Book Symposium

PETER CANE*

Responsibility in Law and Morality

Author's Introduction

My main aim in writing *Responsibility in Law and Morality*[1] ('*RLM*') was to explore the relationship between legal and non-legal understandings of the set of concepts that are referred to by various senses of the word 'responsibility'. A common and traditional understanding of the law of obligations amongst lawyers was neatly encapsulated by Lord Steyn[2] when he said that 'to a large extent the law is simply formulated and declared morality'. By contrast, the most widespread view amongst moral philosophers (or so my reading of the literature suggests) is that law is, at best, a distorted and polluted reflection of morality, and that morality stands to law as critical standard to conventional practice. These contrasting approaches pose a host of questions. What is morality? How are the requirements of morality identified? What does it mean to say that morality is a critical standard, and how does it acquire its status as such? Are moral philosophers better placed than judges to identify what morality requires? Why are moral philosophers apparently so uninterested in what the law says? Why do they assume that any conflict between what they identify as the requirements of morality and what lawmakers identify as such should be resolved in favour of the philosophical account?

These questions raise so many large and difficult issues that I decided to bypass most of them and follow what Anthony Duff describes (in a review of *RLM* in the *Criminal Law Review*[3]) as the Wittgensteinian

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* Law Program, Research School of Social Sciences, The Australian National University.

1 Peter Cane, *Responsibility in Law and Morality* (2003).

2 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 3 WLR 1051, 1073.

3 R A Duff, 'Publication Review 'Responsibility in Law and Morality' [2003] *Criminal Law Review* 136, 137.

strategy of seeking to understand the concept of responsibility by 'identifying the role it plays in our human practices'. For this purpose, I adopted an institutional approach to law and morality respectively. I understand both law and morality as social practices that share certain concerns and address certain common issues — such as responsibility. I characterise the domain of law as being thick with rule-making, rule-applying and rule-enforcing institutions, and the domain of morality as more or less devoid of such institutions. Whereas many moral philosophers seem to picture law and morality as running in parallel, I argue that they are in a symbiotic relationship. I also argue that by virtue of law's institutional resources, it can make a net contribution to developing and refining our responsibility practices. And whereas philosophers tend to treat the law's concern with 'practical' matters, such as evidence and proof, and even sanctions, as disqualifying it as a source of sound ideas about responsibility, I suggest that understandings of responsibility which do not address such issues are incomplete. In all this, I avoid addressing certain issues that dominate much philosophical discussion of responsibility: free-will and determinism, compatibilism and incompatibilism, and the question of whether we can ever 'really' be responsible for anything. Interesting and important though these questions undoubtedly are, they do not form the currency of everyday social life.

A second major theme of the book concerns the relationship between agency and responsibility. The more I read of the theoretical literature on responsibility the more I was struck by its focus on individual agents and their mental states and actions, and its lack of interest in outcomes, victims and society. I soon began to understand why many philosophers find the law so repellent:[4] from an agent-focused perspective various important features of the law of obligations — such as vicarious liability, strict liability (especially in criminal law) and corporate liability — are at best questionable and at worst downright objectionable. Some theorists even find negligence liability problematic. Addressing these worries required consideration of four fundamental issues: the relationship between responsibility and fault, between responsibility and luck, between responsibility and causation, and between responsibility and personality. Central to my discussion of these issues is a distinction between two paradigms of responsibility, which I call the civil law paradigm and the criminal law paradigm respectively. The basic argument is that the key to understanding various features of the law that philosophers find more or less problematic is an understanding of the relational aspect of responsibility: responsibility is a function not just of what we do and why

4 According to Gerald Postema, tort law is a 'shocking departure from our considered moral judgments': Gerald Postema (ed), *Philosophy and the Law of Torts* (2001) 3.

we do it, but also of the impact of what we do on other individuals and on society. Responsibility is not just a state in which individual agents find themselves. Holding, and being held, responsible are features of our shared social life.

A third theme running through the book is the relationship between what I call 'historic responsibility' on the one hand, and 'prospective responsibility' on the other. This distinction is roughly parallel to that drawn by H L A Hart between 'liability responsibility' and 'role responsibility'. My basic argument is that the prime function of criminal law and the civil law of obligations — and of analogous non-legal normative regimes — is to guide conduct by establishing norms of acceptable behaviour. The imposition of punishments and obligations of repair — and the allocation of praise and blame — is secondary to, and parasitic upon, the specification of what we are obliged to do and to refrain from doing. It follows that the prime normative task is norm-making, not norm-applying or norm-enforcing. It follows, too, (or so I argue) that understanding our responsibility practices requires analysis not only of the way historic responsibility for past conduct is allocated ('what it means to be responsible' in other words), but also of the conduct (both acts and omissions) that may attract historic responsibility ('what our responsibilities are' in other words). For instance, in order to explain the fact that in some cases a person will be held historically responsible only if they acted intentionally, but in others a person may be held historically responsible merely for acting negligently, we need to refer to what they are being held responsible for. Another way I make this point is to distinguish between corrective[5] and retributive[6] justice on the one hand, and distributive justice on the other. Norms that specify what our moral and legal responsibilities are establish a certain general distribution of the benefits and burdens of social life, whereas corrective and retributive justice are concerned with enforcing those responsibilities in individual cases. I also argue that the distinction between what it means to say we are responsible, and what our responsibilities are, also underlies the distinction between public law and private law, which differ in the second of these dimensions (concerned with what responsibilities we have) but not in the first (concerned with what being responsible means). In other words, public law imposes different prospective responsibilities than private law does; but it utilizes the same set of concepts as private law does to define what it means to be historically responsible.

The last theme I want to mention concerns the distinction between the content and the application of norms of responsibility. Chapter Eight of *RLM* refers to the latter as 'the realisation of responsibility'. The importance

5 Said by some to provide the best understanding of tort law, for instance.

6 Said by some to provide the best understanding of criminal law.

of observing this distinction is a corollary of viewing responsibility as a set of social practices. What is the relevance to our understanding of responsibility of phenomena such as out-of-court settlement of claims, plea-bargaining and selective enforcement in criminal law, and liability insurance? The underlying question here is not whether responsibility is better understood indvidualistically or socially. Rather it concerns the relationship between concepts of responsibility (however understood) and their realisation in everyday life.