The Responsibility of Lawyers and the Responsibility of Philosophers

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In this short paper, I can focus only on a small portion of Peter Cane's wide-ranging and stimulating book. Inevitably, I shall concentrate upon my disagreements with it. I should not like this fact to obscure my great admiration for the book. I have learned a great deal from it. Nevertheless, I disagree profoundly with some of its central claims.

As I understand it, one of Cane's central aims is to oppose what he (rightly, in my view) sees as the traditional philosopher's attitude toward legal notions of responsibility. Legal responsibility, the notion(s) of responsibility enshrined in legislation and enforced and interpreted by courts, is regarded by philosophers as a watered-down version of moral responsibility. It is, at best, an attenuated version of responsibility full-blown, diminished by the compromises forced upon it by the practical necessity of assigning blame and imposing sanctions, in a world of imperfect information. At worst, it is downright confused or even immoral, reflecting sectional interests at the expense of morality or forcing together incompatible elements.

To this compromised legal version of responsibility, philosophers oppose their own, purified, notion: responsibility as it actually is, its truth revealed. Cane argues, however, that this purified responsibility is nothing more than a philosopher's dream.[1] In fact, responsibility is a human concept, and as such reflects the untidy soil out of which it grows. It is born out of responsibility *practices*, a heterogeneous and variegated lot, and therefore the complexity, the internal tensions, which philosophers deride in the legal version, are native to it. Responsibility purified is responsibility attenuated, stripped of elements essential to it. The responsibility of philosophers, just because it is purified, is *less*, and not more, faithful to the notions of responsibility we find in the common-sense morality from which both philosophers and lawyers depart, and which they attempt to codify. It

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

is the legal notion of responsibility that has best claim to reflecting the moral notion. Philosophers had better start paying attention to this legal notion, in all its richness, or risk irrelevance.

In what follows, I want to defend the purified responsibility of philosophers against Cane. He is surely right to argue that the complexity of the legal notion of responsibility better reflects the concept as it is deployed in common-sense morality than does the purified concept of philosophers. But philosophers don't and shouldn't want to capture the common-sense notion of responsibility. Rather than codify the folk-psychological notions of responsibility, philosophers want to discover the *truth* about responsibility: what it is, and whether we have it.

As Cane argues, the moral responsibility literature in philosophy is concerned with the attribution of responsibility to agents. The philosophers engaged in this debate therefore utilize an agent-centred paradigm of responsibility, according to which an agent is responsible for an act just in case she exercised relevant control over her action. From this perspective, the responsibility concept of the law is seriously deficient, in multiple ways. Most obviously, there is the notion of strict liability: responsibility regardless of fault. If I did not control my *x*-ing, philosophers ask, how can I rightly be held responsible for it? Moreover, the legal notion of responsibility seems insufficiently sensitive to luck, dispositional and circumstantial. To be sure, certain categories of person are excluded from legal responsibility, entirely or in certain circumstances — children below a certain age and the mentally ill, for instance — but the law often simply ignores luck. If I am unlucky enough to possess fewer resources for self-control than most, but I possess enough to rise above a certain minimum threshold, the law will hold me responsible when I lose control — regardless of whether, *on this occasion*, I could have done otherwise. The common law principle that 'you take your victim as you find him' enshrines this relative indifference to luck. Many philosophers regard this insensitivity to luck as a gross injustice, even if they have no practical proposals for how the law could be made less unjust. Legal responsibility, we might say, is compromised responsibility: whether its failings are avoidable or not, it falls short of the highest standards of morality.

Cane argues that the accusation is unwarranted. In fact, the legal notion of responsibility captures more of our intuitions about morality than does the purified notion employed by philosophers. It does so in two, related, ways. First, it captures *prospective* responsibility, which philosophers generally leave entirely out of the picture. Second, it reintroduces the notion of responsibility *to* victims and society. This richer concept of responsibility accommodates our wider intuitions about morality, in a manner that the thin concept of philosophers never can.

Prospective responsibility refers to our obligations. Whereas philosophers ask whether we are responsible for certain bodily movements, jurists ask what our responsibilities are: just what are we required to do? Indeed, prospective responsibility is the more fundamental concept, Cane argues. Accountability responsibility, our responsibility for what we have done, is only a concern at all because it is by holding us responsible in this manner that the law can endeavour to get us to meet our prospective responsibilities. The law aims to maximise the incidence of responsible behaviour, and only for this reason does it punish irresponsible behaviour.[2]

Once we see how important prospective responsibility is, however, we see that an adequate account of responsibility cannot simply consist in an analysis of the conditions under which we control our bodily movements. Instead, and crucially, it must contain an account of our obligations. We are responsible for risk-taking, for instance, only if taking that risk was unreasonable in the circumstances.[3] But we can only know if this was the case once we have an account of our prospective responsibilities in hand. In the absence of this account, we are sometimes simply unable to judge whether or not someone has acted responsibly.

Our prospective responsibilities are *to* others, and it is only by reintroducing these others to our thinking about responsibility that we shall elaborate an adequate concept of it. From this perspective, Cane argue, the limited (but real) sensitivity of the law to luck, and the imposition of strict liability, come to be seen not as moral failings or forced compromises, but as positive advantages of the legal notion of responsibility. From the agent-centred perspective of the responsibility of philosophers, the limits on the sensitivity to circumstantial and dispositional luck makes little sense. Widen the perspective, however, and its moral justification falls into place. As I read him, Cane agrees that the place of luck in legal notions of responsibility reflects a compromise, but it is not a compromise between the demands of morality and practical considerations forced upon us by the inevitable limitations of a real-world system of justice. Rather, it is a compromise between two demands, *both* of which are themselves moral. One is the demand for fairness in treating defendants; the other is the demand for justice to victims and society. By admitting a degree of sensitivity to luck into the legal system, the law attempts to treat defendants fairly, but by constraining that sensitivity, it attempts to protect our interests as (potential) victims. Thus, Cane argues, the real but limited sensitivity to luck characteristic of the legal system distributes the burden of luck between agents and victims.[4] The responsibility of philosophers, with its greater sensitivity to luck, 'puts far too much weight on our interests, as

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2 Ibid 60.

3 Ibid 96–7.

4 Ibid 74.

agents, in freedom of action, and takes far too little account of our interest, as victims, in security of person and property'.[5] The legal concept redresses the balance. In so doing, it does not force a compromise between justice and practicality, but between the morally significant interests of victims, and the morally significant interests of agents. Ignoring the interests of victims makes the philosophical concept *less*, not more, moral, than the legal.

Cane is on solid ground when he argues that the considerations which limit the law's sensitivity to luck are themselves moral, and reflect widely and deeply felt intuitions. Nevertheless, I believe that moral philosophers should not follow him in expanding the scope of responsibility, rejecting the agent-centred approach in favour of a view that gives greater weight to the interests of society and victims. This is not a promising line for us to take, I shall argue. Nor does it possess the moral force he claims for it.

Cane argues, rightly in my view, that philosophical and legal reasoning share a great deal in common. But he underplays one point of contrast between the two. Both law and philosophy, he points out, wish to establish what he, following John Rawls, calls a 'reflective equilibrium' of intuitions, convictions and judgments.[6] Thus, both law and moral philosophy take as their point of departure the common-sense intuitions which we all share, and attempt to systematize them, throwing out those which cannot fit into a reasonably coherent whole. But no intuition, no matter how strongly felt, is non-negotiable for philosophers. If our intuitions rest upon implicit theories which are incoherent, or which conflict with one another, then they have to go. Thus, while law is bound to reflect community standards, at least for the most part, philosophers are free to reject any aspect of common sense morality. Indeed, philosophers seek a *wide* reflective equilibrium: our final moral theory must be, not only internally coherent, but also cohere with our best scientific and social scientific theories.[7]

Since we seek this maximally coherent moral theory, Cane's reminder that the interests of victims and society are commonly regarded as morally significant simply carries no weight for the philosopher. The question is not, 'are these considerations commonly regarded as moral?', but, 'can these considerations be integrated into a coherent moral theory, together with the agent-centred considerations?' If, as I believe, the answer is no, then we must reject one set of considerations or the other, not attempt to balance them.

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5 Ibid 98.

6 Ibid 17.

7 See Neil Levy, 'Wider Still: Reflective Equilibrium and the Explanation of Political Radicalization' (2001) 1 *International Journal of Politics and Ethics* 147, and references therein.

It is a fundamental moral principle that we ought not to punish someone for an action that was unavoidable for them. If I am literally unable to control my actions at a particular moment in time, and, moreover, I am not responsible for the fact that I am unable to control my actions at that time, then I am not responsible for my act, and therefore cannot be blamed (or praised) for it. This intuition is expressed in the dictum 'ought implies can'. I am not under any obligation to do what I cannot do.

Cane denies that this is so. Though it is true that we absolve of responsibility those who do not possess the *capacity* to conform their behaviour to the dictates of morality, if someone possesses this capacity, then we hold them responsible on every occasion. We do not, and ought not, enquire whether they were capable *on that occasion*, of acting otherwise.[8] This is one reason why the issue of determinism is irrelevant to the question of responsibility, he claims.[9]

By ignoring ability on particular occasions, Cane argues, the law takes the interests of victims into account, whereas if we personalised the standard of responsibility, setting not a general capacity-threshold but enquiring of each person on each occasion whether they could have acted otherwise, we would place too much emphasis on the interests of agents. From the point of view of the dictum that ought implies can, however, this restriction of enquiry into general capacity, and not capacity on *this* occasion, is irrationally arbitrary. We cannot pick and choose when our well-justified moral principles will apply; or rather, we cannot do so with any kind of rational (as opposed to practical) justification. If inability to conform conduct to the demands of morality normally excuses, then why doesn't it excuse on this occasion? If I was determined to act as I did, or if I have lower self-control than most people due to my lower serotonin levels in the brain, then I ought to be excused, whether or not I fall above some capacity threshold.

When our intuitions conflict, and we see no way of making them internally coherent, we must reject one set or another.[10] In this case, we

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8 Cane, above n 1, 75.

9 In taking this position, Cane appears to adopt a variant of the view philosophers call compatibilism (since it holds that determinism and free will are compatible). Ten years ago, this was the reigning view in philosophy. But the past few years have seen a resurgence of incompatibilist views, some of which assert that we have free will, because the universe is not (entirely) deterministic, and some of which assert that we do not have free will, because the universe is deterministic (and some of which hold that no matter what the universe is like, we do not have responsibility-conferring free will).

10 Galen Strawson defends the idea that our intuitions about free will and moral responsibility are fundamentally incoherent, in *Freedom and Belief*

must choose, between an agent-centred or a victim-centred account of responsibility: one which takes luck into account to the fullest extent possible, or one which ignores it completely. Which route should we take? I suggest that we retain the agent-centred approach, because victim-centred responsibility practices do not succeed in securing the goods they aim to protect in any case. By limiting sensitivity to luck, Cane aims to give greater weight to our interests as (potential) victims of crime. But how is this to be achieved? It seems that his proposal faces a dilemma. One the one hand, the agent might have been able to conform his behaviour to the demands of law and morality on the particular occasion in question. In this case, we have no need to limit our sensitivity to luck, since he was not in fact the victim of bad luck. On the other hand, if the agent was unable to behave otherwise than he did, punishing him achieves nothing. It does not offer any recompense to the victim, and does not make him any less likely to offend on future occasions. Holding people responsible when they are unable to conform does not achieve the law's aims of reducing the incidence of non-compliant behaviour, since those who are unable to conform cannot be deterred. Of course, Cane might insist that there are many occasions upon which we cannot know whether agents are able to conform their behaviour to the demands of the law or not. Granted; but if we take this route we must see our legal practices as compromises between the demands of morality and the practical constraints under which we operate — precisely the accusation which Cane sought to avoid in the first place. A coherent account of moral responsibility will, therefore, remain agent-centred, and an account which attempts to balance interests of agents and of victims will not be coherent.

Cane has other arguments against an agent-centred account, to which I will briefly respond. He holds that in order to determine whether someone is responsible, in the sense of accountable for an act, we need to know what their responsibilities are: we require an account of our obligations. Otherwise, we shall not be able to give an account of negligence in particular, since we need to know whether taking a particular risk was reasonable or not. Control-focused accounts of responsibility, which I regard as the most plausible, deny this claim. We can determine whether someone was responsible for an act simply by inquiring into whether they exercised control over the bodily movements. From this perspective, we can determine responsibility without assigning praise or blame: indeed, without needing to decide whether the action was morally right or wrong.[11]

(1986).

[11] The best representative of the control account of moral responsibility, to my mind, is John Martin Fischer and Mark Ravizza, *Responsibility and Control* (1998).

The control accounts also give us the means of replying to Cane's second major accusation against philosophical accounts of responsibility. He claims that they are centred around the notion of choice, and therefore cannot account for our very many unchosen, yet apparently morally significant, actions. Many of our actions are automatic — that is, unchosen — yet, when they go wrong, we are responsible for them. It is, of course, true that we are routinely held responsible for actions that are performed too swiftly for them to have been the product of deliberative choice. But few philosophers have required deliberative choice as a necessary condition of responsibility. Control is sufficient, and we do control our automatic actions. We have direct control over some of them, as for example, our normally automatic driving behaviour, which becomes consciously controlled as soon as trouble looms. Over others we have indirect control: we respond in this manner because we have practiced doing so. If it should turn out that we do not have control over some or all of our automatic actions, not even indirect control, then we are not responsible for them. Once again, moral philosophers are quite willing to be revisionist: if it turns out that some of our practices rest upon false or inconsistent beliefs, then our moral theories ought to reject them, not accommodate them.

Moral philosophy and the law have different aims. Because philosophy is, in large part, a revisionist project, it does not seek to find a way to incorporate the variegated responsibility practices into a final theory: not, at least, when those responsibility practices conflict with one another. The law wishes to reflect community standards to the greatest extent possible, and for that reason must construct theories and underwrite practices where consistency and truth sometimes take a backseat to ease of application and congruence with common sense. But this is just to say that the old cliché, that the legal notion of responsibility reflects a compromise between morality (in the sense of a final true account of the right and the good) and the exigencies of practice is after all true.