Cane on Responsibility

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What does Cane mean by responsibility?

Like most common words, 'responsibility' and its cognate 'responsible' have a number of different meanings. The idea of being answerable for something is usually present, but the type of thing for which something is answerable, and the type of answer expected, can vary greatly. One meaning, common in moral and legal theory, is answerable for one's acts or omissions. A study of 'responsibility' in this sense considers the conditions under which someone is blameable for his or her conduct, if it is of a kind normally blameable (or deserving of praise, if it is of a kind normally deserving of praise). I shall call this 'agency responsibility'. Another sense, common in law, is answerable in law for some conduct or event, in the sense that one is liable to punishment or a judgment in a civil case because of it. To bear responsibility in this sense one need not be blameable for the conduct or event, indeed one need not even have caused it. To mark this as a species of responsibility I shall call it 'responsibility at law' — it means the same as the simpler term 'legal liability'. A third sense occurs when we talk about a person's moral or legal 'responsibility', meaning her duty. Not all duties are spoken of as responsibilities: it would be odd, for example, to speak of a responsibility not to commit murder. However, some duties are spoken of as responsibilities: for example, the responsibility to care for a child. I shall call this 'duty responsibility'. There are other senses, but these are those that I will need for the present discussion.[1]

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1 It is testament to the variety of uses of 'responsibility' that these are not exactly the same senses as those that I found it necessary to distinguish in a recent paper, Jim Evans, 'Choice and Responsibility' (2002) 27 *Australian Journal of Legal Philosophy* 97, 98, nor the same as those distinguished by H L A Hart in his extended discussion of senses of 'responsibility' in 'Responsibility and Retribution', in his *Punishment and Responsibility* (1968) 210, 211–30, although in each case there are overlaps. To avoid doubt let me make two points explicitly: (1) 'responsibility at law' is not the same as Hart's 'legal liability responsibility' (215–22), which I think reflects a specialized legal adaptation of the term 'responsibility', although it is the same as the idea he employed in the immediately preceding article (in

Cane doesn't identify the sense of 'responsibility' that marks out the scope of his book. Some inconclusive discussion occurs of distinctions made by Hart and Kurt Baier, but in the end both 'accounts' are dismissed as unsatisfactory for the author's purposes.[2] Nothing is put in their place: there is no further discussion of senses of responsibility, and no definitions are stipulated for the purpose of the book. Cane makes it clear that he is more interested in 'responsibility practices' than senses of the word 'responsibility'.[3] But since what counts as a 'responsibility practice' will depend on the sense of the word that is being employed, this is not a promising strategy. Often he writes as if a single understanding of responsibility might explain all the different concepts of responsibility that are used in law and morality.[4] However, any such hope is doomed by the sheer variety of the way the term is used. It is as if one were to try to find the single concept of 'running' that explains the separate concepts used in 'running a marathon', 'running for president', 'running a wire from the basement to the bedroom', and 'giving someone the run of the place', instead of looking for the etymological connections between these different senses.[5]

Because Cane doesn't define the subject-matter of the book, the reader is left to work out what it is about. If one stands back and takes an overview, ignoring some of the detail, a dominant theme does emerge. At least when he discusses law, Cane's interest is in studying the justification of all, or most, of the conditions under which a person is liable to either punishment or a judgment in a civil action (including a public law action) apart from those conditions that are requirements of procedure. That makes the field of his study similar to the type of responsibility I called above 'responsibility at law', although it is not identical. However, the differences are not large, as I shall explain below.

Cane thinks that in some cases legal liability can exist without responsibility, and in others responsibility can exist without legal liability. His example of liability without responsibility is passive receipt of a mistaken payment.[6] This example results from a confusion. The passive recipient of a mistaken payment is not at fault for the condition that leads to the liability to repay, so is not responsible in that sense, but such a party

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Punishment and Responsibility, 196); (2) the idea I call 'duty responsibility' here is the same as that which I called 'responsibility in the form of an obligation' in Evans, 'Choice and Responsibility'.

2 Peter Cane, *Responsibility in Law and Morality* (2002) 29–30.

3 Ibid 24–5, 31, 279–80.

4 Eg ibid 54, 55, 57, 58, 279.

5 Cf Georgia M Green, *Pragmatics and Natural Language Understanding* (1989) 55–6.

6 Cane, above n 2, 109.

does have a responsibility to repay, if that means merely that he has a duty to repay, and, more pertinently to the present point, he is liable to a judgment of a court if he fails to do so, and hence has responsibility at law to repay the money. So this part of Cane's distinction between responsibility at law and legal liability is not adequately supported.

The main reason Cane thinks responsibility can exist without legal liability is because some of the legal pleas he calls 'answers' — ie pleas that preclude liability when facts exist that would otherwise establish it — do not, he thinks, preclude responsibility.[7] Those that have this role are a miscellaneous set that includes, for example, a judge's immunity from actions for defamation or negligence for things said in court, a young child's immunity from criminal punishment, and the absence of a duty of care when there has been negligence.[8] I think these 'answers' are linked in Cane's discussion by nothing more than the fact that some sense or other of the word 'responsibility' can be used in discussing them, so I don't think there is a principled reason for him to exclude them from his field of study, but I shall leave to the reader the happy task of exploring whether I am right. Even if there is a good reason for excluding them, the range of Cane's interest is still most of the conditions of 'responsibility at law' or, in simpler terms, 'legal liability'.

One further point of difference between 'responsibility at law' and Cane's topic should be noted. Cane includes within the range of his enquiry the justification for civil judgments against public authorities. However, in ordinary usage, a public authority whose order was likely to be quashed in civil proceedings would not be held to be responsible in law on that account. To deal with this point let me, for convenience, and by stipulation, extend the notions of both 'responsibility at law' and 'legal liability', for the remainder of this discussion, to cover the position of all public authorities liable to adverse judgments in civil proceedings.

Cane's views on agency responsibility

We can now explore what Cane has to say about his topic. An adequate study of the justification of all, or even most, of the conditions of legal liability would necessarily include a study of why particular forms of fault (ie agency responsibility) are among the conditions of particular forms of liability. One would expect it also to contain a section that explored when agency responsibility of different types is actually present. Cane finds little place for the second, but he is happy to include the first in his study. However, he constantly insists that the reasons fault is made a condition of legal liability (when it is) must not be treated as the whole of the study of

7 Ibid 89–91, 218–20.

8 Ibid 218.

legal responsibility.[9] That would be sound if he confined the point to responsibility at law, for, of course, there are other conditions of responsibility at law than fault, but he does not. In a characteristic complaint against agency theorists (those who study agency responsibility), he writes:[10]

> Understanding responsibility, whether in law or morality, is not just a matter of knowing what it means to say we are responsible, but also of knowing what we are responsible for and what our prospective responsibilities are.

That the first use of the term 'responsibility' here applies to morality as well as law shows it is not confined to responsibility at law. It apparently refers to a single concept of responsibility that covers all the things listed: but the truth is there is no such concept. When the required distinctions are made the difficulties with this pronouncement become apparent. Obviously, if one is investigating which moral or legal duties we have (ie duty responsibility), then one will need to investigate what our prospective responsibilities are: indeed, if we are investigating the responsibilities *we presently have* all of them will be prospective. Similarly, if one is investigating responsibility at law one will need to investigate what we are responsible for. However, if one is merely investigating the conditions of agency responsibility one doesn't need to investigate these further things, at least not as part of that project. Cane often treats the failure of agency theory to consider these further things as an intellectual mistake, when agency theorists themselves would see it merely as a choice of current subject-matter.[11] Since he does this consistently it is worth asking why. As illustrated above, it is partly due to confusion between different senses of responsibility, but there is more to it than that. There are, I think, two other contributing causes.

The first is that he doesn't really understand the enterprise of agency theorists. Early on, he expresses doubt about whether 'naturalistic ideas of "human agency"' can reveal any useful truth about responsibility.[12] Later, he says that he is 'agnostic' about the chance of success of such theory.[13] He himself, he says, prefers to examine the circumstances under which people are held responsible in different social contexts — something for which there is clear data.[14]

One senses that Cane is uncertain whether there can be any solid data for agency theory. Let me try to meet his scepticism. Agency theory is a

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9 Eg ibid 54, 90, 96, 97.
10 Ibid 54. See also 30, 55, 96, 97, 181.
11 Eg ibid 54, 55, 58, 180, 189, 282.
12 Ibid 23.
13 Ibid 279.
14 Ibid 24, 279–80.

descriptive theory that is partly empirical and partly conceptual. It is empirical when we rely for data on our own experience as agents and on commonplace judgments about agency. It is conceptual when we explore our understanding of relevant terms such as 'reasons for action', 'intention', and 'fault'. In exploring the data we are, as it seems to me, exploring basic aspects of our nature: the ways that our concerns, commitments, and choices shape our conduct. In exploring the types of ascriptions we make in *describing* aspects of agency we are seeking to understand our thinking more clearly. These two things together seem to me an adequately solid foundation for the study.

Because Cane doesn't understand how agency theory can be a descriptive theory, he construes it as making claims about what he is interested in — usually about the conditions of legal liability.[15] In this context he appears to treat it as committed to two claims. The more modest is that fault ought always to be among the conditions of legal liability.[16] The less modest is that the only interest that should be taken into account in the justification of legal liability is our interest as agents in freedom of action.[17] All this is a mistake. Agency theorists may make these claims, but they need not. There is no reason why an agency theorist should not think that strict legal liability is sometimes justified, or take a wide-ranging view about the proper grounds of legal liability.

The second cause of Cane's opposition to agency responsibility, I believe, is that he makes a mistake about inadvertent negligence — ie negligence that did not result from a choice to run the risk that resulted in harm. Cane assumes that 'choice-based accounts' of moral responsibility cannot explain the fault in inadvertent negligence. He believes that inadvertent negligence can be culpable, and so concludes that its culpability has to be explained in other terms than choice. The only adequate explanation, he thinks, must rely on the harm done to the victim, rather than the choice of the agent.[18] This leads him to a general complaint about choice-based theories of responsibility: a theory of this type, he says, 'puts far to much weight on our interest, as agents, in freedom of action, and takes far too little account of our interest, as victims, in security of person and property'.[19]

Let me allow that an adequate account of agency responsibility must (1) be choice-based (ie for present purposes, capable of explaining the agency-conditions of culpability in terms of choice); and (2) explain why inadvertent negligence is culpable. Cane's argument is, in effect, that no

15 Eg ibid 97–8, 181, 184, 188–9, 190.
16 Ibid 98–9, 189.
17 Ibid 182–3, 184.
18 Ibid 97–8, 248.
19 Ibid 98.

agency theory can satisfy these two conditions. If that were true it would lend some support to his claim that we can't hope to isolate the agency conditions of culpability from the substantive conditions of culpability.

However, it is untrue that choice-based accounts of responsibility cannot explain the fault in inadvertent negligence. Of course, they cannot explain it in terms of a choice to run the risk that resulted in the harm: that is true by definition. The whole puzzle about inadvertent negligence is that we complain that the agent did not think about a risk when she ought to have done, although we also accept she made no decision not to think about it. To use Hart's example:[20] a careless youth waltzes around a drawing room and breaks a valuable vase. 'I didn't mean to do it', the youth says, 'I just didn't think'. That is accepted, but the host still responds, 'But you should have thought'. Most of us will agree with the host, although why we do so needs an explanation.

John Mackie gave us the essential clue to solve this puzzle when he explained that behaviour may be caused by the *lack* of any sufficiently strong desire for contrary behaviour.[21] As I have explained elsewhere,[22] we can envisage the presence of such a desire as making a difference in two relevant ways. Firstly we can believe that such a desire, if present, would have modified the careless person's behaviour in the way that our standing goals and commitments shape our spontaneous actions. Secondly, we may believe that if the agent had had a sufficiently strong desire to avoid the harm he would have recognised the risk. Now, if we allow that as we live we make many choices that shape our standing desires and commitments as well as the way these affect our conduct and thought, then it is not so difficult to understand how we can believe that inadvertent negligence involves fault, while also believing that fault requires a connection to choice.[23]

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20 H L A Hart, 'Negligence, *Mens Rea*, and Criminal Responsibility' in *Punishment and Responsibility* (1968) 136.

21 John Mackie, 'The Grounds of Responsibility' in Joseph Raz and P M S Hacker (eds), *Law, Morality and Society: Essays in Honour of H L A Hart* (1977) 175, 180, 184. Cane cites Mackie's *Ethics: Inventing Right and Wrong* (1977) 208–15 as supporting the 'straight rule of responsibility': that we are responsible only for our intentional actions (Cane, above n 2, 55). That book was finished in 1976. Mackie's discussion there contains a brief hint of how negligence might be treated as a form of fault, but the point is not developed. The issue must have worried Mackie, because the point referred to in the text is developed in this article, just a year later.

22 'Choice and Responsibility', above n 1, 107–8.

23 For detail see Evans, 'Choice and Responsibility' above n 1, 101–4, 107–8, 112, 119–21. See also A P Simester 'Can Negligence be Culpable?' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (4th series, 2000) 85.

Cane's views on justifications for laws

When Cane does get to discuss the justification of laws he is often interesting. The book contains perceptive discussions of the grounds of specific areas of the law such as corporate and group liability[24] and the liability of public authorities.[25] There is also an interesting discussion of the way processes like settlement and plea-bargaining shape the actual operation of laws.[26]

However, a striking feature of his discussion of the justification of laws leads to a number of mistakes. Perhaps because he does not squarely identify his topic as being the justification of laws or a sub-set of them, perhaps for other reasons, Cane works with a too limited conception of the reasons that can justify laws. The anchor of his account of reasons for laws is our interests as individuals or as members of a society. He sees justified laws as having functions that involve promoting or protecting interests while limiting the individual and social costs of doing so. Justice comes into his concern, but only as it applies to distributing fairly the costs and benefits of furthering interests.[27]

Because of this limited perspective, Cane fails to understand other important reasons for laws than interests. For example, he only partially understands why strict liability is wrong in the criminal law. He recognises that criminal law is justifiably 'agent-centred' because criminal conviction involves 'stigma';[28] but he fails to investigate the source of the stigma. So he fails to recognise that what is wrong about strict criminal liability is not that it pays too little concern to our interest as agents in freedom of action, but simply that it is downright wrong to employ a mechanism of collective social condemnation against someone who is not at fault. If one wants to understand this wrongness it is a step in the wrong direction to look for a relevant interest. A better explanation is that the convicted defendant is not treated with respect as a member of a community of potential moral agents.

Again, he fails to understand that the reason for requiring the passive recipient of a mistaken payment to return it is not that in this case our interest in holding property outweighs our interest in avoiding the (limited) stigma attached to being the subject of a restitutionary judgment,[29] but

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24 Cane, above n 2, ch 5.
25 Ibid ch 8.
26 Ibid ch 7.
27 See, eg, ibid 181, 258.
28 Ibid 74, 204.
29 Ibid 201–2.

simply that it is wrong that one person should take advantage of another's mistake in the way that would otherwise be involved. If we want to understand the wrongness in this case we will need to explore the ground of the principle of appropriate human interaction that leads us to judge it as wrong. It won't be possible to do that, of course, without taking into account that we have an interest in owning property, but, as it seems to me, it will be a mistake to see the principle as merely an instrument to better secure that interest. (In these terms why should we prefer the interest of mistaken transferors in holding property to those of transferees?) I don't know quite how the answer will run here, it may be multiple, and complex, but I think at least a part of it will have to do with respect for that which others hold as a matter of right and for their entitlement to dispose of this as they choose. Mistakes don't involve choice, so, other things being equal, disposal shouldn't turn on mistakes — that is the standard restitutionary explanation, and it seems to me broadly right. In any event, at the very least, it is a mistake to block off such contemplations by starting with too limited a conception of what justifications for laws must be like.