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Criminalizing Endangerment: A Response to Marcelo Ferrante's Comment

R. A. Duff

I am very grateful to Marcelo Ferrante for his careful commentary on my article—but I am also unpersuaded by his criticisms.¹

I. ATTITUDES AND ACTIONS

Ferrante finds two general theses in my article; he agrees with one, but rejects the other.² He agrees with what he calls “the thesis of attitudes as wrongmakers”—that the kind of wrong an action instantiates can depend on the attitude it expresses. Unfortunately, that is not a thesis that I want to assert, at least as he understands it and as far as the criminal law is concerned. He rejects what he calls “the perfect correspondence thesis”—that actions which are intended to harm or to endanger others always express an attitude of hostility, whereas actions not guided by such an intention do not express anything other or worse than indifference. However, I do not want to assert that thesis either, at least in the way that he understands it; indeed, I agree that it is false.

We can often separate an action from the attitude that it expresses, when we describe the action in a relatively austere way that does not incorporate its deeper motives, and describe the attitude in a relatively rich way that reaches beyond the actions that it directly motivates. Even if we describe an action not simply in terms of its effects upon the world, but in terms of the immediate intention with which it was done, our description often (perhaps always) leaves open the question of what deeper motives or attitudes inform it. We know that *D* killed *V*, intending to do so: but that does not yet tell us whether *D*'s action was motivated by, for instance, her hatred of *V*; or by her desire to achieve an end to which *V*'s death was simply a means—a means that *D* perhaps regretted “having to” use; or by her loving concern to spare *V* the further suffering that his terminal illness would cause him. So too, if we know only that *D* acted in a way that he knew would harm *V*'s property, but without any intention to harm it, we do not yet know whether he was glad that this side-effect would ensue (because he hated *V* and would be glad to see her suffer); or really did not care one way or the other, and would have been neither pleased nor saddened if he had achieved his aim without damaging *V*'s property;

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1. Marcelo Ferrante, *Criminalizing Endangerment—A Comment*, 65 La. L. Rev. 967–982 (2005).

2. *Id.* at 967.

or regretted “having to” cause such harm in order to achieve his aim, and would have been pleased had he (against expectations) achieved his aim without doing so.

Ferrante relies on this kind of separation between action and attitude in § 3 of his article: it is illustrated by his discussion of *A*, who intends to burn down her neighbor’s tree (because it blocks her view), and *B*, who intends to burn down his own tree but realizes that the fire will spread and burn down his neighbor’s tree too. He is right in most of what he says about such examples, in particular in his claims that an attitude of hostility is not “invariably correlated” with an intention to harm,³ and that *A* and *B* might have “equivalent dispositions concerning their respective neighbors,”⁴ in that each might be willing to damage the neighbor’s property in pursuit of the end of clearing the view, without wishing such damage for its own sake. That is why I say, of two comparable agents, that “[e]ach, we might think, displays the same vice or defect of character—a willingness to damage others’ property in pursuit of his own ends, a serious indifference to others’ rights and interests.”⁵

However, the attitudes with which I am concerned are not thus separable from the actions that manifest them; we therefore cannot even ask whether they are “invariably correlated” with those actions. My concern is with the *practical* attitudes of indifference or of hostility, that are partly *constituted* by the actions that manifest them.⁶ Thus the hostility that, on my account, an attack involves is not an attitude separate from and motivating the attack, any more than the indifference that endangerment can involve is an attitude separate from the action of knowing endangerment. In both cases, my concern is with what is “intrinsic” to the action:⁷ to say that an action constitutes an attack, i.e. that it is aimed against a victim and is intended to harm, is to say that it manifests “practical hostility” toward that victim; and the kind of “indifference” that properly concerns the criminal law is a matter not of the agent’s feelings, but of the extent to which her actions show her to be ready to modify her conduct in order to avoid harming others.

3. *Id.* at 971–76. See text following note 15, for the language of “invariably correlated.”

4. *Id.* at 975. However, to claim that each has a “positive attitude” to the destruction of the neighbor’s tree, because *A* intends it, while for *B* it is evidence that his action has been successful, ignores what is surely an important difference between facts that constitute the success of my action and facts that are at most evidence of its success.

5. R.A. Duff, *Criminalizing Endangerment*, 65 La. L. Rev. 941, 947–48 (2005).

6. *Id.* See also R.A. Duff, *Intention, Agency and Criminal Liability* 157–79 (1990); R.A. Duff, *Criminal Attempts* 363–74 (1996).

7. Duff, *supra* note 5 at 943.

Someone might now object that if “hostility” and “indifference” are not, as I use the terms, attitudes that lie behind and motivate our actions, then talking in these terms adds nothing to my initial distinction between attacks and endangerments in terms of the agent’s intentions—nothing except possible confusion, since readers might think that I am talking of attitudes that are separable from the actions that manifest them. I still think it is useful to use these terms, however: they help to characterize the kind of wrong that each type of action constitutes—the kind of wrong that is intrinsic to each type of action. To talk in these terms can also, I think, help us to articulate a conception of action that is rich enough to make it plausible to say that what we are criminally liable for are our *actions*, since it is those that constitute the relevant kinds of criminal wrong. If we, instead, see all attitudes as separable from and lying behind actions, we will be more tempted to try to ground criminal liability in what thus lies behind action—a temptation that we should resist.⁸

My claim that attacks and endangerments are different kinds of wrong because they manifest different attitudes is therefore not the thesis that Ferrante describes as “the thesis of attitudes as wrongmakers,” since that thesis concerns, whereas my claim does not concern, attitudes that are separate from the actions that display them. Nor, accordingly, is my claim undermined by what I agree to be the falsity of what he calls “the perfect correspondence thesis.” Attitudes that are separable from the actions in which they are displayed are not, I agree, perfectly correlated with those actions: my concern, however, is with attitudes that are intrinsic to, because constituted by, the actions that manifest them. Such attitudes cannot be separated from those actions—which is to say that no question about the correlation between them can arise.

II. AIMING AT EVIL

My concern is therefore not with attitudes that lie behind actions, but with the structures of the actions themselves, and with what I claim to be the significant moral difference between attacks, which are structured by the intention to harm, and endangerments, which are not thus structured. Ferrante also objects to this claim, however, in § 4 of his article.

He first draws a distinction, which I admittedly do not draw, between intending evil and “tracking” evil: between an agent who (merely) intends to do what is evil or wrong, and one who intends to

8. See also R.A. Duff, *Virtue, Vice and Criminal Liability: Do We Want an Aristotelian Criminal Law?*, 6 *Buff. Crim. L. Rev.* 147 (2002); R.A. Duff, *Action, the Act Requirement and Criminal Liability*, in *Agency and Action* 69 (John Hyman & Helen Steward eds., 2004).

do what is evil or wrong because of that in virtue of which it is evil or wrong; between one who deliberately burns down her neighbor's tree, despite the fact that this will harm her neighbor, and one who burns the tree down *because* this will harm her neighbor. I do not deny that some such distinction is worth drawing, and morally significant—although a careful account will be needed of just what counts as pursuing what is wrong or evil "*qua*" wrong or evil, as Ferrante puts it.⁹ As he notes, however, drawing this distinction does not by itself undermine my claim that there is also a significant moral difference between intending to do harm and foreseeing harm as a side-effect; but that is the claim on which the distinction between attacks and endangerment depends. What does appear to threaten that claim is his argument that there are cases in which the agent foresees harm or evil as a side-effect, i.e. does not intend it, but in which his action nonetheless "tracks" the evil in that he acts as he does in part because of the evil that it will do. This possibility is exemplified by the pilot who foresees civilian casualties as a side-effect of bombing a military target, and persists with the bombing raid only because those civilians belong to an ethnic group whose members he thinks deserve to die. Ferrante argues that such cases show that tracking evil is quite separate from intending evil (one can intend evil without tracking it, and track evil without intending it). If "aiming at evil *qua* evil" is the ideal type of wrongful action, he then argues, we therefore cannot say that acting with the intention of doing evil is always worse—i.e., closer to that (anti-)ideal—than acting with the knowledge that I will cause evil as a side-effect, since in the latter case I may be tracking evil while in the former case I might not be.

Had I argued that intending evil is always morally *worse*, always more wrongful, than acting in the knowledge that evil will ensue as a side-effect because it is closer to the (anti-) ideal of wrongfulness, the kind of case that Ferrante describes might indeed be problematic for me: but that is not my argument. I argue that the two types of action—attacks and endangerments—are morally different, but that is not the same as arguing that they are differently located on a single scale of moral wrongfulness: "different" does not entail "better" or "worse," and part of my argument is indeed that we should take seriously the idea that there are *different* structures of criminal wrongfulness. Ferrante's example of the bomber therefore does not threaten any claim that I make about the difference between attacks and endangerments.

It is nonetheless an interesting example, which reminds us that human practical reasoning is far more complicated than the simple distinction between intention and foresight allows. It could of course

9. Ferrante, *supra* note 1 at 978.

be true that the bomber intends both to destroy the military target and to kill the civilians (seizing the chance to do both through the same action). It could also be true, however, as Ferrante suggests, that the civilians' deaths form no part of his intention: which is to say that he need not think he would have any less reason to drop his bombs if no civilians were there, or that he would have any reason to drop his bombs if the civilians were there but the factory was not (for he could think that it was not his business to act as their executioner). His case is then morally different both from that of a pilot who drops his bombs with great sadness at the civilian deaths he knows this will cause, whoever the civilians are; and from that of a pilot who does not care about the civilian deaths, whoever the civilians are: his action is motivated in part by a discriminating racism that those other pilots do not display. It does not follow either that his action is *worse* than, for instance, that of a pilot who does not care about civilian deaths at all, or that he is shown to be a worse person than such a pilot: again, "different" does not entail "better" or "worse." Nor, more to the present point, does it follow that the criminal law should mark this difference between types of wrongdoing or of moral defect in its offense definitions. In arguing that the criminal law should distinguish attacks from endangerments, in virtue of the distinct structures of moral wrongfulness that the two kinds of action display, I was not arguing that this is the only distinction that is morally important, or that it can capture all the relevant differences that moral discourse should capture: I was arguing only that this distinction, which is indeed a limited one just because it does not look behind the actions to the deeper attitudes or motives that inform them, is one that the criminal law should draw.

