Author's Response to the Commentators

PETER CANE

Reply to Jim Evans

Jim thinks that I have made various mistakes and false moves. Let me try to identify and deal with some of his worries.

1. Apart from some 'inconclusive discussion' of the taxonomies of responsibility offered by Hart and Baier (Jim says), 'there is no further discussion [in *RLM*] of senses of responsibility'. I find this puzzling, if only because the bulk of chapter two of the book is devoted to offering a taxonomy of responsibility alternative and supplementary to the taxonomies developed by Hart and Baier. Even more puzzling is Jim's suggestion that I think there is a single concept of responsibility. A better criticism (I think) would be that the book tries to deal with too many aspects of what Jim calls 'the sheer variety' of responsibility concepts. There may be an underlying methodological difference here between Jim and me. Whereas I think that the best way to understand the 'variety' of responsibility is to study the complex social practices which generate that variety, Jim seems to put more weight on precision in the use of the language of responsibility. Jim criticises me for failure to 'stipulate definitions'; but I consider this characteristic of my methodology to be an advantage.

2. Jim says that I don't 'define the subject matter of the book'; but that its dominant theme concerns the conditions of liability to incur legal penalties and obligations of repair. I agree with the second part of this statement (about the book's dominant theme), but not the first (about my failure to state it). Forgive me for quoting myself:

> 'Responsibility' is a term that is used in many different senses, and it is no part of my project to stipulate how it should be used. This book offers an account of responsibility from a distinctively legal point of view. As a result, my basic concern is with a conception of responsibility that is

> bound up with (but distinct from) the idea of exposure to sanctions.[1]

3. Jim thinks that I am wrong to say that the legal liability of the passive recipient of a mistaken payment is not responsibility-based. His view is that although the recipient is not responsible for the receipt, she does have a responsibility to repay. A short answer to this is that Jim's objection confuses the ground of liability with the sanction; or, in other words, that the objection uses the term 'responsibility' in two different senses — first to refer to historic responsibility (for receipt of the payment) and secondly to refer to prospective responsibility (to repay).[2] However, a better answer might be to point to what Jim himself says later about the basis of the recipient's liability, namely that it has something to do with 'respect for what others hold as a matter of right'. Up to this point, I would agree with Jim (again, apologies for quoting myself): to explain the liability of the recipient

> we must look to ideas of distributive justice: if a person receives a benefit they would not have received if the giver had known their identity (for instance), the benefit 'rightly belongs' to the giver, not the receiver; and the receiver should give it back.[3]

In other words, the way to explain the passive recipient's prospective obligation to return the payment is in terms of the interests of the giver, not in terms of the historic responsibility of the receiver.

However, Jim fills out the idea of respect for another's rights in terms of choice: a person is entitled to dispose of their property as they choose. A mistaken payment is not a result of the payer's choice, and this imposes a restitutionary obligation on the recipient. There are two difficulties with this account. First, if the reference to choice is an attempt to link the recipient's liability to traditional ideas of responsibility, it refers to the wrong person's choice. Secondly, there is a very important sense in which a mistaken payment is the result of the payer's choice. The reason why we think (if we do) that the recipient should return the payment is not that the payer did not choose to make it but that the choice to make it was the result of a mistake. Since the mistake is, *ex hypothesi*, not the responsibility of either party, the recipient's obligation to repay cannot be responsibility-based. So even if Jim's choice-related account is

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1 Peter Cane, Responsibility in Law and Morality (2003) 2 ('*RLM*').

2 In Jim Evans, 'Choice and Responsibility' (2002) 27 *Australian Journal of Legal Philosophy* 97, 114 Jim makes an argument that seems to me to acknowledge this: 'the whole point about strict liability is that the person who engages in the hazardous activity is not blamable for doing so ... She may be blamable if she then fails to compensate, but that is a different matter.'

3 Cane, above n 1, 208.

preferable to my distributive-justice analysis, his approach does not undermine my argument that the recipient's liability is not responsibility-based.

4. More generally, Jim rejects the distinction I draw between responsibility and liability. He thinks that 'legal liability' is a simpler synonym of 'responsibility at law'. I would need to know more about his reasons for this taking view in order to engage in useful dialogue about it. In particular, I would need to understand more about what Jim means by 'responsibility at law'.

5. Jim thinks that the dominant philosophical tradition that I challenge does not, as I suggest, offer an 'agent-focused' account of responsibility, but rather an account of a species of responsibility that Jim calls 'agency-responsibility'. There may be room for argument about this, but it would not be fruitful. Jim has pinpointed a key difference between our two perspectives on responsibility. Whereas he thinks of responsibility as a function of agency, I think of agency as an element or aspect of responsibility. My main point is the positive one that there is more to responsibility than agency, and that taking law and social practice seriously can provide useful insights into aspects of responsibility other than its link to agency. It may, for instance, help us to understand aspects of responsibility, such as corporate responsibility, that theorists of agency-responsibility find very difficult to accept and rationalise. However, contrary to what Jim says, I am not 'uncertain whether there can be any solid data for agency theory'. Indeed, I think there's just as much data for this as for any other aspect or account of responsibility, and that law and observable social practice provide some of the best data sets available.

6. Jim says that I only 'partially' understand what's wrong with strict liability in criminal law. My basic argument about strict criminal liability is that because criminal punishment carries a stigma that civil remedial obligations do not, strict liability is more problematic in criminal law than in civil law. The stigma arises from punishment's implication of blameworthiness which, I argue, is inappropriate in the absence of fault.[4] Jim says that strict criminal liability is 'downright wrong' because it involves a lack of respect for persons as members of a community of moral agents. I must admit that I'm not sure how Jim's explanation differs from mine.

7. Jim thinks that I am mistaken about inadvertent negligence. It is important to observe straightaway that responsibility theorists are not all of one mind when it comes to negligence. Some treat it as a state of mind — ie inadvertence or carelessness — while others adopt the legal interpretation according to which it is a quality of conduct — ie failure to meet a standard. Some theorists think that

4 Ibid 110.

negligence is a ground of responsibility, whereas others think that it is not. A typical basis for the view that it is not is that responsibility requires choice which, in legal terms, means either intention or recklessness. Jim adopts the plausible view that negligence is culpable and a proper ground for ascription of responsibility. But he also thinks that responsibility for negligence can be explained in terms of choice.[5] Following John Mackie,[6] he argues that we can understand negligence in terms of 'the *lack* of a sufficiently strong desire for contrary behaviour'. Such a lack is indicative of our 'standing goals and commitments' and of 'the concerns that matter to us'.[7] Our goals, commitments and concerns 'shape' our spontaneous as well as our considered behaviour. Although the culpability lies not in the negligent conduct that caused the harm, but in the agent's goals, commitments and concerns, this is enough (Jim says) to 'connect' the conduct to the agent's choice.

This argument, it seems to me, suffers from two defects. First, it attaches responsibility to the wrong thing. In order to justify imposing an obligation on an agent to repair harm done or punishing an agent for particular conduct, we need to show that the agent was culpable for what they did, not for who they are — for their conduct, not their character. More importantly, Jim himself elsewhere asks the following question:

> even if we allow the type of connection to choice that I have argued for, is the whole process of blaming agents for acts justifiable given that it may be true that in some sense they could not have *been* otherwise than they are?[8]

In other words, if responsibility requires choice, it requires choice not only in respect of what we do but also in respect of who we are — our goals, commitments and concerns. If (as Herbert Hart argued and Jim accepts) it is an answer to the plea, 'I didn't mean to do it, I just didn't think', to reply, 'but you should have thought'; is it not also an answer to the plea, 'I don't mean to be a

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5 Jim says that he is prepared to 'allow' that an adequate account of agency-responsibility must be choice-based. In Evans, above n 2, 113–14 he apparently goes further by arguing that praise and blame are 'intrinsically related to choice'.

6 J L Mackie, 'The Grounds of Responsibility' in P M S Hacker and Joseph Raz, *Law, Morality and Society: Essays in Honour of H L A Hart* (1977) ch 10. Mackie's aim was to defend what he called the 'natural' choice-based account of responsibility against Hart's emphasis on capacity and opportunity. I think his argument fails. But I acknowledge that negligence-based responsibility needs more explanation than Hart gave. For my contribution see Cane, above n 1, esp 3.2.3 and 3.6.3.1–2.

7 Evans, above n 2, 108 (emphasis in original).

8 Ibid 121 (emphasis added).

thoughtless person, I just can't help it', to say, 'but you should be more thoughtful'? Pushing the choice back a stage does not salvage the choice theory of responsibility because important aspects of who we are may not be the result of our choices.

Reply to Neil Levy

Neil's basic position (as I understand it) is that the 'pure', 'actual' truth about responsibility is available to be discovered; that such truth is not to be found in the law; that philosophers are concerned to find such truth, and that the methods of philosophy and the natural sciences[9] will lead us to the truth about responsibility.

In the light of some of Neil's comments, it may be helpful to begin by clarifying a few points.

1. Neil attributes to me the view that 'it is the legal notion of responsibility that has the best claim to reflecting the moral notion'. Leaving aside questions about the concept of morality that is in play here, this statement misrepresents my arguments in two ways. First, it suggests that law and morality run in parallel channels, whereas my expressed view is that they are in a symbiotic relationship with one another. Secondly, more than once I expressly reject the idea that if law and morality conflict, law should be considered superior to morality. Given my focus on social practices and the institutional accounts I offer of both law and morality, it would make no sense for me to treat law as the benchmark of responsibility any more than I am inclined to accept that morality fills this role. I do not argue, and I do not believe, that law provides the best, or even a, path to some ultimate truth about responsibility as it actually is. Whether there is such truth or not, I do not know. My disposition, as Neil implies, is to think that responsibility is a human construct. I do not claim that I have discovered, or that the law contains, 'the actual truth' about responsibility. All I claim is that certain philosophical approaches to responsibility fail to capture, or are inconsistent with, important — and (to me) normatively attractive — elements of our social responsibility practices. By contrast, Neil claims that there are many aspects of the legal concept of responsibility that conflict with the actual truth about responsibility.

I do not deny that I am in search of truth. But I am not looking for some pure or actual truth about responsibility. Rather what I am after is a faithful

[9] Neil also mentions the social sciences, which might indicate that in his view, social practice can, after all, be a source of wisdom about responsibility.

account of our responsibility practices in general and our legal responsibility practices in particular. Whether there is any more 'ultimate', practice-independent truth about responsibility, I do not know. I do not say that the agent-focused account of responsibility is wrong in some ultimate sense. All I do is to challenge the agency theorists to explain why we should accept it as true in the face of widespread contrary social and legal practices.

2. Neil also attributes to me the view that 'the legal notion of responsibility captures more of our intuitions about morality than does the purified notion employed by philosophers'. Leaving aside the difficult and critical issues of who 'we' are, of what is meant by 'intuitions', and of what it might mean to say that the philosophical account is 'pure', this statement misrepresents what I say, which is (to repeat) that certain accounts of responsibility in the philosophical literature fail to capture, or are inconsistent with, significant aspects of our social responsibility practices. Whether the practice-based legal notion of responsibility captures more or less of 'our intuitions' about responsibility than the philosophical notion I do not know. More importantly, I do not understand, and Neil does not explain, the relationship between 'our intuitions' and the 'truth' about responsibility. What reason is there to think that the procedure (which Neil recommends) of getting our 'intuitions' about responsibility into '*wide* reflective equilibrium' will show us the pure and actual truth about responsibility as opposed, for instance, to a normatively attractive acccount of responsibility?

The way I see it, Neil and I are involved in different projects. He treats responsibility as a practice-independent phenomenon[10] whereas I treat it as a social phenomenon. I doubt there is any way of establishing which, if either, of these perspectives is correct — perhaps both are. Each individual will choose the perspective which he or she finds the more congenial and illuminating. My project was to show that treating responsibility as a social phenomenon is a potentially fruitful strategy. Because Neil believes that responsibility is a practice-independent phenomenon, he also believes that there is a 'truth' about responsibility in a sense that I do not understand and, therefore, do not attempt or purport to uncover. Neil also implies that all philosophers view responsibility in a practice-independent way; but they do not. The Kantian philosophical tradition is certainly popular amongst contemporary legal philosophers; but

10 Although one might think that philosophy is itself a practice, and that the philosophical concept of responsibility is a product of that practice. On this basis, the way to understand responsibility would be to analyse the practice of doing philosophy.

let's not forget the very different philosophical traditions represented by Hegel, Wittgenstein and Rorty, to name but three.

3. So much for preliminaries. The core of Neil's substantive case against me is that only the agent-focused approach can accommodate 'the fundamental moral principle' that 'ought implies can' because only the agent-focused approach is fully sensitive to luck.[11] Law, by contrast, is selectively insensitive to luck — ie it sometimes holds people responsible for their conduct regardless of whether they could have done otherwise. As a result (Neil argues), the law is internally incoherent because selective insensitivity to agent-luck does not achieve the goal used to justify it, namely protection of the interests of victims and society. This is because,

> punishing [an agent who could not have done otherwise] achieves nothing. It does not offer any recompense to the victim, and does not make him any less likely to offend on future occasions.

Several responses seem apposite. First, the reference to 'punishment' suggests that Neil has criminal liability in mind. But so far as sensitivity to luck is concerned, the distinction between the criminal law and the civil law paradigms of responsibility is of considerable importance. As I point out in the discussion of objective standards of care (for instance),[12] the interests of victims are given more weight in the civil law paradigm than in the criminal law paradigm, with the result that civil law is less sensitive to luck than criminal law. The law is more complex and subtle in its attitude to luck than Neil's argument allows. Secondly, imposing an obligation of repair on a negligent driver, or incarcerating a dangerous criminal, may indeed help the victim or society regardless of whether the agent could have done otherwise and, perhaps, especially if the agent could not have done otherwise. The law's approach to protecting the interests of victims and society is more complex than Neil's argument acknowledges. Thirdly, the law's insensitivity to luck relates to whether the agent could have done otherwise on the relevant occasion, and not to whether she has what Honoré calls the 'general capacity' to do otherwise. A person may have such capacity even though they did not manage to exercise it on the occasion in question. It would be undesirable and illogical to conclude from the fact that a person failed to do X on one occasion that they could never do X in the future; and, consequently, that there was no point in giving them an

11 Interestingly, one of Mackie's objections to Hart's capacity-and-opportunity approach to responsibility is that it leads into the 'could-have-done-otherwise' debate. Mackie argued for the choice theory because it focuses on what was done rather than on whether the agent could have done otherwise.

12 Cane, above n 1, 74.

incentive to try harder next time. On the other hand, people who clearly lack relevant general capacity are not likely to be held liable: a certain minimum of mental and physical capacity is a precondition of legal liability.

Neil offers me a lifeline and suggests that I could respond to his claim of incoherence by arguing that there may be good 'practical' reasons for holding a person liable even if they could not have done otherwise. But, he says, this response will not save me because what I set out to show was that the interests of victims and society are of normative, not merely practical, significance. I hope I have convinced you that I do not need to have recourse to this response because Neil's argument does not put me on the defensive. Anyway, I think the lifeline Neil throws me rests on a misinterpretation of my position. My concern is not whether taking account of the interests of victims and society is of normative significance rather than merely a way of striking a 'practical' compromise between competing interests in security on the one hand and freedom of action on the other. Instead, the claim I want to make is that limited sensitivity to luck and taking account of the interests of victims and society is as much a feature of our non-legal as of our legal responsibility practices. By contrast, Neil argues that the actual truth about responsibility is independent of social practices in general and legal practices in particular, and that the agent-focused, practice-independent, actual truth about responsibility is that 'ought implies can'. Unfortunately, he provides no support for these propositions beyond their mere assertion. He is not alone in this. In much of the philosophical literature on responsibility, 'ought implies can' is the one intuition that is not up for grabs; an Archimedean point, rather than a product of reasoned analysis.

4. Finally, Neil rejects my argument that agent-focused accounts of responsibility have difficulty with automatic or spontaneous conduct.[13] But whereas Jim Evans thinks that responsibility for such conduct can be explained in terms of choice, Neil says that 'few philosophers' consider 'deliberative choice' to be a condition of responsibility. Instead, they think that having 'control' over one's conduct is sufficient. However, Neil does not say that we have 'control' over our automatic conduct, but only that we have 'indirect control' over it in the sense that we act in the way we do 'because we have practised' acting in that way. I am perfectly happy with this explanation of the agency aspect of responsibility for automatic conduct, and I am glad to learn that this is the way most philosophers view the matter.

13 Cane, above n 1, 100–2.

Still, there is an aspect of Neil's discussion of the 'control theory of responsibility' that I find less satisfying. He suggests that the plausibility of the control theory shows that I am wrong to think 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 responsibilities.

We can, Neil continues, 'determine responsibility without assigning praise or blame: indeed without needing to decide whether the action was morally right or wrong'. Two comments are in order. First, I am not sure what Neil means by 'accountable for an act'. In certain possible senses of this phrase — eg 'agent-responsible' in Jim Evans's sense of this term — what Neil says is tautologically true. It would be silly to argue that we need to know what our responsibilities are in order to understand what it means to be agent-responsible for an act. But that is not my argument. Rather I say that in order to understand our social responsibility practices it is necessary to pay attention not only to what it means to be responsible but also to what our responsibilities are.

Secondly, this passage in Neil's commentary demonstrates, I think, the importance of recognising the multi-faceted nature of responsibility. It is, of course, true in one sense that a person may be held 'responsible' for actions within their control. But it does not follow, from the fact that a person is responsible in this sense, that they are responsible in the sense of deserving moral praise or blame; or in the sense of being liable to legal punishment or an order to pay compensation; or that it was that person's responsibility to do or to refrain from doing the action in question. The fact that we can say of a person who controls their actions that they are responsible for those actions does not tell us everything there is to know about the person's responsibility in relation to those actions. Contrary to what Neil seems to think, I would say that the control theory does not tell us all there is to know about 'responsibility' for conduct.

Reply to Prue Vines

I am grateful to Prue for having raised the fascinating topic of vicarious liability. Its real interest lies not in the fact that it is a form of strict liability, but in the nature of the required causal connection between conduct of the person held vicariously liable and the harm suffered by the complainant — namely, creating or providing the opportunity for harm to occur, as opposed to inflicting the harm. It is the combination of the strictness of vicarious liability with the indirectness of its causal basis that makes it problematic in responsibility terms.

A traditional way of overcoming this problem is to stress the interest of the victim in being compensated. In principle, this is the right move. However, one might think that imposing strict liability merely for providing the opportunity for harm to be inflicted by another tips the distributive balance rather too far in the victim's favour. Prue directs our attention to the child-abuse cases, which raise this issue in a particularly troubling way. On the one hand, the vulnerability of the victims and the seriousness of the harm done to them give their interests particular weight. On the other hand, the intentionality of the employee's harm-doing weakens the case for attributing causal responsibility to the employer. The way the courts seem to be dealing with this dilemma is in terms of the degree to which the employer's conduct can be said, as a matter of fact, to have increased the risk of the abuse occurring. For instance, the risk of child-abuse is, one might reasonably speculate, greater in a residential than in a non-residential context; and so it might be expected that an employer would more likely be held vicariously liable for abuse perpetrated in a residential than in a non-residential context. Paying attention to the degree of risk of harm inherent in the employment situation does not — and here I disagree with Prue — involve modulating the liability according to the degree of the employer's fault. There may be no more fault in creating a higher-risk rather than a lower-risk situation. Running a boarding school, for instance, is not, as such, any more reprehensible than running a day school. What it does involve is adjusting the distribution of the respective rights and obligations of the various parties to take account of the relationships between them. That is, it involves treating responsibility as a relational matter.