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“RESPONSIBILITY”: AN EFFORT AT CLARIFICATION

by Thomas Halper*

“What is happening to morality today?” a sophisticated political observer was asked smugly not long ago.

“It threatens to engulf us,” he replied.¹

In an age dominated by such issues as civil rights, Vietnam, Watergate, international terrorism, and the welfare state, who can doubt it? Self-appointed guardians of civic virtue burst forth like so many owls chasing mice; politicians, in the manner of germs fleeing a clot of penicillin, scramble to distance themselves from the “mess in Washington”; the public is said to have grown cynical about it all; and pundits treat this “loss of faith” in government as if it were a plague of atheism striking medieval Rome.

Sooner or later, amidst the thunder and babble, one hears the word, “responsibility.” It is the touchstone of the debate. Everyone, it seems, is for it. Or at least says that he is.² Nor is this refrain all that new: “There is no danger in power,” cautioned one Professor Woodrow Wilson, “if only it be not irresponsible.”³ Modern academics would surely concur: a distinguished European political scientist termed responsibility “the cardinal issue of democracy”⁴ and a well known American analyst of public administration called it “the very crux of the

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1. Bickel, *quoted in* Polsby, *In Praise of Alexander M. Bickel*, COMMENTARY, January 1976, at 50, 52.

2. Even *Cosmopolitan* magazine’s famous *Cosmopolitan Girl* soliloquized, “What’s the very best thing a man can be if he really loves a woman? Responsible! That may sound a little unsexy but believe me it can be quite a turn-on!” N.Y. Times, Jan. 15, 1976, at 68, col. 1.

3. Wilson, *The Study of Administration*, 2 POLITICAL SCI. Q. 197, 213 (1887), *reprinted in* 56 POLITICAL SCI. Q. 481, 497 (1941).

4. Finer, *Administrative Responsibility in Democratic Government*, 1 PUB. AD. REV. 335 (1941). In this paper, I follow Schumpeter’s generally accepted view of democracy as an institutionalized system compelling would-be leaders to compete for the electorate’s vote and featuring broad civil liberties. See J. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269-83 (3d ed. 1950).

maintenance of the democratic system.”⁵

Yet oddly enough, there is no agreement on what “responsibility” means. Is its character mainly legal? Bureaucratic? Political? Professional? A combination of all these?⁶ Dizzy with confusion, the reader is left asking, with Alice, whether you *can* make words mean so many different things. Evidently, most analysts would agree with Humpty Dumpty’s riposte, “[t]he question is . . . which is to be the master — that’s all.”⁷ This is not really a bad answer as much as an inadequate one, for by now the need is less for creativity than for criticism — hence, this exercise in clarification, which proceeds by considering the senses in which “responsibility” is normally used.

I. DESCRIPTIVE RESPONSIBILITY

“Responsibility” in its plainest sense describes a condition. An official is responsible for a particular event or policy, which is to say, had he not acted as he did, the event or policy would have occurred in a substantially different fashion.⁸

The careful reader, noting the use of “significantly” and “substantially” in an exercise in clarification, may desire greater precision. In our personal lives, he admits, such terms provoke no problems. We see spouses “significantly” affecting one another and parents “significantly” affecting their children, and only a pedant would demand calibration of the effects. But our public life is different. Officials are ordinarily enmeshed in large organizations which help to define the individual’s “public reality,” identify his problems, propose solutions for his consideration, monitor his ongoing programs, evaluate his past

5. Levitan, *The Responsibility of Administrative Officials in a Democratic Society*, 61 POLITICAL SCI. Q. 561, 566 (1946). See also, e.g., J. MILLETT, *GOVERNMENT AND PUBLIC ADMINISTRATION* 465 (1959); F. MOSHER, *DEMOCRACY AND THE PUBLIC SERVICE* 7 (1968).

6. See, e.g., Odegard, *Toward a Responsible Bureaucracy*, 292 ANNALS 18, 19 (1954).

7. L. CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 247 (New York 1928) (1st ed. London 1866).

8. Even this principle, it must be conceded, would not cover all situations. If two or more causes concur to bring about an event, but either one of them operating alone would have been sufficient to cause the result, the test breaks down. If the Senate and House, for example, were simultaneously to defeat a bill, we could not absolve each of responsibility merely because the other’s action would by itself have proved decisive. On the contrary, we would assume that both chambers were equally and fully responsible because a defeat in either would in itself have proved fatal to the bill. Similarly, if a man were to bleed to death from substantial wounds inflicted by different persons acting independently, the “law does not measure the effects of the several injuries in order to determine which is the more serious and which contributed in the greater measure to bring about the death,” but imputes the loss of life to both. *State v. Luster*, 178 S.C. 199, 208, 182 S.E. 427, 431 (1935); *State v. Francis*, 152 S.C. 17, 60, 149 S.E. 348, 364 (1929).

actions, and so on. So great is his dependence on the organization for information, ideas, and authority that, *as an individual*, it often seems that he is rarely critically important, even if holding office at the higher levels. In the age of the bureaucracy, to put this view baldly, organization is almost everything. Thus, a bureaucracy may "significantly" contribute to the occurrence of a given event or policy, though acts with such "significance" could reasonably be attributed only to a few of its personnel. Cumulatively, the personnel are important; individually, they are not. Granting this and recognizing the normal habit of obedience, we must be parsimonious in the use of "responsibility" as descriptive of an individual's acts, reserving it for a relatively small number of cases. Moreover, the emphasis on an actor's not merely contributing to an event, but rather *significantly* contributing to it, is required if we are to avoid terming everyone—and, thus, as a practical matter, no one—responsible for everything. Still, replies the careful reader, repeating his request like a pesky drunk accosting a barmaid, how significant is "significant"? How large must it be? One answer, sadly, would seem to be that quantification at this very early stage of conceptual development is simply an unrealistic request.⁹

But another answer would be that this entire line or argument is misguided, for it begs a question whose lineage is as ancient as it is controversial: is individual voluntary action a significant causal factor? Omar Khayyām supplied a famous reply:

'Tis all a Checquer-board of Nights and Days
Where Destiny with Men for Pieces plays:
Hither and thither moves, and mates and slays,
And one by one back to the Closet lays.¹⁰

In less mystical terms, Tolstoy in *War and Peace* argues that human behavior is governed by the inexorable workings of inscrutable natural laws operating through causal chains too numerous and complex for man to fathom.¹¹ It is only ignorance and vanity, in his view, that delude celebrated men of action and intellectuals into believing themselves major historical forces.¹²

9. For an even more pessimistic conclusion to a similar problem raised by the concept of proximate cause in the law of torts, see W. PROSSER, *LAW OF TORTS* § 41, at 236-37 (4th ed. 1971).

10. *THE RUBĀIYĀT OF OMAR KHAYYĀM* stanza XLIX (E. Fitzgerald trans. & ed. 1859)(1st ed. Shiraz 1460).

11. For a searching analysis of Tolstoy's philosophy of history, see I. BERLIN, *THE HEDGEHOG AND THE FOX* (1953).

12. Tolstoy, in fact, contends that celebrated men are further removed from occurrences than ordinary men, whose very nearness gives their actions an impact that the actions of their superiors lack. 1 L. TOLSTOY, *WAR AND PEACE* 22-30 (L. Weiner trans. 1904)(1st ed.

Such assertions of the unknowable may seem inadequate as explanations. Yet what social scientist has not from time to time suspected that many of his data-manipulating colleagues operate from a still cruder environmental determinism, unleavened even by a humility derived from having pondered the issue, let alone by any analogue to Heisenberg's uncertainty principle.

The undeniable existence of great national heroes, on the other hand, would seem to challenge this dour determinism by demonstrating that individuals can in fact make a difference. The very word "greatness," in fact, implies significant social impact. Yet, here too, however, the skeptic has a ready reply, observing that nearly everyone feels a need for leadership in modern society. Both the public, which desires the leader's benefits and social achievements, and the leader, who desires power and glory, have an interest in endowing him with extraordinary capacities. Modern communications skills and technology accentuate these tendencies, and no longer is "charisma" reserved for the Weberian individual who appears supernatural or superhuman.¹³ Leaders try to take credit for accomplishments while they were in office, sometimes, like Napoleon or Andrew Jackson, lending their very names to the age; their foes, naturally, seek to blame them for everything that went wrong, as poor Herbert Hoover discovered; the public, as a consequence, comes to believe that leaders are in fact decisive. But "[c]ertitude," as Holmes observed, "is not the test of certainty."¹⁴ That we feel that our nominal leaders may dominate events does not make it so, but may merely attest to the power of public relations and the prevalence of a popular will to believe that someone is in charge.¹⁵ In the

1869 n.p.). Napoleon's claim to control of events is, therefore, attacked as fallacious, self-glorifying humbug. *Id.*

13. See M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 358-59 (1947).

14. Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 40 (1918).

15. The easy assumption that all influential men must perforce be great is challenged by Sidney Hook, who distinguishes between the "eventful man" and the "event-making man." The former influences subsequent events, though possessing no remarkable qualities, like the legendary little Dutch boy who put his finger in the hole in the dike and saved the town from inundation. Any little boy could have, and probably would have, done the same thing. On the other hand, according to Hook, the event-making man alters developments as a consequence of his extraordinary abilities, like a Hitler changing the course of world history. S. HOOK, *THE HERO IN HISTORY* 151-83 (1943). Other tyrants could be enumerated to underline the point, and, even in democracies where leaders are less powerful, it seems hard to deny that it makes a difference which man is on top. Bernard Brodie, for example, argues that had Bryan been elected President, the United States probably would not have entered World War I. B. BRODIE, *WAR AND POLITICS* 362 (1973). Similarly, one may contend that if McCarthy had been elected President in 1968, the Vietnam War would have ended much sooner; that if Lincoln had not been assassinated, Reconstruction would have been more

words of the eighteenth century encyclopedist, Holbach:

You will say that I feel free. This is an illusion, which may be compared to that of the fly in the fable, who, lighting upon the pole of a heavy carriage, applauded himself for directing its course. Man, who thinks himself free, is a fly who imagines he has power to move the universe, while he is himself unknowingly carried along by it.¹⁶

Yet this paper rests upon the contrary assumption that, within certain ordinarily rather narrow limits, individuals can and do exercise control over their behavior. For we cannot proceed unless we assume, as Cardozo put it, that "a choice there has been, not a submission to the degree of Fate; and the considerations and motives determining the choice, even if often obscure, do not utterly resist analysis."¹⁷

The determination of descriptive responsibility, in any case, pivots upon the *effect* of the individual's actions. Perhaps he intended to act as he did or perhaps he was coerced; perhaps he desired to bring about the consequences that followed or perhaps he did not see them or even sought to avoid them; perhaps he acted after a critical and knowledge-

successful; and so on. Yet such tantalizing "what if" parlor games suffer from a pair of serious flaws. First, they masquerade as controlled experiments in which only one variable, the person of the leader, is changed, when in truth innumerable variables are changed. Had Bryan been elected, for instance, the American polity would have had to have been vastly different; had he been in office at the outbreak of the war in Europe, the American polity would also have been different, as would have been the European perceptions of America. Thus, even if America had not entered the war, one could not determine to what extent (if at all) this was due to Bryan's being different from Wilson, Bryan's America being different from Wilson's, or Bryan's Europe being different from Wilson's. Second, this approach, like its Tolstoyan opposite, resorts to intriguing examples to distract us from noticing that it assumes the very conclusion it is supposed to prove. It may, that is, seem obvious that presidents make a difference, but only if one first posits individual causality. Tolstoy grants that, as a practical matter, we do posit individual causality, even adding that life otherwise would be dreadful; but he is properly firm in insisting that our belief is quite irrelevant to the solution of the problem. After all, our confidence in individual causality may itself be predetermined.

16. *Quoted in Edwards, Hard and Soft Determinism*, in DETERMINISM AND FREEDOM 120 (S. Hook ed. 1961).

17. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11 (1921). *Cf.* S. HODGSON, THE METAPHYSIC OF EXPERIENCE 120 (1898) ("[W]ithout real freedom of choice there could be no real moral responsibility; and the sense of it, if it were still felt, would have, like the sense of freedom, to be classed as an illusion"). *But see also* J. EDWARDS, FREEDOM OF THE WILL (P. Ramsey ed. 1957) (1st ed. 1754 n.p.); D. HUME, *An Inquiry Concerning the Human Understanding*, in ESSAYS AND TREATISES § VIII (1871), *reprinted in* D. HUME, AN INQUIRY CONCERNING HUMAN UNDERSTANDING (1955); C. NOWELL-SMITH, ETHICS 236-73 (1957); C. STEVENSON, ETHICS AND LANGUAGE (1944).

Following Pascal who argued that one ought to believe in God because he has nothing to lose if he is wrong and much to gain if he is right, I contend that one must accept substantial individual choice as a working principle. For if this assumption be correct, the work based upon it will gain in accuracy and importance, and if the assumption be incorrect, it can do no harm, since everything was predetermined, anyway.

able scrutiny of goals pursued and means selected or perhaps he acted impetuously or ignorantly. None of these factors affects the individual's *description* as responsible for significantly contributing to a particular event or policy.¹⁸

II. JUDGMENTAL RESPONSIBILITY

Motivation and intention may be irrelevant to a discussion of descriptive responsibility, but it is hard to believe that they are trivial matters. Clearly, they seem to be important, but in what way? The answer is that they help us to determine if we feel that we can justifiably hold a man responsible for his actions, which is to say, we approve or disapprove of the way he acted and perhaps reward or punish him as appropriate. Although often posed within a political, administrative, or some other ostensibly "practical" amoral context, the question raised is fundamentally ethical in nature: did the official act as he should have, and, if not, were circumstances present which absolve him of blame?¹⁹

Consider an official who failed to tell the proper authorities of corrupt behavior on the part of a subordinate.²⁰ Is this failure blameworthy? Obviously, we might offer one answer if he chose to remain silent and another if he chose to inform but became paralyzed in an auto crash and was thereby physically prevented from executing his choice. In the latter case, his failure would be involuntary, and would free him from culpability. In the former case, we must probe more deeply before satisfying ourselves as to his responsibility.

For suppose, in the first place, that the official's decision to be silent rested on his ignorance of his subordinate's unlawful behavior.²¹ Here,

18. The common law in its earliest days adopted such a view, making "men answer for all the ills of an obvious kind that their deeds bring upon their fellows," irrespective of intent. 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 470 (2d ed. 1899). One modern scholar has argued for a return to this approach. "A crime," he maintains, "is an act. It is *not* an act plus an intent. 'In jure actus non facit reum nisi mens sit rea' is no longer true. The modern maxim should be that most ancient one: Actus facit reum." Lévy, *Extent and Function of the Doctrine of the Mens Rea*, 17 *ILL. L. REV.* 578, 589 (1923).

19. We put aside here Mme. de Staël's contention, "Tout comprendre c'est tout pardonner." A. DE STAËL, *CORINNE*, XVIII, ch. 5 (H. Nicolle ed. 1807).

20. This illustration may perhaps bring to mind the Watergate affair, in which President Nixon claimed ignorance of his subordinates' unlawful behavior, while his opponents replied that such ignorance derived largely from a failure to investigate suspicious actions vigorously and a desire to use lack of knowledge as an exculpatory explanation in the event of a possible future exposé.

21. The official could, of course, have accused his subordinate of misconduct, while he (the official) was ignorant of such misconduct, but such an accusation would have constituted lying, for it would have involved the official's falsely presenting allegations as if he knew

we can distinguish ignorance which defied the official's reasonable efforts to overcome from ignorance based on inattention and disinterest. Even more clearly, such ignorance can be distinguished from ignorance based on the declaration, "Do what you wish but just don't tell me about it." Or suppose that the official's ignorance was not of the facts, but of the law. The general legal rule is that ignorance of fact excuses but that ignorance of law does not. Yet, surely, we could distinguish an official's ignorance of a law which, after reasonable and good faith efforts he found vague, ambiguous, contradictory, and subject to various interpretations by experts, from ignorance based on simple incompetence or on a willful refusal to search out the law for fear of what might be found.²²

Suppose, in the second place, that the official's decision to remain silent was motivated by a desire to protect his family from harm plausibly threatened by the subordinate. If we grant the common sense view that one's obligation ought to diminish as the risk and difficulty of performing a task increase, we are led to the conclusion that there can be no duty to be a hero. The official's decision to remain silent to protect his family, therefore, would obviously differ from one that was motivated by a desire for material gain, such as if the subordinate had paid the official to keep him quiet. In both cases, the official intended to remain silent; his failure to inform could be excused neither as involuntary nor as ignorant. But if the intentions as to the means were alike, the intentions as to the ends were sufficiently different to lead us to deny responsibility to the official in the former case and attribute it in the latter.

It would seem, in any event, that judgmental responsibility is limited by the settled Kantian maxim that "ought implies can." Neither law nor morality can require the impossible. Thus, we do not blame the official for his silence when due to paralysis involuntarily caused and continued, or due to lack of knowledge despite his efforts to inform himself; we do not blame a speechless man for not speaking or an ignorant man for not telling us what he does not know.

As a matter of common practice, however, the apparently self-evident validity of the maxim has undergone considerable modification.

them to be accurate. Although the allegations may have turned out to be accurate, the act of lying would not, as a result of such luck, have become morally equivalent to telling the truth deliberately.

22. For an interesting and sustained attack on vagueness in legal terminology, see O. JENSEN, *THE NATURE OF LEGAL ARGUMENT* (1957). *But cf.* Halper, *Logic in Judicial Reasoning*, 44 *IND. L.J.* 33, 46-48 (1968) (proposing that ordinary standards of vagueness and clarity may not be appropriate in evaluating legal language).

Individuals seeking to avoid responsibility need not claim that such responsibility entails actions on their part which are literally impossible; they may merely claim that such actions impose an unreasonable burden. Thus, we excuse the ignorant official in our example because he had made a reasonable effort to inform himself as to his subordinate's behavior; we do not require, as a condition of exculpation, that he had devoted himself fanatically to the cause, utilizing all available governmental manpower, personal funds, private contacts, and so forth. We may, in fact, even prefer that he limit his efforts to the reasonable level, on the ground that monomaniacal devotion to rooting out corruption within the bureau might leave too few resources to carry out the bureau's tasks within the larger society. In other words, we may view a certain amount of corruption as one of the costs of doing business, and not want purity to be maximized at the expense of all other values; by maximizing purity, the official might be overturning a priority determination made by his superior or by the lawmaking body charged with overseeing the bureau, and this (as we shall see shortly) might involve him in yet another conflict with "responsibility."

On the other hand, the obligation not to demand the impossible of the citizen might be rejected because to hold the citizen to a lesser standard might entail demanding the impossible from the lawmaker: a legal system of perfect clarity and inviolate consistency. Not surprisingly, in the conflict of competing demands, those in authority have usually decided that the hardships should fall elsewhere. And yet, the problems they confront are obviously real ones. Statutes drawn with rigorous precision, for example, might minimize uncertainty in the short run, but, by becoming quickly obsolete, promote it in the long run; for changing times and conditions may upset unrecognized or unarticulated assumptions with a ruthless suddenness. Moreover, democratic legislating, founded on bargaining and compromise and often dominated by personal and partisan considerations, is itself inimical to high standards of statutory definiteness. Thus, citizens find themselves subject to such vague phrases as "due process of law" or "reasonable care," whose amoeboid contours may render them, from the point of view of textual analysis, practically useless as guides to individual responsibility and official actions.²³ Finally, considering legal systems in their entirety, officials and citizens invariably find themselves subject

23. Circularity may compound the problem, as in the case of "reasonable care" which is defined essentially as the care a reasonable man would exercise, while "reasonable man" is defined essentially as a person exercising reasonable care. L. HAND, *THE BILL OF RIGHTS* 25 (1964).

to a number of contradictory commands. The Constitution, for example, clearly guarantees freedom of the press and the right to a fair trial, but offers no hint that the two may conflict, and so, utterly fails to indicate which principle should supersede the other. Such incompatibility may be partly a function of sloppy rulemaking, and yet some internal conflict, despite the legislators' and administrators' best efforts, may be irremediable. This at least is the clear implication of Gödel's Theorem, which states that the consistency of a logico-mathematical system can never be satisfactorily proven by resort to the methods of the system itself.²⁴ P.W. Bridgman, a Nobel laureate in physics, has generalized from this that "whenever we have a system dealing with itself we may expect to encounter maladjustments and infelicities, if not downright paradox."²⁵ Regardless of the rulemakers' preoccupation with symmetry and *elegantia juris*, therefore, some incompatibilities will surely persist like ice patches in an Arctic spring.

Candor, in any event, compels us to admit that we deal with the problem of requiring the impossible through a series of fictions and a policy of selective enforcement. The ideal citizen, we pretend, is obligated not only to obey the law but also to discover what it is, and so if he pleads ignorance we ordinarily brush that assertion aside. We do this despite our appreciation of the enormous subtlety and complexity of the law, and even when the citizen is poorly educated and of low intelligence. And we do this not because we are seduced by the fiction of the ideal citizen, but instead because we believe that expediency requires us to sacrifice the individual's interest in favor of the community's interest.²⁶ We often demand the impossible from him, and hope that he does not complain. By the same token, in the law of torts, we determine liability in accordance with the behavior of a fictional "reasonable man," taking "no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men."²⁷ Again, we do not seriously

24. F. WAISMANN, *INTRODUCTION TO MATHEMATICAL THINKING* 101 (1951).

25. P. BRIDGMAN, *THE WAY THINGS ARE* 7 (1961).

26. Specific rationales differ. A founder of the positivist school of jurisprudence, for example, felt that ignorance of the law, if accepted as an excuse, would always be alleged, thereby involving the courts in insoluble and interminable questions. 1 J. AUSTIN, *LECTURES ON JURISPRUDENCE* 482 (London 1885). Holmes, on the other hand, argued that accepting ignorance as an excuse would encourage such ignorance. O. HOLMES, *THE COMMON LAW* 41 (M. Howe ed. 1963). And a modern legal philosopher, for his part, contended that accepting ignorance would contradict the basic postulate of a legal order, *i.e.*, that the law is what officials and not private persons determine it to be. J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 376-83 (2d ed. 1960).

27. O. HOLMES, *THE COMMON LAW* 86 (M. Howe ed. 1963).

believe that everyone can meet the "reasonable man" standard, but merely that the adoption of such a flexible, objective, external model is preferable to the chaos of attempting to formulate standards for individuals on a case-by-case basis.²⁸

Viewing judgmental responsibility in such mundane terms, however, may produce the unintended effect of trivializing the matter. As an antidote, consider the profound judgmental issue raised by the famous 1961 trial of Adolf Eichmann, one of the chief Nazi officials in charge of the slaughter of European Jewry. Then and now, much of the philosophical controversy clustered around an unusually provocative book written by a renowned political thinker: *Eichmann in Jerusalem a Report on the Banality of Evil* by Hannah Arendt. Herself a Jew, Arendt sees Eichmann less as an anti-Semitic incarnation of evil than as an idealistic bureaucrat dedicated to the performance of his task, a kind of individual common enough under any system to be properly termed banal.

The trouble with Eichmann was precisely that so many were like him, and that the many were neither perverted nor sadistic, that they were, and still are, terribly and terrifyingly normal. From the viewpoint of our legal institutions and of our moral standards of judgment, this normality was much more terrifying than all the atrocities put together, for it implied . . . that this new type of criminal . . . commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong.²⁹

The obligation to obey superiors' orders and the feeling of being a cog in a vast machine were, in Arendt's view, therefore, sufficient to overcome any scruples regarding the Final Solution in those rare Nazis in whom such scruples were present. This, in an extreme form, Arendt seems to be saying, illustrates how far subjective evaluations of judgmental responsibility may diverge from objective evaluations (or at least from someone else's subjective evaluations).

Yet there is something preposterous about treating Eichmann as

28. It is worth adding that just as the law may sometimes demand the impossible, so, too, a defendant cannot count on impossibility as a defense. *See, e.g., O'Sullivan v. Peters* [1951] S. Austl. St. R. 54, where defendant was convicted of attempting to bet on a horse race in violation of law, despite the fact that the horse had been scratched an hour before the bet was placed. Nor is it unknown for men to lose paternity suits, despite blood test results that demonstrate irrefutably that they could not have fathered the child in question, as in the famous lawsuit involving Charles Chaplin and Joan Barry. *Compare* N.Y. Times, Feb. 16, 1944, at 19, col. 6 (reporting result of blood test showing Chaplin could not have been the father) *with* N.Y. Times, Apr. 18, 1945, at 25, col. 4 (reporting a California jury's declaration that Chaplin was, nonetheless, the father).

29. H. ARENDT, *EICHMANN IN JERUSALEM A REPORT ON THE BANALITY OF EVIL* 253 (1963).

merely the "normal," "banal" bureaucrat, for his job was not compiling motor vehicle registrations or supervising income tax audits, but handling the logistics for an unprecedented mass murder. Bureaucrats, after all, are human beings, too: is it a sign simply of "normal banality" to join such an extraordinarily vicious organization as the Nazi party and to dedicate oneself to expediting a policy so uniquely heinous that contemporaries often found it literally incredible? Would a "normal," "banal" bureaucrat perceive no ethical distinction worth noting between carrying on routine administrative functions and sending millions of persons to their deaths? As one venerable student of the Holocaust put it: "In the Nazi universe the monstrous had become acceptable, the extraordinary, ordinary. Evil was not committed by commonplace robots; rather evildoers had become commonplace. The lesson of the Nazi era is not the banality of evil but that inordinate evil, if licensed, can become banal."³⁰ In order to believe that Eichmann did not act from evil motives and intentions, it is necessary to believe, with Socrates, that no one deliberately does evil. For plainly Eichmann acted knowingly, willfully, and voluntarily, with respect to seeking his position and carrying out its awful work. He could plead neither ignorance nor mistake, nor coercion, insanity, or self-defense. If an unambiguous moral judgment as to Eichmann's responsibility is impossible, then no such judgment is possible, and the entire subject exists only at such a rarefied incorporeal level that it never intrudes into the hard earth of reality.

Yet moral fault and responsibility are not an inseparable pair. As the law of torts developed in England, for example, the principle was that, "In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering."³¹ Aiming at preserving the peace by providing an alternative to private vengeance,³² the law was directed at practical and not ethical ends. Gradually, the task of preserving public order was imposed on other governmental units—principally the police—and the practice of holding blameless persons legally liable came under increasing criticism by those contending that there should be no liability without fault.³³ But these crit-

30. Syrkin, Book Review, *NEW REPUBLIC*, May 17, 1975, at 27. Cf. L. LANGER, *THE HOLOCAUST AND THE LITERARY IMAGINATION* (1975) (where it is argued that the uniqueness of atrocity lies in its routinization of horror, in which no act is forbidden to those in control merely on grounds of pain or evil).

31. *Lambert v. Bessey*, 88 Eng. Rep. 220, 221, T. Raym 421, 422 (K.B. 1681).

32. O. HOLMES, *THE COMMON LAW* 2, 3 (M. Howe ed. 1963).

33. *Id.* at 144-63; Smith, *Tort and Absolute Liability—Suggest Changes in Classification* (pts. 1-3) 30 *HARV. L. REV.* 241, 319, 409 (1917).

ics never succeeded in overthrowing the doctrine of strict liability—liability, that is, without fault—which has been used to hold many careful, reasonable persons legally blameworthy. As before, the rationales are apt to be heavily practical. An individual (*A*) involved in abnormally dangerous activities, for instance, may be held liable for damages caused, even if he acted in an entirely reasonable way. Clearly, or so the rationale goes, someone should be compelled to aid the poor victim, and *A* is the obvious choice. For he voluntarily undertook the risky activity for personal gain, and thus should assume the burden if something goes wrong; further, he can probably bear the loss more easily than can the victim.³⁴ Thus, our refusal to assign moral fault to *A* may often coexist with our judgment that he must take on the responsibility.

Thus far, we have used “judgmental responsibility” solely in the retrospective sense as a judgment made on past actions. But judgmental responsibility can also be prospective, and can be concerned with how officials ought to behave in the future. Lacking the rich factual context of the past, prospective rules are frequently too vague, overly abstract, or difficult to apply. Still, their importance as guides to action can hardly be disputed, and most laws, regulations, professional duties, and personal norms fall within the category of prospective rules. A statute prescribes that an official must make certain determinations of fact before proceeding with a certain course of action; custom and tradition prescribe that an official will in good faith seek to implement the policies of his politically appointed superiors; an official’s own views of himself in his professional role and as a moral agent ordinarily prescribe that he not use his discretion to ignore an able subordinate in order to assign an important matter to a ne’er-do-well brother-in-law newly employed by the organization. Whether retrospective or prospective, however, the essence of the notion of judgmental responsibility remains the same: the determination of the justifiability of holding a man answerable for his actions. In this, however, the assumption that descriptive responsibility is a necessary but not sufficient prerequisite of judgmental responsibility is sometimes stretched nearly to its breaking point.

III. COLLECTIVE RESPONSIBILITY

The notion that a society, or at least a very large portion of it, could be held responsible for specific actions of some of its members is at

34. This, of course, is the rationale for workmen’s compensation laws.

least as ancient as the days of the Old Testament, when God punished the Egyptians' first born for the sins of the Pharaoh.³⁵ The practice of assigning such responsibility, however, is by no means dead. In modern America, for example, after virtually every shocking and painful political event, self-proclaimed custodians of public morality declare that "the nation . . . bears . . . a burden of guilt," for "the evil is in us," presumably due to "a sickness weakening our stature before the world" or to "[s]omething in the air of the modern world . . ." ³⁶ Even Watergate, we are straightfacedly told, "happened not because a handful of politicians were unprincipled, but because we, as a people, are not being true to the principles we profess."³⁷ Accusatory and not confessional, these moral spokesmen use "we" to mean "you," as if haranguing a Sunday school class on the evils of tardiness, and we recognize that their denunciation is uttered as much to establish their innocence as our guilt. But inasmuch as judgmental responsibility entails descriptive responsibility, we, the nonassassins and nonplotters, are at least entitled to ask how we properly can be blamed. The acts proceeded wholly without our knowledge or consent, and typically, in fact, against our most strongly held desires; the assertions that we as individuals significantly contributed to the events are entirely unsupported. Lacking responsibility, we are admonished to assume guilt; meanwhile, the guilty, for their part, often seem eager to avoid responsibility.

Suppose, however, that the actions had been done in our name. Would *that* make us responsible? That such a unilateral declaration by someone else could be held binding on us immediately strikes us as

35. *Exodus* 11:4-8. In addition to a mutual moral responsibility, which obliged all Jews to keep their fellows from performing misdeeds, all Jews were held ethically, materially, and legally responsible for the transgressions of any individual Jew. The most important collective responsibility, however, was evidenced at the giving of the law at Sinai, in which the children of Israel were all depicted as in God's debt. *Id.* at 24:3-8.

36. Remarks, respectively, of Senator Eugene McCarthy, Professor Arthur M. Schlesinger, Jr., Archbishop Terence J. Cooke, and columnist James Reston, following Senator Robert Kennedy's assassination. *N.Y. Times*, June 6, 1968, at 23, col. 2, 32, col. 4, 24, col. 7, 20, col. 7. Similar pronouncements had followed President Kennedy's assassination. *See, e.g.*, remarks of James Reston, *N.Y. Times*, Nov. 23, 1963, at 1, col. 5; civil rights leader James Farmer, *id.* at 8, col. 6; Senator J. William Fulbright, *id.* Dec. 6, 1963, at 18, col. 8; psychiatrist Karl A. Menninger, *id.* at 18, col. 3; *Times* editorial, *id.* Nov. 28, 1963, at 38, col. 1 (Editorial).

37. Nimmo, *On Politics in Post-Watergate America*, MADEMOISELLE, May 1974, at 38. Similarly, the journalist author of a much-praised book on Vietnam concluded that the war's great lesson was "to teach you that you were as responsible for everything you saw as for what you did." M. HERR, *DISPATCHES* (1977). The logical next step, of course, is this declaration from mass murderer Charles Manson: "I am what you have made of me and the mad dog devil killer fiend leper is a reflection of your society." Manson, *quoted in* V. BUGLIOSI & C. GENTRY, *HELTER SKELTER* 415 (1974).

absurd.³⁸ What is needed, plainly, is our informed consent. But consent to what? To the legitimacy of the system? To the legitimacy of the actors? To the legitimacy of the actions?

Common speech exacerbates the problem. For like a deserted picnic ground carpeted with discarded paper plates, our talk is littered with errors of reification. Thus, a recent newspaper carried such headlines as, "Rent Board Lowers Ceilings for Raises on Leases for Year," and "I. L. O. Refuses to Censure Israel."³⁹ Reacting against this kind of practice, E. H. Carr argued that institutions ought not to be evaluated morally as if they were individuals. Personifying the state, he conceded, is a useful fiction, but the observer must not neglect several crucial distinctions: the state lacks the "intimate emotions which play a large part in individual morality,"⁴⁰ the state is expected by the "ordinary man" to engage in "certain kinds of behaviour which he would definitely regard as immoral in the individual,"⁴¹ the state has "a right of self-preservation which overrides moral obligation,"⁴² and, above all, international morality presupposes "a society of states" but no such community exists.⁴³

Carr's is the classic Machiavellian position and though none of his contentions is truly persuasive,⁴⁴ they have, over the years, acquired a certain force. The real defect in his argument from a judgmental point of view, however, is quite serious, for his central assumption is fallacious. That assumption plainly is that institutions and individuals are mutually exclusive categories. On a certain primitive verbal level, this is accurate enough: when we say that "Rent Board Lowers Ceilings," we cannot simultaneously literally be *saying* that "Members of the Rent Board Lower Ceilings." But the meaning is clear: when we utter

38. H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 161 (1950).

39. N.Y. Times, June 28, 1978, at A1, col. 6 and at A4, col. 3.

40. E. CARR, *THE TWENTY YEARS CRISIS* 149 (1939).

41. *Id.* at 157.

42. *Id.* at 159.

43. *Id.* at 161. Carr's distinction is reflected at law in the general rule that when an individual acts in his official capacity, he may not be held personally liable, while when he acts in his private capacity, he may be held personally liable. This principle, however, has been modified in practice by such secondary distinctions as discretionary versus ministerial duties and actions wholly outside the official's jurisdiction versus actions in excess of his authority. Moreover, war crimes tribunals can hardly avoid punishing officials in their private capacities, inasmuch as the governments they served frequently no longer exist.

44. Thus: the state may lack "intimate emotions" but the officials who act in its name do not; the "ordinary man" test of morality is arbitrary and irrelevant; the state's absolute right of self-preservation is a bald assertion from which many would most vehemently dissent; and international morality presupposes only multiple actors and not a psychological or organized community of nations.

the first sentence, we mean the second. In other words, when we speak of institutions taking certain actions, assuming certain obligations, or declaring certain policies, what we really are referring to are institutional personnel acting in their official roles. This fact is often obscured by bureaucratic impersonality and the anonymity of the actors, by the great longevity and size of many agencies that seem to eliminate the influence of individuals, by the common institutional practice of claiming to represent large numbers of persons outside their structures, or by the legal fiction permitting institutions in certain circumstances to be treated as persons. But that most officials involved in formulating a given policy are unknown to the public hardly justifies our conclusion that the actions were not theirs; that an agency like the Justice Department has outlived all its employees does not imply that it and not they have done its work; that an organization like the Agriculture Department declares that it "speaks" for farmers does not mean that the institution or its asserted clientele have acted and not the Department's officials; and, on the other hand, that these institutions can sometimes conveniently be treated as if they were persons certainly does not imply that they have any separate life of their own, except in a purely metaphorical sense. The dichotomy, therefore, is not between institutional and individual responsibilities, but between official individual and private individual responsibilities.

Applying Carr's argument in this context, we see that he feels that the former kind of responsibility ought to be subject to different — and lower — moral standards than the latter. Yet the consequences of official action are apt to be more significant than the consequences of private action. Moral considerations, as a practical matter, therefore, become in his schema pretty much confined to small things. Social significance and moral considerations emerge as inversely related; an individual is less subject to moral strictures as a Secretary of Defense contemplating the utility of thermonuclear threats than as a father grappling with the question of whether he should permit his daughter to attend an unchaperoned party. It is, thus, as necessary as it is obvious to recall that institutions as such do not act; individuals, acting in the institution's name, do.

IV. RELATIONAL RESPONSIBILITY

Although we have been focusing on "responsibility" as a word *in vacuo*, this should not obscure the fact that its usage implies the existence of a relationship. At the simplest level, the relationship may involve only a person and a thing. Thus, in a descriptive sense, we might

say that a boy who drops an egg is responsible for having broken it. But in the judgmental sense — and especially when dealing with public affairs — responsibility normally involves a relationship between people: a clerk is responsible to his supervisor for properly processing social security application forms; an Assistant Secretary is responsible to the Secretary for gathering information on, say, East Asia; a ward heeler is responsible to his urban party boss for delivering the vote. Responsibility, then, can be routine or sophisticated, administrative or political. In any case, it ordinarily involves a duty owed to a principal by his agent, and his superior-subordinate relationship, in turn, implies hierarchy.⁴⁵ Bureaucratic officials are said to be responsible to their supervisors, who are responsible to the chief executive, who is responsible to the people (usually pronounced with a capital “P”). Such a model preserves the chain of responsibility, but only at the cost of legitimizing a naivete that leaves the believer as helpless before reality as a rube before a carnival barker.

In the first place, there is less to hierarchy than meets the eye. Civil service has denied the superior much of his control over the hiring and firing of subordinates; the desirability of administrative experience and the breadth of bureaucratic concerns has tended to place generalists in high level positions, where their admitted lack of subject matter expertise has forced them to rely on subordinates for identifying problems or successes and proposing changes or continuities; the sheer size of modern bureaucracies has left superiors reliant upon subordinates to discover what is going on within the organization; bureaucratic subdivisions invariably seek to form alliances with legislators, interest groups, the press, or other bureaus in order to immunize themselves against a good deal of their superiors' authority; political control of the bureaucracy is undermined by the apparently irreversible trend of

45. Two qualifications must be noted. First, in a relatively small number of types of cases, responsibility may exist not in a superior-subordinate relationship, but rather, in one between equals, as in marriage, where each spouse is responsible to the other for the performance of certain tasks. The organizational (and, occasionally, marital) problems flowing from such a lack of hierarchy, however, are apt to be nightmarish — hence, responsibility normally involves hierarchy. Second, in an informal but nonetheless often potent way, a reverse superior-subordinate responsibility relationship often emerges. In this situation the superior is said to be obligated to try to protect or advance the interests of his subordinates. This function may not seem very salient to him, unless he is afflicted with the paternalism of *noblesse oblige*; but it may provide one of the major criteria by which those beneath him evaluate his performance. Granting the significance of bureaucratic goal displacement, still this reverse responsibility obviously is meant to be secondary to conventional responsibility, for an organization is ostensibly created primarily to carry out tasks and not to promote the welfare of its members.

granting agencies vast quasi-legislative and quasi-judicial powers; the ubiquitous goal displacement phenomenon ensures that bureaucrats will tend to place their own interests ahead of the formal aims of the organization; and so on and on. The hierarchical presumption of subordinate dependence upon superiors, in other words, is substantially altered in practice.

It is easy to enumerate the arguments in support of tightening hierarchical control: it would facilitate democratic accountability to the people; it would promote consistency and predictability throughout the organization; it would place key decisions in the hands of top officials who could see the "big picture" that subordinates might not notice beneath a congeries of routine and minutiae; and it would reduce the opportunity and temptation for low-level corruption. These are fine arguments, but they can rarely avoid deflation from the eager pin of practicality. Thus, stricter hierarchy, it could be retorted, would be intolerably inefficient, too rigid and incapable of adapting to change and diversity, and helpless to alleviate the numerous inequities that arise in unforeseen areas. It is almost certain that strict hierarchy could not be imposed—and if, by chance, it could, it would before long prove so unworkable that it would be junked with neither ceremony nor regret.

The predilection to cling to the old hierarchical fiction, however, remains, as in the case *In re Yamashita*,⁴⁶ which involved a general who had been made commander of the Japanese troops in the Philippines during the final, chaotic stages of World War II. A few days after his arrival in Manila, American troops invaded the island of Leyte, and Yamashita withdrew to the mountains, his troops killing about twenty-five thousand Filipinos in the process. Later, he surrendered and was charged with failure to control his troops, thereby permitting them to commit brutal atrocities and other crimes. Yamashita himself was never accused of ordering, condoning, participating in, or even knowing about the crimes. An American military commission nonetheless found him guilty, the Supreme Court upheld this decision, and Yamashita was hanged.⁴⁷

In the second place, as the Watergate affair made irrefutably clear, "The halo provided by the status system makes blame increasingly

46. 327 U.S. 1 (1946).

47. *Yamashita* is not unique. See, e.g., *Commonwealth v. Weiss*, 139 Pa. 247, 21 A. 10 (1891), where an employer was held guilty of unlawfully serving oleomargarine in his restaurant, although the act took place without his knowledge. Differences in the magnitudes of the offense charged and punishment inflicted are, of course, immense and obvious.

difficult as we go up the hierarchy."⁴⁸ It is no coincidence, therefore, that Yamashita fought for the losing side; General Curtis LeMay, who conducted fire-storm raids on Japan at a terrible cost to civilian life, was subsequently rewarded with command of the entire American Air Force. It did not even occur to authorities that Yamashita's conviction for war crimes may have *a fortiori* entailed LeMay's. The prestige of high office and the substantial reprisal powers attaching to it quite naturally contribute to an attitude which ordinarily assigns responsibility to top officials only in the case of success; failure is someone else's fault.⁴⁹

In the third place, Lincolnesque references to "government by the people" have polluted ordinary discourse by focusing on an alleged collective responsibility owed by officials to the people and enforced through the electoral process. It is easy to push such notions too far. Even if one postulates a rational and issue-oriented electorate, one is confronted with rational and intense party leaders and candidates who will choose to maximize their support through vague and ambiguous appeals that frustrate the voters' efforts pretty effectively.⁵⁰ But when one takes into account that most people neither know nor care much about politics, and make their electoral decisions for a very wide variety of reasons (often, nearly issue-free in content), the problem is exacerbated. This is not to say, of course, that the electorate is entirely ineffective in holding officials responsible for their actions. On such broad issues as peace and prosperity, ordinarily loosely construed, large portions of the electorate may vote as a means of registering their retrospective judgments, and issue coherence has become more widespread and more likely to be translated into appropriate voting behavior.⁵¹ But party and candidate considerations often outweigh issues in importance, and the diversity of the voters' issue rationales may make it impossible to speak accurately of an electorate's issue rationale.

48. V. THOMPSON, *MODERN ORGANIZATION* 133 (1961).

49. An extreme illustration of this practice, of course, is contained in the biblical story of Job, for whose many and awful afflictions God was responsible but not blameable. Flaubert recounted a bizarre and not altogether dissimilar experience he observed in his visit to Egypt in the 1850's: the Doseh ceremony, in which

a man on horseback rides his mount over the backs of a number of other men stretched out on the ground like dogs. The celebration is repeated at certain times of the year . . . in memory and as a perpetuation of the miracle performed by a certain Moslem saint who rode his horse into Cairo over earthenware jars without breaking them. The *cadî* who reenacts this ceremony cannot hurt the prostrate men, just as the saint didn't break the jars. If the men die, it is due to their sins.

G. FLAUBERT, in *FLAUBERT IN EGYPT* 93 (F. Steegmuller ed. 1972).

50. A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 135-39 (1957).

51. N. NIE, S. VERBA & J. PETROCIK, *THE CHANGING AMERICAN VOTER* 289-306 (1976).

Thus, even if we avoid the error of reification, and carefully equate the "people" with a tangible electoral majority, it is difficult to discover a consistently effective system for enforcing responsibility in which the "people" play an active and decisive role. Incumbents naturally seek to avoid responsibility; the electorate is not sufficiently knowledgeable, interested, or united in its goals and values to hold officials rigorously responsible, and so, the final link in the chain proves dangerously weak.⁵²

Yet, though the normal tendency is to mistake surface for substance and exaggerate the importance of hierarchy, it also would be a mistake to underestimate its importance. Numerous writers on the presidency, for example, have repeatedly stressed the office's great power—and not merely the apocalyptic power to initiate a thermonuclear war. Richard Neustadt, for instance, while noting that the President's power is less to command than to persuade, makes it clear that he has a formidable array of weapons if he is ready and willing to use them.⁵³ Similarly, while George Reedy elaborates on the theme of ambitious sycophantic aides isolating the President from reality, the former Johnson press secretary observes that it is the unchecked power of the chief executive to choose his favorites that produces this condition.⁵⁴ Nor is hierarchical power restricted to the President. Clearly, White House assistants like Bundy and Haldeman, cabinet secretaries like Dulles and Kissinger, and career bureaucrats like J. Edgar Hoover and Frances Knight were forces to be reckoned with.⁵⁵ It may be, as Howard Lentner has suggested, that "it is a malady of our age that the concept of equality has so taken over our consciousness that we flatten everything out and regard men in production-line terms where each is interchangeable with every other."⁵⁶ If so, it is necessary to guard against the tendency to ignore individual distinctions and to view large organizations as headless monsters. Not only might such an approach be misleading, but

52. Other elements such as interest groups, may, as a practical matter, take up the slack in enforcement caused by the electorate's low level of knowledge, interest, and participation.

53. R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 33-107 (1960). *But cf.* Sperlich, *Bargaining and Overload: An Essay on Presidential Power*, in *PERSPECTIVES ON THE PRESIDENCY* 406-30 (A. Wildavsky ed. 1975) (challenging Neustadt's view that presidential power is less to command than to persuade).

54. G. REEDY, *THE TWILIGHT OF THE PRESIDENCY* 88-99 (1970).

55. Yet these may serve as counter-examples, too. For Bundy and Haldeman were more influential than most cabinet secretaries, Dulles and Kissinger are believed to have been more potent in foreign policy making and execution than Presidents Eisenhower and Ford, and Hoover and Knight were so securely ensconced in their agencies that even hostile superiors could not affect them much.

56. Letter from Howard Lentner to Thomas Halper (Dec. 26, 1975).

also the belief in the impossibility of hierarchical responsibility may become a self-fulfilling prophecy, as all concerned expect upper level officials to be dominated by subordinates and, acting on that premise, help to bring this condition about.

V. NORM RESPONSIBILITY

That responsibility most often describes human relationships should not seduce us into forgetting that individuals may also feel responsible to deeply held beliefs, values, or rules of conduct. These might be personal (*e.g.*, honesty) or institutional (*e.g.*, nonpartisanship), but in the end they usually come down to a matter of conscience. To say this, however, is not to dismiss the topic with a platitude. For one thing, the dictates of conscience are not always clear and unambiguous. Personal and institutional norms may conflict, resulting in wrenching agony for the individual involved. The protagonist in Herman Wouk's best-selling *Caine Mutiny*, for instance, had to choose between the personal norm of protecting his men and the institutional norm of obeying his superior — all while on a ship caught in a violent storm at sea.⁵⁷ Similarly, in the Pentagon Papers affair, Daniel Ellsberg had to choose between acting on his personal belief that American involvement in the Vietnam War ought to be stopped and the Defense Department's norm of adhering to official regulations, including those governing documentary security classifications.⁵⁸

Yet though one might be quite confident about the demands of his own conscience, troubles still persist. Even centuries ago, when the conscience was regarded as the voice of God, it was evident that different men claimed to hear different messages, and that, on a given subject, most heard none at all. Thus my conscience might oppose yours, while onlookers might fail to perceive the issue as involving conscience at all. In today's less pious age, the subjectivity of conscience seems quite undeniable. Conscience, in fact, may be said to rest upon a self-evaluation of self-interest: I must do a certain thing because, if I don't, *my* guilt will be unbearable. What I cannot bear, however, may not bother you.

The place of conscience in politics is difficult to treat with confidence.

57. See Halper, *The Caine Mutiny Trial: Was It Fair?*, in *WAS JUSTICE DONE? HISTORIC TRIALS ON REVIEW* 23 (F. O'Brien ed. 1971).

58. At bottom, however, this conflict between personal and institutional norms may merely reflect David Riesman's famous "inner-directed" versus "other-directed" classification of a quarter century ago. See D. RIESMAN with R. DENNEY & N. GLAZER, *THE LONELY CROWD* (1950).

Weber understood this in his classic *Politics as a Vocation*, in which he distinguished between two kinds of conscience-oriented politicians, one preoccupied with purity of intent and the other believing that consequences must be considered as well.⁵⁹ We may applaud the latter for his maturity, but we must also frankly doubt whether he can carry the vastly more complicated burden he has assumed. In democracies, the officeholder's responsibility to norms becomes still more confusing. A legislator, for example, may play a trustee's role,⁶⁰ deciding, in Burke's famous words, on the basis of "his unbiased opinion, his mature judgment, his enlightened conscience."⁶¹ Or he may play a delegate's role,⁶² in which, as one academic-turned-congressman put it, "the will of the people should prevail as over against any private prejudice, even of the Congressman."⁶³ By the same token, in the bureaucratic arena the traditional preference for a rule of law over a rule of men must be tempered by the recognition that "[a]dministrative discretion . . . is of the essence of the modern State."⁶⁴ This discretion has spread like ink in a snifter of cognac, so that a leading authority on administrative law now estimates that "eighty or ninety percent of the impact of the administrative process comes from informal action which is not reviewed. . . ."⁶⁵ Upper level officials necessarily leave to middle and lower level subordinates such fundamental decisions as whether in specific cases any action should be taken at all, and, if so, what kind of action, and when, and by whom, and with what vigor. It is not the police commissioner, after all, but the lowly patrolman who determines whether there is sufficient cause to justify an arrest.⁶⁶ Institutional

59. M. WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 120-21 (H. Gerth & C. Mills trans. & ed. 1958).

60. See Eulau, *The Legislator as Representative: Representational Roles*, in THE LEGISLATIVE SYSTEM 267, 272-76 (1962).

61. E. BURKE, *Speech to the Electors of Bristol*, in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE 89, 95 (1901).

62. See Eulau, *The Legislator as Representative: Representational Roles*, in THE LEGISLATIVE SYSTEM 267, 276-77 (1962). The distinction between trustee and delegate roles does not imply that either role is ordinarily followed with great consistency or that other role options (e.g., partisan, politico) do not also exist. *Id.* at 277-80.

63. Smith, *Should Congress Lead or Follow Public Opinion?*, TOWN MEETING, July 9, 1942, at 16.

64. Laski, *quoted in* Dimock, *The Rôle of Discretion in Modern Administration*, in J. GAUS, L. WHITE, & M. DIMOCK, THE FRONTIERS OF PUBLIC ADMINISTRATION 45 (1936). The intervening four decades have served merely to reinforce the judgment that "informal discretionary action is the lifeblood of the administrative process." K. DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 217 (2d ed. 1975).

65. *Id.* at 215.

66. See, e.g., J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (2d ed. 1975).

norms as determined by the organizational leadership, therefore, are constantly being modified or reversed by subordinates acting on the basis of their own views of institutional norms or even on the basis of their own personal norms.

By this point, the observer is likely to feel that conscience may be magnificent in such heroic opponents of tyranny as Thomas More or Aleksander Solzhenitsyn, but that, in a democracy, it is necessary to recall the aged maxim, "Virtue itself hath need of limits." For democracy elevates not the moralist or philosopher-king who gives the public what it ought to want, but the opportunist who, in order to secure or retain electoral office, gives the public what in fact it does want. Fueled by self-interest — both of candidates and of voters — democracy has, with accuracy and not malice, properly (if irreverently) been dubbed "the rule of the politician."⁶⁷

This Schumpeterian insight, however, must coexist with one of the more maddening of current anomalies — the widespread preoccupation with public morality coupled with the extreme unfashionableness of the private sense of guilt. After seemingly interminable years of Vietnam and Watergate, official deceptions and credibility gaps, managed news and leaked revelations, integrity to many people constitutes the primary political issue, overwhelming such traditional candidate qualifications as intelligence, sophistication, experience, and achievement. Indeed, the 1976 presidential candidacies of Carter, Brown and, to a lesser degree, Ford and Reagan, appear to have been elaborations on that very theme.

Yet, in our own private lives, the sense of guilt has come under unprecedented attack: self-improvement pop psychology dismisses it, the entertainment media ridicule it, and the "Do it!" counterculture blasts it. In this Puritan-based nation, those few who admit to experiencing guilt do so either in terms of the penitent ashamed of his remorse or of the customer complaining about a defective appliance. So pervasive is this degrading attitude that even one who bitterly excoriates the cravenness of ancient enemies feels compelled to note in passing: "I am suspicious of guilt in myself and in other people: it is usually a way of not thinking, or of announcing one's own fine sensibilities the better to

67. J. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 285 (3d ed. 1950). An enduring problem of democracy, therefore, is how to meet long-range goals that seem to require major short-range public sacrifices. The easy answer is "leadership," but with some reason, the public tends to adhere to Keynes' famous observation that, in the long run, we are all dead. In a dictatorship, a Stalin seeking to industrialize a Russia need pay such sentiments little obeisance. But in a democracy where public dissatisfaction translates easily into votes, officials must proceed with far greater caution.

get rid of them fast."⁶⁸ Only the loftiness of its tone sets this declaration apart from coarser denunciations of guilt.

It was not without good cause, therefore, that a cultural critic recently observed:

The only sin today is not having found a therapy that makes us stop feeling bad. Guilt, instead of being a fever that tells us there's something radically wrong, is a cramp, an involuntary contraction of the muscle or the brain that keeps us from doing whatever we want to right away Therapists forgive everything, because nothing is a crime; we do not sin, we dysfunction.⁶⁹

Guilt, like unhappiness itself, can be alleviated by exhortation or personality tinkering; *Crime and Punishment*⁷⁰ is superseded by *I'm OK—You're OK*.⁷¹

This soft and comforting message has spread like a civilization-endangering fungus in a horror movie, and clearly is hostile to the very concept of responsibility to norms. For if this attitude persists, the inconsistency of such a bifurcated view, in which responsibility becomes more a concern for the public man as it becomes less a concern for the private one, cannot avoid undermining the entire idea of responsibility itself. Assumption of guilt cannot be allocated according to a societal principle of division of labor, even when those bearing the burden are self-recruited elected officials.

VI. DETERMINING RESPONSIBILITY

Whether viewed in a descriptive or judgmental sense, responsibility does not, like a neon sign at an all-night truckstop, unambiguously proclaim its own existence. Discussions of responsibility, therefore, cannot honorably avoid the question: who is to determine who is responsible for what? The answer, however, would seem merely to be: it depends. It depends, that is, on what relationship concerns us. And so we are accustomed to believing that, if it is a political relationship in a democracy, the determination will be made by the electorate or its chosen officials; if it is a legal relationship, then by the courts; and if an administrative relationship, then by one's superiors. Leaving aside the question of how well such formulae accord with limitations imposed by the real world, a fundamental problem persists: how can an outsider make

68. L. HELLMAN, SCOUNDREL TIME 42-43 (1976).

69. Leonard, *Critic's Notebook: An Evening with 2 Walking Anachronisms*, N.Y. Times, May 26, 1976, at 24, col. S. 2-3.

70. F. DOSTOEVSKII, CRIME AND PUNISHMENT (T. Crowell ed. 1886)(1st ed. 1866 n.p.).

71. T. HARRIS, I'M OK—YOU'RE OK (1969).

a satisfactory determination of the nature and extent of *my* responsibility, when *his* information as to my intentions, knowledge, and often even actions is secondhand, and thus, to some degree in error? As Mill pointed out, "with respect to his own feelings and circumstances the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else."⁷² Men defending decisions made under stress invariably take refuge in this argument, denying later critics their legitimacy by denying them their jurisdiction. "How dare they, in a context of peace, comfort, and security, sit in judgment on how I acted in a context of war! How self-righteous of them"—and, more to the point—"how invalid their conclusions must be!"

Plainly, this is a position of some force, intellectually and emotionally. We recognize that our outsider status makes a substantial amount—perhaps a decisive amount—of ignorance inescapable, and we properly shrink from a sanctimonious pose. And yet a flight to the alternative hardly seems satisfactory, either.

That alternative, of course, is internal determination: since only *I* have the requisite knowledge of my situation, only *I* am qualified to sit in judgment of myself. One difficulty here, of course, is that I have a vested interest in my absolution, and that, consciously or unconsciously, my judgment may be critically affected by a desire to protect or further my own ends. Another difficulty is that my knowledge may in fact be less impressive than I believe, for memories and perceptions are subject to many distorting influences, even in the most intelligent and well-intentioned of men. Outsiders, therefore, may be less biased and perhaps, cumulatively, even more knowledgeable than I, and, thus, better qualified to determine my responsibility.

Moreover, internal responsibility, by focusing on the individual's own recognition and acceptance of his obligations, carries with it some special problems. It is not merely that individuals seem prone to proclaim their responsibility for popular occurrences, deny it for unpopular ones, and speak evasively of it for those in between. Such individuals, of course, need not be wrong; President Johnson, as he repeatedly said, was responsible for the adoption of Medicare. No, the ambiguity goes deeper; we feel it to be unjust to blame someone for failing to achieve what he never attempted, and so, ordinarily, we seem to require some acceptance of responsibility before passing judgment on his acts. Yet, presumably as a result of our efforts to educate our

72. J. MILL, ON LIBERTY 94 (Oxford University Press, World's Classics ed. n.d.) (1st ed. London 1859).

children ethically, we feel that requiring this acceptance makes it too easy for individuals to avoid blame for blameworthy acts.

Furthermore, even the individual's acceptance should not always be taken at face value. He may, that is, experience a sense of guilt, but it may be neurotic guilt and not real guilt. Now neurotic guilt, however infantile and irrational, ordinarily contains a core of truth (*e.g.*, the guilt may be a reaction to an unexpressed wish that a family member be killed). A person who experiences guilt, in other words, nearly always has thought or done something for which he should properly feel guilty. But the neurotic pretends to himself and to others that there is no valid reason for his guilt, sometimes misassigning his felt guilt to some obviously minor or irrelevant act, so that his guilt can be easily refuted. Thus, an individual may experience guilt and be quite incapable of discerning which responsibility he has failed to meet.

Neither internally nor externally determined responsibility, viewed in stark isolation, is adequate. And so we have developed a hybrid, consisting of external and internal means of determining responsibility. The external means, which Dahl has identified as part of the Madisonian tradition,⁷³ have received much public attention in the schools and the press, and self-designated "realists" are fond of declaring them the basis of democracy. The American Constitution's labyrinthine system of checks and balances, we are told, especially federalism and the separation of powers, deserves credit for preventing intolerable political and administrative abuses, and for preserving American democracy. A brief glance at democracies lacking these devices and at dictatorships claiming them, however, is enough to decimate our certitude. And when we begin to take account of the enormous importance of social, economic, and informal political factors, the significance of statutes and formal political structures seems to recede still further. As Dahl so succinctly put it:

To assume that this country has remained democratic because of its Constitution seems to me an obvious reversal of the relation; it is much more plausible to suppose that the Constitution has remained because our society is essentially democratic. If the conditions necessary to polyarchy had not existed, no constitution intended to limit the power of leaders would have survived.⁷⁴

This is not to deny that the Constitution promotes democracy, both through its declaration of principles and creation of structures and through its symbolic status as legitimizer of the political system and as

73. See generally R. DAHL, A PREFACE TO DEMOCRATIC THEORY 4-33 (1956).

74. *Id.* at 143.

reinforcer of public support. But, it does indicate that the major significance of systems of values, cognitions, and symbols, types of family and peer structures, socialization and responses to authority, and other social and psychological factors should not be underestimated. Nor, by the same token, is it necessary to be a Marxist to recognize the powerful impact upon a political system of the nature, ownership, and management of the means of production, distribution, and exchange in a society. Similarly, the influential role of such extraconstitutional political elements as parties and interest groups hardly requires elaboration.⁷⁵

But suppose we move from the macro level with its broad societal concerns to the micro level, and focus on the bureaucracy—the context in which “responsibility” is most likely to be heard. As an organizational form stressing such external means of control as formal hierarchical structure and legal rules of behavior,⁷⁶ the bureaucracy has traditionally been staffed in the United States by “a comparatively colorless public service.”⁷⁷ Surely here, if anywhere, responsibility will largely be externally determined and enforced. And, yet, a closer look reveals that bureaucratic authority, communication, and jurisdictional patterns conform only very imperfectly to formal regulations; unavoidable and widespread discretion blurs the distinction between administration and politics; officials, moreover, are human beings, too, with ambitions outside their roles which may nonetheless affect the performance of their tasks, and with the ever present human problems of perception and evaluation. A bureaucracy, in short, comes to resemble a piece of limburger cheese, whose animal vitality is apparent only under a microscope, but is no less frenzied for its low visibility. In bureaucracies, as in other settings, internalized norms of obligation, honesty, efficiency, and so on — whether deriving from childhood experiences, adult peer influences, or some other factor or factors — are crucial in forming the individual’s subjective definition of his “role responsibility.”⁷⁸ And it is this definition which we must largely credit for confining the official’s actions within generally acceptable limits. External

75. Thus, in the course of cautioning against a “period of reductionism in political science,” Dahl argues that “two kinds of institutional arrangements seem to have important consequences for the ‘effectiveness’ of the government,” namely, “strong executives armed with extensive capacities for action” and a “multiparty system.” R. DAHL, *POLYARCHY* 121-22 (1971). Clearly, neither the enormous strength of the Presidency nor even the existence of political parties was anticipated by the Founding Fathers, let alone expressed in the Constitution.

76. M. WEBER, *Bureaucracy*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 196 (H. Gerth & C. Mills trans. & ed. 1958).

77. Dykstra, *The Quest for Responsibility*, 33 *AM. POLITICAL SCI. REV.* 1, 13 (1939).

78. H. HART, *PUNISHMENT AND RESPONSIBILITY* 212-14 (1968). On individual motiva-

controls, viewed as the primary guarantor of responsibility, therefore, must fail in a democracy; for there can never be enough bureaucrats to watch the bureaucrats — or enough to watch the watchers, *ad infinitum* — and heavy reliance on external checks quickly breeds inefficiency, low morale, red tape, and, if taken too far, tyranny.⁷⁹

The necessity for official discretion, however, provides the opportunity for official abuse. Thus, while internalized judgments founded on the individual's conception of his own roles as an official⁸⁰ and as a moral agent⁸¹ may sound ephemeral, they are, in reality, vital to the creation and maintenance of a responsible bureaucracy in a democracy. If such elements are inadequately internalized, no set of external checks can compensate for their absence; and if such elements are adequately internalized, external checks tend to retreat to a supplementary, if still important, position.⁸² In the last analysis, therefore, it is the man, rather than merely the rules by which he is governed, to which we must look for the achievement, retention, and advancement of high standards of governmental responsibility.⁸³ It is he who is the first and the last defense.⁸⁴ In an imperfect world, internalized determination of responsibility is an imperfect safeguard, but here, as in all other things, the people must take their chances.

tion as a main determinant of organizational effectiveness, see D. KATZ & R. KAHN, *THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS* 336-89 (1966).

79. Thus, we see the inadequacy of Mao's famous maxim that "Political power grows out of the barrel of a gun." MAO TSE-TUNG, *Problems of War and Strategy*, in *QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG* 33 (S. Schram ed. 1967). In a face-to-face encounter, such a show of force may be effective, but in a societal context, the threat of violence is a poor substitute for the habit of obedience or even simple approval. Many dictators, furthermore, have found themselves impaled on the horns of a dilemma: they create an army and police to control the people and find that they themselves cannot control the army and police.

80. In this regard, Friedrich has emphasized the official's "sense of workmanship or craftsmanship." Friedrich, *The Dilemma of Administrative Responsibility*, in *RESPONSIBILITY* 189, 191 (C. Friedrich ed. 1960). Gaus has emphasized the "standards and ideals of his profession." Gaus, *The Responsibility of Public Administration*, in J. GAUS, L. WHITE & M. DIMOCK, *THE FRONTIERS OF PUBLIC ADMINISTRATION* 26, 40 (1936). Levitan has emphasized "a high degree of democratic consciousness." Levitan, *Political Ends and Administrative Means*, 3 *PUB. AD. REV.* 353, 357 (1943).

81. From an individual's perspective, these roles may conflict, as the Watergate affair well illustrates.

82. See also L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 155 (3d ed. 1960).

83. The problem takes on a chicken-and-egg character when we note that the society must rely heavily upon internalized norms and values which themselves are products of socialization.

84. But see Lentner, *The Political Responsibility and Accountability of the United Nations Secretary-General*, 27 *J. POL.* 839-60 (1965).

VII. SOME CONCLUSIONS

"Responsibility" has long done double duty: it describes relationships and prescribes obligations. The two functions have themselves often been confused with one another. One reason for this is the common habit of using "is" to mean "ought," but another reason is that "responsibility" is so closely connected with praise and blame and reward and punishment that it is a standard weapon in political scuffles. Whatever the cause, the result is a word abused as often as it is used, and the quality of political discourse has suffered as a consequence.

This paper has represented an effort to begin to dispel the problem by confronting the term as it is ordinarily applied. In its descriptive sense, we say that an individual is responsible for a particular event if, had he not acted as he did, the event would not have taken place in substantially the way that it did. "Responsibility" is thus solely a function of the effects of the individual's actions. In an age of bureaucracies where men work together in large numbers and in complex relationships, the difficulties of establishing the nature and extent of individual responsibility are great, indeed.

More commonly, "responsibility" is used in a judgmental sense, permitting us to approve or disapprove of one's actions and to treat him accordingly. Here, considerations must go beyond questions of effect to those of voluntariness, knowledge of fact and law, and short and long run intentions. Prospectively or retrospectively, judgmental responsibility is also difficult to establish, and even such an obvious standard as "ought implies can" is of less practical value than might be supposed.

Difficulties in establishing judgmental responsibility may have contributed to a perversion of the concept in the form of an asserted collective responsibility, according to which a society or portion thereof can properly be held to blame for actions taken without its knowledge and consent and often even against its desires by a few of its members. Institutionally, this approach manifests itself in the assumption that individuals and institutions are mutually exclusive categories, the former ordinarily said to be subject to much higher moral standards than the latter. Morality, as a consequence, is virtually banished from public affairs, having been sent to preside over private matters of much smaller import. More than that, institutional responsibility, like the genus collective responsibility of which it is a species, ignores the obvious fact that societies or institutions do not act, but that only individuals do.

"Responsibility," in any case, involves a relationship, ordinarily a

hierarchical relationship between people. This, in turn, has given rise to a widely held model of bureaucratic responsibility which is as simplistic as it is simple: from the lowest functionary level, subordinates are responsible to their superiors who are responsible to their superiors who are responsible to the chief executive, who is, finally, responsible to the people. Such a model overstates hierarchical control while understating high officials' abilities at self-protection, and posits an interested, knowledgeable, participatory citizenry which differs considerably from reality.

Running through the entire consideration of "responsibility" is the problem of determining who is responsible for what. Having others determine the nature and extent of one's responsibility seems inadequate in the face of their ignorance and secondhand knowledge of many factors of which only the individual in question can know. Yet having oneself determine one's own responsibility presents an obvious conflict of interest, and faulty memories and perceptions and lack of differing and relevant perspectives pose informational problems, too. The practical solution has been a compromise, in which both external and internal means of determination are utilized. The former receives more public attention and is commonly spoken of as more realistic, but the latter, in the form of internalized norms of conduct, seems more effective.

The history of "responsibility," ancient and modern, is that of a concept ensnared in a thousand threads of facts and values. The temptation to apply the Alexandrian solution to this verbal Gordian Knot is strong, but there is available no blade to cut it. And so we must begin the process of disentanglement. The alternative is neglect.

