

Chapter 2

The Problem of Responsibility

The purpose of this chapter is to establish the conceptual framework for, and articulate some of the pivotal assumptions of, the philosophical analyses and arguments of this book, pointing the reader in the basic direction in which the philosophical discussion will ensue. It contains some general remarks about the metaphysics of human action, and concludes with a concise sketch of what is meant herein by “moral responsibility,” a conception which can and ought to undergird legal conceptions of criminal (liability) responsibility.

Some crucial questions of punishment are quite contingent on answers obtained from moral responsibility theory. For example, that an offender qualifies as punishable depends in part on the extent to which she committed (or failed to commit or attempted to commit, as the case may be)¹ a harmful wrongdoing *responsibly*, which means that she at least acted *knowingly*, *intentionally* and *voluntarily*. Moral responsibility theory has focused significantly and directly on the nature of a moral agent’s acting intentionally and voluntarily and the extent to which that would make one a morally responsible agent.²

Traditionally and philosophically speaking, it is held that a moral agent is properly construed as a morally responsible one (liable to praise or blame, reward or punishment) to the extent that she is a voluntary agent. Generally, to be a voluntary agent, one must, on the traditional view, be *able to do otherwise* even in a context of voluntariness-reducing factors.³

The concepts of responsibility and punishment are related. They imply each other, though perhaps not in a strictly logical sense. The notion of punishment implies that if criminals are to be punished, then they must be responsible agents. Thus responsibility is at least a necessary condition of punishment. Moreover,

¹For an account of equal punishments for failed attempts, see Joel Feinberg, *Problems at the Roots of Law* (Oxford: Oxford University Press, 2003), Chapter 4.

²There is even an increasing concern in moral responsibility theory about a moral agent’s acting knowingly, e.g., of epistemic states.

³For a discussion of a range of voluntariness-reducing factors, see Joel Feinberg, *Harm to Self* (Oxford: Oxford University Press, 1986).

unless one is a punishment skeptic of the abolitionist variety, it would appear that whatever is plausibly argued of the nature and scope of legal responsibility ought to imply something about the legitimate punishability of a criminal, given the facts of the case. It would seem, moreover, that legal responsibility ought to be construed in such a manner that it is congruent with the nature of moral responsibility such that a general account of responsibility is co-terminus with the grounds that would morally justify the state's right and/or duty to punish criminals. But as Joel Feinberg points out:

Determining legal responsibility in problematic cases often comes down to the questions of who ought to pay or who ought to be punished and how much. These questions are rendered problematic by conflicting interests and principles of justice, and the answers to them usually depend on what the judge takes to be the "ends" or "purposes" of compensation or punishment.⁴

Not only does legal responsibility admit of complexity, but so does moral responsibility. Ultimately, "...the precise determinability of moral responsibility is an illusion..."⁵ However, the fact that the boundaries of moral responsibility are not completely discernable does not imply that no one is morally responsible, or that we cannot say rather meaningful things about that in which moral responsibility consists. Nonetheless, we must bear in mind Feinberg's cautions about legal and moral responsibility. For both admit of deep complexity.

Without attempting to resolve or even address the several intricate and worthwhile issues argued in moral responsibility theory during recent years, I will bring together some of the important features of what a plausible (positive) account of responsibility would entail. One assumption here is that moral truth is determined by what the balance of human reason tells us about matters of responsibility, and that whatever the most plausible moral responsibility theory tells us about the nature of human accountability (praiseworthiness or blameworthiness) is what the criminal law ought to embrace, at least as much and as well as would be reasonable and practicable. Here I want to focus on the more serious kinds of cases of responsibility rather than on the minutia of culpable actions. Furthermore, when I use the phrase "action" and its cognates, I mean to use this as shorthand for actions, omissions (negligence) or attempted actions, as the case may be. For if (positive or negative) responsibility accrues at all, it accrues to us on the basis of omissions and attempts as well as actions. I further assume, with Jeffrie G. Murphy, that it is the legitimate business of the state to punish by way of the criminal law.⁶ Finally, I assume

⁴ Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), p. 27.

⁵ Feinberg, *Doing and Deserving*, p. 37.

⁶ Jeffrie G. Murphy, *Retribution Reconsidered* (Dordrecht: Kluwer Academic Publishers, 1992), p. 15. I do recognize, as R. A. Duff insightfully notes, that a comprehensive theory of punishment ought to provide a moral justification of the state's right to punish offenders [R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), p. 25. A discussion of this question is also found in D. Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008)].

that actions are those doings or doing-related events that are motivated or are the result of our wants and desires.⁷ Each of these claims deserves intricate and rigorous philosophical attention. However, none will receive attention in this book.

2.1 Desiderata of a Theory of Responsibility

In order to guide our philosophical thinking about responsibility, it is helpful to consider various desiderata of a plausible theory of responsibility. Desiderata of a plausible theory of responsibility include the following. First, it is desired that such a theory *have a clear purpose*, for instance, to serve as part of the foundation of the elucidation of a theory of punishment. This is certainly the main point of my treatment of responsibility. Without a purpose or aim, philosophical analyses seem often to be confused or even pointless.⁸ Thus there needs to be an aim of a responsibility theory, preferably an explicit one.

Second, it is desirable that a plausible theory of responsibility *set forth and defend the conditions under which an agent is rightly held accountable*, even punishable, for her actions. In so doing, a theory of responsibility serves the function of grounding a theory of punishment's justification insofar as those who are responsible for harmful wrongdoings deserve to be punished. I shall detail the necessary and sufficient conditions of justified responsibility ascriptions.

Third, it is desired that a theory of responsibility *distinguish between the different uses and senses of "responsibility"* in order to not conflate such uses and senses. It is crucial to keep in mind that it is a specific but complex kind of responsibility that is the foundation of justified punishment. I shall make such distinctions in what follows.

Fourth, it is desired that a theory of responsibility *respect the distinction between moral and legal responsibility*.⁹ What amounts to moral responsibility and what amounts to legal responsibility are in many respects congruent with one another. However, there are cases in which, say, criminals are legally responsible for actions for which they would not be morally responsible. The legal category of strict liability serves as one obvious instance along these lines. For purposes of public safety the law sometimes holds responsible those who have the power to effect change given their role responsibility for something, even though they have little or no causal connection to a particular untoward event the harms from which the law seeks to protect citizens.

⁷ Alvin I. Goldman, *A Theory of Human Action* (Princeton: Princeton University Press, 1970). Of course, there is a wealth of philosophical literature challenging this sort of analysis of the nature of human action. But a discussion of this analysis is beyond the scope of this project.

⁸ Keith Lehrer, *Theory of Knowledge*, Second Edition (Boulder: Westview Press, 2000), p. 7.

⁹ For a discussion of legal and moral concepts of responsibility, see Peter Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing Company, 2002). For a review of Cane's book, see J. Angelo Corlett, "Review of Cane, *Responsibility in Law and Morality*," *Mind*, 112 (2003), pp. 328–331.

Not only are there cases of legal responsibility that do not amount to moral responsibility, there are instances where one is morally responsible for something that the law, for whatever reasons, refuses to disallow. An example would be categories of conduct that fall under the rubric of “there ought to be a law!” But for whatever reasons, there is no law prohibiting such conduct. Perhaps one might argue that smoking in public ought to be made illegal (because it wrongfully harms others by setting back their legitimate interest in good health), in which case those who smoke would be held legally responsible for their wrongdoing. However, as things currently stand, smoking is banned only in particular regions (in the U.S., for instance, in California), and only inside public buildings and within a short distance from such buildings. Thus there are instances of legal responsibility for harmful wrongdoings that do not add up to moral responsibility for such actions, and there are instances of moral responsibility for harmful wrongdoings the prohibition of which is not (fully) supported by law. Furthermore, there are essentially hard cases in which morality and the law conflict.¹⁰

2.2 The Uses and Contexts of “Responsibility”

What are the different *uses* of “responsibility,” and what are the contexts of responsibility? *Black’s Law Dictionary*¹¹ defines “responsibility” as “liability ... a person’s mental fitness to answer in court for his or her actions...” and “liability” as “The quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.” Most of these aspects of responsibility are captured in ordinary usage, where “responsibility” and its cognates are used to refer to a variety of things. At times “responsibility” is used to refer to obligations or duties one has, such as when “She is irresponsible” or “You cannot be trusted because you are not responsible” is uttered. Moreover, university professors have professional roles that hold them accountable for certain behaviors in certain situations as defined by institutional rules. These are examples of the *duty use of “responsibility.”*¹²

¹⁰ An example of such a hard case, in U.S. law, would be whether or not the First Amendment to the U.S. Constitution ought to protect hate speech. For a philosophical discussion of this problem, see J. Angelo Corlett and Robert Francescotti, “Foundations of a Theory of Hate Speech,” *Wayne Law Review*, 48 (2003), pp. 1071–1100.

¹¹ Bryan A. Garner, Editor in Chief, *Black’s Law Dictionary*, Seventh Edition (St. Paul: West Group, 1999).

¹² Hart calls this “role responsibility” {See H. L. A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press, 1968), Chapter 9 [Compare the notion of “task-responsibility” in Kurt Baier, “Guilt and Responsibility,” in Peter A. French, Editor, *Individual and Collective Responsibility* (Cambridge: Schenkman Publishing Company, 1972), p. 52]. This notion of responsibility is also captured by R. S. Downie when he writes: “When collectives act individuals act, but those individuals act in roles whose capacities are defined by the nature of the collective. ... Individuals are *authorized* by their collectives to act in certain ways, depending on the function of the

Moreover, there is the *causal use of “responsibility.”* I am responsible for an outcome in the causal use if my action is in some significant way the result of what I did, failed to do or attempted to do or if what I did, failed to do or attempted to do was a contributory cause of that outcome. We often assign causal responsibility to events (economic problems in society, winning athletic competitions, etc.) or persons (public officials, athletes, etc.). To say that I am responsible for a certain outcome in the causal use constitutes a “straightforward ascription of causality.”¹³

There is also the *praise use of “responsibility.”* This use of “responsibility” places a moral judgment on its subjects. Unlike the duty or causal uses of “responsibility,” the praise use ascribes accountability to someone for what she did, where what she did was praiseworthy. For example, when I say, “You are responsible for saving the drowning child,” I am ascribing to you an accountability for your heroic action for which you should be praised and perhaps rewarded.

Moreover, there is the *blame use of “responsibility,”* the use of the expression that attributes accountability to those who are blameworthy for what they do. The blame use of “responsibility” is exemplified in the accusation, “Former U.S. president Andrew Jackson is significantly responsible for the attempted genocide (though not merely attempted genocide, as his actions actually led to the deaths of thousands) of American Indians in and by the U.S.”¹⁴ It is assumed that the person who is responsible in the blame use of the term is one who, if certain other conditions are satisfied, is a candidate for moral censure and/or punishment and that they are at fault in what they did. Thus to say that one is responsible for an outcome in the blame use amounts to an “imputation of fault.”¹⁵ Similarly, when I say, on self-reflection, that I am morally liable for an outcome, I mean that the weight of moral reasons supports the claim that I am to be held liable to punishment or sanction for my part in causing the outcome. Barring strict liability, then, liability responsibility seems to entail, at least in most cases, causal responsibility.

Finally, there is the *liability use of “responsibility.”* This is closely related to the blame use. However, an outcome might be “one’s fault,” yet one is not subject to sanction for it, given, say, that the amount of damage or harm in the given case is

collective” [See R. S. Downie, “Responsibility and Social Roles,” in Peter A. French, Editor, *Individual and Collective Responsibility* (Cambridge: Schenkman Publishing Company, 1972), p. 70]. I do not, however, wish to imply that there are not important distinctions between this duty use of “responsibility” and the duties that are implied by rights (given the correlation, however imperfect, between rights and duties). Surely the duty I have in virtue of my role or position is not necessarily implied by another’s having a right, moral or otherwise, that holds against me at that time. Nor do I wish to discount the important distinctions that have been made between duties and obligations [See Richard B. Brandt, “The Concepts of Obligation and Duty,” *Mind*, 73 (1964), pp. 374–393; E. J. Lemmon, “Moral Dilemmas,” *The Philosophical Review*, 71 (1962), pp. 139–158]].

¹³ Feinberg, *Doing and Deserving*, p. 130.

¹⁴ Indeed, this is an example where blame and role uses of “responsibility” are conjoined. For it was by virtue of his role as Commander-in-Chief of the U.S. Army that Andrew Jackson was responsible for the carrying out of part of his campaign promise to commit genocide against American Indians in that they stood in the way of “manifest destiny.”

¹⁵ Feinberg, *Doing and Deserving*, p. 136.

negligible. The liability use describes someone who is punishable, an appropriate candidate for punishment or compensation due to negligence. When I say that “Former U.S. president Andrew Jackson is significantly responsible for the attempted genocide of American Indians in and by the U.S.,” I mean that he ought to have been punished severely for his actions (assuming he was duly convicted as the result of adequate due process, of course).¹⁶ I have ascribed liability¹⁷ to Jackson.

It is clear that various uses of “responsibility” may be linked in a single use, such as when I say that “Various executives of the large U.S.-based tobacco companies are responsible for deceiving the U.S. public and profiting unjustly from such deception.” Here the causal, blame and liability uses of “responsibility” are combined. Or, when I say, “You acted responsibly,” I may be combining the duty and praise uses of “responsibility.”

There are additional distinctions among the uses of “responsibility.”¹⁸ retrospective, prospective, and *tout court*. Of these three, I am primarily concerned with retrospective responsibility, or responsibility for what one did in the past and/or for what one is doing in the present. But as Joel Feinberg reminds us, I can be responsible for something where “something” is located in the future, which at times can be understood in terms of liability.¹⁹ Finally, I can be responsible “on balance,” which either ascribes or describes my excellence of character. This is responsibility *tout court*, where I am a responsible person, not necessarily responsible for anything.²⁰

Not only are there different ordinary language uses of “responsibility,” there are different *contexts* of responsibility. There is *legal responsibility*, which is when one is properly judged responsible for something according to the rules of a legal system. U.S. law, for instance, has different conditions for criminal responsibility than it does for tort liability. Since this book is primarily concerned with responsibility and punishment for crimes, an (albeit rather concise) account of criminal responsibility is helpful.

The elements of criminal responsibility include: *actus reus* (a voluntary physical or bodily act, omission or attempt by the defendant); *mens rea* (the defendant’s intent or state of mind at the time of the act, omission or attempt); *concurrence* between the defendant’s *actus reus* and *mens rea*; and a *harm* caused by the defendant’s act, omission or attempt. Some crimes, such as receipt of stolen property, require proof of “attendant circumstances” as well. Of course, *mens rea* is not required in cases of strict liability. Whereas the *mens rea* element is often one of general intent or a defendant’s awareness of all factors (e.g., attendant circumstances) constituting a crime, there are

¹⁶ Hart refers to this use of “responsibility” as “liability responsibility” (See Hart, *Punishment and Responsibility*, Chapter 9).

¹⁷ Feinberg, *Doing and Deserving*, pp. 136–139.

¹⁸ For an alternative categorization of responsibility types, see Baier, “Guilt and Responsibility.”

¹⁹ Joel Feinberg, “Responsibility for the Future,” *Philosophy Research Archives*, 14 (1988–1989), pp. 93–113.

²⁰ Joel Feinberg, “Responsibility *Tout Court*,” *Philosophy Research Archives*, 14 (1988–1989), pp. 74–92.

numerous instances of “specific intent” crimes: solicitation, attempt, conspiracy, first degree premeditated murder, assault, larceny, robbery, burglary, forgery and embezzlement come to mind here. Some statutes require that a defendant act purposely and/or knowingly. By “purposely,” the law means that a defendant acts such that it is her conscious object to engage in certain conduct or cause a certain result. By “knowingly,” it means that a defendant is aware that her conduct is of that nature or that particular circumstances exist. She acts knowingly with respect to the result of her conduct when she knows that her conduct will at least very likely cause such a result. This concise outline of criminal liability in U.S. law will suffice for my aim in noting some of the vital connections between criminal responsibility and moral responsibility.

2.3 Moral Responsibility

While it is true that no comprehensive general account of responsibility can be complete without an account of legal responsibility,²¹ it is also true that such an account would be incomplete lacking an account of what makes one morally responsible. For what makes one morally responsible is a matter of what the balance of human reason “decides” and is not contingent on social conventions as are notions of legal responsibility. In this way, moral responsibility is an ontologically prior notion, and serves well as our guide to who deserves to be punished for some wrongful and harmful outcome. So while a plausible account of responsibility for purposes of determining deserved punishment does well to be informed by conceptions of legal responsibility, moral responsibility theory must guide our thinking concerning who *ought* to be punished, and why and how. For social conventions in legal punishment are often incorrect, influenced by an array of factors such as racism, sexism, greed, etc.²² But moral responsibility, being non-institutional, is governed by reason (and moral intuition), though moral responsibility ascriptions are often, when not governed by reason, susceptible to similar problems as with social views of who ought to be punished, and why.

Moral responsibility, on the other hand, accrues when the balance of human reason entails or implies that one is accountable (in either a blame or praise use) for an outcome. For example, if I am walking on a beach and, being a good swimmer, chance across a drowning child, but I do not make an effort to increase significantly the probability of the child’s being saved, I am morally responsible (in the blame use) for the child’s welfare in that situation should the child drown. For I have violated the moral rule, call it “Good Samaritanism:” A moral agent is morally obligated to do whatever she can do to save an endangered stranger’s life to the extent that her performance of such an action does not place herself at genuine and

²¹ Cane, *Responsibility in Law and Morality*, p. 28.

²² Jesper Ryberg and Julian Roberts, Editors, *Exploring the Normative Significance of Public Opinion for State Punishment* (Oxford: Oxford University Press, forthcoming).

significant risk of harm.²³ In many jurisdictions in the U.S., anti-Bad Samaritan laws are in effect such that legal and moral responsibility on such matters coincide one with another. But there are other instances where legal and moral responsibility are incongruent (for whatever reasons), as noted above. In any case, I follow Peter Cane's position that the relationship between law and morality is "symbiotic," and that just as moral responsibility theory can and does inform us of the way legal responsibility ought to be articulated and conceptualized, so too can conceptions of legal responsibility serve as a rich reservoir of clarity concerning conceptions of moral responsibility, objectively construed.²⁴ After all, "...when courts develop rules and principles about responsibility, they are engaging in essentially the same reasoning processes as people use in the moral domain when developing rules and principles about responsibility,"²⁵ and "...the criteria of good legal reasoning and of good moral reasoning about complex concepts are essentially similar in many respects."²⁶

Moral responsibility theory provides a non-institutional analysis of the nature of responsibility such that determinations of responsibility in the law might be made reasonably, given the complex array of factors in a case. But even if it turned out to be true that the institution of punishment is justified, morally speaking, it would not follow that offenders ought to be punished. For it might be true that, all things considered, no one is sufficiently responsible for their actions such that it is justified for the state to inflict hard treatment on them. Thus they would be *excused*, or their actions would be so mitigated that punishment would not be justified. Of course, this would also imply that no one ought to be praised or rewarded for what they do well or rightly. And it is something akin to this latter claim and reasoning which leads John Rawls and many other philosophers to argue that the notion of desert is empty.²⁷ According to Rawls, the social contexts into which we are born are not the results of our desires and wants, and so it is problematic to think that we are deserving of what results from our being born into, say, social and/or economic privilege or the lack thereof. Rawls' reasoning is poignant as it directs our philosophical attention to a fact of sociology, namely, that our starting points in life are largely determined such they are to a significant extent beyond our control. As Rawls himself writes, the "inequalities of birth and natural endowment are undeserved."²⁸ They are undeserved because they are determined arbitrarily. And since our formative years are then largely determined in at least this sociologically arbitrary sense, how can we be said to deserve this or that, except, if at all, in some highly limited way? Would not this kind of

²³ For discussions of this sort of an example, see Joel Feinberg, "The Moral and Legal Responsibility of the Bad Samaritan," *Criminal Justice Ethics*, 3 (1984), pp. 56–69; John Kleinig, "Good Samaritanism," *Philosophy and Public Affairs*, 5 (1976), pp. 382–407.

²⁴ Cane, *Responsibility in Law and Morality*, pp. 12–16.

²⁵ Cane, *Responsibility in Law and Morality*, p. 16.

²⁶ Cane, *Responsibility in Law and Morality*, p. 21.

²⁷ Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), pp. 100–104.

²⁸ Rawls, *A Theory of Justice*, p. 100.

sociological determinism vitiate attributions of moral responsibility that might lead to punishment in cases of significantly harmful wrongdoing?

Of course, there are other senses in which we may be determined besides sociologically. We can be determined economically, or we can be determined biologically, and each in either positive or negative ways. Or, we can be determined ideologically in the sense that our values are taught to us at early ages, and those values to some extent determine how we think and often how we act. So there are a number of ways in which we are subject, to one degree or another, to forces somewhat beyond our control. I say “somewhat” here because it is a metaphysical issue as to whether or not we are determined fully, or partially, or not at all. This philosophical debate about human freedom has been taking place since the beginnings of philosophy. And I assume for the sake of this larger project that cognitively normal agents are at least sometimes significantly free to choose and act (or not act, or attempt to act) in some contexts. However, I will now take some time to outline some of the basic moves of the debate concerning moral responsibility in an effort to arrive at an analysis of the nature of responsibility, the conditions of which are rather congruent with the elements of criminal liability, at least in U.S. law.

2.4 Libertarianism, Determinism, and Compatibilism

There are at least three basic theories or metaphysics about human freedom. One theory is that of *metaphysical libertarianism*. I take this view to hold that some events, namely, human doings, are not determined. It is the logically contradictory position relative to *determinism*, which I take to be the view that all events, even human actions and choices, are completely caused and there is no human free will or volition. By this it is meant, roughly, that given what preceded it, a particular event is inevitable. Although there are a number of different metaphysical analyses of the nature of determinism,²⁹ simple determinism is that view which holds that all of our doings are caused by something other than ourselves, such that we lack significant control over everything we do. From this position we might derive the following argument regarding moral responsibility that I shall dub the *Argument for Non-Responsibility*:

1. Moral responsibility requires that we are at least sometimes able to do otherwise than what we do;

²⁹ John Martin Fischer, *The Metaphysics of Free Will* (London: Blackwell, 1994); Ted Honderich, *How Free are You?: The Determinism Problem* (Oxford: Oxford University Press, 1993); Keith Lehrer, Editor, *Freedom and Determinism* (New Jersey: Humanities Press, 1966); Keith Lehrer, “‘Can’ in Theory and Practice: A Possible Worlds Analysis,” in Myles Brand and D. Walton, Editors, *Action Theory* (Dordrecht: Reidel, 1976), pp. 241–270; “Cans Without Ifs,” *Analysis*, 29 (1968), pp. 29–32. For a general introduction to this problem, see Laura W. Ekstrom, *Free Will* (Boulder: Westview Press, 2000).

2. Being able to do otherwise than what we do requires our having essential control over what we do;
3. Our having essential control over what we do requires that we have the ability to do otherwise³⁰;
4. But we lack the ability to do otherwise because all of our actions are determined such that we lack essential control over them;
5. Therefore, we are not morally responsible for what we do.

The Argument for Non-Responsibility is part of what motivates the traditional view of human freedom and responsibility. To the extent that humans lack the ability to do otherwise, they also lack freedom sufficient to qualify as morally responsible agents. But this line of reasoning has been challenged in recent years by Harry G. Frankfurt, and his proposed counter-examples to the Principle of Alternate Possibilities have received a tremendous amount of well-deserved philosophical attention.³¹ Frankfurt's argument is proffered by way of a series of counter-examples, some of which attempt to demonstrate, intuitively, that a moral agent can be a responsible one even if she lacks the ability to do otherwise, thus casting doubt on (1) of the traditional Argument for Non-Responsibility. What is sufficient for moral responsibility, Frankfurt argues, is that an agent have a higher-order volition to do something, where her wants and desires motivate the action, namely, where she "really wants" to do what she does even though she indeed has no alternative actions open to her at that time. In short, he argues that acting freely is sufficient for moral responsibility. The ability to do otherwise, then, is not a necessary condition of moral responsibility, contrary to what has been argued, for instance, by Peter van

³⁰ In the literature on moral responsibility, this is referred to as the "Principle of Alternate Possibilities."

³¹ For a brief selection of the work on this and related problems of moral responsibility theory, see Harry G. Frankfurt, *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988); *Necessity, Volition, and Love* (Cambridge: Cambridge University Press, 1999). These collections of Frankfurt's work contain his most important work on moral responsibility. Among the finest works which seek to contribute to the ongoing discussion of moral responsibility include: Ton van den Beld, Editor, *Moral Responsibility and Ontology* (Dordrecht: Kluwer Academic Publishers, 2000); John Martin Fischer, *Deep Control* (Oxford: Oxford University Press, 2012); John Martin Fischer, *The Metaphysics of Free Will* (London: Blackwell, 1994); John Martin Fischer, *My Way* (Oxford: Oxford University Press, 2006); John Martin Fischer, Editor, *Moral Responsibility* (Ithaca: Cornell University Press, 1986); John Martin Fischer and Mark Ravizza, Editors, *Perspectives on Moral Responsibility* (Ithaca: Cornell University Press, 1993); John Martin Fischer and Mark Ravizza, *Responsibility and Control* (Cambridge: Cambridge University Press, 1998); I. Haji, *Deontic Morality and Control* (Cambridge: Cambridge University Press, 2002); I. Haji, *Moral Appraisability* (Oxford: Oxford University Press, 1998); see also *The Journal of Ethics*, 1:1 (1997), pp. 1–104; *The Journal of Ethics*, 3:4 (1999), pp. 275–384; *The Journal of Ethics*, 4:4 (2000), pp. 307–417; *The Journal of Ethics*, 10:3 (2006), pp. 211–352; Robert Kane, *The Significance of Free Will* (Oxford: Oxford University Press, 1998); Derk Pereboom, *Living Without Free Will* (Cambridge: Cambridge University Press, 2001); Peter Van Inwagen, *An Essay on Free Will* (Oxford: The Clarendon Press, 1983); R. Jay Wallace, *Responsibility and the Moral Sentiments* (Cambridge: Harvard University Press, 1996).

Inwagen.³² Frankfurt's theory is an instance of higher-order *compatibilism* between both determinism and human freedom on the one hand, and determinism and human moral responsibility on the other.

A Frankfurtian theory (by this I mean a high-order compatibilist theory) of moral responsibility that has gained a solid foothold in the philosophical discussions of moral responsibility is one developed and defended by John Martin Fischer.³³ Fischer's analysis of moral responsibility is similar to Frankfurt's in the following way: each posits higher-order volitional control over one's life as a sufficient condition of moral responsibility. *Regulative control* is the kind of power a moral agent has to make a difference in the way the world turns out. According to Fischer, however, this control might not be open to us as moral agents. On his compatibilist view (doubly compatibilist, that is, between determinism and acting freely, and between determinism and moral responsibility), an agent is morally responsible to the extent that she has higher-order *guidance control* over her course in life. The nature and importance of guidance control is articulated by Fischer in the following claims:

The Frankfurt-type cases seem to me to show that one can be morally responsible for one's actions, even though one does not select the path the world will take, among various paths that are genuinely available; in these cases, suitably filled in, there is just one path the world will take. And what makes the agent morally responsible is *how he proceeds along this single path*. More specifically, the agent can exhibit a certain sort of control - guidance control - even though he lacks regulative control. Guidance control, in my view, is the "freedom-relevant" condition sufficient for moral responsibility.³⁴

Of course, Frankfurt's view assumes, as does Fischer's, that we sometimes have wants and desires such that we can really want to do this or that. And I make this assumption for purposes of this book. For if we lack this component of moral life, there is essentially no normative moral life at all and it would make little or no sense to say that one ought not do this or one ought not to do that. Furthermore, if we do not have desires and wants that are our own, then it would appear that there are no moral selves, and no moral choices for which we can or ought to be held accountable at least in the desert-based sense of "accountability." Moral responsibility ascriptions would reduce to nonsense, and so would normative moral philosophy. There would seem to be no good reason to hold us accountable for what we do that is either praiseworthy or blameworthy.³⁵

³² Van Inwagen, *An Essay on Free Will*.

³³ See Fischer and Ravizza, *Responsibility and Control*; and *The Journal of Ethics*, 6 (2002), pp. 199–303. Fischer's replies to some concerns expressed about his analysis in *Responsibility and Control* are found in John Martin Fischer, "Responsibility and Manipulation," *The Journal of Ethics*, 8 (2004), pp. 145–77.

³⁴ John Martin Fischer, "Responsibility and Self-Expression," *The Journal of Ethics*, 3 (1999), p. 296.

³⁵ Although strong moral skeptics are unlikely to be persuaded by such considerations, my purpose here is not to address meta-ethical concerns of moral realism versus moral anti-realism, but rather to argue from within a moral realist framework for certain claims about responsibility that are relevant to matters of punishment.

But assuming that we do have desires and wants with which we identify to some meaningful extent, and do act freely at least some of the time and to some meaningful extent, it would then be plausible to think that we at least have the *capacity* to act as morally responsible agents, whether or not we *actually* do so in this or that particular circumstance. Under such a scenario, what are the conditions of moral responsibility such that we might be held blameworthy in terms of punishment for our significant wrongdoing? Here I am raising a normative question about how punishable agents ought to be viewed and treated in terms of their responsibility statuses. Moreover, I assume a fundamental congruence between the conditions of moral and legal responsibility.

For me to be morally responsible for what I do such that I am liable to punishment or sanction, it would seem that my causal connection to the wrongful deed, my being “at fault,” my intentionality, voluntariness, and knowledge are each relevant to the degree to which I am accountable for what I did, failed to do, or attempted to do, as the case may be. But precisely how does each one of these factors figure into a general analysis of responsibility, especially the kind that can be used in a reasonably just legal system?

I proffer the following analysis of responsibility for actions, an analysis that can and ought to be used to illuminate the nature of responsibility in criminal justice contexts. It is a conception of liability responsibility that makes use of conditions of responsibility that are at work in both moral and legal responsibility. *A defendant is responsible for a wrongful act to the extent that she: (1) is guilty of committing the act, which means that she is causally connected to the wrongful deed*³⁶; (2) *performed the act intentionally, meaning that her action was guided by her wants and beliefs*; (3) *acted knowingly* [But a defendant may act knowingly (or be an epistemic agent) in one of at least two ways. First, she might act knowingly in a direct way, where she knows that what she is doing is what she intends to do, say, rob a bank. She knew she was robbing the bank when she did it. And there were no significantly ambiguous factors concerning the bank robbery. But she might also act knowingly in an indirect way, where she knew that she was robbing the bank, but did not know or figure that robbing the bank could lead (or likely lead) to the harming of others in the process of the robbery (This point is related to the Scope of Responsibility Principle, articulated below)]; (4) *acted voluntarily*, wherein *the causally contributory conduct must have been in some way faulty* (i.e., she is responsible for the harmful outcome in the blame sense)³⁷; and *if the harmful outcome was truly the fault of the individual moral agent, the required causal connection must exist between the faulty aspect of her conduct and the outcome*.³⁸ The locution, “to the extent that” implies that *responsibility admits of degrees*. This implies that, typically, a person is not either wholly responsible or not responsible at all for an outcome. Rather, she is *more or less responsible for it*. This conceptual point will fit

³⁶ Causal responsibility is typically but not always a pre-condition of legal retrospective responsibility, as noted in Cane, *Responsibility in Law and Morality*, p. 36.

³⁷ Feinberg, *Doing and Deserving*, p. 222.

³⁸ This notion of fault is borrowed from Feinberg, *Doing and Deserving*, p. 222.

nicely with the requirement of proportionate punishment that also admits of kinds and degrees, as we will see in subsequent chapters.

Of course, moral luck figures into all of this rather readily. In the law, it might take the form of a criminal's being born into and raised in a family for which there is little hope, economically speaking, of an opportunity for a decent life.³⁹ When one's life prospects are dim from the start, it is not obvious that one ought to be held fully accountable for what one does at least in certain kinds of circumstances. This is because under such circumstances one lacks sufficient guidance control over her life in general. Furthermore, just as we would hardly be impressed by a wealthy heiress' success in university studies provided that she is a cognitively normal person raised in wealth and opportunity, we would hardly want to blame fully those who lack opportunities for basic life prospects when they turn to certain types of crimes.⁴⁰ To be sure, poverty alone is no excuse, legally speaking, for crime. But certain circumstances of poverty and lack of opportunity might serve as factors of mitigation in sentencing offenders. Moral luck, then, tends to vitiate ascriptions of full responsibility. This is true whether the luck is good or bad, or even a mixture of both. Perhaps something like this reasoning is what Rawls has in mind in his discussion of the concept of desert, noted earlier in this chapter.

Thus we can see that moral responsibility theory just is concerned with the analysis of praiseworthy or blameworthy intentional and voluntary actions. The philosophical notion of intentional action (as behaving according to the agent's beliefs and wants, for instance) helps to illuminate what the law refers to as *mens rea* and acting with purpose. This is especially true with the respective higher-order compatibilist theories of responsibility, as found in Frankfurt and Fischer. But these philosophical theories of freedom and responsibility also assist in the illumination of the legal concept of *actus reus* insofar as the latter concept assumes a level of voluntariness on behalf of the agent. What U.S. law refers to as "concurrency" and harm are typically assumed to be conditions of moral responsibility. Thus we see that the elements of criminal responsibility are captured by at least some aspects of moral responsibility theories. Moreover, since intentional and voluntary actions are crucial for determinations of moral and legal liability, what is said plausibly about legal and moral responsibility depends, in the end, on a plausible analysis of moral responsibility at the levels of intentional and voluntary action. However, the law's requirement (in some cases) that responsible defendants act knowingly could well benefit from a philosophical analysis of the nature of human knowledge. After all, it is helpful for legal theorists and professionals to better understand what ought to be meant by claims such as "Susan Smith acted knowingly in killing her children"

³⁹For an account of the influences of economic poverty on human life prospects, see Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002). For discussions of such issues in the context of globalization and cosmopolitanism, see *The Journal of Ethics*, 9:1–2 (2005), pp. 1–300. Also see J. Angelo Corlett, *Race, Rights, and Justice* (Dordrecht: Springer, 2009): Library of Law and Philosophy, Volume 85, Chapter 4.

⁴⁰Tommie Shelby, "Justice, Deviance, and the Dark Ghetto," *Philosophy & Public Affairs*, 35 (2007), pp. 126–160.

or that “The Nazi Government acted knowingly in regards to its passing laws and policies which caused (i.e., eventuated in) the deaths of millions of persons.” Perhaps one of the next stages in the already philosophically rich area of moral responsibility theory is not only to extend the discussion to matters of collective concern, but to incorporate more fully the epistemic condition of responsibility in order to account more comprehensively for the full range of the nature of moral (and, it turns out, legal) responsibility. There is quite a rich philosophical tradition in epistemology the analyses of which might be used to build a deep theory of criminal responsibility insofar as epistemic action is concerned.⁴¹

But there is even more to responsibility than the preceding paragraph indicates. One question to be raised here is the extent of the *scope* of responsibility for one’s actions. If I drink and drive, am I responsible for, say, endangering the lives of others in a negligent manner?⁴² That depends on whether or not I acted voluntarily. But what sense of “acting voluntarily” is relevant here: acting voluntarily to drink, or to drive, or both? If one is a genuine alcoholic, at least a serious drinker, then one suffers from a disease that mitigates substantially one’s freedom to, say, not drink. Thus one’s drinking is not under sufficient control to hold the alcoholic responsible for drinking. This might impair one’s better sense to not drive while drinking, which suggests that in many cases driving while under the influence of alcohol might deservedly receive a mitigated sentence.

However, it might be argued that this is a simplistic picture of at least some such scenarios of drinking and driving. For is it not true that in many cases folk choose freely to begin to drink? Here I do not include cases where adolescents are pressured by intense socialization to do so. I have in mind cases where one simply decides to begin to drink, for social reasons, let us say. This kind of case lends itself to a particular line of reasoning about responsibility. Precisely where ought the line of responsibility to be drawn? What is the scope of responsibility? To be sure, these are difficult questions to answer. However, perhaps a principle can help guide us in our thinking about such tough cases. I propose the following “*Scope of Responsibility Principle*.”

To the extent that I am responsible for X, and to the extent that a reasonable person can understand, by way of common sense reflection, that X is likely to cause or lead to Y, I am responsible also for Y.

⁴¹ For philosophical accounts of (individual) knowledge, see Robert Audi, *Epistemology* (London: Routledge, 1998); Roderick Chisholm, *Theory of Knowledge*, Third Edition (Englewood Cliffs: Prentice-Hall, 1989); Alvin I. Goldman, *Epistemology and Cognition* (Cambridge: Harvard University Press, 1986); Lehrer, *Theory of Knowledge*. For philosophical accounts of social or collective belief and/or knowledge, see J. Angelo Corlett, *Analyzing Social Knowledge* (Totowa: Rowman and Littlefield Publishers, 1996); Margaret Gilbert, *On Social Facts* (Princeton: Princeton University Press, 1989); *Sociality and Responsibility* (Totowa: Rowman and Littlefield Publishers, 2000); Alvin I. Goldman, *Knowledge in a Social World* (Oxford: Oxford University Press, 1999).

⁴² “When one knowingly creates an unreasonable risk to self or others, one is reckless; when one unknowingly but faultily creates such a risk, one is negligent” (Feinberg, *Doing and Deserving*, p. 193).

This implies that, barring some substantially voluntariness-reducing factors predating or attending my first decision to drink, I ought to be held liable for what I cause as the result of my drinking, directly and indirectly as the principle suggests. That I intend to do only *X* should be no good reason for my not being responsible for *Y* to the extent that a reasonable person by way of common sense reflection could understand that under the circumstances *Y* is likely to result from *X*. Of course, one question here is how likely does it have to be that *Y* would result from or be caused by my doing *X*. And it is precisely such a likelihood that helps determine the level of responsibility that I might have for *Y*.

If my argument is correct, then we are not responsible simply for what we intend to do, but also for the reasonably foreseeable indirect harms we may cause or that eventuate from my direct action. If I am not an alcoholic, yet I drink and drive such that I am negligent in doing so, then I am responsible for the harms I cause.

Given the congruence of many of the elements of legal (criminal) responsibility, on the one hand, and moral responsibility, on the other hand, I will proceed to analyze philosophically the concept of responsibility in terms of the points of congruence: intentionality, voluntariness, epistemic action, assuming concurrence and harm caused by the offender. Therefore, I am morally and (should be) legally responsible for some act, omission or attempt to the extent that I am guilty of committing a harmful wrongdoing intentionally, knowingly and voluntarily, and that I am “at fault” in doing so. Moral luck and other factors may mitigate, not my guilt, but the extent to which I ought to be punished for causing a certain harm prohibited by law.

This analysis of responsibility will serve as part of the content of the meaning of “desert” and its cognates for purposes of the version of retributivism that I set forth and defend in subsequent chapters. To say that someone deserves to be punished in a particular way, then, means in part that she ought to be punished according to her degree of responsibility for the wrongdoing she committed.

For the retributivist, then, the concept of responsibility constitutes part of the heart of her theory of punishment in that responsibility factors determine the extent to which a criminal deserves punishment. But what *is* punishment, and what are the various theories of punishment? What is the most plausible theory of punishment, all things considered? And how ought criminals to be punished? I now turn to these and related questions.



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