Introduction

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The concept of responsibility would appear to oscillate among (at least) three meanings. On one, to be responsible for P is to be guilty of having done P; on another, to be responsible for P is to be the cause of P; and, on still another, to be responsible for P is to say that there is a case to be put and so a case to be answered. With this last, though guilt is not ascribed, there is present the implication that we shall look into the answer that is forthcoming. Different aspects of these three meanings of the term, particularly the last two, which readers may well think of prime importance, are explored in this volume. Here, we touch only upon some of the pertinent issues.

I. RESPONSIBILITY: SOME CONCEPTUAL PROBLEMS

To be responsible, in a sense that matters in law and morals, is minimally to be accountable or answerable for one's actions (or omissions). We are responsible for some consequences of our acts (or omissions), but not for others. The bases of the distinctions that we draw, and those that we ought to draw, are matters of great controversy, not least because of the obscurity of the notions of act and intention. The contributors to this section address three important matters of controversy, each of which attempts to resolve issues central to a theory of responsibility.

In "Can Responsibility Be Diminished?", Anthony Kenny is critical of various legal devices that have recently been

introduced which permit the rendering of verdicts which reduce or diminish criminal responsibility, while not altogether eliminating it. He defends the insanity defense in the face of recent attacks on both sides of the Atlantic. Against recent trends in the United States, Kenny criticizes recent reforms following the Hinckley case that make it harder to secure an acquittal by reason of insanity; he argues that such reforms increase the likelihood of the conviction of the innocent. In England, by contrast, proposals for reform aimed at reducing the likelihood that mentally disordered individuals will be convicted of murder may have an effect opposite to that of American reforms, in that the former would increase the likelihood that those guilty of murder would not be convicted of that crime.

In his essay, "Intention and Side-Effects", John Finnis wants to rescue from what he takes to be confusion and sceptical doubt the distinction between what is intended and what is merely brought about as a side-effect. This distinction is the basis for the criminal law's distinction between murder and manslaughter, as well as the law of tortious liability in negligence, and it has long been discussed by moral philosophers in connection with the doctrine of double effect. Finnis criticizes standard accounts of the distinction and claims that the errors to be found in these have two main sources: (1) the failure to distinguish free choice from spontaneity, and rational from subrational motivation, and (2) the failure in moral theory to distinguish norms bearing only on what one intends (and does) from norms bearing on what one foresees (the side-effects of what one intends). Finnis discusses a recently clarified English judicial doctrine of intention and side-effect, one which allows (1) that one may intend to achieve a certain result without desiring that it come about and (2) that one may foresee a certain result as likely (or even certain) to follow from one's action without intending that result. Such a doctrine permits juries to convict of murder only if the accused had the requisite intention. It allows a determination of intent where desire is not present and of lack of intent where the death was merely foreseen; the conclusion of intent based

upon foresight is to be understood as evidential and not conceptual. Finnis' defense of the moral significance of these distinctions is in terms of the importance of free choice from the perspective of his natural law account of morality.

Can one attempt the impossible? Many legal jurisdictions allow that one can (e.g., attempting to steal from an empty pocket, attempting to kill someone who is already dead). But the issue remains a matter of controversy; a perplexity over it arguably explains conflicting judicial decisions on such attempts. In "Attempting the Impossible", Alan White addresses this controversy. He analyzes the concept of an attempt and suggests that it is indeed possible to attempt the impossible. Attempts, whether successful or not, are doings with intention. An important ambiguity in the notion of attempting (and those of intending, desiring, hoping, etc.), White argues, is that between what the attempt (intention, etc.) is *aimed at* and what it *amounts to*. Awareness of this ambiguity helps resolve some of the legal and philosophical confusions about impossible attempts. For the fact that what one attempts to do (e.g., steal from an empty pocket, kill what is in fact a corpse) *amounts to* the impossible does not entail that one's attempt is *aimed at* the impossible.

II. CONSENT, CHOICE, AND CONTRACTS

The law of contracts has in recent decades been proclaimed dead, or at least dying. The contributors to this section of the volume would each endorse a stay of execution. One of the factors leading to contract law being overshadowed by other areas of law has been the general problem of understanding the nature of contractual obligation and the related problem of determining the content and justification of principles governing default. The three essays included in this section address these issues in ways that make evident the distinct nature of the law of contract.

Contracts fail to cover all contingencies that might arise, notes Richard Epstein, in "Beyond Foreseeability: Consequential Damages in the Law of Contract", and contract inter-

pretation consequently involves addressing matters of uncertainty and ambiguity that could have been, but actually are not, resolved by explicit provisions. While the common law has typically allowed contracting parties great freedom in specifying the terms of agreement, judicial practice with regard to remedies for breach of contract is frequently very different: the view that damage rules are to be viewed as determined by general principles external to the contract itself, rather than as default rules of construction, has become prevalent. Epstein is critical not only of the dominant expectation measure of damages, but of the received understanding of contract damages generally. They should not, he argues, be construed as derived from contract-independent principles of fairness or justice but should instead be understood to be default provisions in the absence of express provisions. Epstein thus wishes to deny that "the choice of proper remedial rules is largely a judicial function." He argues that "damage rules are no different from any other term of a contract. They should be understood as default provisions subject to variation by contract."

From a perspective congenial to that of Epstein, Randy Barnett addresses the matter of remedies for breach of contract from the perspective of a consent theory of contract law. In his essay, "Rights and Remedies in a Consent Theory of Contract", he argues that contract law, understood from this perspective, is part of a larger system of legal entitlements that specifies the conditions for valid consensual transfers of alienable rights. On Barnett's account contractual duties are not derived from those of promise-keeping (and contract law is not embedded in tort law). Rather, they are derived from more fundamental notions of rights and of their legitimate acquisition and transfer. The distinction between alienable and inalienable rights and the notion of consent, the manifested intent to alienate rights, he suggests, are the key to understanding contracts and remedies for breach.

Agreeing with Epstein's view that "the art of contract interpretation requires the application of a general theory of bargaining to particular contractual provisions", Jules Coleman,

Douglas Heckathorn, and Steven Maser, in their essay, "A Bargaining Theory Approach to Default Provisions and Disclosure Rules in Contract Law", address the foundational issues raised by Epstein and Barnett and related approaches to contract law by developing a detailed account of rational bargaining. They distinguish between two approaches to the justification of the default rule in contracts, both of which appeal to what would be a rational, *ex ante* bargain. One approach, the consent theory, appeals to such a bargain to provide evidence of what the parties to a contract would have agreed to; the other approach, that of rational choice theory, understands such a bargain to specify what is rational for the parties to accept (and, with some additional assumptions, what is morally required of them). Without attempting to settle the dispute between these approaches, Coleman et al. develop, with the aid of contemporary game theory, a detailed account of the notion of an *ex ante* rational bargain. They claim that appeals to rational bargains have been insufficiently detailed or systematic to be of much use, and their essay seeks to remedy that defect.

III. RISK, COMPENSATION, AND TORTS

The nature of private law, in particular the law of torts, has always been the source of perplexities. Much recent scholarship has been devoted to discovering the foundations of tort law and the features that distinguish it from criminal law and contract law. The essays in this section address various questions that are central to these efforts.

The notion of compensation is clearly central to the law of torts, as well as to other areas of law and of policy generally. If, as Robert Goodin states, "compensation serves to right what would otherwise count as wrongful injuries . . . ", then the question arises why we may not do anything we like to people as long as we compensate them for their losses. One answer is that some losses cannot be compensated, at least fully, perhaps because their value is infinite or because of problems of incommensurability. Eschewing this type of an-

swer, Goodin develops an alternative account in his essay, "Theories of Compensation". He distinguishes between two kinds of compensation – "means-replacing" and "ends-displacing" views – and argues that certain state policies are impermissible, not because the losers cannot be compensated, but because the only compensation available is the wrong kind given the loss. The first type of compensation, means-replacing compensation, provides people with equivalent means for pursuing the same ends (e.g., an artificial limb). Ends-displacing compensation, by contrast, seeks to help people to pursue some other end in a way that leaves them as well off as they would have been had they not suffered the loss (e.g., a Mediterranean cruise after having suffered a bereavement). The former sort of compensation, Goodin argues, is superior to the latter. He then suggests that it is wrong for states to do certain things to people, even if it compensates them, since the compensation possible in such cases – the second sort – is incapable of restoring the *status quo ante*. Policies that impose losses on people that cannot be compensated in the first way might still be justified; but what cannot be assumed is that just because compensation (of the second sort) has been provided, the losers have no grounds for complaint.

Ernest Weinrib, in "Liberty, Community, and Corrective Justice", understands private law as the realization of corrective justice. Interaction in corrective justice is immediate: there is a doer and a sufferer of a wrong, related causally, as equals. By contrast, distributive justice understands human relations as mediated by a criterion of distribution. Recent attempts to understand the law of torts in distributive terms, Weinrib argues, are consequently mistaken. Equally importantly, in view of recent fashion, he is critical as well of the application of substantial notions of community to private law. It is corrective justice's abstraction from the particular aspects of the parties' situation or character, not any relation of community, that makes bare recognition of each agent's equal standing relevant. Lastly, Weinrib is sceptical of Richard Epstein's well-known defense of strict liability.

The latter's defense of liability without fault is one-sided in its conception of liberty, he urges, and is inconsistent both with the bilateral nature of corrective justice and with the conception of action underlying moral personality.

Causation in tort law is deterministic. The appropriate characterization of the relevant relations (e.g., that of proximate cause) is a matter of considerable controversy. There is, however, relative agreement that the relevant notions of cause are not probabilistic, but deterministic. Probabilities, as Glen Robinson argues in his contribution, "Risk, Causation, and Harm", are treated as evidential and do not otherwise affect liability. Recent cases involving "toxic torts" (e.g., Agent Orange, asbestos) suggest that the assumption of deterministic notions of causation in the determination of liability may be misguided. Without wishing to commit himself to probabilistic accounts, Robinson argues for a consideration of liability based on risk, that is, on the (significant) probability of harm. While he considers some legal precedents for such an extension of liability rules, his main arguments stem from considerations of aggregate utility and corrective justice. In the case of the latter, Robinson argues that the *creation* of risk is the wrong to be corrected in the cases under consideration, and he criticizes the view of others, such as Judith Jarvis Thomson, that culpability is dependent on outcomes. Robinson is critical as well of Weinrib's account of corrective justice and of his endorsement of Cardozo's view in *Palgraf* that risk requires an identifiable set of victims.

IV. PUNISHMENT

Several decades ago deterrence and, to a lesser degree, rehabilitative accounts dominated the theory of punishment in moral and legal philosophy. While many of the criticisms of these accounts were retributive in nature, it would be fair to say that retributivism, as an account or theory of punishment, was not influential. The focus of the debate was primarily upon the ways in which the deterrence theory would have to be modified and amended in order to be fully sat-

isfactory. In recent years, all this has changed. Rehabilitation has to a great extent ceased to be a serious contender among accounts of punishment, and deterrence has become but one among a number of theories in a crowded field. New accounts of punishment have been proposed (focusing upon paternalism, moral education, the morality of threats, etc.), and they are often difficult to classify using the traditional categories. Significantly, retributivism has been resurrected as a serious account of punishment.

The essays in Part IV reflect this new interest in the theory of punishment. Jeffrie Murphy's essay, "Retributive Hatred: An Essay on Criminal Liability and the Emotions", is a defense of a form of hatred as the appropriate response to certain forms of wrongdoing. Building on work he has done with Jean Hampton, Murphy argues that a certain type of hatred, which has as one of its central elements a desire to diminish and hurt another relative to oneself, is motivated by sentiments that are retributive in nature. He argues a case for not dismissing this type of hatred out of hand, as is often done in treatments of retributive (and vengeful) emotions. Murphy's central argument rests upon the idea that if hurt is a retributively justified and consequently permissible response to wrongdoing, then a desire to hurt the wrongdoer is also permissible; retributive hatred can then be seen as a strategy that helps to ensure that wrongdoers get what they deserve. There remains, of course, much that can be said against such hatred, and Murphy concludes with a discussion of cautionary considerations.

It is often said that theories of retribution fail to distinguish retribution from revenge, much less provide a justification of retributive attitudes. In her essay, "A New Theory of Retribution", Jean Hampton claims that Murphy's defense of retribution as involving a type of hatred plays into the hands of such critics of retributivism. Drawing upon discussions with Murphy, Hampton proposes an alternative account of retribution. She argues that someone wrongs another to the extent that the former objectively *demeans* the latter. Wrongdoers thus reveal disrespect of the worth of others. Retri-

bution, in her view, then, is not so much a form of hatred as it is, first of all, the imposition of *defeat* on the wrongdoer: the aim of the retributive infliction of suffering on the wrongdoer is the annulment of the latter's assertion of superiority over the victim. Punishment thus aims to humble the wrongdoer and express a prior and correct impression of the latter's worth relative to that of the victim. Secondly, considering punishment from a social perspective, Hampton argues that as a form of protection, society's punishment of a wrongdoer is a reflection of its understanding of the victim's value. To some degree modifying her earlier views of punishment as moral education, Hampton develops a novel account of retributive punishment as a communicative act designed to show that the act punished was wrong; punishment conveys this message by affirming the worth of the victim.

George Fletcher, in his essay, "Punishment and Self-Defense", is critical of the connections that have been drawn between self-defense and punishment in the recent literature. He contrasts our ordinary views with those of Robert Nozick and others who view the harm inflicted in self-defense as a "down-payment" on deserved punishment. Invoking Kant's distinction between *Recht* and justice, he seeks to explain the differences between self-defense and punishment. The former has as its end the defense of the rightful order of cooperation among autonomous beings; as such, considerations of desert are not relevant to justifications of self-defense. By contrast, punishment is not defended by reference to the theory of *Recht;* rather, it seeks to fulfill a requirement of justice, namely the avoidance of the injustice of suffering unsanctioned crime.

It is clear that the concept of responsibility, not merely at its edges but even in its central cases, needs further work. We hope this volume addresses this need, even as we realize that it cannot totally fulfill it. New thinking on some of the relevant issues, however, is never amiss.

Part I

Responsibility: some conceptual problems