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Review of Peter Cane, Responsibility in Law and Morality (2002)

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I found it a little frustrating. Maruna does not make clear how this approach could support policing, other than quoting Canter who warns that any application to the investigative process should proceed with caution. Indeed, Maruna's view is that "Narrative theory is best used as a means of understanding specific individuals in full social and developmental context." (p. 310). It is difficult to see how such a theory could conceivably help police investigations where the offender is unknown. That is not to say, of course, that such research might not be useful to policy development, which is more concerned with the behaviour of populations than individuals.

The contributory chapters of this book are an odd but interesting mix of high level, conceptual discussion as exemplified by Mars and Maruna and the detailed methodological explanation of McAndrew, with the occasional empirical study thrown in. As a whole it makes a worthwhile addition to the bookshelf. Its main thesis is that research should relate not to the criminology literature or to an academic pursuit of greater understanding, laudable though they no doubt are, but to its practical application. As such the book is contributing toward filling a major gap in the literature. Although many of the ideas are still at the hypothesis stage, they are thought provoking and challenging. In the context of increased enthusiasm for a police service which draws on an evidence base and is data driven this book is welcome.

GLORIA LAYCOCK*

REFERENCES: Clarke, RV (1983). "Situational Crime Prevention: Its Theoretical Basis and practical Scope" in *Crime and Justice: A Review of Research*, vol 4, edited by Michael Tonry and Norval Morris (Chicago and London: The University of Chicago Press).

Responsibility in Law and Morality by Peter Cane. Hart Publishing, Oxford, 2002. 303pp. hbk £25

"This book offers an account of responsibility from a distinctively legal point of view" (p. 2). The "distinctively" announces Professor Cane's intention to distinguish his analysis from more philosophical explanations of responsibility. Cane, Professor of Law at the Australian National University, asserts that philosophers have neglected legal versions of responsibility and directed their work too narrowly, toward other philosophers. In contrast, his book begins with legal institutions and concludes that legal practices provide different lessons about the meaning of responsibility.

Cane's most interesting substantive argument lies in his contrast between individual freedom and social context. He argues that most philosophical analysis of responsibility focuses on "what it means to be a human agent and to have a free will" (p. 4). Such agent-centred theories, however, are too limited; they ignore the important insights available in the social and relational world of the law. One sees the difference in the contrast between personal and vicarious responsibility. For philosophers who think "that responsibility is a function of human agency, personal responsibility is the

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only responsibility there is, because responsibility is a function of being a human agent" (p. 39). Law's social context requires a broader vision of responsibility, one that includes vicarious and strict responsibility.

Cane's methodological discussion, on how to glean these insights from legal institutions, is extensive. I summarise it briefly here before focusing on a fuller analysis of the substantive argument.

Cane replaces the philosophers' concern for "the 'truth' about human freedom" with "responsibility practices" (p. 4). This starting point requires an inductive method, which, for readers, may be refreshing and rich in contrast to the deductive and abstract tone of some philosophical writing. Although some philosophers employ an inductive method such as "reflective equilibrium" (p. 17), Cane argues that law-based inductive theories are more successful because morality lacks an institutional base. "In other words, law can be (and is) used to make up for morality's institutional poverty" (p. 15). Without an institutional base, inductive philosophical argument is too often based upon the "observations and speculations" (p. 15) of the theorist.

Law provides a much thicker base. For this reason, Cane explores the role of responsibility in numerous areas of the law. The book includes chapters on civil, criminal and public law. Where philosophy finds freedom (of the tortfeasor, criminal or politician), law perceives victims as well as agents, citizens as well as the government. Public law, eg, is not primarily about the freedom of agents; it is "an accountability (or 'responsibility') mechanism" (p. 51). It concerns social, not personal, decision-making, the public, not private, interest. It protects the rights of citizens *qua* citizens, not only of separate individuals who hold private law rights. It also checks the illegal conduct of governments. These features of public law, Cane concludes, add to philosophical accounts of responsibility the two ideas of *political* responsibility and of responsibility of and to *groups*.

In the chapter on public law, Cane also addresses an issue that has been widely discussed and debated by philosophers: the problem of dirty hands. He uses this topic to illustrate what his *law-based* standpoint can add to the *moral* analysis of dirty hands. Indeed he claims to add a "new perspective" to the philosophical debate (p. 278). Yet his conclusion about dirty hands,

"that the tension found in public law between subjecting public functionaries to the same rules of responsibility as govern the lives of citizens and treating them differently is also found in our thinking about the ethics of public life" (p. 278)

appears to contradict the book's thesis that legal institutions provide an account of responsibility that is distinctive from philosophy. It is not clear that Cane's "new perspective" is distinctive from *some* philosophical accounts of dirty hands.

In the philosophical world, the dirty hands debate often focused on Michael Walzer's argument that we recognise the politician by his dirty hands. "If he were a moral man and nothing else, his hands would not be dirty; if he were a politician and nothing else, he would pretend that they were clean" (Michael Walzer, "Political Action: The Problem of Dirty Hands," in Marshall Cohen et al (eds), *War and Moral Responsibility*

(Princeton: Princeton University Press, 1974) 62 p. 70). Cane notes in passing that his argument about dirty hands is "similar" to Walzer's (p. 277, n 68). Indeed Cane's "tension" between public functionaries' and citizens' ethics parallels Walzer's politician and moral man. Cane appears to adopt Walzer's conclusion that public life poses moral dilemmas that cannot be resolved.

Walzer wrote his article in response to essays by Thomas Nagel, RB Brandt and RM Hare in a 1972 symposium on the conduct of warfare. The symposium also addressed the philosophical question whether individuals ever face a genuine moral dilemma, in which no moral choice is available. All three authors examined the adequacy of utilitarianism for resolving such questions. The war in Vietnam provided some context for their debate.

Nagel argued that legal restrictions on the conduct of warfare were inadequate and that "a moral basis for the rules of war" exists (Thomas Nagel, "War and Massacre," in Cohen, 3 p. 3). Accordingly he criticised utilitarianism and offered a "somewhat qualified defense of absolutism" (p. 6). Brandt opposed Nagel's absolutism and defended rule-utilitarianism. By employing John Rawls' original position, he argued,

"there is a set of rules governing the conduct of warfare which rational, impartial persons who believed that their country might from time to time be engaged in a war would prefer to any alternative sets of rules and to the absence of rules" (RB Brandt, "Utilitarianism and the Rules of War," in Cohen, 25 p. 40).

Moreover, he added, "such rules ought to be adopted as the law of the land" (p. 42).

Because Hare agreed with Brandt's analysis, his essay focused on philosophical method. About "practical questions," Hare asserted, philosophy offers "simply a method of discussing them rationally" (RM Hare, "Rules of War and Moral Reasoning," in Cohen, 46 p. 46). For that reason, Hare concluded, "a sound theoretical foundation can in principle be provided for moral thinking about war" (p. 58), but not the one that the absolutist Nagel provided. Nagel gave "his principles a higher status than they can have" (p. 60); he should have "treat[ed] the general principles of the absolutist as indispensable practical guides" (p. 60).

The three philosophers disagreed about the importance of moral agency and social context. Although Nagel focused on agency, while Brandt and Hare emphasised social obligations, none of the three ignored the social context of decision-making. All three recognised that morality involves more than the agent's free choice.

Subsequent writings about dirty hands have also struck a balance between agency and context. Dennis Thompson, for example, insisted that the politician's ethical choices must be viewed in the context of democracy (*Political Ethics and Public Office* (Cambridge, Mass: Harvard University Press, 1987)). Alan Donagan argued that the law and "common morality" provide more guidance to the politician than Walzer recognised (Alan Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977) 187-89).

The philosophers' debate, with its conflicting opinions about moral reasoning and the content and application of moral principles, suggests that Cane is mistaken that the law provides a more satisfactory basis for responsibility because of "morality's

institutional poverty" (p. 15). Cane acknowledges in his conclusion that "there are important similarities between moral and legal reasoning" (p. 281). Those similarities suggest that Cane's method is more valuable than his institutional base. Hence *Responsibility in Law and Morality* succeeds, not because it is about law, but due to the author's choice of an inductive method. Along with Cane, philosophers who resist deductive abstraction are able to think about responsibility and other practices "socially," "contextually," "legally," "functionally," "relationally," "distributionally" and "operationally" (p. 279-83).

In his criticism of Walzer, Alan Donagan concluded:

"And so the problem of dirty hands dissolves. It arises from a twofold sentimentalization: of politics, imagining it as an arena in which moral heroes take hard (that is, immoral) decisions for the good of us all; and of common morality, ignoring the conditions it places on the immunities it proclaims" (Alan Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977) 189).

Cane too is "sentimental" when he emphasises public law and politics at the expense of common morality. Nonetheless, he has succeeded in his "aim . . . to suggest fruitful ways of thinking about answering" questions about responsibility (p. 279). The "fruitful way" is that employed by some philosophers who are already comfortable with "reflective equilibrium" (p. 17), ie, to reason socially and contextually about moral principles as well as legal institutions.

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Insurance Law: Doctrines and Principles by John Lowry and Philip Rawlings. Hart Publishing, Oxford, 1999. 520pp. pbk £22.50.

Twenty five years ago, insurance law was regarded by most as an obscure topic, worthy of study only at a professional level. Yes, everybody knew, mostly by osmosis, an insurer often stood behind the nominal parties to many of the leading cases in tort and other subjects, but it was not a matter that undergraduates need bother their tiny heads over. They were to be concerned only with the grandeur of the common law in the traditional legal subjects. Similarly it was not a topic that principally concerned students of economics or business studies either. It would form no more than a peripheral consideration, a few lines in the book. Nor were insurers themselves particularly highly thought of. Insurance was regarded as an "industry", not a "profession", and still largely carries that epithet. Development of new subjects in the Universities centred round matters of a sociological bent. It was thus something of a surprise, when in 1982 the first edition of John Birds' book *Modern Insurance Law* (Sweet & Maxwell, 1982) appeared on the market as a student text, apparently aimed at the university student market and no doubt associated with his own fledgling course at Sheffield. The book

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