reflecting more of the movement and tirelessly undulating chaos of life.

Such an approach may disable us from constructing a neat and knowable model of moral selfhood and suggest a horizon for law's ability to comprehend moral action. Accordingly, criminal theory attempts to avoid the issue of nihilism outlined above by claiming we are able to rationally direct our indeterminate dimensions, and thus can be held responsible insofar as we are rationally 'in control' of ourselves. Moreover, practical justice draws a largely arbitrary line beyond which influences are not pertinent to legal guilt. One is thus responsible in theory for following a non-rational desire because one is generally able to direct or control one's desires (or one's responses to them), and in practice because these non-rational elements are not part of how liability is assessed. If an individual 'rationally' directs his or her desires towards robbing banks, for example, he or she is responsible for that desire and the behaviour which stems from it; the fact the desire might actually stem from complex indeterminate dimensions of the self is overcome by relocating any indeterminate desires as (ideally or normatively) subservient to the rational will (or by ignoring them as beyond the scope of criminal law's tests of guilt). Norrie similarly avoids the nihilism problem by claiming not that we need to blame 'society' *instead of* individual criminals, but that what exists 'beyond' the individual (the 'social context') is *also* determinative of what an individual does, thus side-stepping the problem by retaining a 'Kantian' (autonomous) dimension in the criminal agent, rather than claiming to reject it completely.

But we need not maintain such 'false but necessary' understandings in order to save justice from nihilism. As we have seen, there are important dimensions of the self beyond the 'rationally choosing agent' of criminal theory. If we reconfigure our understanding of the moral self in a way that accepts its indeterminate dimensions and the importance they have in the astonishment of lived human behaviour but concurrently fail to reconfigure the standards of responsibility, nihilism will result; rational choice is an unethical standard by which to judge the living self. We need the same restlessness both in how we approach criminal identity and in how we understand what it means to be responsible. Restlessness is a reminder that astonishing reality is always already more than criminal categories or evidence bags or linguistically and rationally based theoretical models will ever be able to hold. There is a whole experiential dimension to criminality that—through processes of abstraction,

categorisation, and theoretical modelling—become removed from their contexts of living meaning. If we are to better understand the living self and its links with lived behaviour we must retain awareness of these ‘excessive’ aspects in the theoretical models of moral selfhood that we develop; there is no need to cover them up with legal or theoretical ‘certainties’.

Followed through, this awareness in moral theory can potentially shape or influence the way in which practical justice is sought through criminal justice processes and categories. Although the move to phenomenology and restlessness put forward in this article is on a profoundly philosophical level, in practice it could be as simple as judge asking ‘what did this act mean to the defendant?’ or ‘what did it mean to the victim?’, and using the answers in the judicial assessment of responsibility. More radically, and rather than merely supplementing existing practice with a ‘restless’ element, such a shift could potentially reconfigure the whole approach of criminal justice. As theoretical engagement filters through to practical consequences, tests of guilt may look beyond mere rational control into a qualitative examination of a defendant’s biography, informed by ethnographic research and assessments of participants’ subjective experiences. Approaches to punishment may be reconfigured to exploit the meaningful dimensions of a perpetrator’s criminal behaviour. And although the categorical descriptions of various crimes necessarily abstract and generalise moral concerns to some extent in order to be practicable, we can move them closer to the morally and experientially detailed dimensions of living criminality through a methodological shift. Phenomenology and the idea of restlessness remind us that we may only ever be able to approximate ‘reality’, but importantly we are also free to see the abstraction of criminal responsibility not as an insoluble problem, but as something of which we must remain constantly aware as we attempt to build ethical understandings of moral selfhood and to apply those understandings to practical concerns of justice. Vitaly, we must remember that our understandings can never be settled and certain, lest we perpetuate the very abstraction we wish to minimise—they must remain *restless*. But this restlessness must necessarily be reduced the closer we move to practical application, lest those applications be impracticable. This is an irresolvable tension, but one that an enriched approach to moral selfhood, and the ways in which criminal theory and the practical justice system understand moral selfhood, can help us to navigate.

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