Legal and Moral Responsibility

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1. Criminal and Moral Responsibility

The focus of this paper is on responsibility in criminal law, rather than on legal responsibility generally; in particular, it will not be concerned with responsibility in tort law (on this see Owen, especially Part III).

It is often thought that criminal responsibility should track moral responsibility: I should be held criminally responsible for *V*'s death, and liable to conviction for criminal homicide, only if I can be held morally responsible for *V*'s death. Moral responsibility is often analysed in terms of two conditions: control and knowledge.[1] If, walking down your hall, I knock your valuable Ming vase over, you might hold me morally responsible for breaking it, and blame me for it. But if I lacked control over whether I knocked the vase (a child suddenly rushed down the hall and knocked me so violently that I stumbled into the vase); or if I did not know and could not have been expected to know that the vase was there (it had just been put behind the door that I opened): I am not to blame for its breakage, because I was not morally responsible for it. I was (partly) causally responsible for its breakage, in that my conduct played a causal role in the occurrence of that event; but I was not morally responsible —I was not to blame.

So too, it is thought, I should be held criminally responsible for breaking your vase, liable to conviction for criminal damage, only if I had control over whether your vase was broken, and knew (or could have been reasonably expected to know) that my conduct would or might have such an effect. And that, it seems, is precisely what our criminal law provides: conviction for an offence of criminal damage requires proof that a 'voluntary act' of mine caused the damage in question, and that I intended to cause that damage or realised that my action would or might cause it (Criminal Damage Act 1971, s. 1). Criminal responsibility is actually, in this as in many offences, narrower than moral responsibility: I am morally responsible for damaging your vase if I break it inadvertently but negligently, whereas mere negligence is often not enough for criminal responsibility; I am guilty of criminal damage only if I caused damage intentionally, knowingly, or recklessly.[2]

The twin requirements of control and knowledge are reflected in orthodox interpretations of the classical legal slogan that *actus non facit reum nisi mens sit rea*: an act does not make

a person guilty unless her mind is guilty too. This has been transformed by legal theorists into the doctrine that criminal responsibility requires both an '*actus reus*' or guilty act and a '*mens rea*' or guilty mind;[3] and that an *actus reus* must include a 'voluntary act', whilst *mens rea* normally consists in intention, knowledge or recklessness as to every element of the offence. In the absence of a voluntary act, any movements of my body are involuntary; and whilst those movements might cause harm, thus making me (or them) causally responsible for the occurrence of that harm, I lack control over those movements and cannot justly be held either morally or legally responsible for their effects. In the absence of an intention to damage your vase, or awareness that I might damage it, it might be true that a voluntary act of mine caused the damage to it, but it would again be unjust to condemn me for what I thus unknowingly did.[4]

The moral plausibility of this doctrine is evident if we consider some notorious examples of 'absolute' or 'strict' criminal liability—offences whose definition permits the conviction of someone whose conduct was not voluntary, or who acted in non-culpable ignorance of crucial facts. It is an offence to be 'found drunk in any highway', and a person is guilty of that offence even if he is in the highway only because he was carried there by police officers, without any voluntary act on his part:[5] but that is unjust, unless it can be shown that he was carried into the highway only because he had voluntarily got drunk, which would satisfy the 'voluntary act' requirement. It is an offence to cause 'polluting matter … to enter any controlled water', and a person is guilty of the offence even if he does not know and could not reasonably be expected to know that he is doing that:[6] but it is unjust to convict a person on the basis of facts of which he was faultlessly ignorant.

There are two familiar ways of justifying such a requirement of *mens rea*. One focuses on the fact that criminal responsibility is burdensome and potentially oppressive. Conviction usually brings punishment in its train, and punishment is a burden coercively imposed on the individual by the state. If we care, as a liberal polity should care, about individual freedom; if we want, as a liberal polity should want, to maximise individuals' control over their lives: we should try to ensure that individuals are liable to such coercive impositions by the state only if they had the ability and a fair opportunity to avoid such liability.[7] But someone carried bodily into the street by the police lacks the ability to avoid being found drunk in the highway, and someone who has taken all reasonable care to avoid releasing polluting matter lacks any fair opportunity to avoid polluting the water.

The second argument focuses on the fact that criminal responsibility involves censure or condemnation: someone who is convicted of a criminal offence suffers not just the imposition

of some material burden (the loss of freedom if he is imprisoned, of money if he is fined, and so on); he suffers condemnation as a wrongdoer.[8] Justice requires, therefore, that we convict and punish only those who deserve such condemnation; but someone who was not morally at fault in relation to the relevant harm, someone who could not be held morally responsible for that harm because he lacked appropriate control or knowledge, cannot be justly condemned for its occurrence.

There is much more to be said about the various aspects and implications of this doctrine: about the meaning of the 'voluntary act' requirement, whether it really is or should be a requirement of criminal responsibility, and whether it does follow from the control requirement;[9] about how the different types of fault or *mens rea* should be defined, and about why negligence should be sometimes but not always a ground of criminal responsibility.[10] These are not, however, topics for this paper, which is rather concerned with the implications of a distinction between two dimensions of responsibility in both moral and criminal contexts. I will describe that distinction in s. 2, and discuss some of its implications in s. 3.

One more point should be noted here. Our concern is with the conditions under which it is just to hold an agent morally or legally responsible for an action or outcome. Such ascriptions of responsibility for particular actions or outcomes also require someone who is in a slightly different sense a responsible agent—someone whom we can legitimately hold responsible for anything at all: but we cannot discuss this basic conception of responsible agency here.[11]

2. Answerability and Liability

You come home to find your car, parked outside your house, badly damaged; I tell you that I damaged it, by driving into it. You would not, I hope, blame or criticise me straight away for culpably damaging your property; you would realise that it might not have been my fault. But you would at least expect me to explain how I came to damage it, and could criticise me if I refused to do so—if I just walked off with a shrug. The explanation I offer might exculpate me, by showing that I should not be blamed for damaging your car: perhaps I steered into it intentionally, as being the only way to avoid running over a small boy who ran into the road suddenly; or perhaps, although I maintain my car conscientiously, the steering suddenly failed, causing the car to veer into yours. If, however, I can offer no exculpatory explanation; if I admit, for instance, that I just was not paying enough attention, or that I deliberately drove

into your car to take revenge for a supposed wrong: you could blame me for the damage, and criticise me for causing it. We can thus distinguish two stages in the enterprise of holding a person responsible for some (apparently) wrong action.

The first stage is answerability: we attribute an action or event to the person as its author, and request (or demand) that she answer for it; this is in one sense to hold her responsible for it.[12] When the action or event in question is untoward, as it is when I damage your car, blame and criticism are of course in the air, and the calling to answer may indeed be expressed as an accusation. But in calling me thus to answer you are not yet definitively blaming me: there is still room for me to offer a blame-averting answer, as in the examples imagined above. That answer might constitute a justification: I claim that I acted rightly in those circumstances, in accordance with the balance of reasons; it was more important to avoid running over the boy than to avoid damaging your car. Or it might constitute an excuse: although my action, of causing damage to your car, was not justified (it was not something that I had good reason to do), I was not at fault in causing that damage. The important point to notice, however, is that these ways of averting blame still admit responsibility for the damage to your car: it was something that I did, for which I must answer to you as the owner. We can contrast this kind of case, in which I offer a justification or excuse for damaging your car, with cases in which I avert blame by denying responsibility: it was Jones, not I, who drove into your car; or though my car collided with yours, while I was seated behind the steering wheel, I was not involved as an agent, since I had been rendered unconscious by an unforeseeable fit.[13]

The second stage, then, is liability. If I can offer no exculpatory explanation of my action, or if the explanation I offer is inadequate, you may quite reasonably blame me for damaging your car. You might simply disbelieve my would-be exculpatory explanation—there was no boy in the road, my steering did not fail. Or you might accept the truth of the explanation, but deny that it exculpates me. If I swerved to avoid not a child, but a snail, you might think that was not a good enough reason for swerving into your car: it did not justify my action. If I had failed to check my car over regularly, you might accept that the steering failed, so that I could not at the time have avoided swerving into your car, but blame me for not being more careful in maintaining my car. The ascription of answerability, we can say, creates a presumption of liability: when you hold me answerable for damaging your car, you hold me prima facie to blame for it. That presumption can be defeated: I can answer by providing an exculpatory explanation, which blocks the transition from answerability to liability. If no such explanation is available, however, the presumption holds: I am not just answerable for damaging your car, but am blameworthy for doing so wrongfully.

This same logical structure of answerability and liability is found in the criminal law, and is shown in the structure of the criminal trial—though we will see that the criminal law divides the two stages differently. Given the Presumption of Innocence, the onus lies on the prosecution to prove beyond reasonable doubt that the defendant committed the offence with which he is charged. This involves proving both *actus reus* and *mens rea*:[14] if the defendant is charged with wounding, for instance, the prosecution must prove not only that he caused *V*'s wound, but that he did so intentionally or recklessly; unless and until that is proved, there is nothing for which he need answer in the criminal court.[15] Proof of *actus reus* and *mens rea*, however, does not ensure conviction, since the defendant could still offer a defence. He might admit that he intentionally wounded *V*, but argue that he did so in self-defence, this being the only way to ward off *V*'s murderous attack on him; or that he did so under duress—another person had plausibly threatened to kill the defendant and his family if he did not wound *V*.[16] In relation to defences, however, the initial onus lies on the defendant: the prosecution need not, as part of its case, prove that the defendant did not act in self-defence or under duress; only if the defendant adduces evidence of a defence, evidence that if unrebutted would create a reasonable doubt about his guilt, must the prosecution then disprove that defence.[17] The prosecution's initial burden is to prove answerability: it must prove that the defendant committed, and must therefore answer for, the offence charged. Such proof of answerability replaces the Presumption of Innocence by a presumption of guilt: the court is now entitled to presume that the defendant committed the offence culpably, and is thus liable to conviction. But that presumption is defeasible: the defendant can block the transition from answerability to liability by offering a defence, which constitutes an exculpatory answer.

In both the formal context of the criminal law and the criminal trial, and the less formal contexts of our moral dealings, we should therefore distinguish issues of answerability from those of liability: the question of whether I have something—a presumptively wrong action—for which I must answer, from the question of whether I am liable to blame or to conviction for that action. Answerability is one essential dimension of responsibility, and is necessary for liability; indeed, it creates a presumption of liability. But it is not sufficient for liability, since an exculpatory explanation—which constitutes an answer and thus admits answerability—can block the transition from answerability to liability.

3. Criminal and Moral Answerability

Given the distinction between answerability and liability, we can see that the question of whether criminal responsibility either tracks or should track moral responsibility is actually two questions. First, should criminal answerability track moral answerability: should I have to answer in a criminal court (only) for conduct for which I am morally answerable? Second, should criminal liability track moral liability: should I be liable to a criminal conviction only if I am also liable to (deserving of) moral blame for the conduct in question?

The issue about liability has been much discussed, and the common view that criminal responsibility should track moral responsibility is best understood, in the terms used here, as the view that criminal liability should track moral liability. Two kinds of example illustrate the influence of this view.

The first concerns defences: if criminal liability should track moral liability, only those who are truly blameworthy for the wrong that they do should be liable to criminal conviction. So, for instance, in a series of cases in the 1990s women who had killed their violent spouses were convicted of murder, because they did not satisfy the requirements for a legal defence of self-defence or provocation as those defences were then understood.[18] This provoked fierce criticism, on the grounds that given the persistent, serious violence they had suffered at the hands of the men they killed, these women were not morally culpable, or were at least far less culpable than warranted a murder conviction; the assumption was that lesser moral culpability required lesser, or no, criminal liability. Without going into the details of this controversy, we can see that the assumption is plausible, especially if we focus on the condemnation or censure that a criminal conviction expresses: if the circumstances under which the defendant killed were such as radically to reduce, if not to eliminate, her culpability for the killing, it is unjust to condemn her as a murderer.[19]

The second kind of example concerns strict criminal liability.[20] Section 1(1) of the Drugs (Prevention of Misuse) Act 1964 made liability for the possession of a scheduled drug strict, insofar as it did not require proof that the defendant knew that what he had in his possession was a scheduled drug: someone who reasonably and innocently believed that the item in his possession was baking powder was guilty of the offence if it was in fact a scheduled drug.[21] But this is unjust. Even if we agree that there is good reason to criminalise possession of certain types of drug (a controversy into which we need not enter here), and that someone who has a prohibited drug in her possession commits a wrong, it would be unfair to blame her if she did not know and could not reasonably have been expected to know that what she had was a prohibited drug; non-culpable ignorance of relevant facts makes blame illegitimate. But then it is also unjust to convict a person of such an offence, to condemn and punish him for

its commission, if he did not know and could not reasonably have been expected to realise that what he had was (or might be) an illegal drug.

This is not the place for a detailed discussion of the justifications, either principled or practical, that might be offered for strict criminal liability. I will just note one pragmatic justification, as a prelude to the examination of an increasingly common legislative device that will be the main focus of this section.

The pragmatic justification is simple. If the prosecution carries the onus of proving both *actus reus* and *mens rea*, this makes its task much harder. It is one thing to prove that the defendant had what was in fact a prohibited drug in his pocket; or that a shopkeeper sold food that did not in fact 'comply with food safety requirements' (an offence under the Food Safety Act 1990, s. 8(1)). It is another, harder thing to prove that he knew, or could and should have known, that the item was a prohibited drug, or that the food was unfit. Trials will then be long (and expensive): more defendants, including many who actually knew the relevant facts, will plead 'Not Guilty', hoping that the prosecution will be unable to prove their guilt. More trials will end in acquittals, since it will be harder for the prosecution to establish guilt; more cases, including many involving defendants who knew the relevant facts, will not even go to court, but will be dropped by prosecutors who see no prospect of conviction. The result of all this (apart from the cost) will be that the law is less effective in deterring the dangerous or harmful conduct at which it is aimed: more people will acquire drugs, more shopkeepers will fail to take adequate precautions to ensure that the food they sell is safe, since they will know that even if they are caught, they have a good chance of avoiding conviction.[22] So long as the penalties for such offences are relatively light, the argument goes, the practical interests of deterrence and efficient law enforcement must override concerns about justice.[23]

Many will find this argument unpersuasive: we should not so readily sacrifice justice to utility. But legislatures might hope to mitigate the practical problems of deterrent efficacy, whilst allowing due weight to the demands of justice, by using a technique that is becoming increasingly common—one that avoids strict liability without requiring prosecutors to prove both *actus reus* and *mens rea* from scratch. This technique is exemplified in the Misuse of Drugs Act 1971 (which replaced the 1964 Act). Whilst s. 5(2) defines the possession offence in apparently strict terms ('it is an offence for a person to have a controlled drug in his possession'), s. 28 provides that 'it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect' that what he had in his possession was a controlled drug. Similarly, although s. 8(1) of the Food Safety Act 1990 defines the offence in apparently strict terms, so that it is committed by a shopkeeper who has taken all

reasonable precautions to ensure that the food she sells meets safety requirements, by s. 21(1) she can avoid conviction by 'prov[ing] that [s]he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence'.[24]

Such provisions do not make criminal liability strict: liability still requires that the defendant both committed the *actus reus* (possessed the drug, sold the unsafe food), and was at fault or blameworthy in doing so. But it makes criminal answerability strict. When the prosecution must prove both *actus reus* and *mens rea*, criminal answerability is non-strict: I must answer for my conduct in court, on pain of conviction and punishment if I fail to offer an exculpatory answer, only if it is proved that I committed an offence with the appropriate *mens rea*; if the prosecution proves only the *actus reus*, there is nothing for which I must answer. In these cases, by contrast, I am required to answer for my conduct as soon as the prosecution proves the *actus reus*: I am required to explain my possession of the prohibited drug, or my sale of unsafe food, if I am to avoid conviction and punishment. Normally, I need answer only for conduct that has been proved to be intentional, reckless or negligent in relation to the relevant criminal harm; but in these cases I must answer for conduct that might, for all that has yet been proved, be entirely without fault.

Now a common reaction to such strict answerability provisions is that even if they are not as objectionable as those that impose strict liability (since faultless defendants can hope to obtain acquittals), they are still inconsistent with the Presumption of Innocence, and therefore still seriously objectionable. It is, surely, unreasonable to expect innocent citizens to prove (or even to provide evidence of) their own innocence, on pain of being convicted and punished if they fail to do so. Such a reaction, however, must face two challenges.

First, the defendant bears just this kind of evidential burden in relation to such traditional defences as self-defence and duress (see s. 2 above), and this does not seem objectionable: so why should it be objectionable here? Second, if we focus on answerability as a dimension of responsibility, we can see that in relation to such 'strict answerability' provisions criminal responsibility tracks moral responsibility more closely than it does when the prosecution has to prove both *actus reus* and *mens rea*. For in moral contexts answerability is typically strict: I must answer morally for the harms that I cause even if I cause them through non-culpable accident or inadvertence. If I knock over you vase, or take your umbrella, you will rightly expect me to answer for what I have done. My answer might exculpate me, averting blame by showing that I lacked the moral equivalent of *mens rea*: I was pushed into the vase by a rushing child; I reasonably believed that it was my umbrella. But it is up to me to provide such an explanation—which is to say that I am morally answerable even for what I do

through non-culpable accident or inadvertence. If criminal responsibility should track moral responsibility, why should it not track it here? Why should criminal answerability not generally be strict? Why should it not be enough for the prosecution to prove the *actus reus*—to prove, for instance, that I actually damaged your car; and for the onus to then shift to the defendant to answer for that action, and to offer some exculpatory explanation if he is to avoid conviction?

There are answers to these questions, though we cannot explore them here: they concern the obvious differences in context and consequences between our moral dealings with each other and the criminal process, and with what we can reasonably demand of citizens—what they can be reasonably expected to answer for on pain of conviction and punishment if they fail to offer an exculpatory answer. But if we are to maintain the principle that criminal responsibility should track moral responsibility, we must address these questions; and we must recognise that plausible answers to them might justify at least some kinds of strict criminal answerability.

Notes

[1] This analysis started with Aristotle, who identified force and ignorance as the two conditions that rendered conduct 'non-voluntary' (*Nicomachean Ethics* III.1). For recent accounts, see Fischer & Ravizza; Fischer.

[2] On recklessness and negligence in criminal law, see Simester & Sullivan, 134-41, 144-52.

[3] Though many now talk of a 'conduct element' and a 'fault element'.

[4] I leave aside the point (see at n. 2 above) that moral criticism seems appropriate if I damage it through negligence, whereas a criminal conviction requires recklessness.

[5] Licensing Act 1872, s. 12; see *Winzar v Chief Constable of Kent*, *The Times*, 28 March 1983. Contrast *Martin v State* 17 So.2d 427 (1944).

[6] Water Resources Act 1991, s. 85(1); see R v Milford Haven Port Authority (2000) 2 Cr App R (S) 423.

[7] The classic statement of this argument is in Hart, especially papers I, II, VI.

[8] For different versions of this point see e.g. Feinberg; von Hirsch, ch. 2; Duff 2001.

[9] See e.g. Husak 1987, ch. 4; Moore; Simester 1998; Duff 2007, ch. 5. There is also the question of whether we should talk not of a 'voluntary act' requirement, but of a 'voluntary act or omission' requirement: see Simester & Sullivan, 98-102; Dubber & Kelman, ch. 13.

[10] See e.g. Tadros, chs. 8-9; Norrie, chs. 3-4; Simester & Sullivan, ch. 5. On negligence, see Simester 2000.

[11] A prominent feature of recent discussion has been the idea that responsibility is best understood as a matter of being responsive to reasons: see e.g. Wolf, Scanlon 1988, Wallace, Fischer & Ravizza.

[12] On responsibility as answerability, see Lucas; Watson, Part III; see also the distinction drawn in Gardner 2003 between 'basic' and 'consequential' responsibility.

[13] Compare *Hill v Baxter* [1958] 1 QB 277. We should also distinguish responsibility-admitting excuses from responsibility-negating 'exemptions' such as insanity: see Gardner 2003; Tadros, 124-9.

[14] See *Woolmington v DPP* [1935] AC 462, on what Viscount Sankey memorably described as the 'golden thread' running 'throughout the web of the law of England' (481).

[15] Offences against the Person Act 1861, s. 20 (and see the more serious offence in s. 18 of wounding with intent to do grievous bodily harm); see Simester & Sullivan, 402-5. Of course, if the prosecution adduces strong evidence that he committed the crime, he might need to offer an answer to that evidence; but we must distinguish answering *to* a charge from answering *for* a criminal offence.

[16] On self-defence in English law, see Simester & Sullivan, 704-13; on duress, see Simester & Sullivan, 665-77. On American law see Dubber & Kelman 510-52, 597-610. Self-defence is clearly a justification: we are permitted to use violence in defence of ourselves. Duress might sometimes be a justification, if it would be foolish rather than heroic to resist a threat, but is at least sometimes an excuse—I should not be condemned for failing to be a hero: for contrasting views, see Westen & Mangiafico; Dressler.

[17] On the distinction being used here between the 'elements' of the offence (the *actus reus* and *mens rea*) and defences, see Fletcher, 552-79, 683-758; Campbell; Tadros, ch. 4; Gardner 2004; Duff 2007, ch. 9. We can leave aside here laws that require the defendant not merely to adduce evidence of, but to prove, a defence.

[18] The leading cases were *Thornton* [1992] 1 All ER 306; *Ahluwalia* [1992] 4 All ER 859; *Humphreys* [1995] 4 All ER 1008; *Thornton (No. 2)* [1996] 2 All ER 1023. For proposals for reform, see Law Commission. Provocation provides only a partial defence: it reduces murder to manslaughter.

[19] See at n. 8 above. On the importance of 'fair labelling', see Chalmers & Leverick.

[20] See at nn. 5-6 above. For useful contemporary discussions of strict liability, see Simester (ed.).

[21] See *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256.

[22] And the evidence suggests that the deterrent efficacy of the law depends more on the perceived likelihood of conviction and punishment than it does on the likely severity of the punishment: see von Hirsch et al.

[23] To which it might be added that such convictions do not carry the moral stigma that convictions for 'real' crimes carry. See Sayre, 70-75; for a critical survey of the arguments, see Simester 2005.

[24] For a survey of similar provisions in English criminal law, see Ashworth and Blake. One question that we cannot pursue here is whether it is reasonable to require the defendant to 'prove' that he was not at fault, or

only to offer evidence that would if not rebutted suffice to create a reasonable doubt about his guilt (see e.g. Terrorism Act 2000, ss. 57, 118; Sexual Offences Act 2003, s. 75): should the defendant's burden, that is, be 'probative' or only 'evidential'? If the Presumption of Innocence is still to be taken seriously, an evidential burden is more acceptable than a probative burden.

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