

MACCABAEAN LECTURE IN JURISPRUDENCE

Being Responsible and Being a Victim of Circumstance¹

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IT IS AN HONOUR to give the Maccabaeian lecture in Jurisprudence, and to celebrate Cromwell's decision, taken in 1655 on sound legal advice, to allow the return of the Jews to England, the more so given my personal debt to a great Jewish lawyer and philosopher, Herbert Hart. The Maccabaeian lecturer ought in decency to address, at a theoretical level, some puzzle that worries philosophers, lawyers, and ordinary people. In what follows I wrestle with a problem of this sort: the relation between treating people as responsible and treating them as victims of their circumstances.

It may be helpful at the outset to outline the argument that follows. I take a wide view of what it is to be responsible, while conceding that the term is often used more narrowly. We can be responsible even when we are not morally to blame or legally liable for our actions. We can be responsible for unintended aspects or outcomes of our conduct and for actions performed when we are not fully capable of acting rationally or when our freedom is restricted. Moreover this wide conception of responsibility is to be welcomed and defended against attempts to undermine it. Moral blame and legal liability, especially criminal liability, are narrower notions. When they are present their force is or should be mitigated when the person in question, though responsible, was not fully capable of acting rationally or their freedom to choose was distorted by their

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circumstances. To that extent we can properly treat people both as responsible and as victims of circumstance.

So much by way of introduction. Of the various ways of looking at human conduct, two seem at first sight difficult, if not impossible, to reconcile. We think of human behaviour as something for which, except in rare cases, the person whose conduct is in question—the agent, to use a convenient term—is responsible.² Agents are responsible because the conduct is theirs. They have intervened in the world and changed it. Their behaviour is the cause of that change.

At times, however, we think of human conduct differently: as the outcome of factors that cause and so explain it. These include genetic make-up, upbringing, environment, temperament, and the pressures to which we are all subject. Let us call them ‘circumstances’, and note that in this sense circumstances include internal factors (how one is constituted) as well as external ones, past and present. Circumstances can be seen as responsible, or partly responsible, for what we do. We are, up to a point, trapped by them. But they are responsible only in a weak sense. People can be called to account, but these background factors cannot be. So, when circumstances are said to be responsible for behaviour, the word is used in the sense in which any cause is responsible for its consequences—the short-circuit is responsible for the fire it brings about.

These different ways of looking at conduct are familiar outside the law. They also feature within it, especially in criminal law and procedure. In general criminal law treats adults as responsible and so liable to sanctions for the offences they commit. But sometimes it holds that they are not liable, are guilty of a lesser offence, or should be punished less severely than normal offenders. One ground for this—not the only one³—is that, when they acted, they were not (or not fully) capable of making a rational decision. By a rational decision is meant one that relates the conduct to the agent’s general aims, though it may not conform to law or social mores. Those who are not capable of deciding rationally in this sense are regarded as not to blame, or less to blame than they would otherwise have been.

Why capacity and blame should be related in this way is not at first sight obvious: I shall return to the puzzle later on. But the link is a powerful one, and it fits the retributive notion that punishment should not be disproportionate to blame.⁴ In English law the link between capacity, blame, and punishment underlies several features of the criminal process: the defence of insanity,

² The term ‘agent’ is used because our concern will be more with positive action than with failure to act, though this will be touched on briefly.

³ I leave on one side for the moment social and moral deprivation, but return to it at the end of the lecture.

⁴ A. Ashworth, *Sentencing and Criminal Justice* (2nd edn. 1995), ch. 4 (proportionality). Several other notions—deterrence, incapacitation, stigmatisation—enter into the rationale of punishment but I concentrate in this lecture on retribution, which is certainly one element in it.

the law relating to 'abnormality of mind' (resulting in 'diminished responsibility'),⁵ the treatment of infanticide as less serious than murder,⁶ and many matters that are routinely put forward in mitigation (that the offence was prompted by domestic tension, emotional stress, financial pressures, addiction to alcohol or drugs).⁷ These latter factors are stressed both in pleas in mitigation and in the pre-sentence reports that are available to judges and presumably influence them in sentencing. They are thought to impair rational judgement and to affect self-control and other aspects of rationality such as cognition. Short-term factors can also be seen as affecting a person's capacity for self-control. Provocation in the form of physical aggression or grossly insulting behaviour can reduce liability from murder to manslaughter if it results in a temporary loss of self-control, and otherwise may be a mitigating factor that affects the sentence imposed. In all these cases the agent's ability to behave sensibly is taken to be impaired. The agent is in a broad sense responsible, since the conduct is in some respects intentional and so, at least in our culture, invites approval or criticism. But criminal liability is excluded or its impact reduced.

The incidents of the criminal process mentioned enter the law at different points and have different effects. The law is reluctant to accept impaired capacity as a complete defence to a criminal charge; it is much readier to treat it as relevant to sentencing. Yet these are all instances of 'responsible but . . . ' and it makes for clarity to think of them as cases in which the agent is in a broad sense responsible but not, or not fully, to blame. If responsibility and capacity-linked-to-blame are treated as separate in this way,⁸ the term 'diminished responsibility' can be seen as a shorthand way of referring to cases where an agent is responsible but not wholly to blame. There are no degrees of responsibility, but rather degrees of capacity to control one's behaviour. If so, a person who is in a broad sense responsible for conduct may be more or less exposed to criminal liability or moral censure on that account.

Though the examples given come from English law, there are parallels in most, perhaps all, other systems. Nor is there anything peculiar to the law

⁵ Homicide Act 1957 s. 2.

⁶ Infanticide Act 1938 s. 1 (1).

⁷ Many other matters can be relied on in mitigation, such as the offender's youth, contrition and co-operation with the authorities e.g. by pleading guilty: A. Ashworth, *Sentencing and Criminal Justice*, pp. 133–49; Halsbury's *Laws of England* 11.2 paras. 1189–91; D. A. Thomas, *Principles of Sentencing* (2nd edn. 1979), pp. 194–222. Sometimes it is not clear (illness, homelessness, unemployment) whether the factors relied on are meant to account for the offence or to show that the offender is so disadvantaged already that punishment will merely add to existing handicap. I am concerned at this point with the factors that bear on the convicted person's deciding to act as they did, on which see J. Shapland, *Between Conviction and Sentence. The Process of Mitigation* (1981).

⁸ For the argument that responsibility, unlike blame, need not depend on choices being open see B. Williams, *Making Sense of Humanity* (1995), pp. 17–19.

about viewing human conduct in the light of the agent's capacity for self-control and rational decision. In everyday life similar factors are thought to exclude or reduce blame for the bad things that people do to others and to themselves.⁹

An awkward question then presents itself. How can people both be responsible for what they do and at the same time be caused to act as they do by circumstances that impair their self-control? Must we, to be consistent, choose between these perspectives? If we can properly combine them, as in practice we do in ordinary life and in the law, when is it appropriate to look on people as victims of circumstance?

I think we may properly combine these ways of assessing our own and other people's conduct. But how far it is wise to do so depends on how far we think it desirable to press the search for the causes of and remedies for things that go wrong in our society. 'The choice of stance is up to us.'¹⁰ An example will show what is meant. When someone has been disabled in a road accident it is proper, depending on the context, to pick out as the cause of their disability the medical condition that affects them, the accident that caused the medical condition, the driver's misjudgement, the disrepair of the road that brought about the accident, or the shortage of funds that led to the road's disrepair. Any of these can properly be cited as the cause of the victim's disability. No error of fact or logic is committed by selecting one rather than the other. The choice between them depends on the aim of the inquiry. Is its focus medical science, an insurance policy covering accidental injury, a lawsuit for negligence, a study of road safety, or an investigation of local authority finance? What is picked out as the cause depends on how far back and for what purpose we want to trace the causal process.

In much the same way, surely, people can in principle be both responsible agents and victims of circumstance. They can both be the authors of the good or harm that their actions bring about and be caused to act as they do. The question is not which view is exclusively correct but which it is better to adopt when we assess people's behaviour in everyday life and the law. The answer must be that in general we do well, indeed we are impelled (for reasons which I

⁹ On the comparison between mitigation in court and the judgements we make in everyday life see Shapland, *Mitigation*, ch. 3.

¹⁰ D. M. Mackay, 'The Use of Behavioural Language to Refer to Mechanical Processes', *Brit. Jour. Phil. Sci.* (1962), pp. 89–103. I agree with D. C. Dennett, 'Mechanism and Responsibility', in *Essays on Freedom of Action* (ed. T. Honderich 1973), pp. 159–74 that the choice of stance (e.g. intentional rather than physical) should not be endowed with a premature moral dimension. The initial question is whether we regard agents as people, not how we judge them morally or legally.

hope to make clear), to treat ourselves and others as responsible agents. But the argument for welcoming this conclusion is not that our behaviour is uncaused—something that we cannot know and which, if true, would be a surprise—but that to treat people as responsible promotes individual and social well-being. It does this in two ways. It helps to preserve social order by encouraging good and discouraging bad behaviour. At the same time it makes possible a sense of personal character and identity that is valuable for its own sake. But there is a proper place, which it is important to try to define, for the ‘victim of circumstance’ perspective.

Responsibility

To see how this can be the case, let us turn first to the notion of responsibility,¹¹ which, as mentioned, is here taken in a broad sense and does not necessarily import legal liability or moral blame, though it is a condition of both.

There are three sources of human responsibility. The primary one is responsibility for one’s own conduct. Then there is the responsibility for other people, things¹² and events¹³ that we choose to take on. Lastly, there is the responsibility that society thrusts on us, either informally or through the law, for example responsibility to one’s family and community.

If these three sources are kept in mind, some false ideas can be nailed at the outset. One is that we are responsible only for our own behaviour; a second that we are responsible only when we are to blame; a third that we are responsible only when we choose to be. None of these is true. Being responsible for our own behaviour is the prime example of responsibility but not the only one. A person can be both responsible and legally liable for something they have not done. An employer can, for example, be vicariously liable for the act of an employee. Nor is this a legal quirk. People can be morally responsible

¹¹ H. L. A. Hart ‘Varieties of Responsibility’, *Law Quarterly Review*, 83 (1967), pp. 263–4 argued that the primary sense of responsibility was that of answering a charge. I am not sure about this, but in any case the underlying idea is embodied in the Greek *aitios*, being the cause of something (B. Williams, *Shame and Necessity* (1993), pp. 52–4), with the corollary of having to answer for it, not necessarily before a court. This combination yields the notion of responsibility for one’s own (in some aspect intentional) conduct. This notion is in turn capable of extension by analogy to the second and third sources of responsibility mentioned in the text, where these elements are not all present, for example because the person responsible has to answer for the conduct of some other person of which he or she is not the cause.

¹² D. C. Dennett, *Elbow Room* (1984), p. 85: ‘I *take* responsibility for anything I make and then inflict upon the general public.’ It is not in fact necessary to have made it. The seller of something manufactured by another is responsible for inflicting it on the public.

¹³ This may seem surprising, but insurers typically make themselves responsible for paying for losses caused by events such as shipwrecks.

for the behaviour of others.¹⁴ Parents can, for example, be morally responsible for the way in which their children behave even when they are not legally liable for it. In that case the person who is morally responsible should act somewhat as if the responsibility were legal. If the children have broken the neighbour's window they should pay for the damage. This is one of the many ways in which morality, as conceived in western culture, follows the legal model.

As these examples show, we can be responsible for the behaviour of others without necessarily being to blame. The employer or parent is sometimes but not always to blame for the employee or child's behaviour. The same is true of our own behaviour. We can be responsible for what we do by sheer accident, like unavoidably tripping someone. If we do this, though not to blame, we incur at least a moral obligation. An apology is called for and the person who has been tripped must be helped up and if necessary taken for treatment.

Thirdly, when people are responsible it is not always because they have chosen to be responsible. Sometimes they have not chosen to be responsible because they have not chosen to do the thing for which they are held responsible.¹⁵ When they are responsible for their own doings this is usually because they have chosen to act as they did. But at times they have no real choice. Someone who is forced to hand over money by a mugger is responsible for handing it over. It may well have been the right thing to do, though the victim had no real option. And at times our convictions leave us with no real option. In such cases not only are we responsible for what we do but we want, like Luther, to be seen to be responsible: 'Here I stand. I can do no other'.¹⁶ But even those who choose to act as they do do not necessarily choose to be responsible for what they do. When they are morally or legally responsible for failing to act, failing, for example, to help a friend in need or to pay income tax, they may have chosen not to help or not to pay but they have not chosen to be responsible for the default. Social or legal norms required them to act. Their duty arose from friendship or membership of the community, and though they may have chosen to befriend someone or to belong to a certain community, they do not choose what friendship or citizenship requires.

Responsibility is not confined, then, either in law or morals, to responsibility for one's own conduct or for one's fault or for situations in which one

¹⁴ 'Morality' here refers to that type of ethical thought according to which behaviour should be guided by something analogous to law (J. Feinberg, *Doing and Deserving* (1984), at pp. 30–7) in that moral reasoning issues in practical conclusions in the form of obligations (B. Williams in *World, Mind and Ethics. Essay on the Ethical Philosophy of Bernard Williams* ed. J. E. J. Altham and R. Harrison (1995), at p. 204). Morality in this sense is alien to Greek thought, since classical Greece had no lawyers (i.e. to whom law was a distinct intellectual discipline), just as Rome had no original philosophers. Nietzsche, *On the Genealogy of Morals* (1887, trans. W. Kaufmann and R. J. Hollingdale, 1967), p. 64 put the point about the relation between legal and moral guilt, duty, etc. in a typically provocative way.

¹⁵ Williams, *Humanity*, (1995), p. 4.

¹⁶ Words attributed to Luther at Worms in 1521: *Hier stehe ich. Ich kann nicht anders. Gott helfe mich.*

has chosen to be responsible. It has a wider significance. That we should think of ourselves as responsible agents, as taking on responsibility for other people and things, and as having it thrust on us, is what makes possible a shared sense of one's identity and character and of that of others. It makes possible a life in common in which people relate to one another as individuals, each with distinctive traits, virtues, and shortcomings, and with a personal history that is largely made up of what they have done, of their achievements and failures.¹⁷

To grasp what is involved in being responsible, a good start is to think of the ways in which we take on responsibility.¹⁸ Most of them involve assuming control of some situation or purporting to control it. The manager of a business, the leader of a political party, the head of a school takes on a role by virtue of which they are responsible for the business, the party, or the school. If it does well they gain credit and are commended for its success; if badly, they incur discredit and may be blamed for its shortcomings. People also take on transient responsibilities, divorced from any sustained role, say for arranging a meeting or seeing that a friend's children get to school on time. When they promise that something is the case, for example that the car they are lending is in good condition, they make themselves responsible for its condition. If the children get to school on time, if the car is sound, they gain credit; if not, they incur discredit.

The credit or discredit that comes from taking on responsibilities need not have legal implications. The business manager may not be legally liable for the losses the business incurs. The party leader is not legally liable for the party's failure to be re-elected. Nor need the credit or blame be moral. Though moral virtues may help to ensure success, success may also be due, or partly due, to natural ability or luck—by which I mean events that are unforeseen and often unforeseeable.¹⁹ The market moves in the business manager's favour, the political opposition is bankrupt. The manager or leader then gets credit for success, but not moral credit. The same is true of failure, which can come about through moral failings, but also from want of skill or bad luck, or a

¹⁷ 'A conception of personal identity according to which each of us is . . . a being essentially related to others by ties of recognition and concern': M. Nussbaum, 'Aristotle, nature and ethics', in Altham and Harrison (eds.), *World, Mind and Ethics*, at p. 109. The theme was developed, and acquired the label 'outcome responsibility' in H. L. A. Hart and T. Honoré, *Causation in the Law* (2nd edn. 1985), intro. lxxx–lxxxii; T. Honoré, 'Responsibility and Luck. The Moral Basis of Strict Liability', *Law Quarterly Review*, 104 (1988), pp. 537–45; and 'The Morality of Tort Law. Questions and Answers', in D. G. Owen (ed.) *Philosophical Foundations of Tort Law* (1995), pp. 81 f.

¹⁸ Something wider than taking on a role, on which see Hart, 'Varieties', pp. 347–8. One can take on responsibility, for example, for the truth of some assertion.

¹⁹ This refers to luck as to external circumstances and to how our actions turn out. There can also be good and bad luck in the way in which we are constituted, our inclinations, capacities and temperament: T. Nagel, *Mortal Questions* (1979), pp. 28, 32–3. Though for some people 'luck averages out in the long run' (Dennett, *Elbow Room*, p. 95) it can have an unexpected and unwelcome impact on a particular action for which the agent is responsible.

combination of these. In this connection the word 'blame' can be misleading. Some forms of blame carry no moral or legal baggage. People are blamed for actions that exhibit want of skill, bad judgement, or inattention: a footballer for not scoring when he had an open goal, a politician for advocating a policy that lost votes, a motorist for overlooking a convenient short cut.

Much the same is true when, instead of people taking on responsibility, society thrusts it on them by requiring them to do something. Here also they gain credit for fulfilling the obligations they owe to their family and friends and to the community, and discredit if they fail to fulfil them. The credit is often slight, even minimal, but requirements like that of compulsory military service can lead to one's being ordered to the battle front. Duty may then require something close to heroism.

Societies and individuals could not have devised these ways of taking on responsibility or of thrusting it on others unless they first understood what it was for people to be responsible for their actions.²⁰ This primary responsibility, unlike responsibility for what people take on, attaches automatically and with the feature already noted, that they gain credit for getting things right, but incur blame for getting them wrong.

Our responsibility for what we do is certainly connected with the control we have over our conduct. But though our conduct must have an intentional aspect, what we do includes its unintended aspects²¹ or consequences.²² If Oedipus (intentionally) kills a man in a quarrel and that man turns out to be his father, he has killed his father. If while driving (intentionally) I accidentally run someone over and the injured person dies as a result, I have killed that person. Though in the main we control our conduct, to succeed in what we set out to do depends partly on other people and on luck.²³ To act is to some extent to take a chance,²⁴ to mortgage one's credit,²⁵ since we decide what to do in

²⁰ Including responsibility for our actions in taking on responsibilities for other people and events.

²¹ Williams, *Shame*, at p. 69 (Oedipus)

²² This is to adopt the idea of action as an intervention in the world which is in some aspect intentional. The limit of our intervention is set by later interventions, so that the consequences that form part of our action do not extend indefinitely. The theme is developed in Hart and Honoré, *Causation*, at pp. 68–81 and Honoré, 'Causation and Remoteness of Damage', *Intern. Encycl. Comp. Law*, 11 (1971), ch. 7. For a more restricted view of action in the context of criminal law, see Maurach/Zipf, *Strafrecht* (6 edn.) *Allg. Teil* I (1983), pp. 198–96.

²³ T. Nagel, *Mortal Questions*, at pp. 25–6.

²⁴ Because 'how things turn out determines what [the agent] has done': Nagel, *Mortal Questions*, pp. 29–30.

²⁵ I developed this theme in 'Responsibility and Luck. The Moral Basis of Strict Liability', *Law Quarterly Review*, 104 (1988), pp. 530–53. The argument is that when we act we bet on things turning out right, not only in the spectacular cases (such as Chamberlain signing the Munich agreement) where the agent knows in advance that he will be judged according to how things turn out, but in general. See also Dennett, *Elbow Room*, p. 165 ('when people get caught in wrong deeds, their gambles wise or foolish have simply lost').

conditions of incomplete certainty. Moreover the difference in this respect between being responsible for what we do ourselves and taking on responsibility for other people or things is a matter of degree. A competent motorist setting out from Oxford to Glasgow will probably arrive safely. Still, something turns on the road conditions, the reactions of other drivers, and sheer luck.²⁶ When we act we intervene in the world, and since, unlike the objects of scientific experiment, we are not insulated from our environment, to act is to interact with other people and things. Inevitably there is some risk that what we decide to do will go wrong. It is no accident that a person who is risk-averse tends to be inactive.

Responsibility, then, whether it attaches automatically or is voluntarily taken on or is imposed by society, involves a combination of actual or assumed control and risk. To be responsible is to take the credit and discredit arising from something that is in a sense ours, either because it is our conduct (and conduct invites self-assessment or assessment by others), or because we have made it ours by taking on responsibility for it or have had it thrust on us. 'We' is to be understood broadly. Groups and organisations such as businesses and states can be responsible as well as individuals. But it is central to responsibility that it exposes the individual or group to risk. Some thinkers have indeed argued that criminal liability²⁷ and moral blame²⁸ should never depend on luck. That is a possible, though in my view mistaken, view. But the issue it raises is not one about responsibility but about the consequences attaching to it. It may be that people, though responsible for doing harm, should not be made criminally liable or morally blamed for it unless they intended or foresaw the harm. But it would not follow that no one can be morally responsible as a result of bad luck. For that to be true we should have to adopt a narrowly effort-based view of human action, according to which what someone does is always identified with what they try to do, and never constituted by its unintended outcome. Or we might opt for a selfish conception of morality, so that, for example, a relative could not be responsible for bringing up an orphaned child since the death of the child's parents was, from the relative's point of view, an unexpected piece of bad luck. It would be no part of that morality to fix people with responsibility for those who unexpectedly suffered

²⁶ But careful foresight can reduce the role of luck in what a person does: Dennett, *Elbow Room*, pp. 92–9.

²⁷ A. Ashworth, 'Belief, Intent and Criminal Liability', in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence* (Third Series, 1987), pp. 1–31; 'Taking the Consequences', in S. Shute, J. Gardner, and J. Horder (eds.), *Action and Value in Criminal Law* (1993), pp. 107–24, criticised by R. A. Duff, *Intention, Agency and Criminal Liability* (1990), ch. 6; 'Acting, Trying and Criminal Liability', in *Action and Value in Criminal Law*, pp. 75–106.

²⁸ B. Williams, 'Moral Luck', *Proc. Aristotelian Soc.* S.V. 50 (1976); *Humanity*, ch. 21; Nagel, 'Moral Luck' in *Mortal Questions*, ch. 3.

misfortune. Spouses could not take one another for better or worse. Could there be such a morality? I am unsure, but, if there were, many would prefer not to be part of the society in which it prevailed.

Responsibility, then, involves taking risks. But why should we welcome the fact that we live in a society in which we are responsible for our conduct and take on or have thrust on us a wide range of responsibilities for people and things?²⁹ The prime reason can hardly be that the system of responsibility enables us to decide when people can be morally blamed for things that go wrong or when legal sanctions can be imposed on them. These are important but secondary aspects of the institution. They back up its primary function, which is to promote both self-respect and individual and social well-being. Being responsible serves as an incentive to aim at and succeed in doing things that are regarded as valuable. In that way people gain credit for success in worthwhile activities (achievements) and avoid the discredit that attaches to failure in worthwhile activities (botches) and to success in nefarious ones (misdeeds). If they were not responsible for what they did the movements involved would be those of their bodies, but the achievements, botches, and misdeeds would not be theirs. They would not be actions, since actions have an intentional aspect, and there can be no intention without a person to do the intending.³⁰ Their behaviour would be the outcome of circumstances to which it would be pointless to attach credit or discredit.

Only by being responsible for what we do and take on can we be motivated to get things right.³¹ But responsibility for our actions comes with a price tag. Not everything that is socially approved is morally admirable. Nonconformists and rebels have their value. The institution of being responsible works best when the motive of securing approval is combined, and if necessary overridden, by a willingness to take responsibility for unpopular, mistaken or wrong actions. Though the motive of seeking credit and avoiding discredit is essential to the working of responsibility, it does not follow that we are responsible only for those actions which, if successful, redound to our credit in the eyes of others. Other values that relate closely to our sense of identity, in particular self-respect and concern for autonomy, impel us to accept responsibility even for actions which seem to others (and perhaps in retrospect to ourselves) to be wrong. This is true even as regards those aspects and consequences of our conduct that we did not intend.

²⁹ Dennett, *Elbow Room*, at pp. 153–72 has a good discussion of why it is ‘rational for us to [esteem free will and] covet responsibility’ (p. 155) and why a well-designed society should provide for ‘some measure of arbitrariness and wise risk taking’ (p. 164). The value he attaches to free-will, as opposed to freedom, seems however misplaced (below n. 39).

³⁰ This remains true even if the notion of a person possessing in a self a ‘locus of self-control’ (Dennett, *Elbow Room*, at p. 81) is in some sense a construct. It is a necessary construct if we are to embrace the intentional stance and the idea of responsibility.

³¹ Dennett, *Elbow Room*, at p. 165.

Though actions, as noted, must have an intentional aspect³²—they must under some description have been intended—they commonly have unintended aspects as well. We do one thing meaning to do another, or meaning to do it but not foreseeing the outcome. It is then important to our sense of ourselves as persons to accept responsibility for what was not intended or foreseen. Consider the testimony of Vaclav Havel,³³ former dissident, now president of the Czech republic. When detained for the first time he wrote and signed what he thought was a cleverly phrased letter to the Public Prosecutor asking to be released from detention. In doing so he came, without meaning to, dangerously close to saying what the authorities wanted to hear. They released him and then exploited the letter to discredit him. It was only five years later, when detained again, that Havel stopped trying to explain away his mistake and came to accept full responsibility for what he had done. ‘The mistake lay’, he puts it, ‘in an unconscious effort to localise the essential cause of my failure somewhere “outside” in “circumstances”, “conditions” “external factors or influences”’. Redress lay in ‘assuming full responsibility here for one’s elsewhere, today for one’s own yesterday’, so that ‘the “I” achieves continuity and identity with the self’.

The style of Havel’s explanation is metaphysical, but the underlying idea is clear. Our identity and integrity depend on our taking responsibility for the way in which we act or have in the past acted even in its unintended aspects.³⁴ The same is true by analogy of states. To accept responsibility for the unintended consequences of state action or default (e.g. the deaths in the Irish famine of 1845, the Armenian deportations of 1915 onwards, the concentration camps of the Boer War) can for a nation be the condition of self-respect and of reconciliation with the unintended victims of government action.

It may be objected that to treat people as responsible for what they do even in its unintended aspects is to ask too much of them. But to do so is not in itself to attach to them moral blame or legal sanction. It means basically that the person or group in question must accept what has happened as their doing and so as open to assessment, favourable or unfavourable. If what happened was bad, they will have a moral obligation to try to put it right, for example to acknowledge it and apologise, even though they were not morally to blame. That may be the whole extent of the obligation arising from their

³² Perhaps there can be sub-intentional actions: B. O’Shaughnessy, *The Will. A Dual Aspect Theory* (1980), ch. 10.

³³ V. Havel, *Letters to Olga* (translated P. Wilson 1988), nos. 138, 139.

³⁴ Cf. ‘The mature agent . . . will recognize his relation to his acts in their undeliberated, and also in their unforeseen and unintended aspects . . . he will be able to acknowledge more generally that he can be as responsible for some things that he did not intend much as he is for things that he did intend, and in ways that have nothing to do with the law of negligence’: Williams, *Humanity*, p. 32, cf. *Shame*, ch. 3.

responsibility—which is not to underrate the importance of apologising when an apology is due.³⁵

Is even this too much to expect? Remember that people do not have the option of claiming responsibility when things turn out well and disclaiming it when they turn out badly. The principle involved is that of taking the rough with the smooth. More precisely, those who control a situation from which they may derive either benefit or detriment are entitled to the benefit that in the upshot accrues from it but must take the risk of any corresponding detriment. This principle has been developed mainly in legal contexts, such as sales, property transfers and vicarious liability. For that reason philosophers do not usually regard it, or at any rate mention it, as an aspect of justice. It looks, however, very like a species of distributive justice, since the distribution of burdens is the counterpart of the distribution of benefits.³⁶ But however it is classified, its moral force can hardly be denied.³⁷

Is it an objection to this wide view of responsibility that being responsible for one's conduct, with its concomitant credit and discredit, is in the interest only of those who attract more credit than discredit overall? And what of the inadequate, so prominent in the criminal process, who persistently go astray? What of the deviants who pursue anti-social aims? To draw up a balance sheet is a complicated matter. People cannot be sure in advance whether their activities are likely to yield a positive balance. And even those who incur more discredit than credit gain protection against the harm that others might otherwise do them from the fact that the others will be held responsible for their actions. Moreover those who are inadequate or deviant should and for the most part do wish to be held responsible for their actions. They wish their autonomy to be affirmed rather than denied. Their sense of themselves as persons, even inadequate persons, is largely built up from their consciousness of what they have done. Their actions, though they reflect their background and make-up, progressively determine their character both in their own eyes and those of others. Being responsible for them is crucial to their sense of identity as persons who develop and change over time. If their behaviour could not be attributed to them in this way, they would have to conceive of themselves as attenuated beings: objects to which things happen.³⁸

³⁵ The importance of acknowledging that one has hurt someone, even unintentionally, is captured in eastern Christianity by the practice of asking for forgiveness for sins 'voluntary and involuntary'.

³⁶ See Honoré, *Morality*, at pp. 83–5.

³⁷ Though we need not be morally to blame in order to be responsible the 'taking the rough with the smooth' principle provides an argument in favour of our acknowledging responsibility for our actions.

³⁸ Nagel, *Mortal Questions*, at p. 36, says that 'the self which acts and is the object of moral judgment is threatened with dissolution by the absorption of its acts and impulses into the class of events'. This seems to me true also of the pre-moral self; the threat is to peoples' identity, not merely to how they are judged.

If they were not prepared to treat themselves as the authors of their conduct they could not even minimally aspire to dignity, pride, or self-confidence. Since those who are inadequate or deviant need these attributes as much as, or more than, others, it must be important both to them and to the rest of us to treat them as far as possible as responsible agents, while making allowances for their special difficulties.

Determinism and Freedom³⁹

Though to hold people responsible for their behaviour may make for individual and social well-being, is it open to us to do this if their behaviour is determined by their circumstances? It is sometimes said that determinism, if true, is irrelevant to the moral and legal responsibility of human agents.⁴⁰ But can this be the case, given that intelligent people have been and are concerned to show that the things that go wrong in our society are better tackled by eliminating the causes of wrongdoing than by punishing, censuring, or isolating the wrongdoers?

To avoid a superficial discussion of a complex issue, I assume that it makes sense to treat people as the authors of and hence responsible for their actions. I leave open whether this is because they or their decisions cause their actions or because some non-causal relationship between them and what they do makes this a coherent view.

The worry remains that, though it may make sense to treat people as responsible for their conduct, if human actions are caused by circumstances, people are not *really* responsible for what they do. However beneficial it may be to treat them as if they were, to do so is to resort to a salutary lie. And salutary lies stop being salutary when the deception is revealed. Are people's actions in fact caused by their heredity, make-up, and external circumstances? No one can be sure. Though valuable work has been done by psychologists,

³⁹ This brief discussion of a very complex topic is concerned with the hypothetical impact of determinism on our freedom—a matter of degree, since we can be more or less free—not our hypothetical freewill, which either exists or doesn't (Williams *Humanity*, pp. 3–8). There is no need therefore to take sides in the argument between compatibilists and incompatibilists, except to the extent that in my view determinism, if it turns out to be true, is compatible with human responsibility. The question is whether, if our actions are caused by our circumstances, this means that we are so much less free than we commonly suppose that it would be inappropriate to treat us as responsible for them.

⁴⁰ P. F. Strawson 'Freedom and Resentment': *Proc. Brit. Acad.* 48 (1962), pp. 1–25 ('practically inconceivable' that it would make a difference); G. Strawson, *Freedom and Belief* (1986), ch. 2; 'Consciousness, Free Will and the Unimportance of Determinism', *Inquiry*, 32 (1989), p. 3; S. J. Morse 'Diminished Capacity', in *Action and Value in Criminal Law*, at p. 239.

neurologists, and sociologists the precise regularities involved, if they exist, await discovery. But it seems to make sense in each individual case to ask what reasons, conscious or unconscious, induced someone to act as they did. A person who gives up regular employment for freelance work can tell us the reasons that led to the decision (that they wanted more free time), or, if the reasons were partly unconscious (that they could not get their own way in the office), a colleague may be able to do so. At any rate it seems plausible to assume that some reason or reasons determined the decision to make a change. It is true that ‘determined’ is here used in a very weak sense. When we think of a reason as explaining a decision we assume merely that it can, along with other unspecified conditions, on occasion determine a decision of that sort, not that it invariably does so, or even that it regularly does so in the absence of counteracting factors. The regularity we have in mind is far removed from the sort of regularity we suppose to exist when purely physical sequences are in question. Even so, we tend to assume that *something* determines people’s decisions. That nothing determined them would imply that they were not merely unpredictable but inexplicable: a belief that would be truly alarming.⁴¹

Should this disturb us? It seems that even ‘strong psychophysical explanations’ bordering on psychological laws are compatible with the notions of choice, decision, action, and intention to which we are committed when we treat people as responsible.⁴² To suppose, as a working hypothesis, that our actions are determined does not make it implausible or illogical to treat ourselves as the authors of our actions when we judge ourselves and others as social beings. How far back it is rational to go in tracing causes depends on the purpose for which we want to get at the cause of something that has gone wrong. This must also apply to the causes of human conduct. It is rational to treat people as the authors of their actions in the context of a system of responsibility that seems valuable both for individuals and for society as a whole. To treat human action as a stopping point beyond which causal inquiries are not ordinarily pursued is sensible and indeed indispensable.⁴³ Perhaps we can dimly imagine an alternative world in which people were regarded as mere automata. In that world to treat people as the authors of their actions would be a bad way of explaining events. As things are, what (if anything) determines people’s decisions includes their make-up, preferences and ideals, so that the hypothesis that their decisions are determined hardly makes them victims of circumstance.

⁴¹ Hume, *Enquiries*, s. VIII part i, puts this well.

⁴² Williams, *Humanity* p. 8 cf. Hart, *Punishment and Responsibility. Essays in the Philosophy of Law* (1968), p. 28 n. 1.

⁴³ Voluntary actions in particular are often treated as natural stopping-points when causal explanations are sought: Hart and Honoré, *Causation*, at pp. 41–4. But obviously there may be contexts in which it is sensible to pursue the inquiry further.

All the same, worries about freedom remain. One of these concerns manipulation. Could someone who discovered the psychological laws underlying human choice and knew enough about our make-up manipulate us into making the choices that suited him? Perhaps, up to a point. Advertisers influence us by conscious argument and unconscious conditioning. What if those who discovered the psychological laws underlying human choice were funded by an unscrupulous advertising agency? That would be alarming, but we have ways of defending ourselves. If our decisions are determined, this only means that when we decide to do something we regard some reason or reasons as sufficient to induce us on that occasion to reach the decision we in fact reach. It does not follow that the same reasons would be sufficient to induce another person to reach the same decision in similar circumstances or to induce us to decide the same way on another occasion. Human beings are so complex that psychological generalisation from particular instances is a good deal more precarious than physical generalisation. The underlying psychological laws, if they exist, must be extremely complex.

Moreover to predict with confidence how a person will behave would remain difficult because people can be secretive about the details of their make-up and preferences. One aspect of the difficulty facing a knowledgeable manipulator is that any causal laws that may govern human choice are not likely to remain secret for long. Once they are made public the person who has to decide what to do has the option of falsifying any prediction based on the laws.⁴⁴ So the hypothetical laws will constantly need to be revised. In practice, then, the danger of our being manipulated to a greater extent than we are already, should rigorous psychological laws one day be discovered, must be slight.

Victims of circumstance

This leaves open the question of when, if ever, it is in order to treat responsible agents in morals and in criminal law as victims of circumstance. Before imposing sanctions or attaching blame law and morality require something more than that the person concerned is responsible for what they have done. One further requirement common to both, as we have seen, is that in the circumstances the agent had the capacity to reach a rational decision about what to do. When this capacity is present blame for bad behaviour is appropriate and criminal liability may, depending on the state of the law, be imposed. But, though capacity has often to be treated in criminal law as an all or nothing

⁴⁴ Dennett, *Mechanism*, at p. 184 ('as an Intentional system I have an epistemic horizon that keeps my own future as an Intentional system indeterminate').

matter, since an offender must be found guilty or not guilty, in real life our ability to decide rationally is a matter of degree. So different degrees of blame, punishment, and censure correspond to the extent to which the agent's capacity is impaired.

This implies that criminal law and morality treat agents as victims of circumstance insofar as circumstances impair their capacity to reach a rational decision. When a person suffering from impaired capacity behaves badly this is taken into account in fixing the extent of criminal liability or moral censure even though it is not possible to prove that the impaired capacity was the cause of the bad behaviour. Capacity is taken into account on the retributive principle that punishment should not be disproportionate to blame. This principle acts as a constraint on the extent to which it is permissible to punish offenders in order to deter others, to promote the general welfare or to mark the community's abhorrence of what someone has done. To apply this principle courts need to be able, at least roughly, to measure desert. One way in which they do it is by making desert depend, among other factors, on capacity. Other things being equal, the less the defendant's capacity for rational decision the less punishment the defendant deserves. Why should this be so?

To take account of capacity makes sense only if we start from a model of rational decision and behaviour. The model is that of the agent who knows or can discover the circumstances in which he or she has to reach a decision and the option or options that are available, and can think sensibly how to choose between them. This is not the way in which even the most rational person normally decides what to do. It describes rather how they can set about deciding what to do if they want to and are prepared to make the effort. It represents what is in general open to the agent rather than any process that the agent has actually gone through on the relevant occasion.

The notion of capacity involved here is that of a general capacity to do this or that, including a capacity to reason and to conform to norms. But this does not imply a capacity to have behaved differently on the occasion for which the agent is being criminally prosecuted or morally censured. The point is one that I made as long ago as 1964;⁴⁵ Dennett has developed it further.⁴⁶ When we say that someone can do something (has the capacity to do it) we use 'can' in a general, not a particular sense: we mean that the person will in general succeed in doing it if they try. To assert that someone could have acted differently on a given occasion does not mean that given the precise circumstances including the impulses to which the agent was then subject that person could have done something different. It is rather that doing something different was not ruled out by the agent's general capacities. It is after all perfectly familiar that we

⁴⁵ 'Can and Can't', *Mind*, 73 (1964), pp. 463–79.

⁴⁶ *Elbow Room*, at pp. 144–52.

fail, say, on a particular occasion to jump a six-foot ditch, and not for want of trying, though we know perfectly well that we can jump it, perhaps because we have done so before.

This general sense of 'can' is the sense, I believe, in which capacity is and should be understood in criminal law. Those who are under the age of criminal responsibility or who are exempt on the ground of insanity are exempt because they do not *in general* sufficiently understand what causes what or what options are open to them. They do not *in general* possess the balance of judgement that is needed for making sensible decisions, though they may be able to do particular things quite competently. The criminal law has of course to draw firm lines based on age or recognised mental disease, but the relation of capacity to age or mental disability is in reality a matter of degree. Criminal justice recognises this to the extent that it is practicable to do so without endlessly prolonging investigation and trial. It commonly fixes different minimum ages on the one hand for criminal responsibility in general and on the other for liability to certain types of punishment such as imprisonment. It draws distinctions between the mental incapacity (insanity) that excludes criminal liability altogether and lesser incapacities arising from, say, abnormality of mind that reduce the gravity of the offence. It caters for temporary mental disturbances such as underlie provocation as a defence to murder and those milder upsets such as domestic stress that can be adduced in mitigation of punishment.

It is not easy to say why impaired capacity should lead to agents being treated as to some extent victims of circumstance. Why are they less at fault and less to be punished or censured than those of full capacity? To hold that they are seems to undermine responsibility as an institution that is outcome oriented: one that works by motivating success and stigmatising failure. The link between capacity, fault, and punishment works against these aims, since people with impaired capacity are often more likely to offend and to do harm than those whose capacity is normal. The mentally disturbed are likely to be more dangerous to their neighbours than the mentally normal. Why, if they offend, are they to be punished or censured less than those of full capacity, who are in general less likely to do bad things? Why is it that, though such people can, with due safeguards, be rendered harmless by confinement in institutions, they cannot be blamed for what they have done, at least not to the full extent?

It seems inescapable that this is one of the ways in which regard for justice prevents us from rewarding success and penalising failure to the full extent that a goal-oriented outlook would suggest. But why exactly should law and morality, as a matter of justice, pay attention to people's capacity to control their conduct?

It is remarkably difficult to find a satisfactory answer. The best I can do is

to suggest the analogy of a handicap. If life in community is to be looked on as something like a competition, in which those with impaired capacities find it more difficult to get things right, it seems fair that they should be punished or censured less when they get them wrong. They start the race from behind or have already fallen behind so that, if they stumble, any punishment should take account of the handicap they already bear.⁴⁷ For, to the extent that they are punished, the punishment may well operate as an additional handicap, so that next time round (say when they come out of gaol) they start from still further behind. It is as if the horse carrying the heaviest weight was obliged to carry a still heavier weight. It may be that this way of looking at behaviour, in the context of fair competition, explains why, given the competitive model of society which responsibility presupposes, capacity is taken into account when punishment and censure are in issue. It is this that unites fault in the sense of getting something wrong and fault in the sense of being legally or morally to blame.

If this is the link between responsibility and capacity, consequences for penal policy follow that go beyond the allowance for impaired capacity that is already built into the legal system. For if account is taken of the extent to which people are handicapped by impaired capacity to control their behaviour, should the system not also take account of the extent to which they are handicapped by social or moral deprivation.⁴⁸ People can be fully rational and yet live in miserable conditions; they can belong to a subculture or underclass largely cut off from and hostile to the rest of society.

To put it more precisely, people's circumstances can be such that their range of choice is limited and within that range they are subject to pressure to make wrong choices. They can have 'scarcely more capacity for free choice than the person under duress'.⁴⁹ Their freedom, both positive and negative, is impaired. It is not poverty as such but this combination of restricted options and pressure to make wrong choices that can be seen as a serious handicap in the race of life. Those who suffer from it, like the incapable, are to some extent victims of circumstance.

But it is important not to succumb to the temptation of treating the restricted freedom of the socially and morally deprived as relieving them of responsibility.⁵⁰ For they, like the rest of us, benefit from the system of

⁴⁷ The idea of reformatories for young offenders rested on this notion.

⁴⁸ J. Floud, 'Sociology and the Theory of Responsibility: "Social Background" as an Excuse for Crime', in *The Science of Society and The Unity of Mankind* (ed. R. Fletcher, 1974), pp. 204–21 and *Psychological Medicine*, 5 no. 3 (1975), pp. 227–38 sketches the idea of 'social abnormality' as a conceivable defence in criminal law. I am arguing not for this, but for a candid recognition of social and moral handicap as a mitigating factor relevant to punishment.

⁴⁹ A. Ashworth, *Principles of Criminal Law* (2nd edn. 1995), p. 245.

⁵⁰ S. J. Morse, 'Culpability and Control' *University of Pennsylvania Law Rev.* 142 (1994), 1587, 1652–4.

responsibility that gives others an incentive to treat them well and to abstain from harming them. Even more important, their self-respect and sense of identity, limited though it may be, depends on their being held responsible for their conduct. To preserve their integrity we and they must refuse to treat what they do as merely the outcome of pressure exerted by others or of the narrow range of options open to them. To hold them responsible is to respect them as people. For this reason social and moral deprivation should be seen not as a hitherto unrecognised defence to a criminal charge, or as excusing wrongdoing, but rather as a matter to be taken into account in assessing moral guilt and in sentencing. The criminal process, against which the deprived are relatively defenceless, should acknowledge that in the race of life they start far back and that punishment, particularly imprisonment, is likely to set them further back. Probably judges do to some extent take account of social and moral deprivation, so understood. But it would be healthy to recognise this openly.

Society has to punish, because that is the only way of keeping deviance within manageable bounds. But in some ways those who are tried and convicted are like military conscripts chosen by ballot. The lot falls on them, but it could have fallen on others who committed similar offences without being caught, or who were caught but had the intelligence and resource to conduct a sophisticated defence. Once we are alive to the role of chance in the criminal process, it seems proper to take account of the fact that some of those prosecuted, though responsible for what they did, are handicapped by incapacity or deprivation, and can easily be set on a downward spiral from which recovery is unlikely.

