On Guilt, Responsibility and Punishment

By

ALF ROSS

PH.D.(Uppsala), JUR.D.(Copenhagen), Hon. JUR.D.(Oslo and Lund)
Sometime Professor of Law at the University of Copenhagen

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PREFACE

THIS book comprises six essays which, though not forming a systematic whole, have a common topic: the problems of guilt, responsibility and punishment which have occupied the minds of men for all time.

These concepts are common to law and morality. They function in the same way in legal and moral discourse: guilt determines responsibility, and responsibility punishment. But the conditions under which a person incurs guilt differ according to whether the guilt is legal or moral, as do also the manner in which the responsibility takes effect and the penal reaction itself. But these differences do not require us to make a sharp distinction between law and morality in an examination of the meaning and function of the three concepts in question. On the contrary, each set of problems is illuminated by being compared and studied in the light of the other. Jurisprudence, under the influence of the formal and authoritative character of legal decisions, has developed a finely differentiated theory of the conditions under which guilt and responsibility are incurred, an intellectual edifice to which nothing corresponds in moral thought, but from which the latter can certainly learn. Conversely the juridical theory of guilt is really no more than a more precise rendering of current moral ideas adapted to the special needs of the institutions of law. And it is only by bringing into the open this more or less clandestine foundation of moral ideas underlying the juridical theory of guilt and responsibility that one can begin rationally to understand and evaluate its demands.

Still, the richest fruit of the comparative study of law and morality is, I believe, the insight that morality, like law, also has its accusations, trials, judgments, and sanctions; and that morality, like law, is a system of reactions with an action-guiding function. This is what I call the pragmatic view of morality. No one doubts such a function in the case of law, that is, that law serves the purpose of shaping human society in accordance with certain patterns emerging from fundamental objectives and evaluations. But once one sees the close kinship of law and morality it becomes natural to interpret the latter too in this way. Thus one overcomes the widespread prejudice that one " debases " morality if one does not give it some " higher " meaning or " justification " than that of being an instrument in the defence of a system of values. This is not to say that the moral judgment is *nothing but* a tool, that it

has no meaning in itself. Its own meaning is to put things in their rightful place: that is, on the basis of a presupposed system of evaluations to judge rightly about a man's actions and character. But we see that the judgment is nevertheless determined by pragmatic considerations when we note that the conditions of guilt which the system adopts are in fact adapted to this practical consequence of moral response.

Three of the six essays—" The Aim of Punishment," " The Campaign against Punishment " and " He could have acted otherwise "—have been published in English before, respectively in *Homenaje al Professor Ambrosio L. Gioja*, Buenos Aires, 1972; *Scandinavian Studies in Law 1970*, Stockholm 1970; and *Festschrift für Hans Kelsen zum 90. Geburtstag*, Wien 1971. The rest of the material is new.

The Danish original edition of this book appeared in 1970 but several of the essays had been published before. I regret that I have not been able to revise the text taking into consideration important works that have appeared after I finished writing the essays such as Ted Honderich, *Punishment, The Supposed Justifications* (London 1969) and Jonathan Glover, *Responsibility* (London 1970).

Apart from the last essay the book has been translated from Danish by Mr. Alastair Hannay, PhD Institute of Philosophy, University of Oslo, to whom I am indebted not only for the diligence with which he accomplished the translation but also for many a good advice. In the same way I am grateful to Mr. Thomas E. Sheahan, PhD for his translation of the last essay.

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ALF ROSS.

CONTENTS

CHAPTER 1

ON GUILT

1. TO INCUR GUILT IS TO HAVE BROUGHT ONESELF, BY A TRANSGRESSION, INTO THE SITUATION WHERE ONE MUST EXPECT TO BE GREETED WITH ILL WILL AND REPROACH

"GUILT," "responsibility," and "punishment" are notions that we all use in everyday language, especially[1] in moral, religious, and legal contexts. Punishment can be a sentence prescribed by a court of law, God's punishment on Judgment Day, or the penalties doled out in the home, at school, or in other social institutions where certain rules (norms) of behaviour are recognised and upheld. And similarly with "guilt" and "responsibility," which are involved wherever there is talk of punishment.

This general usage is the common source on which jurists, moral philosophers, and theologians have all drawn when, with their special needs in mind, they have analysed and characterised these terms as technical expressions belonging specifically to law, morality, or theology. In this essay I shall, in the main, avoid the theologian's territory and concern myself only with the terms "guilt," "responsibility," and "punishment" as they are used in legal and moral contexts. I am firmly convinced—and will try in these studies to show—that there is an inner connection between the way in which these words function and are used in, respectively, jurisprudence and moral philosophy; and that each of these disciplines can accordingly benefit from examination in the light of the other. By comparing law and morality, jurisprudence and moral philosophy, one sees how, on the one hand, moral attitudes and ideas are built into law and legal concepts; and on the other, how elements of legal structure enter into morality: morality too has its accusations, trials, judgments and sanctions. Indeed, when all is said and done, morality is, just like law, a means of guiding human behaviour.[2]

The three concepts are mutually linked. This is due to their being rooted in a common presupposition, namely that there has been a transgression, or in other words an action violating a given system of rules which tells persons in a particular society what they must or must not do. This system of rules can be of widely different kinds. It can be civil society's criminal law which describes actions which will result in the legal machinery being set in motion in order

[1] One can certainly say, *e.g.* that the bad roads were to blame for the accident, or that overeating is its own punishment.

[2] *Cf.* below, pp. 27 *et seq.*

to find the guilty party, call him to account, and punish him in the way the law prescribes. It can also be a moral outlook widely subscribed to in the society, or in a particular group, which determines what is to be approved or disapproved. Or the principles I acknowledge in my own conscience and according to which I adjudge myself guilty or not guilty. Or the rules of a game, *e.g.* of football, where standing off-side is a violation penalised by a free kick. Or by-laws for traffic in the City Parks, or for the loan of books from the Public Library. The system which is violated may be of these and many other kinds. What is common to them all is that they comprise a set of rules of conduct which a certain group of persons [3] regularly follow, and which they follow because they feel them to be binding,[4] as rules which lay down what is *right* (good, legal, correct) and *wrong* (bad, illegal, incorrect). Such rules can also be said to set up *norms* determining what in a given situation is right conduct and what is wrong. Accordingly we may call the system of rules which is presupposed by the concepts of guilt, responsibility, and punishment a *normative system.*

A transgression is an action that is adjudged wrong, in conflict with a norm, in regard to a certain normative system's rules. The word conveys the idea of an overstepping of the mark, and it is this mark that the given system of rules fixes. In everyday speech we use a number of more specialised words, depending on the nature of the system, *e.g.* " crime," " offence," " misdemeanour," " impropriety," " illegality," " sin," " breach of discipline," " discourtesy," " offensiveness," " indecency," and so on. Or we describe the action with such adjectives as " criminal," " illegal," " immoral," etc. In the following I shall adopt as a neutral expression covering acts (or omissions to act) which conflict with a given normative system's demands either the term " violation " or the more general term " offence."

The mutual link between the concepts can thus be presented in broad outline as follows. A person who has committed an offence thereby incurs *guilt,* though only *under certain conditions*; the person who is guilty of the offence is thereby also *responsible* for it; and the person who is responsible for the offence can or must be *punished* for it.[5] It might seem that responsibility could be left out as an

[3] The autonomous, personal morality has no such objective social existence; *cf. On Law and Justice,* 1953, para. 12, and *Directives and Norms,* 1968, pp. 83 *et seq.*

[4] *On Law and Justice,* 1953, p. 25, and *Directives and Norms,* 1968, pp. 83 *et seq.*

[5] From what follows it will appear that " punishment " here is meant in a wide sense. It covers not only the authorised assignment of suffering, but also the spontaneous reaction of disapproval on the part of the social environment.

unnecessary step here. Why not simply say that the guilty person is the one who can or must be punished? I shall return to this question in a subsequent chapter.[6] Here it can simply be stated that the reason why the concept of responsibility has a function in this context is that man is not omniscient. If, when an offence had been committed, it was immediately clear to each and everyone who the offender was, and whether the conditions of his being guilty were satisfied—if we knew all this without further ado, then there would be no real reason to talk of responsibility. But since in most cases these things are not obvious, further investigation is called for, a *trial*, designed to ascertain and establish who committed the offence, whether the offender was guilty, and if so, what punishment should be imposed on him. In these proceedings the person found guilty is, we say, made accountable. He has to account for his deed, and if found guilty his criminal liability must be determined in the sentence passed on him. All this sounds peculiarly juridical. But as we shall see, the process of law has its counterpart in moral matters in a similar investigatory and judicatory procedure.[7]

In this chapter we are concerned with "guilt." We shall try to see what is meant by this expression, how it functions in speech, and also how guilt itself is experienced.

It is obvious that guilt is not something tangible in the way that offences and punishments are. The latter manifest themselves as outwardly observable phenomena—as in the case, say, of a murder and a spell in gaol, respectively—even if these phenomena do acquire the character of crime and punishment only in the light of the legal system, in particular the criminal code. But what is guilt? In what phenomena does it manifest itself? How can its existence be established?

It would seem natural to say that guilt was the *feeling* of guilt. But that will not do. There is nothing to prevent a man being guilty without having any feelings of guilt; or conversely, not being guilty in spite of having guilty feelings. The former is true of many psycopaths, the latter of people with a neurotic obsession with guilt. Guilt must therefore be something in principle distinct from feelings of guilt.

The way to understanding here is to note how we talk about guilt. Linguistic usage indicates two different, though nevertheless connected, ways of talking about guilt.

First of all we talk of guilt as something that a person incurs in certain circumstances by committing an offence. And it is spoken of in negative terms as something unpleasant, undesirable, a *burden*

[6] See below, pp. 20 *et seq.*
[7] See below, p. 16.

which can oppress and weigh down upon the guilty man, a heavy and poignant load he has to carry along with him. Guilt understood in this way is something that can last through time. The guilty man can carry his burden for years, but it is also possible for him sooner or later to be relieved of his burden, for example by *atoning* for his guilt, or obtaining *forgiveness* for it.

Secondly, however, we also talk of guilt not as a consequence of an offence, but as a presupposition of responsibility for it. We say, for example, that Peter was not guilty in smashing the vase, because it was Jens who gave him the push in the back that made him fall against the table on which the vase stood. Or that this man, because he was mentally ill at the time and did not know what he was doing, cannot be held guilty. Here guilt has to do with the perpetrator's state of mind at the time of his act, and the statement that *A* is guilty is a claim to the effect that his mental state satisfied the requirements which are necessary for his act to impose a burden of guilt upon him, and make him responsible and liable to punishment. The actual requirements are fixed by the normative system whose rule has been violated. When guilt in this sense is present we also say that the act is *imputed* to the perpetrator. Guilt in this second case is thus derivative in relation to guilt in the first case: guilt as imputation is a condition of guilt as the burden of blame.

There is no need in the present context to enter into the details of the circumstances which determine or, negatively, exclude guilt, responsibility, and punishment. An example will suffice to explain the point. The penal law forbids the killing of another person. But there are two kinds of circumstances in which the act of killing may nevertheless not result in punishment. In the first, the killing may, for example, be done in legal self-defence. If so, then circumstances in the *physical* context of the act *justify* it. In these circumstances the killing is not in conflict with the aims of the legal system. The law neither requires nor wishes people to submit passively to bodily assault. If it did, this would simply be an inducement to robbers and hoodlums. Acting in self-defence is desirable and legitimate—though the action in question should not exceed the requirements of that end. Secondly, the killing may be due to an unfortunate accident, say, a stray bullet on a shoot. The act in itself is just as undesirable, but here there are circumstances in the *mental* context which *excuse* it. Its perpetrator in the supposed case intended no evil and has not acted in a thoughtless manner. In these circumstances we do not *impute* the killing to the man who fired the shot. We excuse him, which is to say precisely that we do not accuse him of the deed, do not hold him guilty of it.

But although these remarks allow us to clarify the use of words,

the question still remains: what *is* this guilt which one is said to incur as a kind of burden? As we have noted, it cannot be identified with a particular psychological experience, the feeling of guilt. If it is nothing spatial either, what can it be?

The matter is less puzzling than at first appears. People have recently become aware that many nouns, though apparently designating things that exist, that is, come into existence, undergo change, and then perish, really do not refer to anything that exists at all, either mentally or physically. They have meaning only in so far as certain sentences in which they occur have the function of expressing a certain normative system's demands in respect of a given or imagined situation.[8] This is the case with many juridical concepts and presumably also with the concept of guilt. We cannot point to anything and say that *it* is what "guilt" designates. But we can explain what we mean, for example, by uttering a sentence such as: "by committing a murder this man has incurred guilt."

In order to explain it I must first remind the reader of what I said earlier: that to say that a particular normative system "exists" or "is in force" in a particular society means that its commands are in fact obeyed by and large by the members of that society, and that the members of the society fulfil the demands because they feel *bound*, or *obliged*, to do so. This feeling finds its expression in pro- and contra-attitudes to actions that are, respectively, in accord and in conflict with the normative system. The first are greeted with—and are *expected* to be greeted with—attitudes of appreciation, acquiescence, approval, sympathy—*i.e.* various forms of good will, while the second are greeted with negative attitudes of disapproval, criticism, dissociation, anger, condemnation—*i.e.* various forms if ill will on a scale that continues up to open hostility. These attitudes are in effect preparednesses for certain actions, and as such can easily emerge in overt activity. The hostile attitude, for example, can break out in verbal aggression (rebukes, insults) or physical, possibly violent, reactions (boycotts, persecution, assault, confinement, killing).

It is therefore part of the binding nature of a normative system that to brand an act as a breach of that system, as an offence, is not simply to make a statement about something that has happened, but

[8] Concerning the concept of right, see, *e.g. On Law and Justice*, para. 36, and "Tû-Tû," 70 *Harvard Law Review* (1956/57), pp. 812 *et seq.* In this essay I depict a primitive people who have the idea that in certain cases of the infringement of a taboo there arises tû-tû. I try to show that although this word is empty in the sense that it does not correspond to any phenomenon in the world, it can still function meaningfully in this people's language. The purpose of the fable is to show that the same is true of certain legal concepts, such as "ownership." By a "tû-tû" concept I mean a concept of this kind.

also to demand that this act be met with disapproval and ill will. It would simply be a contradiction to say: you have acted immorally, but I do not disapprove of what you have done, nor do I expect others to do so.

With this background, then, we can begin to understand what is meant when we say that someone incurs guilt through his offence. It is that he has thereby brought himself into the situation where, by virtue of the normative system that he has violated, he is to be shown ill will in the form of disapproval or more tangible reactions. He owes it to society, one might say, and especially to the injured party, to be subjected to their ill will and to afford them an outlet for their anger.

2. Guilt Feeling is Self-Directed Reprobative Anger

The interpretation we have offered of the concept of guilt is the key to understanding guilt feeling or bad conscience.

We have seen that a statement of guilt is objective in the sense that it expresses a given normative system's requirement that a violator be met with reproach and ill will, provided the mental circumstances are not of the kind that exonerate him, for this requirement is quite independent of the fact of whether the man himself has or does not have feelings of guilt. A normative system can only be said to "exist" or "be in force" on the assumption that it is accepted as binding by the great majority of the society. But if now the violator belongs to those few who do not accept the system he has violated, he will have no feelings of guilt. He will experience the disapproval and ill will that surrounds him, and the physical sanctions to which he may be exposed, as manifestations of arbitrary power, unpleasantnesses that he must put up with as best he can, on a par with other hardships and misfortunes in life. Thus it was with those who, during Hitler's régime, were thrown into concentration camps, persecuted and tortured because they defended human freedom and law. They broke the law which was Hitler's will, but they felt no guilt.

It is quite otherwise when the perpetrator of the deed would in calm consideration, accept the norm he has infringed. That means that if another person had done what he himself has done, he would have felt ill will and anger against that person. It cannot make any difference that it is now himself who is the perpetrator—except of course if there are special circumstances which justify or excuse the deed and warrant an exception in his case. It is true, indeed, of all normative judgments that they depend on the fulfilment of the criteria of the norm but not on the individual circumstances and characteristics of the perpetrator himself. If the fulfilled criteria give

no basis for a distinction it matters not one whit whether the perpetrator is called Peter or Paul.

It follows that a person who has violated a system whose validity he himself recognises (*i.e.* experience as binding) in calm reflection, once the heat of the moment of action has subsided, must disapprove of his own conduct and become angry with himself. He must harbour with regard to himself the same feelings of anger, astonishment, sorrow or indignation that he would feel for another were he to have acted in the same way. The tendency to hostile aggression will be directed against himself. A man who feels guilty is like a house divided against itself. It is as if he suffered from acute schizophrenia in a definite part of his mind. He is somehow unable to find his identity. Is he the same person as the one who committed the misdeed? " How could I have done it? " he asks himself. He knows, at the same time, that he is the object of more or less cool feelings on the part of his social environment, especially that part of it most directly affected by his action. The warm ties of society are broken; he is in some respect a social outcast. He lives in conflict with his neighbours and himself.

Closely tied to guilt feeling is repentance. There is remorse at the violation, and a desire to retrieve the situation so far as that is possible, to put to rights what one has destroyed. Naturally, what has been done cannot be undone, but that does not mean that nothing can be done to repair the damage. We talk precisely of reparations when subsequently to an act of aggression the aggressor brings about a situation which is to some degree similar or equal to that prior to his aggression—*i.e.* a *status quo ante bellum.* To what degree and in what way reparation is possible varies a great deal with the type of violation. Physical injury or damage to property can be compensated. But this is less easy in the case of offensive behaviour or the occasioning of mental torts and insults, though in these cases the demonstration of repentance can itself have a clearly remedial, restitutive effect. For the guilty party in this way admits his guilt and acknowledges the rightness of his neighbour's wrath. He shows that in an important way he is not the same person as the one who committed the offence and gives an assurance that in future he will try to avoid repetitions. A demonstration of repentance has a particularly strong restitutive effect when the guilty man stresses his acceptance of the rightness of his neighbour's wrath by asking him to desist from it, that is by asking for his forgiveness.

The feeling of guilt will acquire a different character depending on whether the morality which the guilty person recognises has the character of an external, authoritative system of rules (divine will, the canon law, the views of one's neighbours) or of a personal

autonomous morality of conscience. This can be interestingly illustrated by the history of religion.

Sin is a religious concept. In its central meaning it designates transgressions which acquire their distinctive flavour by being understood as breaches of divine law.[9] For a primitive, authoritarian morality the binding power of this law does not depend on its content, that is, not on the intrinsic rightness of its commandments, but on the blind caprice of the divine will. This amounts to saying that the highest moral norm is a demand for blind, unconditional obedience, and all sins but variants of the one: disobedience of God, defiance of His will, rebellion against His dominion and power.

Views of this kind are common in primitive religions.[10] Within our own culture we see it at its clearest in the Pentateuch. Sin came into the world when man defied God's altogether arbitrary and unreasonable commandment not to eat the fruit of a particular tree which would give him knowledge which God himself possessed. Sin is disobedience, self-will, self-determination,[11] and for this sin Adam and Eve and their descendants were most cruelly punished for all time. We are all supposed to inherit at birth the burden of sin and God's wrath.

The demand for obedience, blind submission to the will of "the leader," pervades the Old Testament. Abraham is tested and rewarded because he is willing in obedience to God's command to kill his only and beloved son, Isaac.[12] God concludes a pact with the people of Israel which makes them His chosen people, enjoying His special favour so long as they obey His summons.[13] The negative counterpart to the demand for obedience is the prohibition against worshipping other gods. The first of the Ten Commandments says: "Thou shalt worship no other God." This commandment is repeated time and again, along with condemnations of idolatry as the gravest of all sins.[14] The golden calf in itself was an altogether innocent affair, a merry diversion with song and dance. The sin lay exclusively in the defection, the defiance.

The God of the Old Testament is a cruel and terrible God. He

[9] *Cf.* J. Hastings, *Dictionary of the Bible*, 1899–1904, Vol. IV, p. 528.

[10] Edward Westermarck, *The Origin and Development of the Moral Ideas*, 2nd ed., 1924–26, Vol. II, pp. 639 *et seq.*; *cf.* Vol. I, pp. 193 *et seq.*

[11] But not in Greek thought. Zeus and the other gods protected morality but they did not dictate it. The good was not good because the gods willed it; they willed it because it was good. *Ibid.* Vol. II, pp. 713, 732 *et seq.*

[12] Gen. 22: 12; *cf. e.g.* Exod. 19: 5; Exod. 20; Lev. 26: 13 *et seq.*; Deut. 8: 10–11. The terminology is taken from the King James Version.

[13] Exod. 19: 5.

[14] *e.g.* Exod. 32: 10; 34: 14; Lev. 10: 1–3; 26: 1; Deut. 12: 1–3; 13: 1 *et seq.*; 30: 17; 32: 16 and 21.

who sees Jehovah must die.[15] Thus must one verily fear God. He is a devouring flame, a jealous God.[16] He is a mighty warrior, the Lord of Hosts, King of Kings. Though the kings of the earth take council in their vanity against Him, He will break them with a rod of iron and dash them in pieces like a potter's vessel. In the day of His fierce anger He will shake the heavens.[17]

Against someone who disobeys God His wrath knows no bounds. God is gripped in paroxysms of rage worse than those of Hitler. Deliberate transgression of the Law knows only one punishment, death, often associated with the most frightful affliction and suffering: fever, pestilence, consumption, visitation by wild beasts, and hunger that drives people to eat the flesh of their own children.[18] Korah's rebellion is punished by the earth opening up and swallowing all his kin, and fire comes from The Lord and consumes 250 men who have brought their censers to offer incense.[19] On another occasion God punishes idolatry by letting 24,000 people die of the plague.[20]

God's punishment is inflicted not only on the guilty. Often God's wrath is kindled against the people of Israel because of the sins of individual persons.[21] God says that He is a jealous God who will punish the third and fourth generations for the iniquity of their fathers.[22] The inherited sin means that because of the Fall of Adam and Eve we are all guilty and doomed to damnation and punishment.

Every transgression is a sin that arouses God's wrath, even if it is accidental. But in this case there is a possibility of propitiating God by offering Him gifts (guilt- or sin-offerings) and praises which show the sinner's humble obeisance.[23] Sometimes Moses is able to talk God out of doing the things which in His anger He meant to do.[24]

In this way the Pentateuch paints a living picture of guilt feeling (consciousness of sin) clearly arising from a harsh authoritarian morality. The burden of guilt is simply fear of the punitive vengeance of the authority's power. The picture shifts, however, when we read the prophets. There is no peace to the wicked, says the prophet Isaiah. Therefore, says The Lord: " Behold, my servants shall sing for joy of heart, but ye shall cry for sorrow of heart, and

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[15] Exod. 33: 20.
[16] Deut. 4: 24.
[17] Isa. 2: 12; 13: 13; 42: 13; Ps. 2.
[18] Lev. 26: 14 *et seq.*
[19] Num. 16: 1 *et seq.*
[20] Num. 25: 9.
[21] *e.g.* Exod. 32: 10.
[22] Exod. 20: 5; 34: 7; Num. 14: 18.
[23] Lev. 4–7.
[24] Exod. 32: 14.

shall howl for vexation of spirit." [25] The feeling of guilt is thus sublimated into a torment of conscience. Its weight consists no longer merely in fear of punishment, but in the soul's anguish at feeling itself separated from God and in conflict with itself and its fellows.

Guilt can be experienced in different degrees. Compared with the Jewish tradition, there seems to be in Christianity a tendency to intensify guilt feeling. This may have something to do with the fact that while Jewish morality was legalistic, that is, confined to precepts with a definite and practicable content, Christian morality finds expression in high-flown ideals of universal goodness and love, which can never be fulfilled, but at most serve as blinking lodestars guiding us to far-off goals. Consequently we are all sinners before God, all guilty. From this it is no great step to the feeling that we are all guilty in everything.[26] But such an all-encompassing guilt feeling threatens to cancel itself. Treating everyone and everything alike excludes discrimination and practical consequence. When things are *so* wrong (and only God's mercy can save us) a little sin more or less makes no real difference.

The intensity of the feeling of guilt and the way of alleviating it also varies with different types of personality. There are men of an intraverted, brooding type who not only experience guilt as the worst pain—sorrow of heart and vexation of spirit, as Isaiah said—but also consider it their constant duty to keep this feeling alive. An inconstant and lukewarm feeling of guilt becomes a new sin bringing with it a new consciousness of guilt. From here it is no great distance to clear-cut mental sickness in which the patient is unfitted to live his own life.

A person of this type will not only be tortured by the special pain of guilt actually incurred; his painful broodings will, perhaps in most cases, relate to purely imaginary guilt. Where, say, he has been the cause of some accident but without being guilty of causing it—it was a sheer mischance—he will continue to speculate over what he might have done to avoid it, and be unable to stop accusing himself, thinking over the possibilities, judging himself guilty. Perhaps a child ran suddenly into the road from behind a parked vehicle, so that he, the driver, ran over and killed him. If he has driven with all due care, he is not guilty according to the general view which is also that which he would apply to others. A normal man will accept the same judgment as to his own act. He will be distressed over what has happened, distressed that he was a pawn in the complex play of events that led to the unforeseeable accident.

[25] Isa. 57: 21; 65: 13–14.

[26] See the quotation from Dostoevski on p. 17 below, note 6.

But the man obsessed with guilt cannot be content with this. In imagination he will go over a whole range of " ifs " which might have prevented the accident. *If* he had left home a little earlier, *if* he had driven a little more slowly, *if* he had braked a little sooner, etc. And despite all the rational arguments against it, he will be unable to rid himself of the feeling that, in spite of everything, he is guilty. It may end in him taking his own life.[27]

There is another, perhaps simpler but also more healthy and easy-going type, who, without wanting to shirk guilt or the purgatory of remorse, nonetheless sees this as a test to be lived through and overcome in order to learn to do better in the future. Guilt is not experienced as a break with God which brings damnation, but as recognition of a departure from the right road, a recognition whose value lies in its ability to stimulate a desire to return to the right road. Repentance or remorse are directed to the future rather than to the past. Their fruit is not self-accusation and self-condemnation in themselves, but the firm intention to do better. When one has settled one's account one goes on to the next item on the agenda.

Finally, there is also an extreme type as counterpart to the man obsessed with guilt feeling. There are men for whom " guilt feeling " and " pang of conscience " seem to be empty phrases. Such people seem to be entirely without the compass needle of conscience, and to be unable to internalise the disapproval shown them by their social environment. We call them psychopaths. These too are unfitted to live their own lives, but in a way other than the guilt-ridden religious neurotic. While the latter, due to his pathological inhibitions, ends up in the nerve clinic, the psychopath, due to his pathological lack of inhibitions, ends up in prison or protective custody.

Shame is related to guilt but is a wider concept. One can be ashamed of things that one does not feel guilty about, *e.g.* for being deformed, having bad teeth, behaving awkwardly, making stupid remarks, etc. " He has brought shame on us," say the parents about a child who has gone astray and not lived up to their expectations. For shame, unlike guilt, also effects those who feel solidarity with

[27] A case of this kind is depicted in detail by Arthur Hailey in his novel *The Airport*. An air-traffic controller leaves his radar screen to go to the toilet, and is replaced by a less qualified observer under the supervision of a superior. Everything is done according to the official regulations. But the air-traffic controller spends longer in the toilet than necessary. While he is away his substitute overlooks certain indications with the result that a terrible aerial collision takes place. In an official inquiry the controller is completely exonerated. But he cannot exonerate himself. He continually hears in imagination a little girl's scream which came over the radio. And he cannot help thinking that *if* he had gone back to his post immediately the accident would not have occurred.

the person who has exposed his shortcomings to the world. One feels shame for whatever detracts from one's honour and self-respect, for whatever lowers one in the esteem of others. One's morally bad actions also come into this category, of course, but shame is not, like guilt, confined to these.

The particular use of "shame" expressions in connection with sexual matters points to something central in the concept. Shame has something to do with exposure. The feeling of shame arises when one's flaws and weaknesses, whether bodily, mental, or moral, are brought to the view of others. Shame is linked with embarrassment, bashfulness and inferiority. The man who is ashamed wants to avoid other people's eyes; and to teach the child to be ashamed, one makes him stand in the corner with his face to the wall.

The reaction of the social environment corresponding to the feeling of shame is not disapproval and anger but contempt, scorn, disdain, derision, and ridicule.

Can one then not be ashamed in loneliness? Can not one, when alone, say to oneself: I am ashamed? Yes, but only in this way: that one imagines one's weaknesses publicly displayed and feels that in that situation one would not meet others openly.

CHAPTER 2

ON RESPONSIBILITY

1. EXAMINING THE CONDITIONS OF RESPONSIBILITY IS NOT THE SAME AS ANALYSING THE CONCEPT OF RESPONSIBILITY

THERE is a considerable literature on the concept of responsibility in the legal and moral sense.[1] For the most part this literature is concerned with the conditions under which a person can be held responsible. It seems clear that the basic condition is that an offence is alleged to have taken place—an immoral act or a crime has been committed. When someone is held responsible it is always on the grounds that someone has contravened a certain normative system, done something reprehensible or prohibited, and which therefore prompts the reaction in which being held morally or legally responsible consists. The first step in this reaction is to call the person responsible to account, to demand a more detailed explanation from him of what has taken place. If this leads to the assumption that a number of conditions, the conditions of responsibility, are fulfilled, the accused is found guilty and liability established: he receives censure or, in the legal context, is sentenced to some kind of punishment, compensation, or other form of sanction.

But who is it that must be held responsible in the way described for an alleged violation? Who is responsible in the sense that it is precisely he who is to answer (to respond to) the demand for an explanation, and defend himself against the demand that sanctions be applied to him? Normally it is the person who is presumed to have committed the offence, that is, who has carried out the reprehensible or illegal act. Normally one bears responsibility only for

[1] Besides the current handbooks on penal law and ethics we can mention, *e.g.* the following: Harald Ofstad, *The Freedom of Decision*, 1961; Herbert Morris (ed.), *Freedom and Responsibility*, 1961; H. L. A. Hart, *Punishment and Responsibility*, 1968; various contributions in Sidney Hook (ed.), *Determinism and Freedom in the Age of Modern Science*, 1958; J. J. C. Smart, "Free Will, Praise and Blame," *Mind*, 1961, pp. 291 *et seq.*; John Charvet, "Criticism and Punishment," *Mind*, 1966, pp. 573 *et seq.*; L. Kenner, "On Blaming," *Mind*, 1966, pp. 238 *et seq.*; Oliver Wendell Holmes, *The Common Law*, 1923, pp. 1 *et seq.*; J. L. Austin, "Ifs and Cans," *Philosophical Papers*, 1961; Gilbert Ryle, *The Concept of Mind*, Peregrine ed. 1963, pp. 69 *et seq.*; A. C. MacIntyre, "Determinism," *Mind*, 1957, pp. 28 *et seq.*; J. Wilson, "Freedom and Compulsion," *Mind*, 1958, pp. 60 *et seq.*; Haskell Fain, "Prediction and Constraint," *Mind*, 1958, pp. 366 *et seq.*; Antony Flew, "Determinism and Rational Behaviour," *Mind*, 1959, pp. 377 *et seq.*; R. C. Skinner, "Freedom of Choice," *Mind*, 1963, pp. 463 *et seq.*; P. H. Nowell-Smith, "Ifs and Cans," *Theoria*, 1960, pp. 85 *et seq.*; Richard Taylor, "I can," *Philosophical Review*, 1960, pp. 78 *et seq.*

one's own actions (or omissions). But it can happen in certain instances that a person must accept responsibility for what others have done. If *A* has helped *B* to commit a crime or misdemeanour, or if *A* has failed to perform a duty which requires him to instruct or supervise *B*, *A*'s responsibility for the actions of *B* can be traced back to his own conduct. But there are also cases where *A* must answer for what *B* has done in which there is no question of complicity or negligence. For example, an innkeeper may be held responsible for unlawful acts which occur in his inn, though without being personally in any way to blame for them, *e.g.* for the serving of alcoholic drinks to the under age; or a minister for acts within his jurisdiction, *e.g.* the leaking of confidential information. One speaks in such cases of vicarious responsibility.[2]

Once it is established that a certain person is the one who in this sense is accountable for a violation, in that it is he who can be called to account before a moral or legal court, the next question is to decide whether he further fulfils the necessary and sufficient conditions for incurring liability, which amounts to saying being subjected to a sanction (reproach, disapproval, moral indignation, anger, compensation, punishment). For it is a deeply entrenched traditional view that besides the objective conditions of violation which consist in being the person who is accountable for it, certain subjective or mental requirements must also be fulfilled for being liable to a sanction. These requirements are collected under the name of *guilt*. In a legal context it is usual in Continental law to divide these requirements or conditions into two groups corresponding, respectively, to the requirements of imputation and imputability, while where common law is practised it is customary to combine them under one requirement called *mens rea*. The imputation requirement is to the effect that the offences have been committed under certain psychological circumstances, having to do mainly with will and understanding, which particularly link the action to him as an agent and not to accidental features of the situation. Normally *intention* is required, sometime *negligence* is sufficient, as a condition of punishment. The imputability requirement on the other hand, excludes liability when the mental state of the offender departs in some significant degree from that of the normal adult. It may be a matter of a temporary or long-term mental disorder (insanity etc.), lack of mental powers (mental retardation etc.), or simply youth.

[2] Hermann Mannheim, in "Problems of Collective Responsibility," *Theoria*, 1948, pp. 144 *et seq.* and 158, discusses the systematic and effective way in which vicarious responsibility was made to operate in German concentration camps: "The idea was that every prisoner ought to feel responsible for any act committed by any other prisoner."

The above sketch of the conditions of responsibility is made primarily with the legal context in mind. But corresponding conditions can also be formulated for moral accusations and judgments, although, because moral norms and decisions are not enshrined, as legal ones are, in objective institutions and authoritative formulations, their conditions cannot be stated with the same firmness and precision. Responsibility, too, according to current moral views, presupposes *guilt*, that is, there are certain requirements that the agent's mental condition must satisfy before he can be condemned morally. Moral judgments, too, recognise excuses based on the agent's mental attitude to his act, *i.e.* the failure of the imputation requirement (*e.g.* " I did not do it voluntarily," " it was an accident that I could not prevent," " I could not help it "), and similarly, excuses based on his abnormal mental condition, *i.e.* failure of the imputability requirement (*e.g.* " I was quite out of my mind with fear "). But what is remarkable and interesting is that it is not with these excuses, so familiar in matters of law, that the very copious philosophical literature on the conditions of moral responsibility deals but with another excuse which, though also known to law, plays only a subordinate role and is only occasionally invoked, namely that the action was done under compulsion. It is thought that moral responsibility presupposes guilt in the sense that the agent *could have acted otherwise* than he did at the moment of carrying out the reprehensible deed. If this is not the case, if he was compelled to act in the way he did, he cannot be morally condemned. This gives rise to a number of problems which call for logical and philosophical clarification. What does it mean to say that a person could have acted otherwise than he did—that is, that the course of events and the existing facts might have been different from what they were and are? What meaning can we give to this? How, in particular, can it be established not only that *A* did not in fact resist a temptation, but further that he could not have done so, that it was not in his power to act as morality demands? From here we move into deeper water: is it at all meaningful to talk about the possibility of something being other than it is, especially about the possibility of someone acting in a way other than he did? It one takes a philosophically deterministic line and assumes that everything which happens does so according to inexorable laws which in principle (*i.e.* given the necessary information and intelligence) allow the prediction of all events, including human actions, must one not accept the conclusions that all moral censure is meaningless and all talk of moral responsibility concerned with an illusion?

It is mainly these questions—as I began by saying—that are

discussed in the available philosophical literature on responsibility. The writers generally think they are, even profess to be, analysing the concept of responsibility. But what they are really doing is to examine a basic condition of responsibility, namely that a person who is responsible for what he has done must have acted from "free will." They are not concerning themselves with the *meaning* of the concept of responsibility, but with the *criteria* (or one of them) for the presence of responsibility. They look for the conditions under which a person can be said to be responsible for a certain action. But the result of this investigation provides no information concerning what it *means to say* that the person is responsible for the action.[3]

I am firmly convinced that a satisfactory treatment of the problem of guilt as a condition of responsibility is only possible if one first undertakes a thorough analysis of the concept of responsibility. I believe further that certain fundamental obscurities and mistakes in the existing literature are due precisely to lack of such an analysis. The purpose of the present essay is to contribute to a clarification of the concept of responsibility and thereby establish the importance of such an analysis for the problems concerning guilt as a condition of responsibility.

2. To Bear Responsibility ("Colloquially: to be Responsible") for Some State of Affairs is to be the Person who can be Rightfully Brought to Account for it

It appears from everyday as well as juridical usage that responsibility is something one has *for* something *to* someone. One is responsible for a murder, for a lie, for there being (or not being) order in the classroom, etc. One is responsible to a court in the widest sense, whether to the State's professional court of law, the court of public opinion, parliament as the political judiciary, one's fellow men, or to conscience. Moral judgment, just like legal ones—and not least those made at the forum of the individual's conscience—are the outcome of a *trial* (Kafka). The accused in this trial is the person who is prima facie guilty because it was precisely he who did the "wrong" (morally reprehensible or illegal) deed, *actus reus*; or because his relationship with others is such that he must bear responsibility for their actions. The trial is to decide whether the defendant can offer in his own defence such justifying circumstances (especially self-defence, necessity, and consent) or subjective excuses (absence of the conditions of imputation or

[3] An important exception is Hart, *op. cit.*, pp. 211 *et seq.*; *cf.* pp. 264 *et seq.* which have not been without significance for my own presentation here.

imputability) as would cause him to be found not guilty.[4] The connection of responsibility with a trial shows that to be responsible for something can mean basically two different things corresponding to the two steps in the trial: accusation and judgment. In the first place being the person who can, when the situation demands, *be rightfully accused* (required to answer, give account); secondly, being someone who also satisfies the conditions of guilt and can therefore *be rightfully sentenced.*

In this section I shall discuss in more detail responsibility in the first of these two senses. Ordinary language marks the distinction between the two senses by having an expression, " to be responsible for," which can be used indiscriminately for both senses, and another, " to bear responsibility for," which can only be used about responsibility in the first sense. For clarity, therefore, I shall consistently use the expression " to bear responsibility for " when talking about responsibility in the first sense, and the expression " to be responsible for " when talking about responsibility in the second sense.[5]

It will be useful to adopt special terms for the two forms of responsibility. Since bearing responsibility for something means being the person who must account for it, it will be appropriate to use the term " accountability " (and correspondingly " to be accountable ") to designate responsibility in the first sense. And since being responsible for an act means being the person who may be sentenced for having committed it, let us refer to this form of responsibility as " liability " (and correspondingly " to be liable ").

To " bear responsibility for " a certain state of affairs means, then, to be the one who must account for the state of affairs before a certain forum. Clearly it is one's own actions that one must primarily bear responsibility for. Indeed this is so self-evident that it does not need to be said; consequently the expression " accountability " tends to be used mainly for where responsibility is borne for the conduct of others. If the person who is answerable in this case is also liable we talk of *vicarious responsibility.*

Some people, for example Dostoevski,[6] are capable of experiencing

[4] I am ignoring the question of proof of the accused's having committed the offence he is charged with.

[5] This naturally does not apply when I simply quote current modes of speech.

[6] " ' Mother, little heart of mine,' he said (he had begun using such strange caressing words at that time), ' little heart of mine, my joy, believe me, everyone is really responsible to all men and for everything. I don't know how to explain it to you, but I feel it is so, painfully even. And how is it we went on living, getting angry and not knowing.' " From *The Brothers Karamazov*, quoted from Herbert Morris (ed.), *Freedom and Responsibility*, 1961, p. 1.

guilt feelings of a mystical kind which lead them to think they must bear responsibility (and be responsible) for everything that happens in the world, for everything anyone does. Jesus, too, is said to have borne the sins of all mankind. But if we stick to a more mundane and bourgeois way of thinking it is only in exceptional cases that one person is presumed responsible for what other people do.

Accountability for the actions of others occurs particularly in the context of co-operation between subordinates and superiors, on different levels. A captain of a ship, for example, can be considered to bear responsibility for the well-being of his passengers, and for maintaining quiet and orderliness on board. This means that the captain is the person accountable to a certain court (the passengers, the shipping line) for what the crew do on board. Passengers and owners have a right to insist on the captain making an investigation, explanation, restitution—and possibly also a reallocation of responsibility, for it is not certain that the captain is also liable for the crew's actions, *i.e.* vicariously responsible for them.

Vicarious responsibility of this kind arises in law, particularly where there is a strong case for effective prevention. Thus according to Danish law the editor of a periodical printed in Denmark is responsible for the periodical's content when the author's name is not given, regardless of any direct guilt (complicity) or indirect guilt (lack of care in the hiring, instruction, and supervision of employees) on his part. But such cases are rare and they go against the contemporary moral view which scarcely sanctions vicarious responsibility in any circumstances.[7]

Accountability for the actions of subordinates will normally be linked in part with the leader's responsibility for his own actions in fulfilment of the duties incumbent on him as leader, and in part with a responsibility resting with the subordinate *to* him as the latter's superior, which can again be partly accountability for the actions of those subordinate to *him* in turn. Think, for example, of the chief engineer on board a ship who must bear responsibility to the captain for all matters relating to the engine room. Often the rungs in the ladder of command are also steps in a series of courts of responsibility.

Ordinary expressions of the form "*A* is responsible for *x*" take on different meanings depending on what "*x*" stands for.

If *x* is some offence that has been committed, *e.g.* a murder, "*A* is responsible for *x*" will normally mean that *A* is liable, that is, guilty of the murder.

If *x*, on the other hand, is some goal which people desire to reach, a function which is to be performed, or the like, then the

[7] Law of the Press, No. 147 of April 13, 1938, para. 6.

expression "*A* is responsible for *x*" is used to pick out *A* as the person accountable should the goal not be realised, the function not performed satisfactorily, etc. If *x* is some single, definite action which *A* is expected to carry out, the responsibility referred to is simply that for his own action. The same is true where *x* is a simple function which can be expected to be performed directly by *A*, *e.g.* to see that the gates are closed every night. But if *x* is a more general aim (the welfare of the passengers, maintenance of order, procuring of provisions for an army, punctual completion of some building project, etc.) or function (*e.g.* that performed by the postal, telegraph, and other "services") which cannot possibly be thought to be achieved or performed directly by *A*'s own actions, then to say that *A* is responsible for *x* means that *A* is entrusted with a leader's, or manager's responsibility of the kind mentioned above, that is a combination of accountability for the actions of others (subordinates) and liability for his own actions (management and supervision).

Some illustrations. To say: "Eichmann was responsible for the deaths of two million Jews" can mean different things depending on the context in which it is made. It *can* mean that Eichmann was accountable to Hitler for performing the function of annihilating two million Jews. But the most obvious interpretation, especially when the statement occurs in the man's trial, is that Eichmann fulfilled all the conditions required for his actions being punishable and that he could therefore be held liable for these deaths. In the first case "the deaths of two million Jews" designates an aim to be realised, in the second a crime to be punished. When *A* hands a letter to *B*, who undertakes to post it, and says: "now, you are responsible for this letter catching the post," *A* obviously means to assert that it is now *B*'s duty to post the letter promptly and that he is therefore accountable for its being posted in good time. If *B* is guilty of not sending it promptly he is also liable. Here it is a simple case of *B*'s responsibility for his own action. The same is true when one says it is the janitor who is responsible for (*i.e.* bears responsibility for) the gates being closed at night. Saying this serves merely to identify the janitor as the person with whom a certain duty lies. If, on the other hand, one says that the chief constable of Brighton is responsible for law and order in that city, or that the prison director is responsible for the prisoners not escaping, or that the governor of a colony is responsible for the lives of two million people, or that the Security Council is responsible for the maintenance of international peace and security—in all cases of this kind it is a matter of a managerial or functional responsibility, an

accountability, partly for one's own actions (management and supervision) and partly for those of others.

It is clear that managerial accountability for one's own actions becomes also liability if duties are neglected and the conditions of guilt fulfilled. On the other hand, it is unusual, as we noted, for managerial accountability for the actions of others to be also vicarious liability. (Recall that if there is complicity or failure to instruct, supervise, and control, a manager is liable for his *own* conduct.) These relationships can be illuminated by means of the rules of ministerial responsibility in politics and law in a parliamentary democracy.

Politically a minister is accountable to Parliament for all public affairs that fall within his jurisdiction (the area of his administration). This responsibility is explicitly guaranteed in the Danish Constitution, Article 53, which says that any Member of Parliament can, with its consent, take up any public business and demand the minister's account of it. The minister, even if the matter in question is not one with which he has been personally concerned, cannot waive the inquiry as having nothing to do with him or refer the inquirer to a subordinate authority who is directly concerned with the matter. Furthermore, he could be made politically liable for his own actions, that is, he could be given a vote of no confidence if he has made some blunder. But there can also be instances of vicarious political responsibility for the actions of subordinates. It is not unknown for a minister, like a general who has suffered a serious defeat, to be accorded a vote of no confidence just because some abuse or scandal has occurred within the area of his administration, even if he himself can in no way be blamed for its occurrence. It is an ancient custom for a people to kill a leader under whose rule misfortune afflicts them. Legally, however, a minister, according to Danish law, can be held responsible for the actions of others—the King, fellow members of the Cabinet and subordinates—only in accordance with general rules concerning complicity and negligence (*cf.* the law concerning ministerial responsibility No. 117, of April 15, 1964). Consequently vicarious responsibility does not arise here.

3. To be Responsible for Something Means Being the Person who can be Rightfully Sentenced for it. "Responsibility" is a "Tû-Tû" Concept

I now go on to discuss responsibility as liability, that is the use of the sentence "*A* is responsible for *x*" in order to state that *A* fulfils all the conditions, subjective and objective, which are jointly necessary and sufficient for his being convicted and sentenced. It

is clear that liability presupposes accountability. *A* can only be rightfully convicted of an offence under the presupposition that he can be rightfully made to account for it.

When the sentence "*A* is responsible for *x*" is used in this sense "*x*" always stands for an offence, a legally punishable or morally condemnable action. In the following, to avoid continual double reference to both legal and moral contexts, I shall have the former primarily in mind. We can discuss later how far the claims made for the legal context can be taken *mutatis mutandis* to apply to the moral one. Further, and also for the sake of simplicity, as far as legal sanctions are concerned I shall confine myself exclusively to punishment; and also ignore the fact that it is possible that *A* is not only rightfully punishable, but that he must actually be punished, in the sense that the authorities have a duty to hold him to account and convict him.

Bearing these simplifications in mind, one can say that the expression "that *A* is responsible for *x*" means the same as "that *A* can be rightfully punished for *x*." I now raise the question of what more precisely is meant by "rightfully" here. What I say about this applies equally to accountability, *i.e.* to the expression, that *A* is rightfully accountable for a certain state of affairs.

That something is done *rightfully* implies (in the juridical context) a reference to a given presupposed legal system, *e.g.* the Danish legal system. It means that according to the rules of this system the course of action in question is allowed, possibly also demanded. To say concretely that a person *A* can rightfully be punished for the act *x* is thus the same as referring to an actual legal situation arising when the general rules of the legal system are applied to the existing facts. To claim that *A* is responsible for *x* is to claim that there are certain facts (*e.g.* that *A*, in a way which makes him imputable, has murdered *B*) which according to the Danish penal law now in force make him punishable.

It is this connection between conditioning facts and conditioned legal consequences which is expressed in the statement about responsibility. The connection is not a "natural" (causal or logical) one, but exists only by virtue of the legal rule in that the facts are judged on the basis of legal rules. Responsibility is an expression of a legal judgment, and the latter consists of a directive (normative) demand that occurs as the conclusion of an inference: since such and such facts obtain (in short: *A*'s guilt), and since the law is such and such, it follows that *A* is punishable. Accordingly, *A*'s being responsible for *x* (according to Danish law) can be described alternatively in terms of a (directive) *demand* that he be punished because he is guilty, or of a *statement* to the effect that such a

demand is a consequence of applying the rules of Danish law to the existing facts. To clarify this further two important points must be made.

(1) We have said that a pronouncement of responsibility is ambiguous; that, on the one hand, it can be paraphrased as a demand, expressed by an injunctive sentence, and on the other as a statement, expressed by a declarative sentence. What does this mean? It means that a pronouncement of responsibility can function in either way depending on the circumstances. We need only touch upon this briefly since the ambiguity is not peculiar to statements of responsibility but is to be found in all statements about concrete legal situations.[8]

Suppose that after *A* has been involved in some brawl his father asks the advice of a lawyer, and that the latter on hearing of the gravity of the situation tells the father that there is no doubt that *A* is responsible for certain infringements of the law. Here the statement of responsibility is purely informative. It tells something about the law which is in force, but it is not in itself a legal statement, a directive of Danish law. The information it conveys simply implies that it is probable that a judge will find *A* guilty if the matter is brought to trial.[9]

When, on the other hand, the prosecuting counsel in *A*'s trial claims that *A* is responsible for a particular breach of the law, his intention is not to inform the judge about the law, *i.e.* to tell him how he is likely to decide the case. The statement of responsibility functions here as a demand for *A*'s punishment. The public prosecutor is not informing about the law, but invoking it. Unlike the lawyer who gives advice, he does not stand outside the proceedings as a disengaged observer passing on information about law; the public prosecutor is not talking *about* the law but talking *in* the law's own language. He is in a sense identifying himself with the legal system and tendering its demands in its name.

(2) Whether a pronouncement of responsibility functions as a demand or an assertion its topic is the connection between guilt and punishment, that is, the connection which in virtue of a legal rule consists in the fact that certain circumstances provide the grounds of *A*'s guilt and thus also of his punishability.

It may be tempting to suppose that "responsibility" denotes one or the other of the connected links, *i.e. either* the conditioning facts (that *A* has culpably committed murder), *or* the conditioned consequences (that he is punishable). The temptation arises because

[8] See Alf Ross, *Norms and Directives*, 1968, pp. 36–37; and *On Law and Justice*, 1958, pp. 6 *et seq.*

[9] *On Law and Justice*, 1958, para. 9.

of a well-established usage that seems to lend support to such a view.

We can suppose, on the one hand, a conversation that goes as follows: " You think *A* is responsible for the old lady's death. Why? " " Yes I do, I consider him punishable because I think it has been proved that it was he that put the strychnine in her coffee and that he suffers from no special mental abnormality which could absolve him of blame."

According to this reasoning responsibility appears to be understood as a *consequence* of the existence of the conditioning facts, that it is taken to be an expression of the legal consequence that *A* is punishable.

But we can also suppose the exchange to have gone as follows: " You think *A* should be punished for the old lady's death. Why? " " Yes I do, because according to the information I have it has to be assumed that it was he (and not *B* who was only a tool for *A*) who was responsible."

Here " responsibility " appears to denote the justification for demanding *A*'s punishment, that is the *conditioning facts.*

However, we cannot take this to mean that the term " responsibility " (as with so many other concepts) has different senses depending on the context of its occurrence. For there is nothing to prevent one using it in both ways in the same context. One can say that *A* is responsible for the old lady's death because he put strychnine in her coffee, and that because he is responsible for her death he is punishable.

It should not be hard to see, then, that the reason for this ambiguity is that responsibility is what I have elsewhere termed a systematically " tû-tû " concept.[10] Our modes of speech make it look as though responsibility were something that comes into existence as a link between conditioning facts and conditioned consequence. There is of course no such link. All that exists is the legal connection between facts and consequence.

The fact that " responsibility " lacks semantic reference does not mean that sentences referring to responsibility are vacuous. Their function is to express the connection between guilt and punishment, conditioning facts and conditioned consequence. They can be used according to context to draw attention to the conditioning facts—guilt—or to the conditioned consequence—the demand for punishment.

[10] Alf Ross, " Tû-Tû," 70 *Harvard Law Review* (1956/57), pp. 812 *et seq.*; *Letture di filosofia del diretto*, Universita di Torino, pp. 45 *et seq.* Spanish translation by Genario R. Carrio (Buenos Aires), 1961; *cf. On Law and Justice*, para. 36.

4. DISAPPROVAL IS THE MORAL SANCTION. CENSURE IS AT ONCE JUDGMENT AND SANCTION (DISAPPROVAL)

In section 3 I said that my account of liability would focus on legal responsibility, and that later we would see whether the results of the analysis applied *mutatis mutandis* to moral responsibility.

In my view they do apply. In moral respects, too, responsibility presupposes that there are norms and so questions concerning their violation, as well as accusations, trials, and judgments—even though none of these are institutionalised as in law. And in this field, too, we can distinguish between bearing responsibility (being accountable) for certain ends being furthered and problems solved (*e.g.* the welfare of one's children), and being responsible (liable) for a misdeed or impropriety.

However, there is one point where the parallel is doubtful; namely, with regard to the sanction to which the accused is subject when he is found guilty.

Let us first look a little more closely at the relation between judgment and sanction in the legal context. In English criminal proceedings a sharp and important distinction is made between *conviction* and *sentence*. The conviction is the decision, usually made by a jury, that determines whether the accused is guilty. The sentence is a decision made by a judge or magistrate on the basis of a conviction as to the punishment (or other legal consequence) to be imposed upon the man convicted. Although Continental law does not make this distinction, either terminologically or procedurally, it is clearly one that can be made in a conceptual analysis of Continental legal usage and practice.

It would be tempting, but mistaken, to suppose that a conviction is a purely assertive or fact-determining act wherein the fact of the accused's guilt is established. As we saw in section 3, to find a person responsible or guilty is something else and something more: it means that one actually invokes the law's demand for punishment. Convicting someone is thus implicitly demanding that he be punished, and it is this demand that is complied with in sentencing him.

How far can this conceptual schema now be transferred to the moral sphere? It is easy enough to find the counterpart to the conviction, namely in the judgment of moral guilt. But there does not appear to be any imposition or administering of a sentence apart from the judgment itself. Is the latter not all there is to it then? Does it not exhaust the truly moral reaction and are not whatever other possible reactions of ill will that may follow merely amoral epiphenomena?

In my view, but contrary to widespread opinion,[11] these questions are to be answered in the negative.

The idea of moral responsibility, no less than that of legal responsibility, is an expression of a normative demand for the tying of guilt to the consequences of guilt, the " punishment " which here is called " disapproval." To brand an action as morally reprehensible, to condemn it, logically implies a demand for disapproval of the action. It would be meaningless (illogical) to say: " I condemn this action morally, but I do not disapprove of it, nor expect others to do so."

On the other hand, it must be stressed that disapproval is not identical with condemnation. An action is disapproved of *because* it is condemned. The disapproval occurs in fulfilment of an implicit demand for it in the condemnation. Whereas condemnation, or the moral judgment, just like the legal one, is an act of thought expressing a meaning, disapproval consists, like the administering of a sentence, of an attitude of ill will or of overt actions which demonstrate and release the ill will for the guilty party that is felt by his social environment.

That this situation is so commonly misunderstood is due to two things. First of all to the fact that subsequent to the moral judgment there is no formal fixing of the form and amount of disapproval. Disapproval comes, it is true, in many shapes and sizes—from gentle reproof or mild remonstrance to various manifestations of dissociation and antipathy, from indignation and resentment to hysterical outbursts of physical violence (lynching)—but the manner in which the demand for disapproval is manifested depends more on spontaneous emotional responses than on formal prescriptions based on recognised standards and measures. Secondly, and in particular, misunderstanding arises because the conviction itself can function as an act of disapproval, that is, it can be—if you like—a self-fulfilling demand. This requires further explanation.

The moral judgment, just like the legal one, can be either " external " or " internal "; that is to say, either a statement about morality or a moral (moralising) pronouncement. Just as the lawyer can call attention to the legal order and its demands without invoking them (see above, section 3), so also can a friend, in an advisory capacity, convey dispassionately and purely informatively how he thinks a certain action must be judged morally. Even if his view is that the action in question is to be morally condemned and is thus one that calls for disapproval, he can let this be known without airing any disapproval of his own. He ventures only a judgment of quality, a marking, just as does the judge at a dog show, an

[11] See below, s. 6.

examiner correcting examination papers, a tea-taster, or an apple-sorter. Just as a bad apple is put to one side because it fails to come up to a given pomological standard, so an action is judged bad because it fails to comply with an accepted moral standard (and there are no extenuating circumstances which absolve the agent from guilt and responsibility). " No," says the friend, " in fact I think you should not have done that." He offers this as a piece of information that might serve as a guide to future behaviour (*e.g.* making an apology), but not to voice any disapproval of his own for what was done. Indeed this would be uncalled for in a situation where he has been approached precisely in an advisory capacity to inform about the moral demands of the case, and not to invoke these demands.

But the picture alters when the judgment of the action is offered as *censure* or *reproach.* The words may be no different " you should not have done that," " it was not right of you," *i.e.* the forms of words in themselves only express judgments of the action. But the context and tone of voice can make it clear that their function here is not informatory, that the words are not intended to say what the demands of morality are, but to bring the demands to bear upon a particular person, to insist upon disapproval and also to give expression to it.

This can be done in all sorts of ways and degrees. Censure always contains an element of emotion, a dissociativeness at least, anger maybe, though not necessarily of a personal nature, but rather on behalf of the values and general order of things which the given morality expresses. Censure contains an element of hostility and aggression which presumably has its evolutionary origin in spontaneous feelings of vindictiveness, but which have now lost much of their self-centred and unreflective character.[12] The anger can give way to resentment, and the aggressive emotions to open hostility, from verbal abuse to the most extreme physical violence. In confirmation I would invite the reader to say aloud the words " What a filthy trick! You louse! " or something similar, as he can imagine using them in a real-life situation. I suspect he will feel indignation and aggression beginning to well up inside him, though of course only as pale shadows of the emotions he would experience were he in earnest.

Censure is therefore simultaneously judgment and sanction, *i.e.* disapproval.[13] This is why people dislike censure. It has the effect

[12] Edward Westermarck, *The Origin and Development of the Moral Ideas,* 2nd ed. 1924, Vol. I, pp. 42 *et seq.*; Oliver Wendell Holmes, *The Common Law,* 1923, pp. 1 *et seq.*

[13] R. E. Hobart has presumably failed to grasp the essentials when he explains blame, praise, and dispraise as a combination of a description and

of a punishment, suffering inflicted because of guilt. And so one's reaction to censure is quite different from that to information. If someone tells you that Napoleon died in 1820, or comes out with some other incorrect statement or theory, most probably you will be disinterested and just let him have it his way, or else observe in a matter of fact manner that Napoleon actually died in 1821, perhaps even say, " No, I'm afraid I just can't accept that." But not if he says you have behaved wrongly or despicably. For censure is an act of aggression which calls either for surrender (admission, apology) or defence (pointing out misunderstandings or misinterpretations of what has taken place, explanation of motives and intentions, interpretations of moral requirements).

5. Consequence: The Traditional Opposition Between Retribution and Prevention as " Aims " of Punishment is Meaningless [14]

In conclusion I shall suggest some of the consequences of the foregoing as matters of general significance for the philosophical-juridical debate on guilt and responsibility.

In the previous section it was explained how moral disapproval performed the same function as punishment. Like punishment, it is a sanction which acts as an impetus to the achievement of that social control of human conduct which is just as much the aim of a moral normative system as it is of a legal one. Censure—being both judgment and sanction—acts, like the legal sentence and its execution, as an instrument for the influencing and directing of behaviour. Through censure the rules of morality are upheld. But as legal rules have been to a large degree developed through judicial practice in courts of law, so too do the ill-defined standards of morality largely acquire their more precise meaning in community life through the " praxis " of censure. Indeed, this is even more the case for morality than for law, because with the former it is only to an insignificant degree, if at all, that one finds a conventional fixing of rules. The limits of what is morally acceptable, *e.g.* of the moral freedom of

certain feelings: " And what are praise and dispraise? Always, everywhere, they are *descriptions* of a person (more or less explicit) with favourable or unfavourable feeling at what is described . . . ," in Bernard Berofsky (ed.), *Free Will and Determinism*, 1966, p. 68. Whatever feelings may accompany a description this latter is and remains, according to its logical nature, a declarative, indicative statement which is either true or false. But censure is neither true nor false, although naturally it can be based on true or false presuppositions concerning what is actually the case. Censure is a directive speech-act with a specific pragmatic function. It can also be expressed in a performative utterance: " I blame you for . . . ," etc.; *cf.* Alf Ross, *Directives and Norms*, 1968, para. 12; *cf.* para. 2, and " Rise and Fall of the Doctrine of Performatives."

[14] *Cf.* below, pp. 60 *et seq.*

action accorded to members of a family, are to a large degree set by censure attempted, accepted or rejected in mutual relationships of the members. It is by hitting back, by attack, defence and the conclusion of peace that the norms of family life become established.

It follows from this that just as it is right to say that censure presupposes guilt in the sense that it is only *justified* where guilt can be assumed (*i.e.* where the accused is justifiably believed to have performed a morally objectionable act in a way and in a state of mind that do not exonerate him from moral blame), so is it true that the *pragmatic function* of censure is its having guiding influence upon behaviour. Censure is justified, on the one hand, by its being a form of retribution (an emotive, hostile reaction) for guilt, but its pragmatic aim (intention, purpose, function), on the other, is to have a guiding, preventive effect upon actions. Exactly the same is true, of course, of punishment as a juridical sanction; and this shows just how meaningless is the deeply rooted traditional question of whether retribution or prevention is the " aim " of punishment. These two are not contraries. Retribution, censure, is an emotional, hostile reaction which in itself acts as a punishment, *i.e.* directively, preventively.

People have quoted *ad infinitum*, and as though it were the truth of the ages, Seneca's dictum that we punish not *quia peccatum est* but *ne peccetur*—that is, not because there has been a wrong-doing, but in order that there should be none. But this opposition is, to put it bluntly, sheer absurdity and only made plausible by failing to note that the prepositions " because " and " in order to " denote logically quite different relations. One punishes *A because* he is guilty of theft, and that means that according to valid law sentencing him is only justified in so far that he is in fact guilty, *i.e.* satisfies the law's objective and subjective requirements for punishment. " Because " prefaces an expression of a justification or ground, and the only good grounds the judge can offer for sentencing a man for theft is that the man in question is guilty of theft. It is no justification for sentencing the man that society or the man himself will benefit from his being punished. It is quite another thing that society has introduced laws for the punishment of theft *in order to* make ownership possible, and consequently in order to combat actions of the kind branded as theft. " In order to " prefaces the expression of an aim, and the only reasonable account of the aim of legislation which prescribes punishment for theft is that one wants to combat actions of this kind.[15] It is manifestly unreasonable to suppose that the penal

[15] In " The Aim of Punishment " (following) I explain more fully that this does not exclude the penal law from being determined by consideration of certain secondary aims and restrictive principles.

laws have been introduced to make it possible for citizens to commit offences for which the state can then exact just retribution.[16]

If it is correct to say, as I believe it is, that punishment and censure as retribution for guilt are sublimated forms of a spontaneous desire for revenge,[17] this provides a confirmation and explanation of what we have said of the preventive function of retribution. For there can surely be no doubt that awareness that someone will avenge himself, just as much as awareness that he will defend himself, has a deterrent effect on the aggressive aims of others. Revenge is, one might say, simply a delayed defence reaction. Is the retaliatory "second strike" on which the nuclear balance of terror is based preventive defence or just retribution?

6. The Question of the Conditions of Moral Responsibility is Normative, but Usually it is Treated in a Dogmatic, Descriptive, not a Moral-Critical Way

I mentioned in the introduction to this chapter that an analysis of the concept of responsibility can be presumed to have some importance for the philosophical discussion on the conditions and possibility of moral responsibility.

In this regard I will claim, in the first place, that it clearly follows from the analysis that the question of the conditions of responsibility is a normative one, that is one which can only be answered on the basis of a certain normative system. Thus it is plain that the question of conditions of legal responsibility can only be answered on the basis of the rules of a definite positive legal system. There is no legal system "as such" existing outside all such historically identifiable phenomena as the Danish law, international law, union rules, or the like. And similarly with regard to moral responsibility and its conditions. Questions about this can only be answered on the basis of a certain given morality. There is no more a morality "in itself" than there is a law "in itself." However, a special difficulty arises in the moral-philosophical debate because, unlike law, morality is not institutionalised and objectified in authoritative stipulations within relatively stable systems. Morality is in principle an individual phenomenon, even though one may talk of certain moral outlooks or views as typical or predominant within a certain cultural group.[18]

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[16] The distinction between the justification of penal legislation and that of its use in a judgment has been pointed to earlier by S. I. Benn, "An Approach to the Problems of Punishment," *Philosophy*, 1958, pp. 325 *et seq.*, and by Hart, *Punishment and Responsibility*, 1968, pp. 3 *et seq.* These authors do not seem to have noticed, however, that the "justification" they speak of indiscriminately means something different in each of the situations.

[17] See above, s. 4, note 12.

[18] *On Law and Justice*, 1958, p. 61; *Directives and Norms*, 1968, p. 93.

What morality is to be appealed to, then, when we are to identify the conditions of moral responsibility? Is it Catholic or Protestant morality? Communist or Capitalist? Chinese or Eskimo? The morality of duty or of utility? Or perhaps the author's own personal morality? Or are there certain presuppositions common to all moral systems, however much the evaluations that one derives from them may diverge?

This question has seldom been raised in the existing literature,[19] but it certainly seems to require an answer before the discussion can profitably proceed. Where, exceptionally it has been raised, the usual procedure has been to settle somewhat indecisively for a presumed *communis opinio* shared by humanistic circles in the Western World.[20]

As a rule, however, people have ignored these fundamental problems and assumed that " moral consciousness "—whatever that may be—requires as a condition of moral responsibility that the agent acted from " free will " in the sense that he could have acted otherwise than he did. And much energy has been spent on subtle analyses of what this requirement in fact amounts to and to discussions of whether it is in principle possible for it to be fulfilled.[21]

Without wishing to deny that these discussions have thrown light on essential problems, I believe that they are by and large unsatisfactory precisely because they have not included any methodological clarification of what the analysis is of, nor therefore of what its results show.

The outcome of an analysis based on the requirements of what writers sometimes call the common moral consciousness can never be other or more than an historical account of the content of a

[19] An exception is Harald Ofstad, *The Freedom of Decision*, 1961, which strongly emphasises the connection between analysis and ethics.

[20] Ingemar Hedenius, " Idén om viljans frihet," *Harald Nordenson 60 år*, 1946, pp. 139 *et seq.*, bases his analysis on " our moral principles " and says (p. 141) that by that he means " the special moral view which is common to myself and many other fairly humane and theologically uninfluenced people within the contemporary Western cultural group " (my translation). Hart, in *Punishment and Responsibility*, similarly operates on the basis of a commonly accepted moral view; see pp. 21, 22, 37, 44, 73, 77, 82, 152, 207, and in many other places where he uses expressions such as " our moral code," " the real moral objection that most thinking people have to . . . ," " utilitarianism of the plain man," " common notions of justice," " many people including myself," and so on.

[21] Especially, *e.g.* P. H. Nowell-Smith, *Ethics*, 1954, pp. 273 *et seq.*; " Ifs and Cans," *Theoria*, 1960, pp. 85 *et seq.*; J. L. Austin, " Ifs and Cans," *Proceedings of the British Academy*, 1956, reprinted in *Philosophical Papers*, 1961; Gilbert Ryle, *The Concept of Mind*, Peregrine ed. 1963, pp. 69 *et seq.*; C. A. Campbell, " Is ' Free Will ' a Pseudo-Problem? " *Mind*, 1951, pp. 446 *et seq.*; G. E. Moore, *Ethics*, 1912, pp. 122 *et seq.*; Richard Taylor, " I can," *Philosophical Review*, 1960, pp. 78 *et seq.*; M. R. Ayers, *The Refutation of Determinism*, 1968, pp. 119 *et seq.*

certain positive morality prevalent among twentieth-century philosophers. The outcome is in every way comparable to an account, say, of the requirements of subjective guilt which the current Danish law lays down as conditions for the imposition of punishment. In the one case as much as the other the analysis is of a simple dogmatic-descriptive nature.

But the interesting discussion begins, in my view, once the results of this dogmatic-descriptive analysis are to hand. When we know what the Danish legal rules for punishable guilt are, the legal-political question then arises as to whether these rules can be accepted as rational and appropriate when they are critically considered and evaluated by measuring their actual social effects against certain objectives, evaluations, and principles. It is the legal-political discussion, not the dogmatic presentation of current law, which opens up perspectives of philosophical interest.

The same, I think, applies to the discussion of moral responsibility and its conditions. Once we have the dogmatic account of " the contemporary moral view " to hand, the moral-political question can be tackled of whether this view can stand up to a critical evaluation in the light of objectives, evaluations, and principles which I myself acknowledge and to which I hope others too can subscribe.

In any such rational test of a spontaneous morality, a fundamental thought to bear in mind is, I believe, that, basically, censure and other forms of punishment are instruments for directing human activity and should therefore be used, and only be used, where general human experience has shown they are suited to this purpose, and so long as no other instruments are known to be better suited. This presumably—roughly expressed—is the rational thought dimly underlying the requirement that the guilty person be someone who could have acted otherwise.[22] We have given up regarding bed-wetting as a punishable offence, and now regard and treat it as a form of sickness, because suitable medicinal and psychological treatment has proved more effective than censure and other kinds of punishment. On the other hand, the modern movement which wants to do away with punishment and censure altogether on the grounds that the aim of the social response to violation of law is preventive,

[22] This pragmatic interpretation of the criterion of responsibility is to be found, *e.g.* in Harald Höffding, *Etik*, 1913, p. 122; Sidney Hook, in Hook (ed.), *Determinism and Freedom in the Age of Modern Science*, 1958, p. 176; M. C. Bradley, " A Note on Mr. MacIntyre's *Determinism*," *Mind*, 1959, p. 526; P. H. Nowell-Smith, *Ethics*, 1954, pp. 300 *et seq.*; Charles L. Stevenson, *Ethics and Language*, 1944, p. 313; and G. E. Moore, *Ethics*, 1912, p. 133.

not retributive,[23] is unreasonable. As stated above, it is a misunderstanding to pose prevention and censorious retribution as mutual alternatives. Censure has in itself a directive, preventive function.

But how to elaborate the suggested view concerning the rational formulation of the conditions of censure and punishment? That, of course, is a long story which we cannot enter into in this context.

[23] Typical representatives of this movement are Olof Kinberg, "Punishment or Impunity," *Acta Psychiatrica et Neurologica*, 1946, pp. 429 *et seq.*; Barbara Wootton, *Crime and the Criminal Law*, 1963, and *Social Science and Social Pathology*, 1959, Chaps. VII and VIII.

CHAPTER 3

THE AIM OF PUNISHMENT

1. THE TRADITIONAL APPROACH TO THE QUESTION OF "THE AIM OF PUNISHMENT" OBSCURES THE ISSUES AND IS CONCEPTUALLY CONFUSED

FROM the dawn of time, or to be more exact, at least from the time of Protagoras and for more than two thousand years, men have debated "the aim of punishment." In the *Protagoras* Plato lets that philosopher say:

> he who undertakes to punish with reason does not avenge himself for the past offence, since he cannot make what was done as though it had not come to pass; he looks rather to the future, and aims at preventing that particular person and others who see him punished from doing wrong again . . . he punishes to deter.[1]

Half a millennium later the Roman philosopher Seneca drew upon this quotation and it is to him that we owe the formulation in which it has come down to us: *Nemo prudens punit quia peccatum est, sed ne peccetur.* (No reasonable man punishes because there has been a wrong-doing, but in order that there should be no wrong-doing.) And this has provided a theme which, in whatever variations or paraphrases, has recurred in essentially the same form in an endless literature on "the aim of punishment." In every textbook of penal law, as well as in countless publications on legal and moral philosophy, we are presented with the same opposition: on the one hand, theories which, with Kant and the Catholic Church to the fore, make just retribution for the attack on the social and moral order involved in crime the aim of punishment; and on the other, theories which, like those of Protagoras, Seneca, Bentham, and the majority of modern authors, maintain that the purpose of punishment is to frustrate the committing of future crimes. These two points of view traditionally confront one another under the labels of "retributive" and "preventive" theories of punishment. The preventive effect of punishment is split into special prevention, which aims at deterring the punished person from future transgressions, *i.e.* from recidivism; and general prevention which aims at discouraging people in general from criminal action. In either case the preventive effect may be

[1] Protagoras, trans. W. R. M. Lamb, Heinemann, London, 1952, p. 139.

considered due to an appeal to fear, an interest in not being exposed to the pain of punishment and deprivation of benefits resulting therefrom; or to an appeal to moral feelings. An appeal of the latter kind obtains in part because the sentencing of a person to punishment is taken as an expression of society's disapproval of the act he has committed, and in part because of the impact of the punishment on the punished person's character. Thus prevention theories can appear in many different versions, depending on whether special or general prevention is stressed in combination with either the deterrent or the morally educative aspect.

Retributivism, of course, has its different versions too. So the collective result is a large, though surveyable, number of so-called theories of punishment, all of which are intended to deal with the same question, namely what is the aim of punishment?—or, why do we punish? We are to look for the answer in one or other of the possibilities contained in the given schema, or perhaps in some combination of these possibilities.

If one ignores the innovation involved in the idea of the general preventive effect of punishment via the moral attitudes of members of society (von Bar), and its development in recent Scandinavian doctrine (Lundestedt, Ekelöf, Olivecrona, Andenaes), it is astonishing that the discussion should have stagnated in this fashion for two thousand years; that again and again, with an almost excruciating repetitiveness, we should find the same contest staged and the same moves enacted. The deciding factor in the outcome of the contest seems to be which particular ethical and religious views of guilt, free will, and atonement are currently in favour. Within the group of preventive theories the outcome seems to depend on more or less weakly-based theories of psychological and social causation. One gets the impression that theories of punishment succeed one another rather like changes in fashion.

I don't mean to add a further contribution to this discussion here, but rather to say something about the discussion itself. I shall try to explain just why it is so sterotyped, and what it is that makes the participants in it appear to be marking time instead of marching forward. I shall offer as a main point in explanation a failure to make clear what the discussion is about, what question is being posed, what it is we are trying to answer under the label " the aim of punishment." People have failed to see that by posing the problem as if the task was to find some single thing called the " aim " of some other single thing called " punishment " they have effectively forced the discussion into a straitjacket which makes it look as though there were only one question here, and only one answer.

But such is not at all the case. A glance at the literature will quickly convince one that the topic under discussion is no less than the basic regulative principles governing the whole development of the penal system. First and foremost the principles of penal legislation: What acts are to be classified as criminal? What kind and degree of penalty is to be attached to particular criminal acts? Under what conditions is a particular person to be punished, and under what conditions is some other form of response indicated? But also the principles of the administration and enforcement of penal legislation—of the trial, the sentencing, and the execution of the sentence: On what principles should the various administrative, judicial, and penal authorities exercise the freedom of choice and discretion in decision making which the legislator bestows upon them within the framework of the legal system? Further, we have to note that the principles in question can be of widely differing kinds, bearing upon mutually incommensurable considerations and evaluations. They can pertain to objectives and the rationality of these in terms of interests and needs; or to choice of means and the rationality of these in terms of objectives; or to moral and juridical evaluations of ends and means as permissible or obligatory, as well as to other questions of possible relevance to criminal policy.

How have people contrived to believe that all these comprehensive problems can be profitably posed and discussed under a general question of the aim of punishment? It is in any case unclear, in the first place, just what the " aim " of punishment is supposed to mean. Aims are things which, under certain conditions, can be attributed to human actions. We are in no doubt what is meant if, for example, someone asks about the aim of *A*'s trip to America. But it is very far from clear what is meant when it is asked what the aim of punishment is. The general term " punishment " here indicates that the question does not concern some particular legislative or judicial act, but the institution of punishment as a whole. But how can we talk of the aim of a social institution which has been handed down to us as a cultural fact, and the existence of which cannot possibly be attributed to the decision of any one man, living or dead? Even if one regards the institution of punishment as the sum total of the thousands of legislative, administrative, and judicial acts in which it manifests itself in community life, how can one possibly ascribe to all of them one common purpose? I do not wish to say that these questions are unanswerable, only that they must be in any case clarified and answered before we are able to understand what " the aim of punishment " means. Further, that it must, in prospect, seem unlikely that the many and multifarious problems relating to the regulative principles of criminal policy can

be given solutions that are contained in the statement of an aim, or even of a limited combination of aims.

Before entering into a systematic analysis of the complex of problems masked by the label " the aim of punishment," it will be useful to interpolate two sections, one on the concept of punishment, and the second presenting a simple model (the building of a house) which will clarify the ways in which in that situation, one can retrospectively " explain " and prospectively " plan " an action according to considerations of aim or purpose and to other regulative principles.

2. Punishment Defined

The word " punishment " is used in many different contexts—juridical, religious, moral, pedagogical, natural (excessive eating brings its own punishment)—with shifting meanings, but nevertheless in such a way that there always appears to be some family resemblance (Wittgenstein) between the various senses. I believe, therefore, that it will be useful, following Hart, to establish (more or less arbitrarily) a central meaning, defined by means of a number of characteristics, and then locate other meanings as variants or derivatives in relation to it, as particular characteristics drop out as unnecessary, or have to be added.

Following Benn and Flew, Hart uses five elements to fix the word's central meaning. Punishment must: (1) involve pain or other consequences normally considered unpleasant; (2) be for an offence against legal rules; (3) be of an actual supposed offender for his offence; (4) be intentionally administered by human beings other than the offender; and (5) be imposed and administered by an authority constituted by the legal system against which the offence is committed.[2]

As can be seen, it is punishment in the juridical sense that Hart has in mind, but from this point of view it is hardly a satisfactory definition.

It is a minor point, perhaps, that (4) seems redundant in so far as this requirement is included in (5). But the definition is, in my view, essentially deficient in not including a requirement to the effect that the punitive measure must be an expression of *disapproval* of the violation of the rule, and consequently of censure or *reproach* directed at the violator. It is, I believe, simply a logical impossibility

[2] H. L. A. Hart, *Punishment and Responsibility* (1968), pp. 4–5; S. I. Benn, " An Approach to the Problem of Punishment," *Philosophy*, 1958, pp. 325–326, reprinted in *Freedom and Responsibility*, ed. by Herbert Morris (1961), pp. 517 *et seq.*; A. Flew, " The Justification of Punishment," *Philosophy*, 1954, p. 291. See also Donald Loftsgordon, " Present-day British Philosophers on Punishment," *Philosophy*, 1966, pp. 341 *et seq.*

to enforce a normative system, that is, give effect to its normative requirements, without at the same time giving expression to disapproval. I have given a detailed account elsewhere of how, if a social norm is to be said to exist or be in force—and not be just, say, a proposal, or a figment of imagination—then it is not enough that people merely conform with it, however generally, in a purely external way; the reason for this conformity must be, in addition, that the norm is experienced as binding. This means precisely that violations of the norms are in fact disapproved of, and can be expected to be disapproved of by the community at large.[3] The disapproval that is experienced in connection with violations of legal rules differs from that which is linked with morally reprehensible actions. Its psychological basis is the feeling of respect for law and order (the formal legal consciousness) which is the foundation of the legal system. Moral disapproval, on the other hand, is based on a feeling of respect for the voice of conscience, or for the demands of an accepted, authoritative moral order. It is possible, in a purely informative way, and so without disapproval, to *state* what a normative system's demands amount to, and how a concrete situation is to be judged on this basis. But it is not possible to bring a normative system's demands *to bear on an offender*, and so not just talk *about* but *in* the directive language of law and morality, without this amounting to an expression of disapproval.[4]

Disapproval is an act of thought which in itself need not be communicated to others. When it *is* communicated to a violator it is called censure or reproach. In that case it is not an act of thought alone, but an act of thought with a pragmatic function; that is to say, an act of communication with a certain typical effect, in this case precisely that of conveying feelings of disapproval and attitudes of a generally dissociative, unbenevolent, and even positively hostile character. The " temperature " of these feelings can vary from the " coolness " of disdain to the " white heat " of fury and indignation, which may even give way to acts of violence, *e.g.* lynching.

Reproach is therefore not merely a moral judgment that is passed on someone, it is at the same time itself a sanction; reproach brings suffering, or at least a measure of unpleasantness, to the person at whom it is directed. When further suffering is inflicted upon the violator in the form of punishment in the legal sense, this additional suffering may be understood as being experienced, by the members of the community as much as by the violator himself, as an ampli-

[3] Alf Ross, *Directives and Norms*, 1968, para. 21; *On Law and Justice*, 1958, paras. 2 and 11. Similar points are made by John Charvet, " Criticism and Punishment," *Mind*, 1966, p. 573.

[4] *Directives and Norms*, 1968, para. 9; see p. 22 above.

fication of the hostility already conveyed in the expression of disapproval.

Punishment is at once suffering and disapproval, and the two are, as indicated, closely bound up with one another. Hart overlooks this connection when he explains punishment as suffering but makes no room for disapproval.

There is a practical advantage in admitting disapproval along with suffering as part of the definition of punishment. For it is precisely by means of these characteristics that punishment is to be distinguished from other social responses to law-violations, that is from what goes by the generic name of " treatment." Punishment is of course a form of treatment too, in the everyday sense of the word. As a term in criminology " treatment " is used in a narrower sense for something that is to be distinguished from " imposition of penalties," and this distinction consists precisely in treatment in this sense of the term being intended neither as the infliction of suffering nor as the expression of disapproval, but only—just as in treating a case of pneumonia—as an attempt to bring about a desirable change in the state of the individual's psycho-physical organism. As an example of pure treatment we may think of the imaginary case where a person who feels criminal tendencies of some kind welling up inside him reports to a clinic in order to have the appropriate pills prescribed for their removal.

If it is difficult in practice to keep this distinction between penalty and treatment clear, this is due to the fact that the forms of treatment available today involve restrictions upon the " patient's " freedom or other kinds of interference, and are therefore experienced as suffering or unpleasantness—which, as we know, may assume proportions in excess of that of regular punishment. In practice, therefore, the distinction between punishment and treatment must be based on whether or not an element of disapproval is involved.

Including social disapproval among the conceptual components of punishment does not, of course, imply any answer to the political question of how far disapprobation should colour the system of legal response to crime. The definition clarifies the concepts but does not preclude the view that punishment, that is, a response which brings suffering and is inseparably linked with attitudes of disapproval, is an obsolete institution based on metaphysical concepts that have no place in the modern scientific age; or the demand that punishment, for technical as well as moral reasons, should be replaced by the painless and morally neutral treatment of law-violators.[5]

[5] As an extreme representative of such a view we can mention Barbara Wootton, *Crime and the Criminal Law*, 1963; *Social Science and Social Pathology*, 1959, Chaps. VII and VIII.

Yet another amendment is, I think, called for in Hart's definition, this time regarding (3), the requirement that for a legal response to crime to amount to punishment, it must be directed upon the person who in fact or allegedly committed the crime. Accepting this condition prevents us from talking of vicarious responsibility, in other words criminal liability for the actions of others, as indeed we do, not only in everyday life but also in juridical contexts. It is quite another matter as to whether, in general, one finds it objectionable or inappropriate to punish *A* for something *B* has done. But the very fact that such a view can be formulated shows that the practice itself is not to be excluded from the concept of punishment.

In accordance with these amendments, the concept of punishment could be defined in terms of four components. Punishment is that social response which: (1) occurs where there is violation of a legal rule; (2) is imposed and carried out by authorised persons on behalf of the legal order to which the violated rule belongs; (3) involves suffering or at least other consequences normally considered unpleasant; and (4) expresses disapproval of the violator.

I am not convinced this is a satisfactory definition. A number of difficult problems of delimitation can arise, in particular in connection with the concept of compensation. However, there is no need to go into them here. The proposed definition is, I believe, adequate for the problems we are posing, despite any inability to account for distinctions which might be significant in another context.

3. A Simple Model Analysed to Show what it Means to Ask why a Particular Complex Action is Carried Out

The word " aim " suggests a goal that lies ahead. " Goal " in this context refers to something striven for, and " ahead " must mean that the goal lies ahead in terms of time and the course of events in relation to a certain activity which is generated by the striving directed toward the goal. So it would be reasonable to fix the word's central meaning accordingly: an aim presupposes some human activity and striving, and is that goal, lying outside this activity, which is sought to be attained by means of the unfolding of the activity.

The action and its aim must not be understood to be two distinct and independent things. The aim of an action governs its more precise nature and course, and very often an action is best described simply by specifying its aim. " Throwing a stone in the direction of *A* " designates quite different actions when, respectively, the aim of it is for *A* to catch the stone and for *A* to be hit and injured by it. " Writing a letter to *A* " can be almost any action, and if we

know no more about it we know very little indeed. But if we are told that the aim of writing the letter is to give *A* some particular information, we understand what is being done.

Not all human activity is purposeful. Eating because I am hungry (as against doing so because I want to put on weight), or taking a walk in fine weather (as against exercising my leg muscles) are self-fulfilling actions, so not done with any aim. The same applies to doing something out of duty, for example repaying debts (as against making a payment to save trouble or avoid a lawsuit), as also to unpremeditated actions which are the result of a spontaneous urge, or burst of emotion, such as striking out in anger.

Purposive actions are, accordingly, premeditated, deliberate. They presuppose the agent's having set himself a goal and having adjusted his actions to this goal in such a way that the goal should be attained. The action *aims* at the goal, but of course does not always achieve it.

The agent sets his goal in view of considerations of what serves his *interests*, and the goal can therefore be judged for its rationality in this respect, *i.e.* in terms of its being in harmony with the general matrix of his interests. (It is unnecessary to explicate this in greater detail here.) The action aims at the goal and can therefore be judged for its rationality in *this* respect, *i.e.* in terms of its actually promoting the achievement of the goal.

A can conceivably engage in certain activities which in fact promote his own interests, but without his being aware that they do, or having intended that they should. Thus he may walk to his job every morning in order to save money, but by doing so also make himself more healthy. In that case, the latter is not the aim of his walks, but rather, we might say, a function of them.

" The aim of *X* is . . ." is a common form of expression in talk about aims. What can " *X* " stand for here? (1) A single action, in isolation, for example: What is the aim of *A*'s throwing a stone in the direction of *B*? (2) A complex of actions which is considered to form a co-ordinated activity precisely in so far as it has a common objective, for example a trip to America, a south polar expedition, legal education at the University of Copenhagen. (3) A thing or appliance, for example: What is the aim of that gadget on the ceiling? This latter variant, however, can be reduced to one of the two former—it is a question of the aim of *putting* such a thing on the ceiling.

The aim of an action is decisive for its *being* carried out, and also for *how* it is carried out. But it is not the only factor influencing these things. Let us try to see what factors and considerations can

be identified as decisive for the activity that consists in *A*'s building himself a house.

If we hear that *A* has decided to build himself a house, generally we will not ask why. We will assume, or take it for granted, that he wants to build a house to provide himself and his family with somewhere to live, or with a better place than the one they have now. But even if we are right in taking this to be the decisive or *main aim*, in the sense that the house would not be built if *A* had not cultivated this interest and set himself this goal, we may very well be able to point to other, contributory, or *secondary aims*. *A* might for example, have it in view also to make a sound investment, or to give a young architect a chance to show his worth, or to stop other people putting the plot of land to environmentally detrimental uses. But none of these secondary aims would in itself be sufficient to motivate *A* to build the house.

We can also talk of *negative aims*, meaning states of affairs which *A* is interested in trying to avoid, for example spending more than he has calculated on the house, or expropriation of the property.

But even though these main and secondary aims, positive and negative, can explain *that* the house should be built, they cannot explain, at least not exhaustively, *how* it is to be built. Once the basic decision has been made, there are a whole series of executive decisions to be made, each of which must, in turn, be decided by reference to an aim. The rooms and layout must be designed individually with special *subsidiary aims* in view. This wing is to serve primarily for a garage, but also as a tool-shed, and this particular layout is to make it easier to warm the house, etc.

All these different kinds of aim have a common source of motivating and directive energy, dictated as they are, more or less rationally, by A's interests. Besides these, and often in opposition to them, various *restrictive factors* operate in the development of the enterprise, factors which the builder takes into consideration more or less at will or because he has to.

In the first place there are *legal* barriers and restrictions. The builder must naturally draw up his plans for the house in accordance with legal requirements: he must be the legal owner of the property, respect the laws, building regulations, easements, etc.

Then secondly, even if it is less typical in this kind of case, there can also be *moral* factors in regard to the interests of others and to general values to take into consideration. Perhaps *A* feels it would be thoughtless of him with regard to his neighbours to build the house in such a way as to spoil common amenities, for instance a fine view, or access to the seashore.

Once all conscious factors, interest-determined as well as restrictive, have been drawn up, there are still some determining factors or influences to name which do not enter consciously into the deliberations, but nonetheless contribute their stamp to the over-all result. Thus, a number of factors of a culturo-historical and technical kind determine the style of the house and the way in which it is constructed and form a sort of restriction on the scope of the builder's deliberations. In Denmark, for example, people do not build pagodas, bamboo houses on poles, or gothic castles.

This type-analysis shows that if one asks " Why did *A* build a house, and why did he build it in just that way? " the " because " that prefixes an answer may cover relationships of a wide logical range, and relate to problems and contexts of many different kinds.

In the first place, an answer may be given which offers a *causal explanation*, independently of the conscious intentions which lie behind *A*'s choice and actions. It might be to the effect that he built the house in the way that he did because he lived in a particular culture and belonged to a particular social group. Or depth psychology might be brought in, *e.g.* psycho-analysis, to explain it in terms of personal factors. He built such an imposing house because of an inferiority complex, or because he was not nursed by his mother.

Then secondly, an answer can offer an explanation in terms of *aims*, that is to say an account of the interplay of interest-determined intentions that were decisive for *A*'s deciding to build himself a house, and for his having built it in just the way that he did. It may be, for instance, that *A* built the house as he did because his interest was to provide better accommodation for his growing family and so that they could live in healthy surroundings, with good traffic communications, etc.

Thirdly and finally, question and answer may relate to normative considerations, legal and moral, which have entered into the decision. The answer provides a *justification* for a particular normative assessment of the action. Why did *A* build only a one-storey house (when a two-storey one would have suited him better)? Because there is an easement on the land (to which he is bound legally); or because he feels morally obliged to respect a clause to this effect in his parents' will. Why has *A* built his house so that it encroaches on his neighbour's land? Because he has arrived at an agreement which entitles him to do so.

We see, therefore, that " why " can mean (1) " an effect of what cause? " (2) " with what aim? " and (3) " with what justification (in respect of legal or moral right or duty)? "

4. A Classification of the Various Questions Involved in the Phrase "Why do we Punish?"

Turning now, in the light of the above, to the question of why we punish, or what is the aim of punishment, it will be expedient first to set down some statements whose correctness can now be contended.

(1) The question of *why* we punish people covers at least three widely diverging questions which cannot possibly be thought to be amendable to just one answer.

(2) The question of the aim of punishment relates not to one specific mode of behaviour, but to a great variety of co-ordinated behaviour, or decisions, which together form the institution of punishment, within which it is possible to pick out at least the following three as topics of our "why" questions: (a) the *institution of punishment as such*, that is to say, the use of penal sanctions, regardless of the content of the rules which are sanctioned in this way; (b) the development of the institution of punishment in the *penal code* which determines what acts are to be classified as criminal; and (c) the unfolding of the institution of punishment in *administrative and judicial decisions* for the actual enforcement of the penalty clauses of the penal code.

Benn distinguishes between "punishment in general (*i.e.* as an institution)" and "particular penal decisions as applications of it," Hart similarly between "the general practice of punishment" and "the distribution of punishment," which latter covers questions of who is to be punished for a particular contravention and how the penalty is to be meted out.[6] It is unclear, even so, what "the penal institution as such" and "punishment in general" mean as against a particular penal system. The assumption seems to be that one must abstract from all "material" factors—what acts are to be punished, in what circumstances, and in what way—in order to retain the purely formal fact that punishment, as an authorised and established response that invokes suffering and reproach, is (in certain circumstances) practised at all when a legal rule has been broken. This means the authors in question have overlooked an essential step between the institution of punishment as such and the passing of specific sentences, namely the penal laws which determine what acts are classified as criminal and set rules for the distribution and measuring of punishment. The question of why punishment is employed at all differs from the question of why these particular acts are made punishable.

(3) A combination of the different questions with their different

[6] Benn, *op. cit.*; Hart, *op. cit.*, 1 *et seq.*

topics enables one to formulate a well-differentiated and systematically co-ordinated set of questions.

(4) The question of the *aim* of punishment provides only one of the three basic senses of our " why " question. In accordance with ordinary usage, I shall confine considerations of aim to *interest-determined* purposes (from the agent's viewpoint) which motivate and direct action. If the agent is identified as " society " (this involves a difficulty which I shall pass over here) then the aim of punishment denotes the general social interests—as opposed to interests of the individual as such—which motivate the institution of punishment.

(5) The traditional opposition of retribution and prevention (*quia peccatum—ne peccetur*) is meaningless because the opposing answers are not concerned with the same question. To maintain that punishment is imposed *in order to* prevent crime is to offer an answer to the question of the *aim of penal legislation.* To say that punishment is imposed *because* the criminal has incurred (legal, moral) guilt, is to offer an answer to the question of the (legal, moral) *justification for imposing penalties.*

(6) Ignoring causal explanations, the different ways of posing the question afford an opportunity not simply to " explain " how the present situation has come about, but also to give a critical evaluation of it. The consideration of aims allows us to ask whether the aim or purpose for which the penal code is intended is a rational aim in terms of interests, and whether its specific contents are rational in terms of these aims. The restrictive considerations of legal and moral norms allow us to ask whether the penal system is rational in terms of values, that is to critically assess positive normative views in the light of presupposed basic values and of insights of an empirical nature.

I shall attempt in what follows to give a schematic survey of the various problem areas that are concealed behind the question of why we impose punishment. I shall, however, leave aside all causal questions and explanations, in particular sociological and historical explanations of how the penal law is a development of ancient blood feuding and other patterns of primitive behaviour in which vengeance, as a spontaneous and useful defence mechanism, plays a part along with a mixture of magical, religious, and rational considerations. I shall further omit also any attempt to a depth-psychological analyses of the motives which may explain the demand for the imposition of punishment. There remain, therefore, only considerations relating to aims and normative restrictions. If we let "A," " B," and " C " represent the three steps in the institution of punishment as a whole, and " 1," " 2," and " 3 " represent ques-

tions, respectively, about aims, legal restrictions, and moral restrictions, their combination gives us nine different groups of questions.

A 1. If we now ask what the aim or aims of the use of punishment in general are—regardless of what particular acts are classified as criminal or under what penalty—it seems that the only answer we can give is that its main aim is to influence the behaviour of members of society to refrain from certain acts in order to procure or attain a certain ideal of community life. Various secondary aims can be thought to apply which, in certain cases, may even supplant this behaviour-influencing aim. Sentences passed on people who betray their countries in war are doubtless determined less by preventive considerations than by a demand to wreak vengeance. And legislation on sexual matters seems in many countries to be determined more by a desire on the part of a sizable section of the community to give practical expression to its feelings of moral condemnation than by any genuine wish to influence behaviour.

On the other hand, it seems altogether meaningless, and not just false, to cite retribution for incurred guilt as the aim of punishment, that is as society's operative *interest* in punishing. At least we could only ascribe such an interest to society as part of a magico-religious view which sees the wrongdoer, by his wrong act, as infecting the whole of society with the stigma of his guilt, and thus exposing it to divine wrath unless society cleanses itself by punishing the criminal. Views of this kind are no longer influential in modern society, and if we ignore them retribution for incurred guilt is considered either as a *moral duty* derived from a moral principle requiring that evil is returned for evil; or as a condition for the *moral right* to inflict pain through punishment. But the moral qualification of an action as either required (as a duty) or permitted (as the exercise of a right) has nothing to do with the aim of that action.

Even if we, contrary to facts, assume that the State distributes punishments motivated by the belief that it is in duty bound to return evil for evil it would be misleading to say that retribution was the aim of punishment. The aim of an action has to do with some effect caused through the action but fulfilment of a duty is not such an effect. Speaking of aims we refer to motivating interests, speaking of fulfilment of a moral duty we refer to a disinterested motivation, that is a motivation independent of anything our desires and inclinations tell us, a motivation of pure sense of duty. To say that the aim of punishment is to fulfil a moral duty is to mix two incompatible dimensions: the dimension of actual interests and the dimension of moral evaluation and validity.

That it never was the true intention of any retributivist thinker to maintain that retribution as the fulfilment of a moral duty is

the aim of punishment appears from the observation that this view obviously cannot hold in relation to actions that are not in themselves evil (*mala per se*) but only because they are formally prohibited (*mala quia prohibita*). There is no evidence that they have limited their doctrine in this way.[7]

The mixing of the aim of punishment (prevention) with moral evaluations of punishment is just as confused if retribution is understood as a condition for the right to inflict pain through punishment on an individual, that is as a moral justification of punishment. To set up guilt as a requirement for the moral right of the State to punish an individual means to set up bounds to the interests of the society in influencing through punishment the behaviour of people. One thing is to ask: what is the interest of the society in the administration of punishment? Another thing is to ask: how far is it morally legitimate to pursue this interest? What are the opposing interests of the individual limiting the right of punishment?

Just how confused is the traditional opposition of prevention and retribution as alternative aims of punishment emerges also from the fact that no retributivist thinker has ever actually assumed that penal laws did not aim at deterring people from criminal acts. If one really took seriously the idea that penal laws had no preventive aim, but were meant only to exact payment in return for guilt, one would have to accept the consequence that it was indifferent to the authorities how few or how many murders were committed, so long as the persons who had committed whatever murders there were received their due punishment. But then punishment becomes a kind of admission fee: come on in, you pays your money and you takes your life!

A 2. The question of whether there are, in any real sense, restrictions of a *legal* nature on the use of punishment at all, that is, apart from what specific acts are classified as criminal, can scarcely be one with any practical consequences—unless one assumes that the legal order embodied in the State derives from, and partakes of, a " natural " legal order which sets its own restrictions in this respect.

A 3. In respect of any actual or hypothetical moral view, the legislator's freedom in general to introduce the practice of punishment, regardless of the actual content of the penal law, can be considered as restricted in two ways: by limits upon the *moral right* to punish or by the existence of a *moral duty* to punish. But these questions do not appear to have any particular meaning either if it is insisted that they are about the institution of punishment as such and not any particular piece of penal legislation.

The first question, more precisely, in effect asks whether it can

[7] On Kant, Binding and others, see below, notes 14 and 26.

be morally defensible, in any circumstances, to prescribe penal sanctions; or whether this instrument must be categorically rejected as immoral, regardless of what particular acts are classed as crimes. Apart from extreme anarchists and religious fantasts and fanatics, hardly anyone would condemn all use of punishment in this unconditional way.[8]

The second question asks, correspondingly, whether the State has a moral duty in all circumstances, in some way or other, to use punishment, independently of what acts are classed as crimes. This no one is likely to maintain.

Regarding A 1–3, it follows then that the only " why " questions that can be meaningfully and interestingly asked about *the institution of punishment* as such concern the problem of the aim of punishment; and the only plausible answer to this seems to be that its principal or main aim is of a directive kind: to prevent certain kinds of acts with a view to enabling a certain ideal of community life to be realised. There can be a number of associated secondary aims.

B. The institution of punishment exists concretely only in the form of particular items of penal legislation. The latter establishes (1) what acts are punishable, (2) who can (is to) be punished for perpetrating any such act, and (3) with what kind and degree of punishment. As far as (2) goes, a person is usually only punished if he can be described as the actual perpetrator (or as party to the perpetration) and only under the conditions of subjective guilt—namely that he had the intention of doing the act (imputation) and that he can be held responsible for it (imputability). In most cases the law allows the judge considerable freedom in the meting out of penalties, or allows him to prescribe other reactions in addition to or instead of punishment.

B 1. The *main aim* of penal legislation is to prevent, for the purposes of realising a particular social pattern, the perpetration of those acts which it classes as crimes. Theft and other infractions of laws pertaining to the acquisition of property are classed as crimes in order to deter people from acting in ways inconsistent with the maintenance of that pattern of social life we describe as " property owning." A fair number of criminal laws, however, have secondary aims which in certain cases might overshadow or even altogether supplant prevention.

[8] To this company also belong not a few " modernists " who on grounds of " scientific " determinism wish to ban all talk of guilt, responsibility, and punishment. To show just how curiously inconsistent they are we can note that their argument is partly to the effect that it is morally *unjustified* to talk of guilt and to express disapproval and reproach. See " On Determinism and Morality," s. 7.

That it is simply meaningless to talk of just retribution as an *aim* of penal law is especially clear in the case of laws which, for reasons of social organisation, regard as crimes acts which are not in themselves—*i.e.* independently of the particular legislation—conspicuously objectionable, *e.g.* traffic laws (*leges meres penales, mala prohibita*). Clearly the aim of these is to ensure an efficient flow of traffic at a minimum cost in inconvenience, and not to create the possibility of infringing them and then of repaying for doing so.

But the same is true of laws which prescribe punishment for acts which do in themselves appear to be evil, for instance murder. The homicide laws aim to combat the urge to kill, whenever it occurs. The question of just retribution for guilt does not come into this at all, but relates only to the moral and legal question of the State's right (duty) to enact penal laws and to impose punishment upon individuals (see below, B 2–3 and C 2–3).

The aim-perspective provides an opportunity for a comprehensive critical inquiry which must not be confused with questions of moral justification; its concern is with interests, not with ethics.

First, then, there is the critique of the rationality of laws in terms of interests, that is, the question of whether classifying specific acts as criminal is sound in terms of social interests. What considerations make it desirable to try to prevent precisely those acts? Are there, for instance, social interests to be promoted by punishing people for playing cards, betting, smoking tobacco or opium, listening to foreign radio stations, driving with 0·05 per cent. alcohol in their bloodstream, passing on rumours, or for doing things that the official morality condemns but which do not directly harm others, except by scandalising them? The answer to this latter question will depend on the theoretical outlook one forms of the causal relations between morality and society. If one believes, for example, on the analogy of ancient magico-religious views, that unpunished violations of the official moral code lead to the weakening and eventual destruction of society,[9] then one has an argument in support of the rationality of punishing acts of this kind. What must be insisted, however, is that the discussion at this stage has nothing at all to do with the question of the State's moral right or duty to interfere in such cases. An aim is something one sets oneself because one believes it serves one's interests. The question of whether it does indeed serve them has nothing to do with the quite different question of whether setting oneself the aim in question is morally defensible.

[9] Concerning views of this kind in James Fitzjames Stephen and Lord Devlin, see H. L. A. Hart, *Law, Liberty and Morality*, 1963, pp. 48 *et seq.*

Then there is the criticism of the rationality of laws in terms of means and aims. Does punishment actually help to achieve the aims of penal legislation? It is one thing that it is desirable to overcome bed-wetting, another whether punishment is a suitable method of achieving that aim. Similarly with social ills such as prostitution. It is a popular piece of telescoped reasoning to think that if something can be diagnosed as a social ill, then the proper therapy for it is penal legislation. Further, even if punishment itself is deemed useful in this way, what do we say when undesirable side effects and disadvantages are taken into account? Are there other methods which in terms of net social gain can be considered better?

The question of how far punishment is suited to realising a specific aim of penal law is not a philosophical question but an empirical one. Only experience can provide the basis of an answer. It is up to socio-psychological criminology to develop general theories on the mechanics of the ability of penal legislation and its enforcement to influence the behaviour of members of society. Unfortunately, this is a matter in which there are as yet practically no well-supported scientific results to help us. The political reformer has to rely essentially on general experience, interpreted in the light of common sense, together with some general hypothesis concerning human motivation. This lack of precise knowledge explains why political discussions of the appropriateness and effectiveness of penal sanctions tend to degenerate into a stereotyped conflict between opposing schools of opinion each of which in turn enjoys a temporary vogue, just as fashions do.

The pattern of the debate is provided by the distinction between special and general prevention. The former takes note of the preventive effect of the sentence and of serving one's time upon the convicted person's committing further crimes; the latter of the deterrent effect of penal law—given its effective enforcement—upon the committing of crimes in general. Both approaches, in their further elaboration, take account of the censorious as well as the painful elements in punishment. The special-preventive effect can be partly explained by the passing and carrying out of a sentence acting as a reminder of the seriousness of the warning inherent in penal law (a child that burns its fingers avoids the fire, as the saying goes); and partly by the reformative effects intended by the public censure inherent in the sentence and by the reformative measures connected with serving time. The general-preventive effect can be ascribed, correspondingly, in part to the fear of the pain of punishment and of the social stigma attached to it (the deterrent effect); and in part to the capacity of the penal system, through public censure, to impress certain evaluations and attitudes upon people in

general, which again harden into conventional and moral patterns of behaviour raising emotional barriers against criminal tendencies. A sort of primitive brain-washing, one might say. It is not so much a fear of punishment that deflects the good citizen from a career of petty theft, the thought of stealing simply does not occur to him. This is what has been called the penal system's *habit-creating, moral-reinforcing* and even *moral-creating* force.

These various theories of course do not exclude one another; they can be combined and ascribed greater or lesser weight in guiding criminological policy. General prevention (in a number of versions) and special prevention have both had their enthusiastic supporters, as we all know. The conflict between the two main views continues unabated, and presents what is perhaps the most significant problem of criminological policy today—not least because of the shortness of the step from a one-sided special-prevention theory to the view that punishment (as suffering and censure) should be replaced by " treatment."

It is beyond the scope of this essay to take sides in this conflict. But I would like to stress that in my own view the discussion cannot be carried on, as it often has been, at a purely abstract level; the question is to be decided with reference to specific penal laws and categories of crime. And I would add that the great stress on special-preventive or purely treatment-oriented approaches that one finds with most medical, sociological, pedagogical, and psychological specialists, has its roots, I believe, in vacuous philosophical speculations on determinism and ethics, and in a curious claim that it is " unscientific " to respond emotionally and censoriously to criminal acts.[10]

B 2. In fact *legal restrictions* on the legislator's freedom to classify specific acts as criminal are of no great significance. A State's constitution or an international agreement can guarantee citizens certain freedoms, or establish certain principles which limit the legislator's freedom, for instance prohibitions against inhumane methods of punishment, or against any kind of interference in specific areas marked out for " human freedoms."

B 3. On the other hand, the question of *moral restrictions* upon the legislator's freedom to pursue his conduct-influencing aims opens the door to many-sided philosophical and political discussion. The problems are concentrated in the following points: (a) How is the State's moral right to classify certain acts as criminal justified and

[10] No one will convince me that Olof Kinberg and others who claim this in theory do not react with emotional disapproval when someone treads on their toes, mentally or physically. Furthermore I find it hard to understand what they mean by calling it " unscientific " to express an emotion, especially when as here doing so serves some suitable function.

defined? (b) What acts, if any, has the State a moral duty to punish? (c) What moral principles apply for establishing the *conditions in which* a specific individual is liable to punishment and for *fixing the degree* of punishment?

Of these three questions discussion of the last will be postponed until section C.

Regarding (a): The question of the justification and limits of the State's right to punish is admittedly one of the most central issues discussed under the rubric " the aim of punishment." But traditionally the discussion has been waged in such a confused and maladroit way that it is hard to give any clear account of what the views advanced in it amount to. " Retributivist " theories are commonly opposed to " utilitarian " ones, but in the first place—and as has been several times pointed out—the notion of retribution has nothing to do with the question of the aim of punishment, nor, secondly, with the question at issue here, namely *what acts* the State has a moral right to class as crimes. The unclarity is due to people speaking vaguely of the State's right " to punish " without their seeing that this expression conceals at least two altogether different problems, namely those mentioned, respectively, under (a) and (c).

Although the idea of retribution has a clear meaning as far as problem (c) is concerned—it provides the condition and measure for individual penalties—it is difficult to see what reasonable meaning it could have as an answer to the question of what acts the State is entitled to class as crimes. For if it should be relevant in this respect, it must surely mean that the State is only entitled to punish actions which in themselves, that is independently of the penal law, must be stamped as evil, or morally objectionable, because only under these circumstances can punishment be regarded as retribution for autonomous moral guilt. But I know of no one who has claimed this, nor can I seriously envisage anyone doing so. For it would mean that one denied the State the right to sanction by punishment the innumerable regulations that govern life in a modern society—*e.g.* regarding traffic, business, competition, building, public hygiene, etc. —and which most often are concerned with acts not in themselves morally reprehensible. One cannot of course escape this difficulty by pointing out that every penal law, as part of the prevailing social order, creates a moral duty for the citizen to obey that law, and that a sentence that is imposed upon him for an infraction of them is to that extent always a retributive payment for moral guilt. For this reasoning applies only to the particular sentence imposed and in itself introduces no principle for deciding what acts are to be punishable. It applies, as it says, to " every penal law."

I believe, therefore, that the question of what acts the State is

morally entitled to class as crimes can only be answered on utilitarian lines; that is to say by referring to the alleged social benefits of the law offset by its social and other disadvantages. More precisely, one must evaluate the aim of the particular penal law, then judge its ability to promote that aim, and finally weigh against its ability to do this whatever undesirable effects may ensue from enforcing the law, remembering that punishment in itself is suffering and so of negative utilitarian value.

Unfortunately it is impossible to establish objectively any basic standards of evaluation which can be used in this calculation, or to quantify any positive or negative amounts of value the calculation gives rise to. One can try to rationalise the outcome as far as possible, partly by making plain the social effects of the law, first positively then negatively, and partly by making the premises of one's own evaluation clear. In the final analysis, however, the decision cannot be rationalised, but must stand as the outcome of an irreducible process in which all relevant factors are integrated into a resolution.[11]

It must be stressed that a calculation of this kind must refer to a definite item in the penal code. All too often utilitarian authors speak generally of the justification of " punishment," or of " the institution of punishment," in terms of social utility. But this is empty talk which can solve no problem, as, for instance, when Lundstedt declares that the moral justification of penal legislation is inseparable from the aim of such legislation. The moral basis for Lundstedt is simply that without such legislation society would perish.[12] But all this argument amounts to is that without *some* penal legislation society would perish; it says nothing of what ought to be the content of this legislation, in particular what precise acts should be classed as criminal acts and what should not, if it is to be accepted as morally justified.

Naturally one is allowed to philosophise as to whether a more effective key is to be found for solving the problem than the weighing procedure I have described, one that permits a more precise criterion of the criminality of acts (*i.e.* of what acts could, from a moral point of view, rightly be classed as crimes). But I have little confidence that one will be found. The formula that John Stuart

[11] *On Law and Justice*, 1958, para. 70.

[12] There are surely only a few, if indeed there are any, penal laws of which one could say that but for their existence society would perish. If penal sanctions were lifted, say, from homicide or fraud, life would undoubtedly become more unpleasant, and members of society would have to take security measures of their own. But I can see no reason why society itself should altogether disintegrate. These and other penal sanctions are not necessary conditions purely and simply for the existence of society, but for its existence in a manner which accords with certain values and demands.

Mill defended in *On Liberty* was just another of those familiar idle formulae which implicitly presuppose what they set out to justify. Mill's principle was to the effect that the only purpose justifying the State's exercising coercion (penalties) upon the individual is the aim of preventing that individual from inflicting harm on others. Since " harm " cannot be co-extensive with every violation of interests—anyone who exerts his rights inflicts " harm " on others in this sense—the claim must be that freedom of action is justifiably curtailed only when it would interfere with the opposing *rights* of others. These rights must—because the principle is supposed to be one that guides the legislator—be *natural* rights. But then we have presupposed exactly that moral evaluation of actual legislation the principle is supposed to supply.

Regarding (b): if one considers penal legislation as a means whereby society attempts to promote its " own " interests, the question of whether there are acts which the State has a moral duty to punish seems to have no real meaning. It is relevant to ask it, on the other hand, if one assumes that it is the moral task of the State to realise moral justice, and that this requires that morally reprehensible action be met with retributive suffering, *i.e.* punishment. If this view is accepted, then so must its consequence that the State ought to punish any action that is reprehensible according to the presupposed moral system. Certain variants of the retributive theory do indeed have this content, and they merge here with the utilitarian viewpoint that unless " morality " is enforced, society will perish.[13]

C. A penal law is nothing if it is not enforced. A warning that is empty is not yet a warning. Similarly with disapproval that is never manifested in response to a transgression. Enforcement of the penal laws by criminal investigation, indictment, trial, sentencing, and execution, is therefore a necessary condition of their serving the conduct-influencing aim we have discussed.

The conviction is a decision stating that the accused party is guilty in a violation of law. The sentence is the decision as to what punishment should be inflicted on the guilty party. In this decision the judge is guided by the directives of the law, which nonetheless typically give him considerable scope for independent discretion and choice.

C 1. A judge performs an official duty. It seems meaningless, therefore, to ask what his *aim* is in passing judgment. We have indicated above that an action done purely from duty has no aim. To this one must add, however, that there is of course nothing to prevent the content of the duty being fixed precisely as a duty to try to realise certain aims. And this must be presumed to be so in

[13] See above, note 9.

the case of the judge. He sees it as his task and official duty to enforce the penal laws in order to help achieve the aim which these laws must be assumed to serve. In his choice of kind and degree of reaction he is guided by special- and general-preventive considerations about what methods are best suited to help realise these aims.

C 2. While the question of legal restrictions for imposing punishment proved somewhat indifferent in so far as the institution of punishment itself and penal legislation were concerned (B 2 above), it does have relevance for the judgment.

The judge, in his official capacity of promoting social ends by combating crime, is bound by the law. The only valid grounds he can give for imposing a penalty is that in this way he is fulfilling the requirements of the law: that a crime has been committed, that the person he has sentenced is responsible for the crime, and also fulfils the legal requirements of guilt (imputation and imputability). Any other justification, for instance that the punishment he imposes will have a therapeutic effect upon the convicted man, that it will strengthen popular confidence in the police if he convicts someone of the crime, that popular outrage at the crime demands a scapegoat or that this man in particular should be condemned for it, or any other similar utilitarian considerations, are without weight or validity and if invoked would make the judgment a violation of justice, morally as well as legally.

I believe most people will agree with me in this, in the moral judgment too. One might argue that it is this, and nothing else, that Kant is saying in the famous passage traditionally cited in support of his advocacy of retribution as an *aim* of punishment, *i.e.* of penal laws. This latter interpretation bears no examination. Kant writes:

> Judicial punishment (*poena forensis*) is entirely distinct from natural punishment (*poena naturalis*). In natural punishment, vice punishes itself, and this fact is not taken into consideration by the legislator. Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things [*Sachenrecht*]. His innate personality [that is, his right as a person] protects him against such treatment, even though he may indeed be condemned to lose his civil personality. He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens. The law concerning punishment is a categorical im-

> perative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it—in keeping with the Pharisaic motto: "It is better that one man should die than that the whole people should perish." If legal justice perishes, then it is no longer worth while for men to remain alive on this earth.[14]

C 3. In the passage just cited the principal idea is that the judge should follow the law: no consideration of utility can justify sentencing a person who is not guilty, or letting a person who is guilty go free. The law is a categorical imperative! But there is something more implied in Kant's reasoning, some presupposed moral requirement about the content of the penal law which is so self-evident to Kant that he does not expressly state it. For quite clearly if we conceived, for example, of a penal law which determined that when a murder had been committed people had to draw lots to decide who should be hanged for it, such a law would not represent the justice that Kant calls upon us to defend.

The more basic requirements made by Kant may be glimpsed in his stating that the fundamental condition for justly punishing a person is that he is the actual offender. There are two moral requirements implicit here which amount to *restrictive principles* overriding the legislator's wish to achieve a certain social aim by wielding the conduct-influencing instrument of penal legislation.

The first of these is that punishment for an offence be directed only at the person who has committed the offence, the perpetrator, including of course anyone who is technically an accomplice. This excludes *vicarious responsibility, i.e.* responsibility of one person for another person's act without being involved instrumentally in its perpetration, *e.g.* through failure to keep effective watch upon the other person, etc. The prohibition covers such cases as collective responsibility (*e.g.* the whole class having to pay for what one unidentified member of it has done) and the punishment of hostages (punishment as reprisal against arbitrarily selected victims). That measures like these can effectively influence behaviour needs no saying; boarding-school life, the barrack room, concentration camps, enemy-occupied territory, and other contexts of the rule of force provide any testimony we may need.[15] That such measures be ex-

[14] Immanual Kant, *Metaphysische Anfangsgründe der Rechtslehre*, 1797, Rechtslehre, 2. Teil. Das Staatsrecht E, Vom Straf- und Begnadigungsrecht. The translation is taken from *The Metaphysical Elements of Justice. Part I of The Metaphysics of Morals*. Translated by John Ladd, Indianapolis, 1965, p. 100.

[15] See Hermann Mannheim, "Problems of Collective Responsibility," *Theoria*, 1948, pp. 144 *et seq.*

cluded cannot therefore be argued in terms of the aims of penal legislation; their exclusion must be based on a regulative principle which sets limits to the freedom with which these aims can be pursued.

The second requirement implicit in the condition that the punished person be himself the offender is that it is not enough that he simply be, objectively, the perpetrator of the offence, the act must also be one for which he can be subjectively *blamed*. This involves requirements of imputation—that there was the intention to do the act—and imputability—that it was done in a state of mental normality. Kant can hardly be thought to have meant to include among " offenders " people who altogether inadvertently bring about some unfortunate state of affairs, or small children, or the mentally handicapped or sick, who are not in a position to know what they are really doing.

Here too there is a restrictive moral principle to be elicited from the basic moral idea that responsibility for an offence presupposes guilt. For clearly punishment without guilt can quite well be rational in terms of serving certain aims. Suppose that not only wilful but inadvertent and accidental violations of penal law were regularly punished; there is little doubt that in that case there would be a signficant reduction in the number of violations. People would be forced to be more attentive to what they did, and to take steps to avoid situations in which they might accidentally injure people. Much the same applies to the imputability requirement. Aside from the fact that the mentally sick and others of unsound mind can still be influenced by the threat of punishment, the elimination of this requirement would almost certainly have a general-preventive effect: it would no longer be possible to elude the law by pleading a pretended lack of accountability as a reason against conviction.

As for the more precise specification of the guilt requirement, legal and moral, this is a central and complex problem, indeed probably the most difficult in the whole of the philosophy of punishment. Naturally it is not a question I can take up here; in this context it is only necessary to point out that there *is* a moral regulative principle here which is quite independent of considerations of rationality in respect of aims.

If one reads on further in Kant's account, one finds that he introduces yet another third morally restrictive principle in his notion of retribution, namely the requirement that the punishment should not only presuppose guilt, but that it correspond to the guilt in degree as well as kind. It is retribution as *a principle for measuring the amount of punishment*. Kant develops this idea in a rigorous manner which is unlikely to commend itself to many people today. It is on

this point and this alone (and which has nothing to do with " the aim of punishment ") that one may with some justification, though perhaps not without a note of pharisaical self-righteousness, take exception to Kant's retributive doctrine and condemn it as barbaric and antiquated.

But having said this, it must be pointed out in qualification of the criticism that the demand for a certain proportionality between punishment and crime or guilt is a constantly recurring theme in the thinking that underlies our penal legislation and juridical practice, and that many people do in fact view it as a moral requirement of justice. It is clear that here too we have a restrictive principle that is quite independent of considerations of rationality in respect of aims. For it certainly cannot be doubted that maximum penalties for all violations would have a significant preventive effect, particularly, say, in reducing the number of thefts and robberies.

The three restrictive principles we have mentioned can be collected under the name of the " retributive principle." This expresses the moral notion that the individual must not be made society's scapegoat. The right of the State to influence and direct the social behaviour of its citizens towards certain social objectives by threat of sanctions is limited by countervailing considerations of the individual's *legal security*. No one is to live in the risk of being struck by punishment as if by lightning just because his sacrifice will serve a social end. The individual must have a chance, secure from arbitrary interference, to plan his life in such a way as to be free of the coercive interference of the legal machine. He must be able to calculate that so long as he, for his part, avoids committing any crime, he will be secure from the threats inherent in the State's penal authority. It is another matter if he decides not to take up this option; or if for psychological or social reasons he is not in a position to. The opportunity must be there.

Consideration of legal security also underlies the " *legality principle*," traditionally expressed in the sentences *nullum crimen sine lege* and *nulla poena sine lege*. This establishes requirements for the penal system's proper foundation, requirements which in particular exclude arbitrary punishment, retroactively valid penal legislation, and too great a freedom in the court of law's interpretation of penal law, and which, like the retributive principle, serves to protect the individual against the arbitrary and the unforeseeable.

Finally, the right to punish bears the stamp of various other restrictive considerations which can be conveniently collected under the name of the " *humanity principle*," and which demands that considerations of efficiency give way to respect for the worth of the law-breaker as a human being. Many hold that the death penalty is

to be excluded on this ground. And most people will presumably agree that a punishment should not give rise to unnecessary suffering and never have as its aim the degradation of the law-breaker as a human being.

It is not my task in this chapter to give a more detailed account of the content of these restrictive principles, nor to say whether I think they are justified or not, but only to elucidate the nature of the debate to which they can give rise.

The principles in question are, as I have said, *moral* principles. There can be no question, therefore, at least on any non-cognitivist moral philosophy, of a presuppositionless, scientific foundation of their validity. Scientific knowledge and other kinds of understanding are naturally not without significance for the attitude one takes to them, but this will always be co-determined by appraisive attitudes of a subjective kind. This, however, does not exclude them from being, within certain limits and as with other normative questions, subjects of scientific investigation and of rational discussion.

One task is to describe the extent to which ideas like those discussed do or do not in fact characterise a certain historically given penal system, for instance the present-day Danish system; or the extent to which they actually are or are not accepted by particular people or groups of people, for example the Danish lay population, criminologists, philosophers, and other groups of experts.

Another task is the philosophical-analytical one of clarifying the content of these ideas in so far as they are expressed in current turns of phrase taken to express " the general moral consciousness," " our common notion of justice," what " we " think about guilt and responsibility. Much energy has been expended in particular on the analysis of what is meant by " he could have done otherwise," which is assumed to express a generally accepted basic condition of moral guilt and responsibility.[16]

It is my impression that the reason why this analysis has been so enthusiastically engaged in, and the debates so vigorous, is that the participants have more or less consciously assumed that an analysis of this kind provides the final word in the matter. Once we know what " our moral consciousness " in effect implies, what is contained in " our common notions of guilt and responsibility,"

[16] We can mention in particular P. H. Nowell-Smith, *Ethics*, 1954, pp. 273 *et seq.*; " Ifs and Cans," *Theoria*, 1960, p. 85; J. L. Austin, " Ifs and Cans," Proceedings of the British Academy, 1956, reprinted in *Philosophical Papers*, 1961; Gilbert Ryle, *The Concept of Mind*, Penguin, 1963, pp. 69 *et seq.*; C. A. Campbell, " Is ' Free Will ' a Pseudo-Problem? " *Mind*, 1951, pp. 446 *et seq.*; G. E. Moore, *Ethics*, 1912, pp. 122 *et seq.*; Richard Taylor, " I can," *Philosophical Review*, 1960, p. 78.

there is nothing more to ask, nothing to discuss, for we then *know* what the requirements of " morality " are.

But this is wrong. In the first place, the professed *opinio communis* is of course a fancy. All we can say is that there is a certain unanimity within a certain cultural group. Secondly, barring a metaphysical postulate about a trans-personal moral consciousness which reveals eternal truths to us, the results of the analysis are no more than a description, an account of the content, of a particular moral view existing in a particular cultural group at a particular time. The same holds when an author relies on his own moral conviction. What he presents us with is a personal confession that may claim interest as any other human document but not as evidence of trans-personal truths.

The description of the requirements that are found in a given morality, whether this be more or less " general " or individual, can be called a dogmatic description, *moral dogmatics*, in the same way that a descriptive account of a certain legal system is a piece of legal dogmatics.

A dogmatic presentation (of either kind) provides us with useful knowledge of how the world actually is, what normative attitudes actually occur in it.

Another, and in a way more exciting, set of questions arises when one adopts a critical viewpoint to the given " positive " morality and considers how things ought to be, how in the light of certain values one might want to change actual morality. Such a turning of viewpoint from description to criticism is well known in the sphere of law. It takes place when one switches from a dogmatic study of law to legal politics. In exactly the same way one may move from a dogmatic description of a given morality to a critical evaluation of it (moral politics).[17]

But deliberations of this kind are relatively rare, especially in philosophical literature. When they do occur it is nearly always to reject guilt, moral as well as legal, as a requirement. The main thesis, for example, in the " positive " school of criminology, originating with Ferri, is that guilt in terms of imputability is a meaningless requirement because it presupposes a metaphysical doctrine of free will and is therefore inconsistent with a thoroughgoing determinism. In the latest development of this line of thought even the imputation requirement is cast onto the rubbish heap.[18]

H. L. A. Hart is the only philosopher who to my knowledge has dealt with the problem in depth and tried to show that subjective

[17] *Cf.* H. L. A. Hart in note 9 *op. cit.*, pp. 17 *et seq.*

[18] Barbara Wootton, *Crime and the Criminal Law*, 1963, Chap. 2. See " The Campaign against Punishment," s. 3.

conditions of guilt, *mens rea*, can constitute a satisfactorily meaningful requirement without depending on metaphysical indeterminism. This is the central topic in a series of essays in legal philosophy which Hart has published since 1958 and collected under the title *Punishment and Responsibility* (1968). In these essays Hart wavers between two solutions: on the one hand that of simply grasping onto the fact that *mens rea*—the requirement of guilt as a precondition of punishment—expresses a principle of justice to which " our " moral consciousness actually does attach importance, which is in fact an element in " our moral code," " our common notion of justice," and accords with what " most thinking people " think [19]; or on the other hand that of attempting also to " explain," that is justify rationally, this requirement by showing that its observance leads to effects which must be considered desirable in the light of certain basic, generally acknowledged values.[20]

It follows from what I have said in the foregoing that the first solution is no solution at all in my view. That is to say, it is not a rational justification in terms of values, but just a description or confession. Critical reflection in moral matters can never accept the oracular deliverances of " consciousness " or " feeling " as the last word.[21] The task of such reflection must always be to look for a justification, in terms of observable consequences and presupposed value-premises. Hart himself has made what I should consider valuable contributions to such an evaluation of the guilt-requirement of penal law.

5. The Traditional Opposition between Retribution and Prevention as the " Aim " of Punishment is Meaningless and Rests on Misunderstandings

Classifying the different elements of the discussion of " the aim of punishment " in the way we have just done shows how variegated the problems are which have been traditionally lumped together under this label. And it confirms in particular the claim that the central issue in the traditional debate—retribution versus prevention —is merely a pseudo-problem arising from obscurity in the use of terms (*e.g.* of " why? ") and from confusing different categories of question. Prevention—or, more generally, the influencing of behaviour—is the only adequate answer when the question is posed as one of the aim of penal legislation. Retribution, *i.e.* requirement of

[19] H. L. A. Hart, *Punishment and Responsibility*, 1968, pp. 21, 37, 77, and 207.

[20] Hart, *op. cit.*, p. 22; *cf.* pp. 44 *et seq.*

[21] Therefore I cannot accept the opposition between " justice " and " social utility " which Torstein Eckhoff advances in his " Justice and Social Utility " in *Legal Essays: A Tribute to Frede Castberg*, 1963, pp. 74 *et seq.*

guilt as a precondition and measure of punishment, is the only adequate answer when the question is posed as one of what restrictive moral considerations limit the State's right to use punishment as a means of influencing behaviour.[22]

According to the prevailing view among legal writers, " theories of punishment " have to do with the question of the *aim* of punishment, *i.e.* with the nature of the results that are (or ought to be) aimed at by means of the existence and enforcement of penal laws. And it is maintained that from far back in history there has been a fundamental opposition between those who say that this aim is retribution (the absolute theories, *quia peccatum est*), and those who say it is prevention, *i.e.* the combating of acts that are classified as crimes because they are socially harmful (the relative theories, *ne peccetur*).

This interpretation of the traditional problem is, as we have said, altogether mistaken. Theories of punishment have from old times been ethical theories concerning the State's (moral) right and/or duty to punish. Precisely because punishment is the deliberate infliction of pain or suffering, a system of ethics which assumes suffering to be a basic evil and the forbidding of the (unauthorised) harming of others a fundamental moral law, must find it a problem to justify and delimit the State's right to inflict suffering through punishment—suffering which often consists in the deprivation of the greatest human goods, for example freedom and even life itself.

It is this ethical question to which each of these two essentially quite different viewpoints offers an answer. According to the one view the State's right derives from an ethical principle—the principle of justice, which allows—perhaps even requires—that evil be repaid with evil. The State is accordingly entitled (even bound) to inflict punishment on someone who has broken the law in a way which makes it proper to hold him responsible. According to the second view the right to punish derives from the socially beneficial effects of imposing punishments: the law-breaker must suffer pain of punishment because it is necessary for the maintenance of certain ideals of social life. It is punishment's aim, one might say, that justifies it.

But in both cases the topic is not the aim of punishment but its moral justification. The aim only comes in indirectly in so far as, according to the relative theories, it provides the ground for the moral justification. Retributive theories, for their part, quite clearly have nothing at all to do with the aim of punishment.

The two theories, or types of theory, are thus divergent solutions

[22] This naturally does not exclude other than moral factors limiting the distribution and measuring of punishment.

to the same problem, the moral-philosophical problem of the ethical status of punishment as the State's right or duty. The expression "moral-philosophical" must here be used with caution. According to current conceptions, at least where philosophical views of an empiricist character hold sway, the concept of law is confined to systems of norms which are institutionalised as "positive" law. Anything beyond this is regarded as morality (convention). It was different in the days when people assumed the existence of a law of a higher order, a natural law which was taken to be precisely a legal system and not just a ramification of morality.[23] From this point of view the problem we have been discussing was not formulated as a question of the moral entitlement to punish, but as one of the "*legal ground*" (*Rechtsgrund*) of punishment. When positivistic thought eliminated the idea of a trans-positive law, it became natural, among *jurists*,[24] to regard the question of the "legal ground" of punishment as a pseudo-problem and to focus interest exclusively on the aim of punishment. The relative theories thus slipped effortlessly into the new conceptual framework, people just ceasing to be interested in what had before been the main point at issue, namely that the aim *legitimises* punishment. Because the relative and the absolute theories had always stood opposed to one another as contrary solutions to the same problem, it was inevitable that the positivistic interpretation of the problem should then lead to the absolute theories, too, being understood as theories of the aim of punishment. And thus is explained the absurd belief that the absolute theories were intended as doctrines about retribution as the aim of punishment.

The absurdity is manifest. Retribution has never been understood by retributivists themselves as an aim—an intended effect—of punishment, but as its legitimation and a principle for its measurement. This is quite clear in the case of modern authors like Hart, who settle for the requirement of guilt (*mens rea*) as a restrictive principle counter to considerations of purpose.[25] But it is also true of classical theorists like Kant,[26] Stahl, Hegel, Binding and any other one cares to mention. If it has ceased to be obvious, then, this is

[23] *Cf.* Alf Ross, *Towards a Realistic Jurisprudence*, 1946, pp. 22 *et seq.*, and *Kritik der sogenannten praktischen Erkenntnis*, 1933, pp. 231 *et seq.*

[24] Not amongst philosophers. For them the traditional problem relates not to the aim but to the justification of punishment. See *e.g.* Donald Loftsgordon's survey article, "Present-Day British Philosophers on Punishment," *Philosophy*, 1966, p. 341; and "*The Right to Punish*, published under the auspices of UNESCO and the Institut International de Philosophie on the occasion of the Xth International Congress of Philosophy, Amsterdam, August 1948," printed in *Theoria*, 1948, pp. 111 *et seq.*

[25] See *e.g.* Hart, "Legal Responsibility and Excuses," reprinted in *Punishment and Responsibility*, 1968, pp. 28 *et seq.*

[26] See above, pp. 54 *et seq.*

due in the first instance, simply to the fact that these authors are no longer read. People simply parrot one another's hearsay that the absolute theorists claim retribution, and not prevention, to be the aim of punishment. No one stops to consider how unreasonable such an assumption is; how a thinker of Kant's calibre could have thought anything so foolish. And even people who take the trouble to read the original works often lack the required familiarity with natural law conceptions to grasp their meaning. Admittedly the going is often heavy. A special difficulty is the lack of analytical rigour with which the problem itself and the basic concepts are presented, and the fact that they are only intelligible on the basis of assumptions quite foreign to contemporary modes of thought. The universe of discourse in which the reader must move is aprioristic, and he must bear in mind that in that universe expressions like " law," " legal ground," " necessity," " consequence "—and even " aim "—have meanings quite different from those he would normally give them.

Take, for example, Karl Binding, who, it so happens, is a writer of this century. Try to read his *Grundriss des deutschen Strafrechts, Allgemeiner Teil* (8th ed., 1913), the section on *Grund und Zweck des Strafrechts* (paras. 84–92). It would be quite impossible for me to paraphrase the main thoughts in this section. Some attempts at illustration will have to suffice.

Binding opposes the view that " punishment is crime's *necessary*, and so *inevitable*, consequence " (para. 84, author's emphasis). Clearly the expressions " necessary " and " inevitable " cannot have the meanings we now tend to give them. Authors like Hegel who put forward views like the one Binding opposes naturally do not mean that every crime will *in fact* and without exception be punished. The terminology here is that of an aprioristic moral philosophy, and this gives it quite another content. It is moral necessity that they talk about, not factual necessity. One must not be misled, therefore, by Binding's designation of " retribution " or " compensation " as the " aim " of punishment. By " aim " he does not mean what is actually aimed at, but the consequence or effect of punishment that morally justifies it. In Binding's own elaboration of the retributive theory, punishment is imposed " in order to uphold the authority of the violated law " (para. 92). He further explains that punishment is the law's reply to the law-breaker's revolt against the legal order. Its reply is coercive subjection to the power and supremacy of the law. " Punishment is thus *confirmation of the power of law*, the guilty person's coercive subjection to the strong arm of the law." The point is that the ethical justification of punish-

ment is derived from the authority and supremacy of the law, *i.e.* the laws' ethical validity and immanent moral authority. It is clear, however, that respect for the law's authority in practice cannot be manifested in any other way than by obedience to it, *i.e.* in there being no law-violations. It would be absurd, therefore, to ascribe to Binding the view that the legislator should not aim at motivating citizens, by means of penal legislation, to act in certain ways and not in others, that punishment should therefore not have a preventive aim. It is just that a view of this kind lies outside his terms of reference. What he thinks is that the ethical justification of punishment cannot be derived from such aims, but only from the law's intrinsic validity, its supremacy. One may think what one likes of such a theory—in my view it is idle verbosity—but one cannot burden Binding with the view that retribution, and not prevention, is the aim of penal legislation.

How deeply entrenched the moral-philosophical approach has been is illustrated with striking clarity when one reads Ferri, the founder of the so-called positive school of criminology. Despite a show of experimental scientific method [27] which seems to be intended to elevate criminology above the level of mere philosophy,[28] one of the main problems Ferri tackles is precisely the question of the State's *right* to punish. His basic idea is that this right cannot (as the classical school would have it) be derived from moral guilt or responsibility, because this presupposes a free will which on scientific grounds must be rejected as illusory.[29] The right to punish must be derived from the natural conditions of existence, more precisely every living being's fight to exist and to defend itself against attack.[30] On this basis the concept of social responsibility develops simply out of the circumstance that men live in society, and quite independently of free will, moral responsibility, and guilt: " Voila comme l'école positiviste au critérium, contesté et indéfini, de la responsabilité *morale*, comme raison et fondement du droit de punir, substitue le critérium positif et précis de la responsabilité *sociale* ou juridique, comme raison et fondement du droit de défense sociale des honnêtes gens contre les criminels." (In this way the

[27] Henri Ferri, *La sociologie criminelle*, 1893, p. 7.

[28] In fact Ferri's " positive " sociology of crime was no more purely scientific than August Comte's positivism, by which it was inspired (Ferri, *op. cit.*, p. 261), but a metaphysical moral theory based upon the assumption that the moral norm proceeds directly from reality as an expression of immanent tendencies in the latter. The portrayal of French sociological positivism I have given, in *Kritik der sogenannten praktischen Erkenntnis*, 1933, pp. 245 *et seq.*, applies in every respect equally to Ferri's criminological positivism.

[29] Ferri, *op. cit.*, pp. 261 *et seq.*

[30] *Op. cit.*, pp. 291 and 293.

positive school replaces the contested and indefinite criterion of *moral* responsibility as the reason for and basis of the right to punish, with the positive and precise criterion of *social* or juridical responsibility as the reason for and basis of the right of honest people to defend society against the criminals.) [31]

6. The Problem Reorganised

It can be useful, I believe, to regroup the nine questions discussed in section 4 so as to leave out what has no essential bearing on our question and to collect the remainder in groups according to the kind of question asked.

First there is the question of social policy: what aim is society to set itself in regard to the kind of society it wants to be (*e.g.* capitalist, democratic, with safeguards for human rights, the benefits of freedom, etc.—however otherwise defined in detail) and what acts will it therefore be desirable to discourage? This is essentially a question for politicians to answer in the normal political way, that is by way of legislation under pressure of interests and ideologies. Experts (political scientists, economists, sociologists, critics of ideologies) can lend some assistance, but mainly of a negative kind —as, for example, if it can be shown that certain objectives are mutually incompatible, or that a particular objective is based on false presuppositions about the facts, *e.g.* a belief that society will collapse if certain sexual taboos are not protected by threat of punishment.

Then there is the technical, criminological, question of whether punishment is a suitable, and preferable method of attaining the given political objectives. By " preferable " I mean better suited to the aim than such " treatments " as could conceivably be used in place of punishment. If it is preferable, then there is a further question as to the most effective form the penal legislation can take to achieve the aim, in regard to conditions for conviction, the meting out of punishment, the kind of penalties applied, etc. These are questions which call for expert criminological knowledge supplemented by expert advice in such diverse fields as sociology, psychology, and medicine. One must unfortunately admit that the knowledge we need to answer these questions is still largely lacking. We need to know much more about the motivations of human behaviour and the possibilities of influencing it in the desired direction, more particularly the capacity of penal legislation to influence it in this way. Such questions are dealt with in the regrettably

[31] *Op. cit.*, p. 427. See also pp. 330, 342, 344, 347, and 419. For further details see " The Campaign against Punishment," s. 2.

still only very weakly based theories of the *special- and general-preventive* effects of the passing and enforcing of penal legislation.

It must be stressed that the research and knowledge needed at this stage is of a purely empirical kind. It is an empirical fact that human behaviour is capable of being influenced within certain limits by the intervention of other men; and this fact can be as little affected or refuted by philosophical or moral arguments as any other. In particular, no philosophical speculations, whether of a deterministic or an indeterministic kind, can alter one jot the truth of the claim that within certain limits human behaviour can be modified by appeal to moral attitudes (punishment as reproach) as well as by appeal to fear (punishment as suffering).

Finally, there is the moral question concerning the restrictive factors governing society's right to pursue behaviour-regulating aims (prevention) by means of penal legislation. This concerns especially what actions the State is morally right in classing as crimes; and the requirement of guilt as a condition and measure of punishment. Has the judge a right to make the innocent suffer for the guilty if social aims can be thereby achieved? This is a question for moral and legal philosophy, and on this point one cannot simply reject the relevance of philosophical determinism and indeterminism out of hand. It is another matter to say, as I myself would, that the view that moral guilt and responsibility are incompatible with " scientific " determinism is a fallacy based on misunderstandings.

I believe it would be a gain if the traditional chapter on " the aim of punishment " in the textbooks were replaced by a statement of the problems on the lines I have sketched.

CHAPTER 4

THE CAMPAIGN AGAINST PUNISHMENT

1. THE ABOLITION OF PUNISHMENT AS A POLITICAL PROGRAMME

THE topic of this essay is a political programme which, under the banner "Abolition of punishment," calls for far-reaching changes in the traditional legal response to crime. There is, of course, no authoritative formulation of the programme. It has its origin in ideas put forward by the so-called positivist school of criminology founded by Lombroso, Garofalo, and Ferri in the 1870s. Since then the original views have been modified to some extent and have given way to a number of variants.[1] There has been no change in the underlying view, however, that punishment in the traditional sense should be done away with and replaced by "treatment," aimed at cure, or in special cases by precautionary measures, aimed at rendering the offender socially harmless. The idea is that these responses are to be regarded as society's way of defending itself against crime, but without moralistic prejudice. In Sweden the psychiatrist Olof Kinberg has been an ardent spokesman, in the older generation, for changes based upon views of this kind,[2] and their imprint is clearly discernible in the penal law reform which, after many years of preparation, was enacted in the Swedish Criminal Code of 1962.

In our own days, the programme's adherents are to be found mainly among psychiatrists, psychologists, sociologists, and other experts with a "scientific" outlook, who with *avant-gardiste* enthusiasm often support it as an expression of a progressive, empirically scientific approach in opposition to legal scholasticism and metaphysics.[3]

In this essay I shall not attempt to outline the development of this line of thought, or to describe its various exponents; I shall confine myself to an account of one of its outstanding contemporary representatives, Baroness Wootton.[4] Nor do I intend to

[1] Concerning this see Marc Ancel, "L'évolution de la notion de défense sociale," *Festskrift tillägnad Karl Schlyter*, Stockholm 1949, pp. 32 *et seq.*

[2] See especially, Olof Kinberg, *Basic Problems of Criminology*, 1930.

[3] Typically, *e.g.* Karl Menninger, *The Crime of Punishment*, 1968.

[4] I have not taken the movement's latest work into consideration, namely Karl Menninger's *The Crime of Punishment*, 1968. Compared with Barbara Wootton's close analyses and scientifically disciplined thinking Menninger's book is a superficial and rhetorical contribution, and amazingly dilettantish in dealing with the more fundamental questions.

present an exhaustive examination of the policies which Barbara Wootton and other criminologists support. For that task, I lack the necessary criminological training and experience. I will limit myself to expounding and criticising the underlying elements of the theory upon which the demands for reform rest. Should these be shown to be untenable, it does not follow, of course, that the criminological policy is misguided, but rather that it is not well founded and should therefore be subjected to further testing.

As we have said, the programme aims at the abolition of punishment. However, in the absence of a closer definition of the concept of " punishment " it remains unclear what this means. Karl Menninger, for instance, emphasises that the demand for the abolition of punishment " certainly . . . does not mean the omission or curtailment of penalties; quite the contrary. Penalties should be greater and surer and quicker in coming." [5] Not *punishment*, we note, but *penalties*. What is the difference? Menninger tries to illustrate the distinction with examples, but he is not able to analyse it. By way of introduction, therefore, it will be useful to try to clarify what is meant by " punishment."

Legislators as well as legal theorists distinguish between " punishment " and " other legal measures " in the application of criminal law, but it is not always clear to which of these two groups a particular action belongs. Thus, for example, the imprisonment of juveniles is counted a punishment in Denmark, while the corresponding measure is not so counted in Norway. I believe that the requirements of ordinary usage, as well as of any adequate analysis of the question of the justification of punishment, are best served by attaching the following two conditions to the concept of punishment: (1) punishment is aimed at inflicting *suffering* upon the person upon whom it is imposed; and (2) the punishment is an expression of *disapproval* of the action for which it is imposed. Consequently the following are not to be regarded as punishments:

(a) Measures which are aimed at inflicting suffering but which are not expressions of disapproval. The standard model is to be found in the " conditioning " of reflexes in experiments with animals. By inducing pleasure or pain in an animal, *e.g.* by giving it food or an electric shock, its behaviour can be controlled. The same kind of control can be exercised on humans.

(b) Measures which are expressions of disapproval but are not intended to inflict suffering. If " suffering " is taken in a sufficiently wide sense to cover any degree of displeasurable experiences, such measures become inconceivable. For the very disapproval, which, when communicated directly to the person in question, is termed

[5] *Op. cit.*, p. 202.

reproach, already implies an attitude of hostility, which may range from cool disdain to physical violence, and which must therefore be experienced by the person at whom it is directed as in some degree unpleasant.[6] Consequently we must narrow the scope of this category to cover only measures which are expressions of disapproval but are intended to inflict no other suffering than that inherent in the reproach itself. Although measures of this kind occur, in the form of reprimands, warnings, public condemnations, and the like, they are of no particular significance for criminal law.

(c) Measures which are neither intended to inflict suffering nor expressions of disapproval. Under this category we find steps taken to educate the person in question, cure him, or render him socially harmless—steps taken in the same spirit as those taken by a doctor in treating his patient. Reproach is excluded and there is no *intention* to inflict suffering, though, as everyone who has been to a dentist knows, this is no guarantee that it will not be inflicted! So too, in the field of criminology, until science invents some means such as pills, radiation, or the like, which can cure criminal tendencies, the measures we are discussing will in general require loss of freedom for a considerable, possibly an indefinite, period of time.

It appears from the criminological literature that those writers who would abolish punishment are advocating, in the first instance, that the legal reaction to crime should consist in measures of the educative, curative, or neutralising kind discussed under (c). They see crime in the same light as illness, that is, as a phenomenon calling for diagnosis and treatment based upon a theory concerning the type and causes of sickness, a treatment aimed only at recovery of health, not at suffering or censure. But they do not exclude the necessity of resorting to measures mentioned under (a) as well, that is the deliberate administering of suffering (in the form of a fine or imprisonment) as a method of changing a pattern of behaviour where remedial treatment is deemed inappropriate. On the other hand, it must certainly be assumed that measures mentioned under (b) will be rejected.

It appears from this that it is *punishment as disapproval*, not *punishment as suffering*, that is the target of the abolitionists. It is important to stress this if the programme is not to be misunderstood. "Abolition of punishment" might seem to hold out to criminals the promise of a carefree future. This is far from being the case. Deliberate suffering would continue to be prescribed, and the remedial measures will often in practice be more unpleasant than normal punishment. Indeed the situation is rather the opposite: when the reaction leaves no room for disapproval, its

[6] *Cf. On Responsibility*, above, s. 4.

form and intensity are no longer determined by guilt, and an essential barrier to society's reaction is thus removed. When the judge (and here I mean the person who finds a man *guilty*) is replaced by the manipulator and the therapist, when the criminal law is based on a philosophy of treating citizens like mice or patients without responsibility, the vista that opens up is not so much that of a criminal's paradise as that of a totalitarian state with its mechanical and unlimited power over the individual.

Our task will be, first, to give a short account of the aims and basis of the abolitionist programme, with Ferri's " positive criminology " as our point of departure. The next step will be to separate out the underlying elements in this way of thinking, after which we shall make a critical evaluation of it.

2. Ferri's " Positive " Criminology: a Philosophical Theory of the State's Right to Punish

In order to provide a background for an understanding of the modern authors, it will be useful to recount briefly the content of Ferri's positivist criminology.

Ferri himself maintained that it was its choice of method that characterised the positivist school. The positivists' aim was not to approach crime and punishment as juridical phenomena but to study them with the help of scientific methods, observation, and experiment. Their inspiration was drawn, therefore, from anthropology, psychology, statistics, and sociology. Despite this commitment to scientific principles, however, the main problem with which Ferri dealt was the age-old moral question of the State's *right* to impose punishment.[7] His basic idea was that this right could not be derived, as the classical school would have it, from moral guilt or responsibility on the part of the offender, since responsibility of this kind presupposes a free will which scientific reason must reject as illusory.[8] The right to punish must be derived from the natural conditions of man's existence, and more specifically from every human being's struggle to exist and to defend himself against attack.[9] On this basis the concept of social responsibility develops simply out of the circumstance that men live in society, and quite independently of free will, moral responsibility, and guilt: " Voilà

[7] Henri Ferri, *La sociologie criminelle*, 1893, p. 261: " Le raisonnement habituel qui sert au sens commun, à la philosophie traditionnelle et à l'école criminelle classique pour justifier la punabilité de l'homme à raison des crimes qu'il commet, se réduit à ceci: L'homme est doué de libre arbitre, de liberté morale, il peut vouloir le bien ou le mal; et partant, s'il choisit de fair le mal, il en est coupable et doit en être puni."

[8] *Ibid.*, pp. 262 *et seq.*

[9] *Ibid.*, pp. 291 and 293.

comme l'école positiviste au critérium, contesté et indéfini, de la responsabilité *morale*, comme raison et fondement du droit de punir, substitue le critérium positif et précis de la responsabilité *sociale* ou juridique, comme raison et fondement du droit de défense sociale des honnêtes gens contre les criminels." [10]

In the light of assumptions current in our days one may wonder how Ferri could suppose that a scientific method based upon observation and experiment would enable him to establish a moral principle, namely that the State has a right to administer punishment. Historically, however, the matter may seem less baffling. For Ferri's positivist criminology was in fact no more purely scientific than was the positivism of Auguste Comte from which it drew its inspiration. Both were metaphysical natural-law theories of morality, based on the assumption that the moral principle proceeds directly from reality itself as an expression of its inherent tendencies. From the fact that human beings defend themselves when attacked, it is inferred that they also have a moral right to do so. The description I have given elsewhere [11] of French sociological positivism as camouflaged natural law applies equally to Ferri's criminological positivism.

Ferri himself summarised his doctrine in the following three basic theses which he opposed to the postulates of the classical school [12]: (1) first, as already mentioned, the thesis that free will, postulated by the classical school as a presupposition of moral responsibility, is, as demonstrated by positivist physio-psychology, an illusion; (2) next, the thesis that the offender is, owing to organic and mental abnormalities, inherited or acquired, a special variety of human-kind—a thesis that contradicts the classical school's belief that the offender has the same intellectual and affective equipment as other men; (3) the assertion that crimes flourish, increase, decrease, or vanish from causes quite other than the imposition of punishment, a view which is opposed to the classical school's belief that the principal effect of punishment is to bring about a decrease in the number of offences.

On this basis Ferri proposed a reform programme the main idea of which was to effect a change in the nature of the criminal law's response to criminals. Rather than punishment (a censorious reaction) determined by guilt and meted out in proportion to the guilt, the reaction should be a social sanction determined by the danger constituted by the law-breaker and applied in proportion to the degree of this danger. Mental responsibility (imputability) is

[10] *Ibid.*, p. 427; *cf.* pp. 330, 342, 344, 347 and 419.
[11] *Kritik der sogenannten praktischen Erkenntnis*, 1933, pp. 245 *et seq.*
[12] Ferri, *op. cit.*, p. 22.

an illusion. There is in principle no difference between punishment and safety measures. This is the doctrine of punishment as *difesa sociale*.[13]

3. Barbara Wootton's Demand for the Abolition of Both Imputation and Imputability as Requirements for Conviction

In England the discussion on the problem of imputability has long taken the form of a criticism of the famous *McNaghten Rules*, formulated by the House of Lords in 1843. According to these a person is held responsible for his actions unless he is labouring " under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." Only mental disorders which have affected the intellect are recognised as exculpating according to this doctrine. The traditional criticism has been that the McNaghten criterion is too crude and too narrow. It should be refined and extended to take in also those cases in which mental disorder has affected the emotions and the power of restraint in such a way that although the agent knew well enough what he was doing, it was not in his power to prevent himself from doing it.[14] Consequently there has been a demand to place greater stress on the distinction between responsible and irresponsible actions and to modify the criterion so that more people are exempted from criminal liability. This criticism led in 1957 to the introduction of the concept of " diminished responsibility." Under the Homicide Act, section 2, it was established that if the accused's mental responsibility was substantially impaired by mental abnormality he could only be convicted of manslaughter, for which the maximum penalty was life imprisonment, not for murder, the penalty for which was death.[15]

But there is also a modern school of thought which maintains, on the contrary, that a psychologically based distinction between responsible and irresponsible behaviour is impracticable and pointless. The criterion of mental responsibility (imputability) should simply be dispensed with as a condition for conviction, and the criminological reaction to crime should be arrived at in each in-

[13] *Ibid.*, pp. 407, 408, 429 *et seq.* and 433.

[14] See, *e.g. Royal Commission on Capital Punishment 1949–53 Report* (1953), paras. 289 *et seq.*; *Model Penal Code* (The American Law Institute, 1956), Tentative Draft No. 4, Art. 2, s. 4.01; Barbara Wootton, *Social Science and Social Pathology*, 1959, p. 231, with a discussion of the reform proposal prepared by the British Medical Association; and Herbert Morris (ed.), *Freedom and Responsibility*, 1961, chap. VIII, " Legal Insanity."

[15] On this see Barbara Wootton, *Crime and the Criminal Law*, 1963, pp. 59 *et seq.* and 85 *et seq.*; and H. L. A. Hart, *Punishment and Responsibility*, 1968, pp. 245 *et seq.*

dividual case without regard to guilt, and only with a view to what in the particular instance will offer the best chance of preventing recidivism. The traditional system, which bases punishment on retribution for guilt, should be replaced, according to this view, by a system designed as a means of preventive social hygiene.

A leading member of this group of critics is Barbara Wootton. She has been described by the legal philosopher H. L. A. Hart as " by far the best informed, most trenchant and influential advocate of these new ideas . . . whose powerful work on the subject of criminal responsibility has done much to change and, in my opinion, to raise, the whole level of discussion." [16]

Barbara Wootton's attack is directed at the concept of *mens rea* which she thinks should be dispensed with as meaningless, or at least as irrelevant. English penal law is, as we know, constructed on the basis of the concepts of *actus reus* and *mens rea*, corresponding approximately to what, in Danish law, we know under the names of, respectively, objectively illegal action (*den objektivt retstridige handling*) and mental conditions of guilt (*psykiske skyldbetingelser*). These conditions include, according to the Continental view, imputation (intention, negligence) and imputability (mental responsibility) (in Danish: *tilregnelse* and *tilregnelighed*). Barbara Wootton's doctrine thus amounts to no less than the view that questions of both imputation and imputability be discounted as conditions for convicting a person of an offence, while at the same time they are to be taken into account as circumstances which partially determine the nature of legal reaction to be applied in a particular case.

Barbara Wootton's most comprehensive treatment of the question of mental responsibility is contained in her major work, *Social Science and Social Pathology* (1959), while a less detailed account is to be found in *Crime and the Criminal Law* (1963), comprising her four " Hamlyn Lectures " delivered that year.

Her argument is based upon two main theses. These, however, do not amount to mutually supporting views. If they are tenable, then each is in itself conclusive. In adducing both, therefore, her appeal is *ex abundante cautela*: if one thesis fails to convince the reader, the other may succeed.

The first of these theses is that it is simply impossible—if mental irresponsibility is allowed to extend beyond the narrow, purely intellectualistic limits set by the McNaghten Rules—to set up a meaningful and applicable criterion. For then the question becomes whether the agent's emotions and powers of self-restraint have been so impaired by disease of the mind that he was unable to act other-

[16] Hart, *op. cit.*, p. 193.

wise than he did; or, one could also say, the crucial point becomes whether he acted from free will or was driven to act as he did by an irresistible impulse. Now we know that he actually did not overcome the inducement to act as he did. The question is whether it was possible for him to do so. But the answer to this question lies, according to Barbara Wootton, beyond the limits of knowledge; so if one poses such a question to a judge, jury or psychiatric expert, one is asking them something that in fact they are not able to answer.[17]

It is part of the traditional theory of mental responsibility that the exculpating intellectual or emotional deviation must be due to mental disorder—this latter being taken in a wide sense to encompass not only insanity but any lack of full mental health. The idea that any illness which causes misconduct also excuses that misconduct is, according to Barbara Wootton, deep-seated in contemporary ideas on responsibility.[18] She begins, therefore, with an analysis of the concepts of " mental health " and " mental illness."

This chapter makes fascinating reading. Traditional views depend, it is claimed, on the assumption that mental disorder is, just as is physical illness, an objective phenomenon in the sense that the occurrence of an illness can in principle be diagnosed from symptoms whose presence or absence can be established by expert scientific observation, independently of subjective evaluations and moral ideals.[19] She further claims that this assumption is untenable. This emerges from a survey of no fewer than twenty-five different definitions of " mental health " taken from expert writers. A recurring theme in these definitions is the equation of mental health with the ability to live happily, with vigour and full use of capabilities, with inner integration and outward adaptation, so that both inner and outer conflicts are avoided. It is not difficult to show, as already Kingsley Davis did,[20] that these definitions imply, more or less openly, evaluations and cultural ideals.[21] Adaptation—yes, but to what? What was considered lack of adaptation in Nazi Germany may for us be mental health and strength; and what is seen as lack of adaptation in the competitive society of the United States may be regarded in a South Sea island as the healthy unfolding of the human spirit. Development of capabilities—yes, but there are also capabilities, of course, which belong to the seamier side of the soul and which it would not be thought healthy to develop. It is par-

[17] Wootton, *Crime and the Criminal Law*, pp. 73 *et seq.*

[18] Wootton, *Social Science and Social Pathology*, p. 208.

[19] *Ibid.*, p. 207.

[20] Kingsley Davis, " Mental Hygiene and the Class Structure," *Psychiatry* (February 1938).

[21] Wootton, *Social Science and Social Pathology*, pp. 216 *et seq.*

ticularly the discipline known as " mental hygiene " that has exploited the concept of mental health. " Disguising its valuational system . . . as rational advice based on science, it can conveniently praise and condemn under the aegis of the medico-authoritarian mantle." [22]

Similarly, " mental disorder " is often—still according to Barbara Wootton—only a term used to indicate a kind of behaviour which is in conflict with recognised social norms. This is true, in any event, of the more moderate cases. " Mentally sick " is a label attached to a person simply because, in one way or another, he fails to live up to the expectations of the social environment. A man who is unusually suspicious, irritable, melancholy, or aggressive is sent to a doctor for treatment. He is considered to be ill and therefore not responsible. But in these cases there is no other indication of sickness to be found than the behaviour of which the sickness is supposed to be the cause. This means that the behaviour is its own excuse. The effect is to undermine the concept of responsibility. " For if illness excuses bad temper, and if a man is only known to be ill by reason of his temper, the same logic may be used to absolve him of responsibility for other forms of behaviour which are classified as anti-social." [23]

The claim that it is impossible to form an acceptable criterion of mental responsibility is developed by Barbara Wootton in the succeeding chapter, where she examines and rejects a series of attempted definitions. In all cases the criticism turns either on the thesis just discussed—that the argument for freedom from responsibility is circular, and therefore empty, because there is no other indication of sickness than the norm-conflicting behaviour itself—or on the thesis that the criterion of sickness offers no foothold for the assumption that the inducement has been irresistible. Take, for example, the kleptomaniac. When well-to-do people steal things they have no use for, their action seems unintelligible since it appears to lack any motive, or at least any rational motive. Beyond the behaviour itself there is no further indication of the exonerating illness, and there is no foothold for the assumption that the well-to-do man's kleptomaniac yearning is more irresistible than the poor man's hunger for a proper meal or a packet of cigarettes.[24]

Barbara Wootton's rejection of the concept of " medical crime " is interesting, this being defined by her as a crime due to factors in the personality which can be recognised and treated by medical means. Sickness in this sense is whatever a doctor can treat in

[22] Kingsley Davis, *op. cit.*, quoted in Wootton, *op. cit.*, p. 217.
[23] Wootton, *Social Science and Social Pathology*, pp. 225 *et seq.*
[24] *Ibid.*, pp. 233 *et seq.*

his professional capacity or whatever is treatable by medical means. However, when these means are no longer confined to medication, surgery, and other somatic intervention, but also include psychotherapy in the form of interviews, advice on emotional and other personal matters, psychoanalysis, and so on, the concept becomes extremely elastic. Moral exhortation by a clergyman and psychotherapeutic treatment by a doctor are both forms of verbal communication, and there is no reason why a man treated by a doctor should be any more exempt from punishment than his fellow " treated " by a clergyman.[25]

The essential point in the rather wide-ranging observations of *Social Science and Social Pathology* comes out more sharply in the simpler account in *Crime and the Criminal Law*. The chief object, says Barbara Wootton, is to show the difference between " he did not resist the impulse " and " he could not resist the impulse."

> But neither medical nor any other science can ever hope to prove whether a man who does not resist his impulses does not do so because he cannot or because he will not. The propositions of science are by definition subject to empirical validation; but since it is not possible to get inside another man's skin, no objective criterion which can distinguish between " he did not " and " he could not " is conceivable.[26]

Barbara Wootton discusses a further argument for the inapplicability of the concept of mental responsibility—in fact not only for its inapplicability but also its meaninglessness—though it is not an argument she subscribes to herself. It is the determinist argument urged, among others, by Eliot Slater [27] and J. E. MacDonald [28] —and also, we may add, by Olof Kinberg and the positivist school (Ferri). This, as we know, considers mental responsibility to presuppose a metaphysical free will which has to be rejected as a figment of the imagination inconsistent with scientific determinism. Barbara Wootton does not deny that determinism excludes responsibility but is aware that determinism is far from being a demonstrable scientific truth, and is in fact a highly controversial philosophical hypothesis.[29]

Abolition of the concept of mental responsibility does not mean,

[25] *Ibid.*, pp. 240 *et seq.*

[26] *Crime and the Criminal Law*, p. 74.

[27] " The McNaghten Rules and Modern Concepts of Responsibility," *British Medical Journal* (September 1954).

[28] " The Concept of Responsibility," *Journal of Mental Science* (July 1955).

[29] *Social Science and Social Pathology*, p. 247.

however, that the perpetrator's mental state has no relevance at all for criminal law. Although it has no significance for his responsibility and conviction, it still affects the choice of the most effective treatment for restraining him from further offences:

> The psychiatrist to whom it falls to advise as to the probable response of an offender to medical treatment no doubt has his own opinion as to the man's responsibility or capacity for self-control; and doubtless also those opinions are a factor in his judgment as to the outlook for medical treatment, or as to the probability that the offence will be repeated. But these are, and must remain, matters of opinion, " incapable," in Lord Parker's words, " of scientific proof." [30]

Barbara Wootton's second main thesis is that the concept of mental responsibility—whether or not it is meaningful or practically applicable—is in any case irrelevant for a rational criminal policy. She thinks we can simply bypass the problem of determinism and leave the concept of mental responsibility in suspense as something which is of no concern, at least to criminologists. Her argument in support of this is sketchy and is confined to the almost self-evident presupposition that the purpose of criminal law is to minimise offences, *i.e.* is prevention, and not to punish the guilty, *i.e.* retribution.[31]

The author's attack on that side of the concept of *mens rea* which relates to imputation (intention, negligence) occurs only in the shorter book.

The first thing to note is that in this part of the criticism of *mens rea* nothing is said about the impossibility of recognising the psychological states in question. On the contrary, the possibility and relevance of identifying them for shaping the reaction to crime are taken for granted.

Barbara Wootton's thesis proposes that the perpetrator's mental attitude to his action, which is described in such terms as " intention," " negligence," and " accident," is irrelevant for conviction in criminal law, but not for determining the sentence. Her argument for this derives from the assumption that criminal law aims at prevention and not retribution:

> If, however, the primary function of the courts is conceived as the prevention of forbidden acts, there is little cause to be disturbed by the multiplication of offences of strict liability. If the law says that certain things are not to be done, it is illogical

[30] *Crime and the Criminal Law*, p. 77.

[31] *Social Science and Social Pathology*, p. 247; and *Crime and the Criminal Law*, pp. 40 *et seq.*

> to confine this prohibition to occasions on which they are done from malice aforethought; for at least the material consequences of an action, and the reasons for prohibiting it, are the same whether it is the result of sinister malicious plotting, of negligence or of sheer accident. A man is equally dead and his relatives equally bereaved whether he was stabbed or run over by a drunken motorist or by an incompetent one; and the inconvenience caused by the loss of your bicycle is unaffected by the question whether or not the youth who removed it had the intention of putting it back, if in fact he had not done so at the time of his arrest.[32]

As we see from this passage, not only simple negligence but also sheer accident are set alongside intention.[33]

Nevertheless, the mental conditions with which the doctrine of imputation is concerned acquire significance when, once the accused has been convicted for the deed (because he is in fact the one who perpetrated it), a decision about the appropriate legal measures has to be made:

> At a later stage, that is to say, after what is now known as conviction, the presence or absence of guilty intention is all-important for its effect on the appropriate measures to be taken to prevent a recurrence of the forbidden act. The prevention of accidental deaths presents different problems from those involved in the prevention of wilful murders. The results of the actions of the careless, the mistaken, the wicked and the merely unfortunate may be indistinguishable from one another. But each case calls for a different treatment.[34]

4. Abolition of the Requirement of Imputation: an Obvious Non-Sequitur in Barbara Wootton's Argument, and its Implausibility

In turning now to the task of expounding and evaluating the underlying thought in these projected criminological reforms, I shall begin by considering Barbara Wootton's attack on the doctrine of imputation, that is, her demand that negligence and accident be put on a par with intention for purposes of conviction. The thought involved in this side of the criticism of *mens rea* is considerably

[32] *Ibid.*, p. 51.

[33] Thus also *ibid.* p. 52: "If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which were due to carelessness, negligence or even accident." In view of these clear words it can make no difference that the author occasionally speaks only of negligence in the following pages.

[34] *Ibid.*, pp. 52 *et seq.*

less complex than that concerning the problem of mental responsibility.

Her argument is quite simple. It is that when it is the task of the legal system to prevent, as effectively as possible, those acts which are held to be criminal offences—rather than to make punishment the wages of guilt—there is no good reason to confine the reaction to cases in which guilt obtains in the form of intention. Nor do the interests of the injured party speak in favour of such a restriction. The injury for him is the same, and the wish to combat it as great, whatever the mental constellation under which it may have originated in the perpetrator's mind. "If the object of the criminal law is to prevent the occurrence of socially damaging actions, it would be absurd to turn a blind eye to those which are due to carelessness, negligence or even accident." [35]

The reasoning can be outlined more precisely in the following steps: (1) the aim of criminal legislation is to prevent the perpetration of acts classified as criminal (because they are regarded as being socially damaging); (2) from the injured party's point of view, interest in the non-occurrence of such acts is the same whether the perpetrator acted intentionally, negligently, or by sheer accident; (3) legislation which drops the requirement of criminal imputation (for conviction) will work more effectively in prevention than one which retains it; (4) consequently the requirement of criminal imputation as a condition for legal reaction should be dropped. What should we say to this?

First, regarding (1), nothing. I can subscribe fully to this premise, and would only add the rider that, if by putting it forward it is sought to suggest, as does Barbara Wootton, that the purpose of penal legislation is *not* retribution for guilt, then the point rests on a misunderstanding. For this is something no one has ever claimed. The so-called retributivist theories are not concerned with the *purpose* of penal law (its intended effects) but with the moral basis for sentencing a particular person and for the kind and extent of the punishment imposed. The substance of the retributivist's case is that the guilt requirement sets a moral limitation upon the State's right to pursue its preventive aims. I have developed this line of thought more fully elsewhere.[36] Since it has no further bearing in this context I shall not elaborate on it here. I accept premise (1) unreservedly: the purpose of penal law, or at least its typical main purpose, is to prevent the occurrence of criminal acts.

[35] *Ibid.*, p. 52.

[36] See above "On Responsibility," s. 5, and "The Aim of Punishment," s. 5; and below "On Determinism and Morality," s. 9.

As for (2), this premise is open to question, though it is not here that we shall find the fatal flaw in the argument.

It is open to question because it is an error to suppose that an act can be described objectively as a purely physical sequence of events, that is to say without introducing into its description a reference to mental components. There is a manifest difference between *A*'s throwing a stone in the direction of *B* as part of a game, for *B* to catch it, and *A*'s throwing it at a police officer during a demonstration in order to bring him down. But this difference cannot be described in purely objective physical terms. If in describing *A*'s " action " one leaves out everything we refer to in terms of " intention," " meaning," " purpose," the action shrinks to nothing more than certain muscle contractions and arm movements. But it is not possible on this basis to distinguish between something that is a part of a game and something that involves wilful aggression. The distinction between the act itself and its attendant mental circumstances is an artificial and impossible abstraction. The act is grasped immediately as having a definite " sense " and only in this way becomes an act, or action, of a definite kind, *e.g.* a throw in a game or an assault.[37]

It is also clear, then, that if by mischance a stone thrown in a game strikes *B* and injures him, the hurt he receives is not the same as that when he is subjected to personal assault. And this is true even if the bodily injury is the same in each case. Even a dog reacts in different ways to a deliberate kick and to an accidental movement of the foot. Personal assault brings a mental distress and suffering that does not occur in the case of accidental injury. There is greater interest, therefore, in preventing assault than in preventing accidents.

The questionableness of premise (2) does not, however, imply the total invalidity of the argument. For even if it is conceded that the difference we have pointed to here between the intentional and the accidental is a relevant one, it may still be maintained that there is nevertheless some interest also in preventing accidental injury, and that this is enough to sustain the conclusion.

Premise (3) is doubtful. The question how a system of criminal law that drops the requirement of criminal imputation will work is surely one we cannot answer with any certainty and must leave to conjecture, fortified as best it may be by hypothesis.

It should be granted that it is reasonably certain that criminal legislation based on strict responsibility will have an immediate preventive effect. The knowledge that both negligence and accident

[37] Franz From, *Perception of Other People* (New York 1971), p. 69.

will lead to criminal proceedings will certainly provide more inducement than does the law as it actually stands to pay greater heed to what one is doing and to take care, as far as possible, to avoid situations in which there is a significant risk of one's being the cause of some accidental injury. For example, when undertaking a journey it would, from this point of view, be wiser to walk or take a train than to cycle or go by car.

On the other hand, it is possible, and in my view even probable, that such an arrangement will in the long run weaken the general preventive effect of penal law. As has been vigorously maintained, especially in Scandinavian theory, this effect depends in the first instance on the capacity of the system to strengthen and form popular moral attitudes of disapproval of criminal acts. And as Ekelöf in particular has urged,[38] this capacity in turn depends on popular recognition of the justice of punishment, and that in turn means that the punishment should be both directed at the guilty and reasonably related to the guilt. And this condition will certainly not be fulfilled in a legal system in which it is a matter of pure luck whether one will be prosecuted and possibly sentenced to one or other form of suffering or cure.

Now for step (4). This is an inference the invalidity of which proclaims itself to the high heavens. It assumes, if it is to be tenable, the rule of inference that if an agent wishes to realise a certain goal (an intended interest-determined end) he must also be prepared to employ every means by which he might achieve that goal. This, of course, is false. Two kinds of factors may justify an agent's unwillingness to avail himself of a particular means. First, other interests. Besides promoting the end in question, the means may have what the agent considers to be undesirable after- or side-effects which must be balanced against his interest in realising the goal—just as medicine can have harmful effects which outweigh its advantages (thalidomide!). Secondly, restrictive considerations, especially of a moral nature, which are recognised and taken into account by the agent although counter to his own interests. Barbara Wootton argues as if there could be only one goal in the world, and as if nothing else counted but the interest in achieving it. She could just as well have argued: the task of a national fire service is to devise effective means for fighting and preventing outbreaks of fire. Therefore, since prohibition of the use of inflammable materials in houses and the requirement that no two houses should be closer than a hundred yards to one another are means to this end, they should be enforced.

It should not be difficult to see what compelling reasons there

[38] *Per* Olof Ekelöf, *Straffet, skadeståndet och vitet*, 1942, p. 35; *cf. Tidsskrift for Rettsvitenskap* 1968, p. 129.

are for not making responsibility in penal law strict, that is to say unqualified by imputation (intention, negligence). One need only imagine for a moment a world in which every case of negligence and mishap would lead to police action and criminal charges provided that under the rules now in force such action is regarded as criminal if intentional. In such a world any accidental damage to property would have to be brought to court as wanton destruction. Any accidental violation of another's person, a jostle, push or knock, would come under the rules relating to bodily injury. Anyone, in any circumstances, found in possession of stolen goods would be chargeable with receiving, and so on. It is clear that such a situation would be intolerable, and that strong counter-considerations can be adduced against a one-sided implementation of preventive policies, namely consideration for the individual's legal security and autonomy, his interest in knowing that he is not the prey of a capricious legal machine, but that punishment or other legal measures will normally only be imposed upon him in circumstances over which he can exercise control. The rule that only offences which a person can be held accountable for may lead to legal reaction against him affords everyone the knowledge that his own fate in regard to society's penal machinery depends on himself, on his own will and character, and not on chance. He knows that if, by his own will power, he can live up to a sincere desire not to break the law, he is secure against criminal action. His efforts may be in vain. But even so they are meaningful, and he is sustained by the encouraging knowledge that if he succeeds the reward is security against the imposition of punishment. The requirement of imputation is the condition of the individual's ability to plan his own life with the purpose of keeping himself free of the criminal law.[39]

Hart, who has objected to Barbara Wootton's demand for the elimination of imputation, is in my view, too lenient in his criticism. He seems to suppose that if Barbara Wootton's programme were put into effect, accidents would only lead to criminal proceedings if the circumstances indicated that some form of treatment, medical or penal, was called for; and he assumes that the prosecuting authority will show a reasonable regard for good sense.[40] However, I cannot see how, once the purely accidental is brought into the domain of crime, there can be room for any consideration at all as to whether a reaction is indicated, and if so what reaction. The perpetrator is in no way implicated with his person and character.

[39] Hart has worked out this view in detail; see, *e.g. Punishment and Responsibility*, 1968, pp. 44 *et seq.*

[40] Hart, *op. cit.*, p. 206.

If the desired preventive effect is to be attained, the rule must simply be that he shall be unconditionally and automatically prescribed a dose of penal suffering.

One inevitably looks for some explanation why a scholar of Barbara Wootton's calibre should have failed to see the invalidity of the conclusion. There are, I think, two fallacies which may have played a decisive part here. One is the conclusion that if retribution for guilt is not the *purpose* of punishment, then retribution and guilt have no place at all in the philosophy of punishment. This misunderstanding is in turn due to the fact that in much of the discussion on the principles of penal law in recent times among criminologists there has been a tendency to present the problems of policy under the heading "The purpose of punishment." But this provides an altogether unsatisfactory frame of reference for such complex and diverse problems.[41] The second fallacy is the asumption that, if guilt (imputation and imputability) is to be accorded any relevance in penal law, this must be on the presupposition that man's will is free in the metaphysical sense, that is to say is not subject to causal laws. If one feels compelled to reject indeterminism, one feels one must also reject all talk of guilt as metaphysical delusion. It is true that the guilt requirement has often been justified in this way. But it does not, of course, follow from this that another and better, fully rational and empirical justification cannot be given. Elsewhere I have argued that such a justification can be given.

5. The Deterministic Argument that the Notion of Imputability (Moral Responsibility) has no Meaning is too Implausible for Anyone to have Taken it Seriously

If Barbara Wootton's attack on the requirement of imputation must be termed a "speciality" of her own devising, the demand to do away with the criterion of moral responsibility, on the other hand, is a standard item in the programme of modernist reformers. In continuation of the positivist school's view, it has become increasingly the vogue among criminologists, psychiatrists, psychologists, physicians, educationists, sociologists, and other experts with scientific training and aspirations, to regard the idea of moral guilt, and the derivative ideas of responsibility and punishment (as disapproval) as metaphysical notions which are inconsistent with, or at least of no relevance to, pure-bred scientific thinking.

An underlying factor in this attitude is the determinist argument.

[41] *Cf.* above "The Aim of Punishment," ss. 1 and 5.

We noted above under section 2 the central role that this argument has played for the positivist school. With the rejection of the classical school's faith in a metaphysical free will it was thought that the ideas of guilt and mental responsibility must go out too. Punishment is not determined by, nor is it to stand in any relation to, any moral or legal guilt in the criminal; rather it is society's way of defending itself against socially damaging acts. Similar arguments based on " scientific determinism " are constantly found playing a leading role in the literature both of criminology and of moral philosophy.[42]

The determinist argument should therefore be taken up for more detailed study. It cannot be avoided by simply maintaining that metaphysical problems have no significance for practical criminology. Even if that were the correct view, as indeed I believe it is, one does not thereby escape the fact that philosophical speculations of the kind discussed, though in an undigested and confused form, do in fact play an important part in argumentation and the forming of opinions. Even if it should be true (as I believe it is) that there is no tenable formulation of determinism that would oppose the meaningful use of such notions as guilt, responsibility and punishment, this does not prevent misunderstandings from creating pseudo-problems and leading opinion astray. So we must look more closely at the reasoning.

As we have mentioned, Ferri presented his postulate that free will is an illusion in opposition to the classical school's postulate of free will. In as much as the classical doctrine of moral guilt and responsibility was based precisely upon this postulate, he thought that by rejecting it he had also disposed of the concept of responsibility.

The classical school reasoned in this way: (1) moral responsibility (and *ipso facto* morality as a whole) presupposes that man has a free will; (2) man has a free will; (3) therefore moral responsibility is possible.

The positivist school denied premise (2). It took it as scientifically

[42] The idea has roots far back in the history of moral philosophy. See, *e.g.* Spinoza, who in his *Ethics* (Bk. 4, theorems 51 and 63) taught that indignation is evil and should not dictate the punishment. In a recent symposium a number of modern philosophers expressed something of the same view. *e.g.* John Hospers: " Someone commits a crime and is punished by the state, 'he deserves it,' we say self-righteously—as if we were moral and he immoral, when in fact we are lucky and he is unlucky—forgetting that there, but for the grace of God and a fortunate early environment, go we." In Sidney Hook (ed.), *Determinism and Freedom in the Age of Modern Science* (1st ed. 1958), p. 124 (Collier ed. p. 138). Similarly Paul Edwards, *ibid.*, pp. 104 *et seq.* From the literature on penal law we can mention Franz von Liszt and many others. On this see below " On Determinism and Morality," ss. 1 and 12.

proven that man's will, like all other phenomena, is subject to causal laws. So it concluded that moral responsibility is without meaning.

There are two objections to this. First, it is oversimple to assume that determinism is " scientifically proven." It is generally acknowledged today that the determinist thesis, however precisely it may be formulated, is not a straightforward empirical statement, and that it cannot be definitely confirmed (or refuted) from experience. It does not, like a natural law, express invariable relations between different events, but postulates—if it is to support the conclusion—that all phenomena, including the human will, are subject, without exception and in all circumstances, to determination by causal laws. Any attempt to determine the conditions for the truth of this assertion would transcend all finite bounds of experience.[43] The conflict between determinism and indeterminism cannot be regarded as having been brought to a conclusion. Modern nuclear physics has breathed new life into it, and there are even those who believe it to be an established fact that there are atomic phenomena which are by their very nature immune from any causal determination.[44] The dispute continues, and our endeavours should perhaps, for the time being, be directed principally to the task of giving meaningful interpretations to the two theses, so that we may at least begin to decide which of them is true. As matters now stand we must in any case put to rest the naive belief that determinism is " scientifically proven."

The second, and in my view crucial, objection, so long as the determinism dispute is not settled, is that the inference to the impossibility of morality is possible only because the positivists still cling to the classical school's point of departure, *i.e.* premise (1), which states that moral responsibility presupposes man's possession of a free will in the sense of a will that is not (or is not in all circumstances) subject to causal laws. The fundamental assumption is the postulate that, if the determinist thesis is true, then all talk of morality and of moral responsibility is meaningless.

But this postulate, in my view as well as that of many others,[45]

[43] *Cf. e.g.* Sir W. David Ross, *Foundations of Ethics*, 1939, pp. 213 and 218.

[44] Thus, *e.g.* Bohr, Heisenberg and Born, as against Einstein, Planck, Schödinger, *et al.* See Percy W. Bridgman, " Determinism in Modern Science " in Hook, *op. cit.*, pp. 43 *et seq.*

[45] Compatibilism, *i.e.* the view that determinism and morality are consistent with one another, has a long tradition behind it. We may mention in passing: Hobbes, Locke, Hume, Höffding, Jodl, Westermarck, Heymans, Ayer, Schlick, and Stevenson. From the collection referred to in the preceding note (Hook, *op. cit.*) we can mention Blanchard, Brandt, Ducasse, Pap, and Hook. It is not to be denied that the contrary view, too, has had its outstanding proponents among philosophers and jurists.

is incorrect. An adequate argument in support of this view would require a more precise interpretation of the conceptual content of determinism, and logical analysis of its implications. This would take me beyond my present terms of reference, and here I must content myself with mentioning a consideration which can to some extent make it at least probable that my view is correct.

But first I must make it clearer what my view is. In contesting the assumption that moral responsibility presupposes indeterministic freedom of the will, I do not mean to deny that moral responsibility presupposes a state of freedom in a certain sense, namely something we could call *freedom of action*. Everyone agrees that moral responsibility presupposes that in a certain sense it has been in the offender's power to act otherwise than he did. He is responsible if he *could* have done the right thing, which is to say that he would have done it if he had willed to do so with sufficient strength; if he had made a serious effort to ascertain his duty and had striven to carry it out. He is free of responsibility if he could not have acted otherwise, which is to say if there existed such outer or inner compulsion as to make all his efforts in vain. Therefore the man who acts in a delirium or under an irresistible impulse is not responsible for what he does.

On this, as we have said, there is general agreement. The dispute is whether moral responsibility presupposes, part from this freedom of action, freedom in another, deeper sense, namely genuine *freedom of will*. Those who claim that it does, state that moral responsibility must also be excluded in cases where the offender could have acted rightly (that is to say, would have done so if he had willed it), namely if his lack of will is nothing but the necessary product of inherited incapacities, environment and personal history. Moral responsibility presupposes not only that we could have *acted* otherwise, but also that we could have *willed* otherwise. If one assumes, with the indeterminists, that this is precluded, it follows that all talk of morality and of moral responsibility is empty.

Let us call this doctrine—that moral responsibility is inconsistent with determinism—incompatibilism. And let us call the conclusion, that moral responsibility is impossible, moral nihilism.[46] We can see that moral nihilism presupposes a combination of determinism and incompatibilism. It is precisely this combination that we find in the positivist school and its modern extensions.

The point I shall confine myself to making is that moral nihilism is a product of philosophical speculation whose unreasonableness

[46] The expression " moral nihilism " is, of course, not taken in the sense in which it is often used in the Uppsala philosophy's doctrine of the a-theoretical nature of moral statements.

is so glaring that it can never have had any serious adherents, even among those philosophers who have enthusiastically defended it in their books. It can be compared to the subjective idealist theory that the external world is mere illusion and in fact exists only in one's own experience (*esse est percipi*). There is a story of a professor of philosophy in the old days who liked to ask examination candidates whether there was anyone present besides the candidate himself and failed them if they answered in the affirmative. And just as I cannot believe that any philosopher has ever seriously doubted the reality of the world, so I find it hard to credit that Ferri, Kinberg, or any other " positivist," has ever seriously rejected morality and moral responsibility as meaningless talk. Have these men never felt moral indignation and anger, and in fact given vent to it? Have they never reacted with irritation and reproach when someone offended them? Have they never rebuked themselves for anything or felt the burden of responsibility? In short, have they never reacted like other men?

Of course they have. And there is an element of absurdity in their protestations when their very rejections of moral indignation assume exactly this character. Thus Hospers, after arguing that determinism precludes moral blame and that we good citizens who have not come into conflict with the law should remember that this is due not to our being morally superior to the criminal but to our being *lucky*, goes on to say: " There is one possible practical advantage in remembering this. It may prevent us (unless we are compulsive blamers) from indulging in righteous indignation and committing the sin of spiritual pride, thanking God that we are not as this publican here." [47] Which is to say that Hospers the amoralist brands a certain attitude as sinful and thanks God that he is not like those who thank God that they are not like the publican.

6. The Pragmatic Argument that the Preventive Aim of Punishment Makes Responsibility Irrelevant is a Mistake Due to Conceptual Confusion

Barbara Wootton is too sophisticated to think that determinism is proven and that the meaninglessness of such concepts as moral responsibility and criminal imputability can be established in this way. She says that we should not take sides in this philosophical dispute. The main point is rather that the concept of responsibility, whether meaningful or not, is in any case irrelevant for the criminologists' discussion. For if the aim of punishment is prevention and not retribution, there is no call to make responsibility a condition for punishment. " For this purpose it is unnecessary to ask whether

[47] In Hook, *op. cit.*, pp. 126 *et seq.* (Collier ed. p. 138).

an offender is, or is not, a free agent, or a responsible person in the sense that he could, if he wished, have done otherwise than he did." [48] That does not mean, however, that the offender's mental state is of no importance. Although responsibility should not be considered in arriving at a conviction, an assessment of the offender's mental state is relevant in the consequent sentencing. The author gives the following sketch of the future criminal process:

> The legal process for determining who has in fact committed certain actions would continue as at present; but once the facts had been established, the only question to be asked about delinquent persons would be: what is the most hopeful way of preventing such behaviour in future? In criminal procedure the age-old conflict between the claims of punishment and of reformation would thus be finally settled in favour of the latter.[49]

That is to say: when the purpose of punishment is prevention there is no call to make responsibility a condition for conviction. This, however, is an elliptical inference which transparently assumes a number of concealed premises. These can be rendered explicitly as follows: (1) the aim of criminal legislation is prevention, not retribution; (2) criminal legislation should be formed with regard to its aim, and only to that; (3) the system of criminal law should therefore be formed, and function, only with a view to prevention; not as an expression of moral disapproval; (4) the requirement of mental responsibility has meaning only as a condition for moral disapproval; (5) the requirement of mental responsibility should therefore be dropped as groundless.

The fundamental mistake in this argument is to be found straight away in premise (1). The opposition between " prevention " and " retribution " contained in it, as two conceivable aims of criminal legislation, is meaningless. As I have argued in detail elsewhere, this rests on a confusion of different questions and on a misunderstanding of the classical retributivist theories.[50] It is altogether unreasonable to suppose that retribution should be an aim, that is to say an intended and deliberately pursued effect, of criminal legislation. Nor have classical retributivists, like Kant and Binding, ever claimed any such thing. The problem they were concerned with was the ethical question of the State's moral right to subject the individual person to the pain of punishment, often the severest encroachment on his freedom, his bodily integrity, indeed his very

[48] *Social Science and Social Pathology*, p. 247.
[49] *Ibid.*, p. 251.
[50] *Cf.* above " On Responsibility," s. 5, and " The Aim of Punishment," s. 5; and below " On Determinism and Morality," s. 9.

life. It was not the criminal legislator's intended effects they asked about, but the moral basis for the imposition of punishment (also termed the *Rechtsgrund* of punishment). And their theory was that not social expediency but only the fact that an individual has committed an *offence* can *justify* his being punished. That he has commited an offence implies, first, that he is actually the perpetrator and, second, that he is responsible for the perpetration because he committed it under mental conditions making him guilty. The requirement of being guilty in a violation of the law is thus a restrictive moral consideration which limits and conditions the State's right to use penal suffering in order to pursue a social aim (prevention). It precludes the punishment of non-perpetrators (*e.g.* hostages) and of non-guilty perpetrators, regardless of whether such punishment might promote the goal of prevention.

Thus right from the start the opposition of " prevention " and " retribution " as alternatives set us off on the wrong track. And we should go even further astray by inferring from this that, if the aim is prevention (which no one will deny), then all talk of guilt, moral responsibility, blame and retribution must be excluded.

This is a fundamental mistake—and here we come to a main point in the discussion—because *disapproval* (or *reproach* when it is directed expressly at the accused) *is in itself a form of behavioural reaction with a conduct-influencing* (*preventive*) *function.*[51] In disapproval and reproach, or censure, a more or less cool disdain, an unfriendly or patently hostile attitude is directed towards the guilty party. The reaction can vary in strength over a wide range, from a gentle snub to seething anger and indignation, which may be succeeded by violent aggression (*e.g.* lynching). In all cases disapproval works as a conduct-influencing factor because it is experienced by the person affected as something disagreeable, unpleasant, and painful. Moreover, in many cases, especially when it is expressed by persons in authority or collectively by the social environment, its effect will be such that the judgment is accepted by the recipient, taken up into his own moral consciousness, and in this way come to be a determining factor in his own future behaviour, not just from fear of unpleasantness, pain, etc., but also from respect for what is regarded as right and just.

In our present society punishment is experienced as an expression of disapproval on the part of the community, which brands the punished person in a way that a morally neutral cure does not. There can be no doubt that the moral stigma attached to punishment is of great importance for the preventive effect of the penal

[51] *Cf.* above " On Responsibility," s. 5, and below " On Determinism and Morality," s. 9.

system, both as a deterrent and as a factor influencing moral attitudes. For many persons, certainly, the shame and infamy attached to punishment are a greater deterrent than the actual pain that it involves, or at least function as a very serious addition to it. Punishment, even a fine, is not experienced just as the price one has to pay for doing a crime in the way that one pays for a cinema ticket. The moral stigma of punishment must be assumed to be of particular importance for the ability of criminal legislation to influence current moral attitudes. In Scandinavian penal theory it has been vigorously stressed that the general preventive effect of punishment depends primarily on its capacity to cement and possibly shape the morality that is current among the members of the society. By "morality" here one may be thinking both of valuations and attitudes of a directly moral nature concerning certain forms of behaviour, *e.g.* murder and theft (material legal consciousness of law), and of the attitude of respect for the law because it is the law of the land, and independently of any exact coincidence between its requirements and one's own direct moral valuations (formal legal consciousness of law). If this is so, as I believe it is, then it means that the moral aspect of the penal system, the moral disapproval which characterises punishment, is, through its influence on moral feelings and attitudes, of decisive significance for the preventive function of the system.

It is this most useful influence that criminal theory, according to Barbara Wootton and like-minded criminologists, is to give up by letting a morally neutral "cure" replace punishment (as disapproval). Why? On what grounds? No rational, practical argument has been adduced in support of this, only the irrational and false inference that in so far as the purpose of the penal system is prevention, that is behaviour-guiding, there is no place in it for moral disapproval—that is precisely for the reaction which by its very essence and meaning is a behaviour-guiding factor!

In any case Barbara Wootton cannot deny that the imposition of punishment is at present intended to be, and is in fact experienced as, an expression of moral disapproval.[52] There is surely little ground for supposing that this situation will change in the foreseeable future. Moreover, I believe that I have justified the contention that the desirability of any such change is no consequence of the assumption that the purpose of penal legislation is prevention. The arguments that follow presuppose, therefore, that imposing legal punishment on a man is a way of morally censuring him.

Given this presupposition, Barbara Wootton's argument for the

[52] This does not imply that the judge, in pronouncing sentence, need feel and/or express any such disapproval, although, so far as I understand, this is not at all unusual in Anglo-Saxon legal practice.

view that the criminological system has no place for the requirement of imputability falls flat. The positive justification for a criterion of mental responsibility which is decisive for the question of whether criminal law's reaction to crime is to be in the form of (censuring) punishment or (neutral) cure and precautionary measures, can be provided from two different viewpoints.

First, if sentencing a man to punishment is to be popularly experienced as moral disapproval of him and is to have the kind of effect upon current moral attitudes that we have just discussed, then the law will have to take into consideration all those exculpating or mitigating circumstances which according to common moral understanding preclude moral responsibility, and therefore also disapproval. If the law did not do this, if it ordered the judge indiscriminately to sentence children and mental defectives along with normal adults, the criminal system would appear in the people's eyes as a manifestation of a brutal will to power, and not as an exponent of society's morally based needs and of its moral disapproval of disregard of these needs. The system would thus lose its grip upon popular morality and thereby an essential part of its preventive effect. At the same time, of course, the deterrent effect would presumably be strengthened to some extent because the opportunity which occurs in the existing order to evade punishment and other legal measures under the pretext of momentary irresponsibility (*e.g.* because of shock, somnambulistic and similar kinds of passing unconsciousness, narcotic intoxication, etc.) will be done away with. But the increment of preventive gain will be insignificant compared to the loss in terms of the power of punishment to appeal to, and cement, moral dispositions. The consequence of this view, then, is that it would be *unwise and self-defeating* to eliminate the criterion of mental responsibility and with it the distinction between punishment and curative or precautionary measures.

Secondly, the legislator himself and those of us who try to guide him by working out a well-grounded theory of criminological policy, are also people with moral views which impose certain demands upon our actions, and not least upon those which consist in determining, by way of legislation, under what conditions our fellow men (or we ourselves!) are to be sentenced to punishment, that is to a reaction that involves both pain and censure. We, too, accept the moral view (I assume) that there are mental conditions which exclude moral responsibility. From this point of view to eliminate the requirement of imputability would lead to *morally indefensible, unjust* convictions.

These different bases for retaining the criterion do not, of

course, contradict each other. As motives for its retention they can work in concert. What they signify is that a certain course of action is to be adjudged both rational and morally desirable.

If we consider it established in this way that *some* criterion of mental responsibility is called for, this is not to say that we have established *what* criterion is appropriate. For on this point what one might call the " general moral consciousness " is extremely inarticulate. The exclusion of moral responsibility is expressed in such common locutions as " he could not help it," " he did not do it deliberately," which exclude responsibility for accidents and possibly also negligence, and thus relate to the requirement of imputation which is not discussed in this context. The requirement of imputability is expressed in such locutions as " he did not know what he was doing," " he did not do it of his own free will," " it was not him but his illness that did it," " he was subject to an irresistible impulse." The precise meaning to be given to these expressions is, however, far from clear. They seem to indicate mental circumstances which either exclude *knowledge* of the nature of the act perpetrated (*e.g.* in the case of children, mental defectives, and the deluded), or neutralise or diminish *the capacity to control or master impulses in the normal way* (as with drug addicts, and those who are subject to inner or outer compulsions).

This being the case, it is desirable that philosophers and criminologists should analyse these expressions in order to arrive at their meaning and express it in formulations acceptable for juridical practice. However, this analysis should be not only of a descriptive but also of a critically evaluative kind. We cannot accept our spontaneous or acquired moral attitudes as manifestations of eternal truths. We must believe that the morality which develops in a society and is experienced by its individual members as self-evident requirements is in reality (that is, without their being aware of it) directed by needs and interests. It is the moral critic's task, therefore, in his analysis and critical reflection, to test the positive, experienced morality in order to discover the purposes it was made to serve, and how it is to be evaluated in the light of consciously accepted norms. In brief, we must attempt to rationalise our experienced morality, and especially our experienced criterion of mental responsibility, or perhaps rather the approaches to it of which we are in possession.

But this is a task that lies outside the scope of this essay, which is concerned with the question whether the criterion of responsibility should be retained, not, in the event of an affirmative answer, with its more precise formulation.

7. The Argument for the Impossibility of Formulating a Criterion Rests on Exaggerated Demands on the Kind of Knowledge that a Moral and Legal Code must be Founded on

In section 3 above I mentioned Wootton's argument that the requirement of imputability (mental responsibility) must be given up simply because, as soon as one tries to widen the narrow, purely intellectualistic criterion of the McNaghten Rules, it is impossible to set up a meaningful and practicable criterion. As I have already remarked, I find the author's observations in support of this argument, especially those on the concepts of " mental health " and " mental illness " and their relevance for criminal law, interesting and thought-provoking. I should like to know, for instance, just what the Danish Medico-Legal Council means when it pronounces authoritatively that someone has sadistic propensities which are not, however, to be described as morbid. What is meant by characterising a propensity as morbid, and how does one determine whether or not morbidity exists in a given case? Can one, by observation and on the basis of expert knowledge, establish objectively whether or not a person is in any way mentally sick, in the same way that one can determine whether or not he suffers from tuberculosis, or any other recognisable physical ailment? If by calling a given person's propensity morbid the Council means simply that the urge driving him to satisfy it is stronger in him than in most people, then I am afraid that my own inclination for philosophy must also be labelled a sickness. But what relevance, what moral or legal relevance is there in the statistical fact that one person differs in a certain respect from most others?

The question we shall concern ourselves with here, however, is whether Barbara Wootton's observations, whatever their inherent interest, are capable of sustaining the conclusion that the responsibility requirement should be eliminated. The answer must be in the negative.

The very idea of the impossibility argument is obviously unacceptable. How can one recommend the giving up of a distinction on the grounds that it is impossible to carry it out? Would it not be nonsense to dissuade a man from jumping over Westminster Hall on the grounds that it is impossible to do so? It is a fact that in current practice we do distinguish between responsible and irresponsible persons; and since this distinction is not applied by casting lots or by any other resort to chance, it must, in a certain sense, be possible.

It seems, then, that Barbara Wootton is thinking of impossibility in some narrow sense, namely that of formulating the criterion of

mental responsibility in such a way that experts are able, on an objective, scientific basis, and without the intrusion of more or less subjective evaluations, to answer the question whether a particular person in a given situation was responsible or not. In her opinion the questions which are in practice posed to the experts are such as they are not in fact able to answer with scientific authority.

Her argument for this is obviously constructed with such an enlargement of the McNaghten Rules in view as was proposed by the British Medical Association. According to these proposals, lack of mental responsibility—beyond those cases in which the agent did not know what he was doing—will be recognised when the following two conditions are satisfied: (1) the accused was labouring under a disorder of emotion such that he did not possess sufficient power to prevent himself from committing the act; and (2) this disturbance was the result of a disease of mind. Her arguments fall, correspondingly, into two parts: (1) it is impossible to establish objectively whether an impulse was irresistible or was merely, as shown by the facts, not resisted; and (2) it is impossible to establish objectively whether a person suffers from a disease of the mind or not.

Let us take this latter argument first, since it is the easier to deal with. It relates only to a criterion of responsibility which, in the way discussed, incorporates the requirement of mental sickness, and does not apply to purely psychological criteria. If one ignores the aetiology of the proposed criterion, that is, its background in the McNaghten Rules, it is hard to see why condition (2) is to be linked to condition (1). If a person acted from an irresistible impulse, is it not indifferent whether or not this state of affairs was the result of mental sickness? Indeed, is it not rather that we regard the person as mentally sick *because* he acted under an irresistible impulse? That is to say, that the irresistibility of the impulse is a criterion of sickness, not sickness a cause of the irresistibility?

There remains the first argument, that it is impossible to establish whether an impulse was irresistible or not. In support of this the author adduces, as in the passage quoted above (p. 76), the general epistemological observation that such knowledge transcends the limits of empirical insight, since it is not possible to get inside another man's skin. Clearly this proves too much. If the observation were correct the consequence would be that no moral or legal relevance whatever could be attached to any psychological state. Moreover, the author herself has no compunction, in another context, in accepting the possibility of knowing about other people's

mental states. Indeed she accepts the classical McNaghten Rules which themselves presuppose knowledge of the accused person's mental state. And she recognises that this state, especially his " capacity for self-control," must be taken into account when, after conviction, a choice of the appropriate treatment has to be made. She says that the psychiatric adviser " no doubt has his own opinion as to the man's responsibility or capacity for self-control," but adds that " these are and must remain matters of opinion ' incapable,' in Lord Parker's words, ' of scientific proof '." [53] Thus the capacity for self-control is something on which the psychiatrist nevertheless has an opinion. And this opinion can hardly be pure guesswork without any empirical basis. There is such a basis, in my view. All we have to do, I believe, is to formulate the problem in a somewhat different way. It is certainly not possible to establish that an impulse is absolutely irresistible, and therefore impervious to any motive forces that might be mobilised against it. A person who, after an heroic fight, succumbs to a craving for nicotine and alcohol may say that this craving was irresistible, and we others may perhaps, on the basis of our general experience of similar cases, agree with him. But this does not exclude the possibility that the same person in the same situation might have overcome his craving if he had been offered a million pounds to postpone gratification for a certain time; or if he had been threatened with instant, inescapable and violent pain if he gave way to his craving. The psychiatrists tell us that there are few mentally sick people who will commit an offence while a policeman is watching them.[54]

The irresistibility of an impulse, which is supposed to justify irresponsibility, must therefore be interpreted in some way or other as conditional, or relative. Perhaps we could put it in the following way: that the impulse is of such a strength that, according to general experience, it normally cannot be resisted, either by moral appeals (admonitions, self-admonitions, reproaches), or by threats of sanctions which are not instant, inescapable and violent, or by fear of the act's harmful effect in regard to the agent's own interests. And there is no doubt that we have empirical knowledge of this, of varying degrees of certainty. This knowledge will in all

[53] *Crime and the Criminal Law*, p. 77.

[54] " There are few cases of mental disease, except cases of advanced dementia, in which the patient is so completely dominated by his symptoms that he is uninfluenced in his behaviour by motives such as self esteem, fear of consequences, social sentiments, and a sense of duty, which regulate the behaviour of normal persons. . . . An insane person who might otherwise commit an offence, might certainly refrain from doing so because a policeman is looking on. . . ." Angus MacNiven (Physician Superintendent, Glasgow Royal Mental Hospital) in L. Radzinowicz and J. W. C. Turner (eds.) *Mental Abnormality and Crime*, 1944, pp. 52 *et seq.*

cases depend on observations as to whether the counter-motivations in question have, in certain typical situations, normally proved to be ineffectual. One knows with great certainty, for example, that the craving for habit-creating drugs in a person who has been addicted to them for a considerable time is in this sense irresistible. In other cases the empirical basis affords less certainty, and depends more on the trained expert's practical judgment than on objective criteria and publicly accessible data. So far Barbara Wootton is correct: in many instances irresponsibility cannot be established with scientific objectivity, in the way that one can point to the occurrence of cancer. But this should cause no anxiety in the moral philosopher or the jurist. For each must know that this is far from being a peculiarity of the concept of responsibility, and indeed is, on the contrary, the normal condition for the moral and juridical judgment and treatment of men. We have to make distinctions—even if the boundary often cannot be defined precisely but must be drawn according to estimates and sometimes is blotted out altogether in borderline cases where all landmarks are lost.

Failure to grasp the relativity of the criterion of irresistibility has led people to assume that an impulse is irresistible simply because it forces itself upon one in circumstances where no countervailing forces are at work. This is true, for example, in cases of posthypnotic suggestion.[55] Here the subject's psyche is subjected to an impulse which appears as a compulsion because it is not rationally grounded in his needs and interests. However, in the typical experimental set-up there are no counter-motivations for *not* performing the action, and so no basis for calling the impulse to perform it irresistible. Something similar applies in kleptomania. A well-to-do man's yearning to steal appears to us as "abnormal" or "sick." But there is no real basis for saying that it is more irresistible than the poor man's "normal" desire to improve his lot.[56]

8. The Theory of L'Uomo Delinquente (the Born Criminal) and Underestimation of the General Preventive Effect of Punishment are Contributory Arguments in Support of the Campaign Against Punishment

In the foregoing I have dealt with the three pillars that support the criminological programme which I am criticising; namely the determinist argument, the misconception that prevention and disapproval (retribution) are alternative aims of punishment, and the impossibility argument. And I have tried to show that none

[55] *e.g.* Paul Edwards in Hook, *op. cit.*, p. 106 (Collier ed., p. 118).
[56] *Social Science and Social Pathology*, pp. 233 *et seq.*

of them is capable of supporting the edifice. But now, in addition, we must discuss two secondary supports: the theory of the born criminal, and the underestimation, connected with this, of the general preventive effect of the penal system.

The theory of the born criminal was developed by Lombroso and, as we indicated in section 2, taken over by Ferri. One of the fundamental tenets of the theory was precisely that the criminal does not possess the same intellectual and emotional equipment as other men but, owing to organic and mental abnormalities, is a special variety of human kind. In a less pronounced form this view is put forward by several modern adherents of the " positivist " school of criminology—though not by Barbara Wootton. It is clear that the more one approaches this view the greater is the inducement to suppose that the criminal reaction system should be shaped with a view to recovery or neutralisation without moral censure. At the same time the view encourages a tendency to underestimate the general preventive effect of the penal system. But the more criminal policy is centred around the aim of fighting recidivism, and has a preference for curative methods, the less reason there is to attach any significance to the fact that to impose a sentence upon an offender is to express society's disapproval of his action. In this way a line can be drawn from Lombroso's theory of the born criminal to the criminological school which wants to abolish mental responsibility and punishment.

It is beyond my competence to judge the merits of the theory of the criminal as being a specific pathological type. But I must be allowed to point out that this view is often opposed by modern criminologists. In evidence I can produce Barbara Wootton herself. She attacks the stereotypes of " the criminal " or " the delinquent " with their implication that all persons found guilty of breaches of the criminal law must, if we only look long enough and hard enough, reveal inherited or congenital characteristics which distinguish them from the rest of the population.[57] She claims that what looks like documentary support for the view is due to sources of error in statistical methods. " The further it [criminological research] is carried and the greater the refinement of the methods of investigation used, the more closely does any group of miscellaneous criminals appear to resemble the population at large." [58]

While Barbara Wootton, then, does not share the view that there is a specific criminal character, she does form a highly

[57] *Crime and the Criminal Law*, pp. 11 and 17.
[58] *Ibid.*, pp. 17 *et seq.*, and the full documentation in *Social Science and Social Pathology*, pp. 301 *et seq.*

sceptical view of the general preventive effect of the penal system. But her observations in support of this lose their force through her obvious unfamiliarity with the theory of punishment's morality-building effect. She speaks only of the possible deterrent effect on potential offenders, arguing that such an effect presupposes that the offender, before his offence, makes calculations as to the risk of his being punished, something which can be supposed to happen only in the rarest instances. She thinks that we " are almost totally ignorant of the deterrent effect on potential offenders," and that for this reason it will be reasonable to give individual preventive aims priority over general preventive aims in cases where the two conflict with one another.[59]

Her observations about the offender's calculating his chances do not affect the morality-building effect of punishment. And it is incorrect to say that we do not in fact know anything about the general preventive effect. Let me only refer to the various works by Johs. Andenaes in which the author points convincingly to observations and investigations which allow us to draw conclusions with reasonable certainty as to the existence of a general preventive effect.[60] One might even go so far as to say that it is the overwhelming opinion among Scandinavian jurists and criminologists today that the general preventive effect of punishment, especially in its habit- and morality-forming function, is a factor of importance which cannot be ignored in formulating policies for the treatment of crime.

9. Summary

I think that, in this chapter, I have established that the basic ideas in the " campaign against punishment," which had its point of departure in the positivist school of criminology and continues to have many adherents, especially among scientifically-orientated experts in various fields, are untenable. This is so (1) because of the false assumption that moral disapproval, and punishment as an expression of it, are incompatible with scientific thinking on a deterministic basis, a mistake that is due to undigested philosophy; (2) because of the false assumption that moral disapproval, and punishment as an expression of it, are irrelevant once it is assumed that the aim of the penal system is prevention, a mistake arising from the conceptually confused view that " prevention " and " retri-

[59] *Crime and the Criminal Law*, p. 101; *cf. Social Science and Social Pathology*, pp. 252 and 336.

[60] " General Prevention—Illusion or Reality? " *Journal of Criminal Law, Criminology and Police Science*, 1952, pp. 176–198; " The General Preventive Effects of Punishment," *University of Pennsylvania Law Review*, 1966, pp. 949–983; " The Moral or Educative Influence of Criminal Law," *Journal of Social Issues*, 1971, pp. 17–30.

bution " express alternative aims of punishment; and (3) of the false assumption that it is impossible to formulate and apply a criterion of mental responsibility, an error stemming from exaggerated demands on the knowledge needed to make moral and legal judgments.

But this, of course, does not establish that the criminological programme expressed by the call to abolish punishment is itself misguided. A programme can be good even if the grounds one has given for it are bad. But if there is any cogency in the arguments I have presented, we must be justified in calling for a renewed debate on the principles of criminal policy. In this debate the jurists should not allow themselves to be impressed by arrogant " scientific " claims to the effect that moral indignation, moral and mental responsibility, are prejudices which have no place in the modern world. And until chemists have invented effective anti-crime pills they should insist that it is moral forces that cement society, and that it is therefore those very forces that criminal legislation must try to mobilise in the fight against crime. But it it precisely these forces that are neglected or neutralised in proportion to the degree to which crime is equated with sickness. One meets an acquaintance and learns that he is to go into hospital. There is something the matter with his kidneys, perhaps also complications connected with his metabolism. One comforts him; after all, the doctors are so clever these days. And in the same way, in Kinberg's and Barbara Wootton's brave new world, again our acquaintance is to " go into hospital." There is a spot of bother about some embezzlement, and perhaps a few complications involving forgery, and again one reassures him: they *are* so very clever.

The jurists should also hold fast to a moral-legal thought which, as such, of course, lies outside the competence of the medical scientist. It is the thought which no one has expressed more strongly than the Danish legal scholar Carl Goos: that the requirement of guilt, and of moral and mental responsibility, is the citizen's Magna Carta in the face of the power of the State. For this requirement not only justifies but also limits the State's right to impose punishment. If it were to be dispensed with, the individual would perpetually be exposed to society's coercive solicitude in prescribing courses of treatment lasting for indefinite periods of time. Goos believed—like so many others—that guilt and responsibility presuppose a free will in the indeterministic sense, and he also believed, therefore, that freedom of the will is a postulate that one must cling to with " the power of the instinct for self-preservation."

> To keep hold of this postulate is a condition of life for society when it does not want to give up all the conquests it has made

> for a legally safeguarded life in society for its members, and which it has cost many struggles to win. If it is abandoned we take a step on the slippery slope back to barbarism, and that will inevitably involve sooner or later all its consequences.[61]

We can dispose of the necessity of the belief in free will. There will still be the need, in the name of legal security, for adults and responsible persons to be punished—and not abandoned to unbridled therapy.

The ideology behind the label " campaign against punishment " has put its stamp clearly on criminological discussion, especially in Sweden. Its influence perhaps culminated in the report on a *skyddslag* (protection law)—thus not a penal law—which was made in 1956 by the *Strafflagberedning* (Royal Commission on Penal Law) under Karl Schlyster's chairmanship. With the law reform realised by the enactment of the new Penal Code of 1962, however, this terminology was not followed. One can discern, so far as I can understand from various quarters, a tendency to react against the ideology of therapy and its practical implication of indefinite freedom-depriving sentences. I am by no means alone in my scepticism.

[61] C. Goos. *Den almindelige Retslaere*, Vol. 2, 1892, p. 618; *cf.* pp. 519 *et seq.* and 610 *et seq.*

CHAPTER 5

ON DETERMINISM AND MORALITY

1. INCOMPATIBILISM, OR THE VIEW THAT DETERMINISM AND MORALITY ARE IRRECONCILABLE, IS NOT AN OBVIOUS TRUTH

I AGREE with modern Danish writers on criminal law that the main problems of criminal law can and must be solved without recourse to the philosophical dispute between determinism and indeterminism.[1] Yet there is no avoiding this dispute so long as it remains true that various criminalists accept its relevance and use their position in regard to it as an essential argument in support of a particular criminological policy. Whatever else one thinks of their proposed policies, the task remains of showing that the support thus claimed for it is in any case illusory.

I am thinking here especially of the part that deterministic views have played within the so-called positive school of criminology and its continuation in the modern movements which adopt the common cause of "the campaign against punishment." Not all authors of this ilk base their views on determinism, but, in so far as they do, the operative ideas can be expressed as follows: (1) determinism must be assumed to be scientifically proven; (2) determinism implies that it is meaningless to talk of moral guilt and responsibility; consequently: (3) the system of penal reactions should be formed without being in any way based on the illusory notions of moral guilt and responsibility, or influenced by the attitudes of indignation and condemnation which are dependent on these notions.

In order to present a more vivid picture of the matter I shall quote Hurwitz's excellent concentrated account of the essential features of Franz von Liszt's deterministic view of penal law (my translation):

> The "law of causation" is a necessary form of the understanding. For our understanding there is no effect without a cause. This implies nothing about what lies beyond our understanding. The law of causation applies only to time and space. Outside these limits there is room for faith. As an object of our understanding the criminal is unconditionally constrained: his crime is the necessary effect of the given conditions. The presupposition of responsibility according to the penal law is the

[1] Stephan Hurwitz, *Den danske kriminalret. Almindelig del* (1952), pp. 104 *et seq.*, and the 4th revised ed. of the same work by Knud Waaben, p. 73.

normal capacity to let oneself be determined by motives. The pharisaical attitude to the criminal must be dropped when we take determinism seriously. It is not to our " merit " that we have for so long avoided being sentenced for a crime, and it is not the criminal's " fault " that circumstances have led him into the way of crime. We must stop morally condemning the criminal. The determinist cannot harbour different feelings for the criminal from those he harbours for the person suffering from an infectious disease. This does not exclude all value judgment. We prefer the gifted man to the ungifted one, and feel more captivated by the beautiful woman than by the ugly one, without these value judgments being based on merit and guilt. The determinist adopts the same attitude to the criminal. Nobody can " help " being a great artist, nor can he " help " being bad. Different value judgments can be linked to different actions, but a judgment cannot depend on the assumption of " guilt " once it is understood that the person " could not have acted otherwise." Along with the concept of " guilt " we must drop that of " retribution." " Die Vergeltung auf deterministischer Grundlage ist nicht nur eine Versündigung des Herzens, sondern auch eine Verirrung des Verstandes " (" retribution on the basis of determinism is not just a sin of the heart, but also an error of the understanding ").[2]

In the preceding chapter (" The Campaign against Punishment ") I criticised similar views put forward by Olof Kinberg and the positivist school of criminology. But on a central point I did not press my criticism home, and it is to this point that I shall address myself in the present essay.[3]

As we have noted, the determinist viewpoint in penal law rests on two premises. For the sake of brevity we shall call them the *postulate of determinism* (" determinism is scientifically proven ") and the *principle of incompatibility* (" determinism and the notions of moral guilt and responsibility are incompatible "). I regard them both as false. It is my aim here to justify this as far as the principle of incompatibility is concerned. Once the incorrectness of this principle is established it is a matter of indifference for the moral-philosophical and criminological debate whether " determinism " (however this should be more precisely understood) is a scientifically proven law, a well-based or unwarranted philosophical thesis, just a heuristic working hypothesis, or possibly something quite different. This narrowing of the task has to do with the fact that whereas I

[2] *Op. cit.*, p. 106.
[3] Above p. 86.

think I can say something fairly reasonable about the principle of incompatibility, there seem to me to be insurmountable difficulties in defining the concepts and formulating the problem in such a way that one could say anything reasonable about the postulate of determinism, or of indeterminism. I am inclined to believe that the dispute about these is a dispute about castles in the air, and that people will lose interest in it once they realise that whatever can be said for or against " freedom of the will " or " the universality of causation " is without any interest for law and morality.

There can scarcely be doubt that the thesis I wish to defend goes against the unreflective popular view. A poll would probably reveal views like those mentioned above in Hurwitz's account of von Liszt. Indeed most people would be hard put to it to locate any problem: they would probably regard it as well-nigh self-evident that moral guilt is excluded to the extent that actions are subject to the absolute necessity of the law of causation.

This can hardly be surprising. What is more remarkable is that a number of distinguished Scandinavian authors, including jurists who may be presumed to have some philosophical training, show the same unsuspecting naïveté in supposing there to be no problem: moral responsibility must simply be an illusion if determinism is true. Thus for example Andenaes writes (my translation):

> For the consistent determinist human actions are as much a product of their presuppositions as any phenomenon in the outside world. If one had sufficient knowledge of the agent's constitution and environment and also of the laws governing the mental lives of human beings, according to the deterministic mode of thought one should be able to predict a crime with the same certainty with which astronomers predict a solar eclipse. The idea of a free will and personal responsibility is an illusion for the determinist. To censure a person for his actions has as little sense as to censure the tree which bears poor fruit or the tiger that goes in search of prey. The idea of a just punishment is, for the determinist, meaningless. The principle of utility is for him the only possible one. Not all determinists accept the consequence. But here I would express myself in agreement with von Liszt when he states that " die Vergeltung auf deterministischer Grundlage ist nicht nur eine Versündigung des Herzens, sondern auch eine Verirrung des Verstandes " (" retribution on the basis of determinism is not just a sin of the heart, but also an error of the understanding ").[4]

Statements in the same spirit, that is, statements which without

[4] Johs. Andenaes, *Avhandlinger og foredrag* (1962), pp. 71–72.

analysis or discussion assume as self-evident that determinism and morality are incompatible, are to be found in a number of other contemporary writers.[5] This must surprise one, because even a superficial acquaintance with the history of philosophy shows that the principle of incompatibility is far from self-evident. On the contrary, opinion has been sharply divided. Without counting heads, and on a personal estimate, it is my impression, indeed, that the school which William James called " soft determinism "—precisely because it maintained the compatibility of determinism and morality —has been the dominant one, particularly within empiricist-orientated philosophy, with which recent Scandinavian philosophy is especially related. Höffding[6] and Westermarck[7] can be named as just two of the most influential Scandinavian philosophers; and behind them stands a long tradition in moral philosophy with Jodl,[8] Heymans,[9] Hume,[10] Locke,[11] Hobbes,[12] Augustine[13]—to name only some of its most familiar representatives. Among modern authors who have continued in the same tradition are, *e.g.* Dewey,[14] Ayer,[15] Ryle,[16] Stevenson,[17] and Schlick.[18]

However, the opposing school which maintains the incompatibility of morality with a consistent determinism also has its many and outstanding representatives. They can be divided into two groups, both of which adhere to the principle of incompatibility but differ as to which of the incompatible items they want to retain. On the one hand there are the " hard determinists " who stand by determinism and therefore have to reject all talk of moral guilt and responsibility. Among these may be mentioned Spinoza,[19] Ferri,[20]

[5] For references, see the Danish edition of the present book.
[6] Harald Höffding, *Etik*, 1913, pp. 112 *et seq.*
[7] Edward Westermarck, *The Origin and Development of the Moral Ideas*, Vol. 1, 1924, pp. 320 *et seq.*
[8] Friedrich Jodl, *Allgemeine Ethik*, 1918, pp. 275 *et seq.*
[9] G. Heymans, *Einführung in die Ethik*, 1914, pp. 98 *et seq.*
[10] David Hume, *An Enquiry concerning Human Understanding*, s. VIII; *A Treatise of Human Nature*, Bk. II, Pt. 3.
[11] John Locke, *An Essay concerning Human Understanding*, Bk. II, chap. XXI.
[12] Thomas Hobbes, " Of Liberty and Necessity," in the *English Works of Thomas Hobbes*, 1840, Vol. IV, pp. 242, 256–257.
[13] St. Augustine, " The Freedom of Will," *The City of God*, quoted in Bernard Berofsky (ed.), *Free Will and Determinism*, 1966, pp. 269 *et seq.*
[14] John Dewey, *Human Nature and Conduct*, 1930, pp. 17–19.
[15] A. J. Ayer, " Freedom and Necessity," *Philosophical Essays*, 1954, pp. 271 *et seq.*
[16] Gilbert Ryle, *The Concept of Mind*, Peregrine ed. 1963, pp. 74–78.
[17] Charles L. Stevenson, *Ethics and Language*, 1945, pp. 312 *et seq.*, 314.
[18] Moritz Schlick, " When is a Man Responsible? " *Problems of Ethics*, 1939, pp. 143 *et seq.*
[19] Baruch Spinoza, *Éthique*, livre IV, théoreme LI, scholie; théoreme LXIII, scholie.
[20] Henri Ferri, *La sociologie criminelle*, 1893, pp. 260 *et seq.*

along with other adherents of the " positive " criminology, Broad,[21] Edwards,[22] Hospers,[23] and Hedenius.[24] On the other hand we have the " libertarians," that is, those who insist on the possibility of morality and therefore also on a will that is not bound by the law of causality. The most noted representative of this school is certainly Kant,[25] while its more recent spokesmen include Taylor [26] and Campbell.[27]

The dispute between *compatibilists* and *incompatibilists* is thus deep-rooted and of long standing. The impression I have from a perusal of a fair proportion of the literature is that the argumentation has simply come to a standstill. The same arguments are made over and over again without either side being able to convince the other. Crudely simplified, the position is as follows. There is agreement *that* the question must be answered on the basis of what are generally supposed to be the conditions of moral responsibility, and *that* among these conditions a fundamental one is that the agent " could have acted otherwise." Disagreement begins when one first enters into an analysis of this phrase. Compatibilists maintain that it refers to situations in which the agent possessed *freedom of action*, meaning by this that he was not subject to any external or internal compulsion which prevented him from acting in another way *had he wanted to.* Incompatibilists think that freedom in this sense is not sufficient to establish moral responsibility. What use is it, they ask, that he would have acted otherwise *had he wanted to,* if he was not in a position to want to? Moral responsibility must presuppose not simply freedom of action, but also *freedom of will* in the indeterminist's sense.

But by what criterion do we decide which of these two interpretations is the correct one? Both sides appeal to the same commonly agreed assumptions underlying everyday expressions and distinctions. I do not believe we can make any progress without digging a little deeper. How is the problem to be more precisely

[21] C. D. Broad, *Ethics and the History of Philosophy*, 1952, pp. 195 *et seq.*

[22] Paul Edwards, " Hard and Soft Determinism," in Sidney Hook (ed.), *Determinism and Freedom in the Age of Modern Science*, 1958, pp. 104 *et seq.*, Collier Books, 1961, pp. 117 *et seq.*

[23] John Hospers, " What means this Freedom? " *op. cit.*, pp. 113 *et seq.*

[24] Ingemar Hedenius, " Idén om viljans frihet," in *Harald Nordenson 60 år*, 1946, pp. 139 *et seq.*; " Om Gengældelse," in *Vindrosen*, 1966, No. 2, pp. 64 *et seq.*

[25] Immanuel Kant, *Kritik der praktischen Vernunft*, 1788, I. Teil, I. Buch, 3. Hauptstück: " Kritische Beleuchtung der Analytik der reinen praktischen Vernunft "; *Kritik der reinen Vernunft*, 1787, 2 Teil, 2 Abt., 2 Buch, 2 Hauptstück, 9 Abschn. III og IV.

[26] Richard Taylor, " Determinism and the Theory of Agency," in Hook (ed.), *op. cit.*, pp. 211 *et seq.*

[27] C. A. Campbell, *On Selfhood and Godhood*, 1957, pp. 158 *et seq.*; " Is ' Freewill ' a Pseudo-problem? " *Mind*, 1951, pp. 446 *et seq.*

stated? Just what kind of " meaninglessness " or " impossibility " is supposed to pertain to morality if determinism is true? On what basis can the problems concerned be analysed and solved? Is the common view expressed in everyday speech the final word, or can it, too, be subjected to rational criticism? The following presentation aims to show that it is possible to inject new life into the discussion in this way.

The first step must be to try to present the problem more precisely.

2. That *A* Cannot be Made Legally Responsible for *X* Means that *A* Cannot be Rightfully Convicted of *X*

The problem is usually formulated as a question of what are the conditions under which a person *can* be made morally responsible for something. If the proposed answer is to the effect that moral responsibility presupposes that the conditions b_1, b_2, and b_3 are satisfied, this means—it is said—that so far as these conditions (including, *e.g.* that the " will " is " not bound by the law of causation ") cannot be fulfilled, moral responsibility is an *impossibility*, and talk of it *meaningless*. But it is not immediately clear what these two latter italicised expressions mean. Hard determinists, who of course make this claim, must nevertheless admit that in a factual sense it is possible to invoke moral responsibility. We do so every day, in the sense that we actually express disapproval and censure and are actually understood by our fellow men when we do so. What is meant, then, by saying that this is nevertheless *impossible* and that what we say is *meaningless*?

I think we can throw light on this question by first examining the corresponding question concerning *legal* responsibility.[28]

That a person *A* is legally responsible for a state of affairs *x* means, according to normal juridical usage, that *A* satisfies the jointly necessary and sufficient conditions for his being convicted and sentenced in a court of law for *x*, *i.e.* sentenced to punishment, restitution, or some other sanction. It is assumed here that " *x* " denotes the violation of a legal norm. When responsibility is attributed, it is always on the basis of an act being committed which, by virtue of a particular normative system of rules, should not have been committed, and which therefore opens the way to the reaction which is the invoking of responsibility. When the responsibility is legal, the violation is of a legal norm. If, for the sake of simplicity, we confine ourselves to penal responsibility, " *x* " denotes a violation of a penal norm.

[28] *Cf.* above, " On Responsibility," s. 3.

But what are the necessary and sufficient conditions for conviction, and on what basis can this question be answered?

The latter question is easily answered: the conditions are laid down in the penal law. This law consists precisely of directives to the judge concerning the conditions under which he is to impose a punishment of a certain degree for violation.

The former question can only be answered concretely by listing the rules of the penal law. But, by generalising, these conditions can be reduced to two: (1) *A* must be the *perpetrator* of the act, *i.e.* he must have committed one of the acts which the law describes as a crime and not in any recognised special circumstances that legitimate his action. *A* may have killed *B*, but in self-defence. In that case *A* is exonerated because the act is not one that is disapproved of, but is taken to be legitimate in the special circumstances of self-defence. (2) In addition *A* must be *guilty, i.e.* have fulfilled certain mental conditions which are collected under the name of "guilt" (*mens rea*). In Continental law it is usual to divide these conditions into two groups, which we can refer to respectively as imputation and imputability. The imputation requirement is to the effect that the offence has been committed under certain mental circumstances, having to do mainly with will and understanding—which particularly link the action to him as an agent and not to accidental circumstances. Normally *intention* is required, sometimes *negligence* is sufficient, as a condition of punishment. The imputability requirement, on the other hand, excludes liability when the mental state of the offender departs in some significant degree from that of the normal adult. It may be a matter of a temporary or long-term mental disorder (insanity etc.), lack of mental powers (mental retardation etc.), or simply youth. When some action comes to light, unless there is good reason to suppose the opposite, one tends naturally to assume that the conditions of guilt are satisfied. These requirements can therefore be represented appropriately enough as *excuses* which the agent can offer. They do not *except* the action in itself from the domain of the punishable, but they *excuse* the man, that is to say, free him from guilt.

We can also say: that *A* is responsible for *x* means the same as that *A* can be rightfully punished for *x*. To say that something is done rightfully implies (in this context) a reference to a given presupposed legal system, *e.g.* the Danish legal system. It means that according to the rules of this system the course of action in question is allowed, possibly even required. To say concretely that a person *A* can rightfully be punished for the act *x* is thus the same as referring to a definite legal state of affairs which arises when the rules of the legal system are applied to the obtaining facts. To

maintain that *A* is responsible for *x* is the same as to maintain that there are certain facts which if judged in accordance with the Danish penal laws now in force entail that *A* is punishable.[29]

Depending on the circumstances in which the assertion that *A* is responsible for *x* is made, this assertion, with the meaning we have given it, can function in two different ways. It can function as a declarative sentence with an informative function, *i.e.* as an expression aimed at conveying that the present Danish law contains norms which entail that *A* is punishable in the given circumstances. Understood in this way, the expression amounts to a *reference to* or *mention of* Danish law, and is either true or false. Secondly, it can function as a directive utterance which does not mention Danish law but brings that law to bear upon someone or something. The public prosecutor who claims that the accused is guilty is not talking *about* Danish law, he is talking *in* the language of that law. He is in a sense identifying himself with the legal system and tendering its demands in its name. He is not enlightening anyone about anything, but demanding that *A* be punished. This demand is neither true nor false, but justified or unjustified. If the judge finds the charge justified and the accused guilty, his finding is not simply a declarative sentence stating that the conditions of punishability obtain; apart from being a statement it is at the same time a directive which presents the law's demand for punishment: you are guilty, that is, you are to be punished. And the judge complies with this demand by passing sentence on the delinquent to a penalty.

The point of these observations concerning legal responsibility is to make it clear that the question under what conditions a person is legally responsible can only be posed and answered by reference to a particular legal system, *e.g.* the Danish system. There is no legal order *an sich* and no legal responsibility *an sich*. A statement of the conditions under which a person incurs responsibility must always be understood as elliptical. It implies that the conditions referred to are requirements of this or that legal system.

In what sense can one now say that *A cannot* be made legally responsible for some state of affairs when such and such conditions are not fulfilled? Or that legal responsibility is an *impossibility* if it has to be recognised that the conditions are such that they can never be fulfilled? Naturally, it is neither inconceivable nor physically impossible that *A* be convicted despite the fact that the legal conditions for his conviction are not fulfilled. The conditions are not conditions for the possibility of his being convicted, but for his being *rightfully* convicted. The statement that *A* cannot

[29] " Punishable " is used here to cover cases where *A* can be rightfully punished whether or not there is also a duty to punish him.

be made responsible, or that it is impossible to make him responsible when certain conditions are not fulfilled, is not a statement of a logical or a physical impossibility, but of a legal one. It means that it will be *illegal* to make a person responsible unless the conditions of responsibility are fulfilled. The law's statement of the conditions of responsibility must be understood as giving not just sufficient but also necessary conditions of conviction. So if the judge convicts a person when these conditions are not fulfilled, he commits an unlawful act for which he himself can be held responsible.

When we have made out what the conditions of responsibility are according to Danish law we know that much. But it does not follow that they could not be otherwise. Experience shows that the conditions do in fact vary from one legal system to another. This gives rise to the question of legal policy. What should the conditions of responsibility be when the legal rules are evaluated in the light of theoretical insight into causal relationships combined with given objectives, evaluations, and principles of various kinds.

3. That *A* Cannot be Made Morally Responsible for *X* Means that *A* Cannot be Rightfully Censured for *X*. The Statement is of a Moral Kind and Refers to a Given Morality

In the light of these observations let us now see what it means to be morally responsible, and how the question of the conditions for moral responsibility can be posed and answered.[30]

Moral responsibility, too, is something that is invoked when a norm is violated—in this case a moral norm. And here, too, to be (morally) responsible for the violation means to be the person *rightfully* convicted of it. "Rightfully" in this context must mean that the conditions which the moral norm establishes for responsibility are fulfilled. Whether this is so or not is decided in a trial which results in a judgment—even though these are not institutionalised as they are in the case of law. The court can be the accused's own conscience, the judgment of outside observers, or the opinion of that more ill-defined group, the "public." And the trial naturally lacks any formal procedure, even if the court of conscience can be more probing and inquisitorial than any court of law. Its aim is in any case the same as that of a legal trial: to establish whether the conditions of guilt laid down by the moral norm are fulfilled, whether the accused is guilty, and, if so, to put the norm's demand for sanctions into effect.

It is obvious that no formal imposition of sanctions ensues upon a moral conviction. But the notion of moral responsibility, just like

[30] *Cf.* above, "On Responsibility," s. 4.

that of legal responsibility, is nonetheless an expression of a normative demand for the tying of guilt to the consequences of guilt—the sanction that consists in disapproval. To brand an action as morally objectionable, reprehensible, logically implies a demand for disapproval of the action. It would be meaningless (illogical) to say: " I condemn this action morally, but I do not disapprove of it, nor expect others to do so."

On the other hand, it must be stressed that disapproval is not identical with condemnation. An action is disapproved of *because* it is condemned and the disapproval occurs in fulfilment of an implicit demand for it in the condemnation. Whereas condemnation, or the moral judgment, just like the legal one, is an act of thought with a meaning, disapproval consists, like the administering of a sentence, of overt actions or latent attitudes which demonstrate and release the ill-will harboured by the social environment for the guilty party.

That this situation is so commonly misunderstood is due to two things. First of all to the fact that subsequent to the moral judgment there is no formal fixing of the form and amount of disapproval. Disapproval can, it is true, come in many shapes and sizes—from gentle reproof or mild remonstrance to various manifestations of dissociation and antipathy, from indignation and resentment to hysterical outbursts of physical violence (lynching)—but the manner in which the demand for disapproval is manifested depends more on spontaneous emotional responses than on formal prescriptions based on recognised standards and measures. Secondly, and in particular, misunderstanding arises because the conviction itself can function as an act of disapproval, that is, it can be—if you like—a self-fulfilling demand. This calls for further explanation.

The moral judgment, just like the legal one, can be either " external " or " internal;" that is to say, either a statement about morality or a moral (or moralising) pronouncement. Just as the lawyer can call attention to the legal order and its demands without invoking them, *i.e.* without bringing them to bear on the delinquent, so also can a friend, in an advisory capacity, convey dispassionately and purely informatively to another how he thinks a certain action is to be morally judged. Even if his view is that the action is to be morally condemned and thus calls for disapproval, he can let this be known without airing any disapproval of his own. He ventures only a judgment of quality or an assessment of character, just as does the judge at a dog show, an examiner correcting examination papers, a tea-taster, or an apple sorter. In just the same way that a bad apple is put to one side because it fails to come up to a given pomological standard, so an

action is judged bad because it fails to comply with an accepted moral standard (and there are no extenuating circumstances which absolve the agent from guilt and responsibility). "No," says the friend, "in fact I think you should not have done that." He offers this as a piece of information that might serve as a guide to future behaviour (*e.g.* making an apology), but not to voice any disapproval of his own for what was done. Indeed this would be uncalled for in a situation where he has been approached precisely in an advisory capacity to inform about the moral demands of the case, and not to invoke these demands.

But the picture alters when the judgment of the action is offered as *censure*. The words may be no different: "you should not have done that," "it was not right of you," *i.e.* phrases which in themselves only express judgments of the action. But the context and tone of voice can make it clear that their function is not informatory, that the utterances are not intended to enlighten about the requirements of morality, but to bring those requirements to bear upon a particular person, to insist upon disapproval and also to express it.

This can be done in all sorts of ways and degrees. Censure always contains an element of emotion, a dissociativeness at least, anger maybe, not necessarily of a personal nature, but rather on behalf of the values and general order of things which the given morality expresses. Censure contains an element of hostility and aggression which presumably has its evolutionary origin in spontaneous feelings of vindictiveness, but which have now lost much of their self-centred and unreflective character. The anger can give way to resentment and the aggressive emotions to open hostility, from verbal abuse to the most extreme physical violence. In confirmation I would invite the reader to say aloud the words "what a filthy trick, you louse!"—or something similar—as he can imagine using them in a real life situation. I suspect he will feel indignation and aggression beginning to well up inside him, though of course only as pale shadows of the emotions he would experience were he in earnest.

Censure is therefore simultaneously judgment and sanction, disapproval. This is why people do not like to be censured. It has the effect of a punishment, suffering inflicted because of guilt. And so one's reaction to censure is quite different from that to information. If someone says to you that Napoleon died in 1820, or comes out with some other incorrect statement or theory, most probably you will be disinterested and just let him have it his way, or else observe in a matter-of-fact manner that Napoleon actually died in 1821, perhaps even say, "no, I am afraid I just

cannot accept that." But not so if he says you have behaved wrongly or despicably. For censure is an act of aggression which calls either for surrender (admission, apology) or defence (pointing out misunderstandings or misinterpretations of what has taken place, explanations of motives and intentions, interpretations of moral requirements).

It should follow from this comparison of legal and moral responsibility: (1) that the question under what conditions a person is morally responsible relates to a presupposed moral norm (or normative system) which fixes these conditions; (2) that the answer which is given on the basis of a specific positive morality can be subjected to criticism in a moral-political discussion in the light of theoretical insight into causal relationships combined with given objectives, evaluations and principles of various kinds; and (3) that the "cannot" or impossibility of making a person morally responsible which obtains when the conditions for doing so are not fulfilled (possibly cannot be fulfilled) is of a moral nature. It means that according to the normative system in question it would be *morally reprehensible* to react disapprovingly towards the person concerned.

4. Incompatibilism has a Moral and a Pragmatic Version

If we now compare this analysis with the available literature we find an agreement inasmuch as the general view is that the question of the conditions of moral responsibility is a moral one which has to be answered by means of an analysis of moral attitudes. However, the general view is not that one must refer to a definite, given positive morality, but rather to a presupposed "common moral consciousness," principles which "we" recognise and demonstrate in "our" moral judgments. Thus, for example, Campbell—who is one of the few to have discussed the methodological question of how we can come to know the conditions of responsibility—says:

> I know of only one method that carries with it any hope of success; *viz.* the critical comparison of those acts for which, on due reflection, we deem it proper to attribute moral praise or blame to the agents, with those acts for which, on due reflection, we deem such judgment to be improper. The ultimate touchstone, as I see it, can only be our moral consciousness as it manifests itself in our more critical and considered moral judgment.[31]

Without explicitly making their method so precise, practically

[31] C. A. Campbell, *On Selfhood and Godhood*, 1957, p. 159.

all other authors follow the same track.[32] They analyse "our moral consciousness" on the tacit assumption that it is unitary and universal and contains the definitive and indisputable answer to the question of under what conditions someone can be made morally responsible.

It is a rare exception for an author to state precisely what moral views he bases his analysis on. In fact I know of no others besides Ingemar Hedenius and Harald Ofstad who have done this. Hedenius specifies his basis as "the special moral view which is common to myself and many other fairly humane and theologically uninfluenced people in contemporary Western culture." [33] Ofstad clearly formulates the problem as a moral-analytical one and acknowledges that a solution to it must be relative to a particular moral view. However, he works not with actual ("positive") moralities, but with "ethical systems" as, for example, Kant's ethics of duty and Bentham's utilitarianism. His analysis is confined to two kinds of ethical systems, characterised respectively by retributive and teleological views on moral disapproval.[34]

It is incontestable, therefore, that the problem of the conditions of moral responsibility has been understood as a moral problem in the sense that its solution must be based on the analysis of a particular, given morality. Yet apparently people have failed to see that it is a moral problem also in the sense that the statement that moral responsibility is excluded when the conditions for it are not fulfilled (or cannot be fulfilled) is itself a moral statement which says that under these conditions it is unjustified (immoral) to invoke responsibility by expressing disapproval.

However, there is also another view to be found in the literature, according to which it is not simply immoral but also pointless (meaningless), on deterministic grounds, to make a person morally responsible. Thus John Hospers, for example, says: "it is foolish and pointless, as well as immoral, to hold human beings responsible

[32] See, *e.g.* Heymans, *Einführung in die Ethik*, 1914, pp. 33, 101; Friedrich Jodl, *Allgemeine Ethik*, 1918, p. 309; F. H. Bradley, *Freedom and Responsibility*, ed. by Herbert Morris, 1961, p. 43; C. D. Broad, in Berofsky (ed.), *Free Will and Determinism*, 1966, p. 136; Arthur Pap in Hook (ed.), *Determinism and Freedom in the Age of Modern Science*, Collier ed., 1961, p. 212; Ted Honderich, *Punishment—the Supposed Justifications*, 1969, pp. 105–106. The many modern philosophers who adopt the method of linguistic analysis direct their analysis upon current usage of moral terms in that they pre-suppose that this is an expression of a generally accepted moral consciousness.

[33] Ingemar Hedenius, "Idén om viljans frihet," in *Harald Nordenson 60 år*, 1946, p. 141.

[34] Harald Ofstad, *An Inquiry into the Freedom of Decision*, 1961, pp. 263 *et seq.*, 265, 267.

for crimes." [35] I would also remind the reader of von Liszt's statement quoted earlier: " die Vergeltung auf deterministischer Grundlage ist nicht nur eine Versündigung des Herzens, sondern auch eine Verirrung des Verstandes " (" retribution on the basis of determinism is not just a sin of the heart, but also an error of the understanding ").

This viewpoint patently depends on the assumption that moral disapproval is not just a spontaneous reaction, but also—more or less consciously—intends to serve a purpose: to influence behaviour. If, however, determinism is taken to imply that men cannot act otherwise than in fact they do, it follows that all moralising is futile and pointless.

Incompatibilism therefore occurs in two versions, a moral version and a pragmatic one. In the following we shall subject each of them to analysis and criticism.

The first version is presented with exceptional clarity in Hedenius's essay " Idén om viljans frihet " (The Idea of Freedom of the Will), which will therefore serve as a basis for our discussion of it.[36]

5. Hedenius Maintains that Western Morality sets up Unsatisfiable Requirements as Conditions for Moral Responsibility

In the work in question Hedenius [37] does not undertake to discuss the question of whether the will is, in some sense or another, free. He is concerned only with the role that the notion of freedom of the will actually plays in " our moral consciousness of right " (p. 139). He clearly recognises that the question of under what conditions a person can rightfully be made an object of moral approval and disapproval can only be answered by reference to a given morality. He has given himself the task of rendering a sober and purely descriptive account of the situation in these respects according to the modern Western moral outlook, with particular reference to the question of the extent to which and the sense in which this morality holds " free will " to be a condition of moral responsibility (p. 144). The morality that is the object of his descriptive analysis is more exacty identified, as mentioned, as " the special moral view which is common to myself and many other fairly humane and theologically uninfluenced people in contemporary Western culture " (p. 141).

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[35] Hook (ed.), *Determinism and Freedom in the Age of Modern Science*, Collier Books, 1958, p. 121.

[36] See above, Note 33.

[37] All quotations of Hedenius are given in my translation.

The point of departure is that the moral view in question requires as a condition of a person's moral responsibility that he *could have acted otherwise.* The question is how, more precisely, to understand this phrase. His approach to an answer is to reflect on a number of imagined situations in order to find out how this phrase really functions. He obviously assumes that he has a direct intuitive knowledge of the way in which the " Western moral consciousness " would answer questions of moral responsibility in the imagined situations—presumably because he identifies his own spontaneous reaction with that of the " common moral consciousness."

The outcome of the analysis is that " our moral consciousness " requires as a condition of moral responsibility that the agent has acted freely in three different senses.

First, it must have been possible for him to have acted otherwise in the sense that he would have done otherwise *had he so willed.* This is not the case if he acted under outer or inner compulsion (pp. 146, 167). A sailor who in time of peace and without any thought of sacrificing his life for his country serves aboard a warship which is quite unexpectedly torpedoed cannot be acclaimed a hero. Nor can someone be blamed for giving away secrets under unbearable torture. In such cases it is not lack of will power on the part of the agent that led to the event; it would have occurred however hard he willed to act otherwise. I would add here, on my own account, that freedom in this sense, as absence of compulsion, is the requirement which for the " soft " determinists (Hume, etc.) is the necessary and *sufficient* condition of moral responsibility.

But according to Hedenius's (and other " hard " determinists') view, freedom in this sense, although a necessary condition, is not a sufficient condition. By analysing examples of the use of violence under a variety of circumstances the author arrives at the conclusion that it must be further required that the action can be imputed to the agent's character, or personality, and not to unusual outer stimuli. " His will must also have been free in the sense that it was not determined by circumstances external to him " (p. 161).

Freedom in each of these two first senses is—I am still recounting Hedenius's views—a perfectly acceptable concept in the sense that they both state requirements whose fulfilment or unfulfilment can be empirically verified. That the will can in fact be free in both of these senses cannot be doubted. So far our moral principles are unexceptionable from the standpoint of reason. But this is not so

when we come to the third sense in which our moral consciousness requires freedom of the will as a condition for the invoking of moral responsibility. For this last condition requires something that does not exist, something that is altogether illusory (pp. 161, 163).

By reflecting on our moral reaction to the young offender who has grown up with inherited weaknesses and in an adverse environment, and to the mentally ill, Hedenius finds that it is not a sufficient basis for moral responsibility that an action proceeds uncompelled from the agent's character. He must withhold moral judgment in so far as the agent is not in control of the kind of character he has, specifically when this is imposed upon him by his progenitors and environment. The last and deciding requirement of freedom as a condition of moral responsibility is therefore that the agent could have had another and better character than the one he actually has; and that again means that he would have had a better character *had he so willed.* But neither is this enough. How can we make the man responsible if he could not have willed this? We must therefore require in addition that he could have willed to acquire a better character. According to the proffered analysis of "could have done something," this once again means that he would have willed to acquire a better character if he had so willed it. But this act of will too must be one that he could have accomplished, *i.e.* that he would have willed to will if he had willed to will to will, etc. And this is meaningless.

That this regressive appeal to a will to will, etc. is meaningless, Hedenius now (astoundingly and without further argument) takes to be tantamount to moral consciousness demanding as a condition of responsibility that the will be free in the sense that it is uncaused. "His personality must not be formed by definite causes. For if we suppose there to be such causes, he loses his purely moral responsibility in our eyes" (p. 163).

If now one assumes—as the author does without further argument since this would be beyond the scope of his present task—that determinism is true, it will follow that our moral consciousness requires as a condition of moral responsibility a freedom of the will that does not exist. It sets an unsatisfiable requirement. Once we see this the practical consequences must be—if we do not want to act in conflict with our own morality—that we either give up moralising or change our moral principles. Since the author declares again (without further argument) the latter alternative to be completely unacceptable, his final step is to enjoin us to desist from making people morally responsible (pp. 145, 150, 163).

That the necessity assumed to obtain in this conclusion is of a

moral, not a factual, kind seems incontestable. For it is the logical result of a reasoning based on an analysis of the requirements of our moral consciousness. This latter lays down certain conditions for invoking moral responsibility, *i.e.* for giving expression to disapproval. To act in conflict with these conditions is immoral, not impossible in fact. The author speaks also of how we *ought* to react once we have realised that our morality lays down conditions for disapproval which cannot be fulfilled (p. 145). He further acknowledges that it is in fact still possible to regard people as heroes and villains, but thinks that we nevertheless will not do so just because we think it can have practical advantages, when it goes against the principles which we ourselves recognise (pp. 150–51).

In another essay [38] Hedenius elaborates the practical consequences of his view. He acknowledges that moral disapproval, anger, and indignation are necessary ingredients in social life. "It is impossible for a society or a culture to be able to function without a constant repayment of evil with evil or at least ill will towards those who are dangerous." "A general dispensing with moral disapproval is . . . not desirable" (p. 77; *cf.* pp. 68 and 72). A double morality is therefore required as regards our way to react in the face of transgressions. The necessary indignation is left to the common, or vulgar morality, while the subtle-minded who have realised the impossibility of fulfilling the requirements of morality refuse to have any part of it.

> The subtle-minded both realise and accept that they are exceptions, because they for their part constantly take the liberty of suspending indignation in deference to quite other feelings. Only when they are unable to restrain themselves will they allow themselves to feel moral anger, or also when it will be detrimental to their welfare to suppress agressiveness, or when they find it necessary to blow the horn of anger to procure some advantage (p. 11).

I would beg the reader to note this last quotation. It shows clearly (as is also only consistent) that the author's aversion against moral indignation (disapproval) is *moral* in nature.[39] It is in principle immoral to disapprove. But as with other moral requirements this one too can give way in the face of strong counter-motivations.

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[38] "Om gengældelse," *Vindrosen*, 1966, No. 2, pp. 64 *et seq.*

[39] It is necessary to stress this since the author sometimes expresses himself as if it was a question of a psychological effect; *cf.* below, s. 7 *in fine* and s. 16.

6. Hedenius's Account of Western Morality is and Must be Incorrect

Hedenius states as his task the description of certain principles contained in a certain given morality, namely that which he calls the Western moral view. But is there such a thing, and even if there is, how can its content be identified? Hedenius notes that it is not his opinion that this moral view should be expected to be one and the same for all members of the cultural groups he has in mind. " But there are nevertheless principles which are common to them," he adds, and is clearly thinking here precisely of the principles determining the conditions under which moral responsibility can be invoked. No evidence is adduced for this statement, and I cannot but doubt its correctness. There are indeed certain current modes of expression (" he could not help it; " " he did not know what he was doing; " " he was not his normal self ") relevant to conditions of responsibility which can be said to be common within an extensive cultural group. But when it comes to their actual use, and that means to the criteria which effectively determine the distinction between guilt and absence of guilt, I doubt if there is general agreement as to their content. Presuming that Hedenius would include me in the group of " fairly humane and theologically uninfluenced people," I must offer myself as a witness against Hedenius's view. I do not concur in all instances with his moral distinctions, and even less with his interpretation of why these distinctions are made. Hitler, I would think, must have had a rather poor genetic inheritance and a somewhat unfortunate adolescence—but I condemn him morally no less for that. And I know of a good many others who do the same.

But let us now nonetheless grant that we believe there are, or are willing at least to investigate to what extent there are, certain generally accepted principles concerning the conditions of responsibility, especially concerning the sense in which " free will " is such a condition. How must one then proceed to establish whether there are such principles, and if there are, what their content is?

Quite clearly it would be useless to take a poll of a representative cross-section of the population. Most people will probably just not understand the concepts and distinctions in question. Nor is this Hedenius's own procedure. What he does is to oppose and compare situations for which, according to the common moral view, we suppose different moral reactions would be appropriate. In certain circumstances an action is excused which in other circumstances would be considered reprehensible. Hedenius points out, for

example, that we look differently upon the man who betrays his country under torture from the man who does so voluntarily; differently upon the adolescent and environmentally deprived thief from those better qualified to lead a decent life; differently upon the man who strikes another down in self-defence from the violent robber (pp. 146, 151, 159). By analysing such distinctions it should be possible to arrive at the criteria to which an exculpatory force is actually attached, and thereby at the conditions which are actually taken to determine responsibility inasmuch as their absence has the effect of freeing a person from blame.

This procedure is one which, with a qualification which I shall come to presently, I can subscribe to. But what I cannot comprehend is how it can lead to the result that the common moral view examined rests on a criterion of responsibility which is in principle unsatisfiable (an undetermined free will), and thus to the conclusion that all moral responsibility is excluded. How is it possible, by studying the criterion upon which *given moral distinctions* are based to come to the conclusion that the criterion is such that *no distinction can be made*? Something must be wrong here. We started out with a distinction, *e.g.* the one we make in our moral judgments between the unfortunate juvenile delinquent, and those who are not subject to the same undeserved handicaps. And we found that we exonerate the adolescent offender from moral responsibility because we realise that he himself has not formed his own character, but that this has been forced upon him as a product of his inheritance and environment. But Hedenius maintains that the same applies to everyone: no one has an uncaused character freely chosen by himself. Therefore, he concludes, all moral distinctions are meaningless (immoral). In other words, the criterion which justifies a distinction is found to be of such a kind that it renders the distinction impossible to make.

But it is not really deterministic considerations which warrant our excusing the young offender mentioned above. It is characteristic that incompatibilists who want to demonstrate the exculpating effect of determinism typically make mileage out of the young offender, particularly when he is environmentally handicapped. What is distinctive of him, and can justify differential treatment in his favour, is not the fact that his will and character are in any greater degree causally determined than those of other men, but his *youth* and the *adverse environment* in which he has grown up. These circumstances can justify the correction that he undoubtedly needs being administered to him not as punishment, but as a way of imparting to him the education that he has had to go without. In our moral judgment we cannot get away from the fact that he

has behaved like a worthless scamp. But precisely because his character is not yet finally stabilised the generalising-moralising reaction gives way to an individualising-pedagogical one. We then devote our consideration to the means best suited to bringing the young offender back onto an even keel and giving him a better start in life. And it is very probable that aggressive moral condemnation is less suitable in these respects than treating him with friendly understanding, and if possible love, of which he has been deprived in his years of development.

I said just now that I could subscribe to Hedenius's procedure, but with a certain qualification. What I meant by this latter is this: we have, in my opinion, an alternative procedure which is less encumbered with the sources of error that can pertain to intuitive interpretations of a few arbitrarily chosen examples of moral judgments. We have, I think, a much more tangible and systematically worked out classification of the conditions of responsibility inherent in " our common moral consciousness " in the civil penal law's rules concerning the conditions of penal responsibility, especially the rules concerning the alleged offender's being the cause of the offence, having committed it wilfully, and in a sound state of mind. To the extent that punishment is commonly understood as a morally determined reaction, and the penal system is generally accepted, it must be assumed that the requirements of guilt specified in penal legislation reflect the requirements made by the current moral outlook. It is of course possible that technical considerations of a legal nature have resulted in the legal requirements presenting a somewhat distorted image of the underlying moral attitudes. The study of the penal law should therefore be supplemented by a study of the committee reports, and debates that lie at the root of penal legislation, with a special view to finding spontaneous expressions of moral evaluations and considerations. The juridical study should possibly also be supplemented by sociological investigations of popular reaction to legal decisions concerning the conditions of guilt.

Such a method is naturally more strenuous than that employed by Hedenius. But it could never lead to the astonishing result that " our moral consciousness " poses as conditions of moral responsibility requirements that in principle cannot be satisfied.

7. Hedenius's Thesis Contains a Self-Contradiction

The thesis which Hedenius defends must seem immediately paradoxical. For in effect, and in short, it says that according to the Western moral view it is immoral to moralise; or that one

must disapprove of anyone disapproving of anyone (or anything). He disclaims that the basis necessary for disapproving of Hitler's actions exists. But this does not prevent him from disapproving of us others for disapproving of those actions.

Although the contradiction seems plain, the matter must nevertheless be looked into more thoroughly.

It is crucial to hold onto the fact (which we have already shown) that the conditional statement that if we realise that determinism is true we must stop moralising (disapproving) is a moral statement. Its necessity is of a moral, not a logical, psychological, or physical nature. For the basic idea is that morality (here Western morality) itself fixes the conditions under which an action can and is to be greeted with disapproval; and that it has proved to be the case that these conditions are unsatisfiable. The conditions are not just sufficient, they are also necessary. They fix not only when it is justified to invoke responsibility, but also when it is unjustified. If, for example, it is a condition that the action was not done under compulsion, this means that it is unjustified (immoral, in conflict with the requirements of the moral law) to invoke responsibility when this condition is not fulfilled. It follows from this that when it is to be assumed that the moral law's conditions are not fulfilled it is contrary to morality (but not logically, psychologically, or physically impossible) in any instance to hold a person morally responsible. This makes the paradox seem unavoidable: it is immoral to moralise, reprehensible to reprehend.

However, the contradiction, so far as its self-referential aspect is concerned, can be overcome. Let us consider Hedenius's thesis in this formulation:

I disapprove of anyone disapproving of anything.

The apparent contradiction arises from the statement being understood as a reflexive, or self-referential, statement, that is as a statement that refers also to itself: the disapproval expressed in the statement applies equally to itself, *i.e.* to the disapproval directed at those who disapprove of anything. As I have argued in detail elsewhere (genuine) reflexive or self-referring utterances must be considered meaningless.[40] However, if we dispense with the reflexivity the thesis can be expressed in a logically unimpeachable way. In the following manner.

Let us call the disapproval which is directed at a human action which is not itself an act of disapproval, *e.g.* committing a murder, telling a lie, stealing, an act of disapproval of the first degree ($D°_1$).

[40] " On Self-reference and a Puzzle in Constitutional Law," *Mind*, 1969, pp. 1 *et seq.*

And the disapproval which is directed at an act of disapproval of the first degree an act of disapproval of the second degree ($D°_2$), and so on. Hedenius's thesis can then be put thus:

I disapprove of $D°_1$.

Here there is no contradiction or circularity. The sentence itself expresses an act of disapproval of the kind $D°_2$.

Quite obviously this sentence is not an exhaustive rendering of Hedenius's moral position. He naturally approves of the disapproval $D°_2$ expressed in the sentence. If anyone should not do so, thus expressing $D°_3$, Hedenius would have to express disapproval $D°_4$ of this disapproval $D°_3$ of his own disapproval $D°_2$, and so on. If interrogated, Hedenius must continue to make statements of the kind $D°_n$, where n is an even number.

So far as I can see the possibility of continuing the series indefinitely contains no infinite regress which would make the thesis meaningless. $D°_2$ is in itself perfectly intelligible. It does not presuppose $D°_4$, nor any other subsequent D, as part of its meaning. And the same can be said of any subsequent D. The series is *progressive*, not regressive. It gives a rule for answering subsequent questions, but at no stage presupposes that these questions have been asked and answered. The series can be compared with that cited by Hart: it is forbidden to mention a number greater than that so far mentioned by anyone.[41] Every violation of the rule changes the specific content of the rule, but it nevertheless has a precise meaning at any given point in time.

That the even-numbered series is not a meaningless infinite regress can also be seen from the fact that in effect each step in it expresses $D°_2$ and nothing else. Suppose, for example, that we have reached $D°_{16}$. $D°_{16}$ expresses disapproval of $D°_{15}$. And since $D°_{15}$ in the same way expresses disapproval of $D°_{14}$, $D°_{16}$ will be identical with approving of $D°_{14}$. Similarly $D°_{14}$ will be identical with $D°_{12}$, etc. and so on, *i.e.* identical with $D°_2$.

However, although we can in this way, with the help of the theory of types, save Hedenius's theory from the paradox of self-reference, it nevertheless founders on a self-contradiction. His moral thesis $D°_2$ means that he disapproves of $D°_1$, that is, of acts of disapproval of human acts of the first degree, such as murder, lying, and so on. He has reached this position because he has found that " our moral consciousness " makes disapproval (moral responsibility) dependent upon unsatisfiable requirements. But the same requirements must also be made for the disapproval $D°_2$ expresses, and consequently $D°_2$ is also an impossibility. Hedenius cannot

[41] *Festskrift tillägnad Karl Olivecrona*, 1964, pp. 309–310.

reproach us others for making Nazi criminals responsible for the murder of Jews. For his justification for precluding disapproval for the Nazi criminals—namely that the conditions for disapproval are in principle unfulfillable—must also apply to his disapproval ($D°_2$) of our first-degree disapproval ($D°_1$).

It might conceivably be objected on Hedenius's behalf that my criticism is based on a misunderstanding. His thesis is not a moral statement to the effect that one should not disapprove of anything, but a psychological thesis to the effect that realisation of the unsatisfiability of the conditions simply leads people to desist from acts of disapproval. He sometimes says that " it stands to reason that we must give up " invoking moral responsibility once we have gained this insight. As an illustration of such a psychological reaction we can think of the case where I prepare to fell a tree that obstructs the view. If I now see that it is not the tree I am about to tackle that blocks the view, it stands to reason that I will give up the idea of felling it. Or I try to persuade someone to give me some information, but discover he is not the person who has the information. In cases like these it stands to reason that I give up the idea of doing what I had planned because I realise that it would be pointless to continue.

But this interpretation of Hedenius's theory is not possible. The conditions of moral responsibility which he advances are derived from " our moral understanding " and must therefore necessarily express moral demands, thus be conditions for the *justifiability* of moral censure. But the fact that I have realised that an action is morally unjustified does not imply that it stands to reason that I must avoid carrying it out. Consciousness of what is morally right does not, unfortunately, exclude our nevertheless doing the exact opposite. Moral insight is not the same as psychological necessity.

8. Alternatively, if Hedenius's Account of Western Morality were Meaningful and Correct, the Task would have to be to put this Morality to a Critical Test

In the foregoing I have contended (1) that the thesis about the unsatisfiability of the conditions of responsibilty *cannot* be a true description of a given morality (Western morality) analytically obtained by comparing the cases in which responsibility is taken to occur with those in which it is not; and (2) that the thesis that disapproval must be disapproved of, or that it is immoral to moralise, is logical nonsense.

To this I now add an alternative argument. Let us suppose that I am wrong, that is, that it is in fact the case that, properly under-

stood, the Western moral understanding sets conditions for moral responsibility which are in principle unsatisfiable. What would be the consequence of this?

Hedenius says, as noted, that in that case we must either change our moral understanding or give up moralising (because moralising is immoral). Agreed. Posed with these alternatives he chooses the latter on the grounds that the former is completely unacceptable (p. 145).

Here I cannot follow him. I would immediately renounce a positive morality which had such an unreasonable content. Nor do I see anything which would make it unacceptable for me to do so, or which would prevent me from such a course. The assumed description of the content of the " Western moral understanding," as an historical and cultural phenomenon tied to a certain place and time, has its exact parallel in the corresponding description of the conditions of legal responsibility in present Danish law. In both cases there is a description of a given, so-called positive normative system—positive Danish law and positive Western morality. And just as we can subject the former to critical review and evaluation in legal-political deliberations concerning law, so can I subject the latter to similar critical appraisal. This could conceivably result in my accepting, for my own part, a modified morality and agitating for its acceptance by others.

If, in rejecting the possibility of changing our moral principles, Hedenius thinks that it does not lie within my power to change " Western morality " as an existing cultural fact, that may be true enough. But this does not prevent me changing my own moral understanding (if it ever had the supposed content). Adopting a critical stand of this kind to the positive morality in which we grow up as members of a particular cultural group is nothing exceptional. On the contrary, it is something which anyone experiences who frees himself from attitudes of infantile authoritarianism.[42]

I could have understood Hedenius if, with Kant, he regarded consciousness as a heavenly voice, the voice of God within me, which gives every man immediately evident and certain knowledge

[42] *Cf.* Alf Ross, *Directives and Norms*, 1968, para. 15, and the following statement by H. L. A. Hart in *Law, Liberty, and Morality*, 1963, p. 20: " To make this point clear, I would revive the terminology much favoured by the Utilitarians of the last century, which distinguished ' positive morality,' the morality actually accepted and shared by a given social group, from the general moral principles used in the criticism of actual social institutions including positive morality. We may call such general principles ' critical morality ' and say that our question is one of critical morality about the legal enforcement of positive morality."

of the moral law, the categorical imperative.[43] In that case there could be no question of any revision of our moral consciousness. But if (and here Hedenius is naturally in agreement)[44] we regard the morality a person grows up in from childhood on an empiricist basis as a cultural phenomenon confined to a certain place and time, I see no reason why one should not, after critical reflection, try to revise " our moral principles " as we find them given in the " Western moral understanding."

9. A Rational Discussion of the Conditions of Moral Responsibility Must Take into Consideration the Behaviour-Guiding Function of Disapproval

It is not my purpose here to undertake a moral-critical discussion of the conditions of responsibility. The task I have set myself does not aim at establishing these conditions, but only at determining whether they are such that they make moral responsibility incompatible with philosophical determinism. And in respect of this aim it is sufficient to state the main viewpoints upon which a rational criticism must rest.

With this aim in mind it is crucial to remember what was made clear in sections 2 and 3 above. The moral judgment is not just an indicative thought-act in which it is affirmed that an action fails to comply with the demands of a presupposed moral norm; it is also a directive demand for disapproval of the action. The disapproval is the sanction of the moral norm. It is not a thought, an opinion, but an action or a preparedness for action. It presents itself as an emotive reaction of ill-will towards the person regarded as guilty. In the censure, conviction and disapproval merge into one. But the disapproval can also manifest itself in other, non-verbal, possibly violent ways.

To disapprove of a person's conduct is thus in itself an action, a venting of emotion, of great importance to other men, in particular the one or ones at whom it is directed.

Although disapproval certainly occurs in most instances as a spontaneous emotional reaction, and not as a deliberate action with a particular aim in view, it is nevertheless possible to ask whether it does not serve a purpose in the sense that it performs a function in producing effects of vital significance to the individual and the

[43] See Alf Ross, *Kritik der sogenannten praktischen Erkenntnis*, 1933, pp. 304, and 320 Note 34.

[44] It is indeed a basic idea in the so-called Uppsala Philosophy's Value-Nihilism (or Axiological Nihilism) that moral utterances are theoretically meaningless and can therefore be neither true nor false: *cf.* Ingemar Hedenius, *Om rätt och moral*, 1941, and his essay on freedom of the will, Note on pp. 147–148.

community. If, as I believe, this is the case, it will be rational to adapt the conditions under which disapproval is proper to the reaction's purposive function. Furthermore it is also possible that the conditions, regardless of the fact that disapproval would answer a pragmatic purpose, must be restricted because of opposing considerations (restrictive principles).[45]

In order to understand these problems it is important to examine the origin of the moral emotions. I lean here on Edward Westermarck's renowned and still pertinent work *The Origin and Development of the Moral Ideas.*[46]

Moral disapproval is assigned by Westermarck, along with anger and vengeance, to the retributive emotions of a hostile nature.

Anger is the spontaneous, thus unpremeditated, hostile reaction to the person or thing that is thought to be the cause of some inflicted pain. (For my own part I would interpolate that one should not identify the object of anger by means of the concept of cause, but rather say that anger is directed at whatever or whoever is immediately apprehended as the assailant.) One cannot say, therefore, that anger is shown with the aim of inflicting pain, only that its function is to repel an attack.

Vengeance, however, is a premeditated reaction guided by a desire to inflict pain on an aggressor in return for an unsuccessfully repelled attack. Vengeance is a delayed reaction and therefore presupposes a certain ability to remember, and to make and stick to plans. Nevertheless this ability is thought to exist in a number of the more highly developed animals, among others apes, elephants, and camels. Like anger, vengeance is a built-in mechanism which serves to protect the individual. The knowledge that an attack will be met with subsequent retaliation naturally has a restraining effect upon the urge to attack. This is not contradicted by the fact that, especially in primitive cultures, revenge is often directed not at the immediate assailant, but at a group to which he is considered to belong, particularly his family (blood vengeance). Collective responsibility is a natural result of viewing the struggle and the hostility as obtaining between, not individuals, but families as acting units.

Moral disapproval and indignation resemble anger in being spontaneous, hostile reactions to an attack, and vengeance in involving a delayed reaction which can manifest itself in a

[45] *Cf.* "The Aim of Punishment," s. 3.

[46] For the following see Vol. I, chaps. I–IV of the work mentioned. Also Oliver Wendell Holmes, *The Common Law*, 1923, who, relying on a wide selection of material from the history of law, shows how punishment, just as much as restitution, has developed out of vengeance, often directed at the object that causes the injury.

deliberate desire to inflict pain (punishment). But they differ from non-moral reactions in three related respects which Westermarck designates " disinterestedness," " impartiality," and " generality." They stamp moral disapproval as its at least innate, though not always wholly realised, intentions. As I see it, this can also be put by saying that that which elicits the moral reaction is not an attack upon a person's own personal interests as such, but upon the moral order, a system of values, which the moral re-agent identifies himself with. Moral anger therefore becomes " just " or " righteous " anger, an anger on behalf not of oneself but of what is right. Moral retribution therefore becomes not " revenge," but " just punishment." And the reaction is directed quite generally, without fear or favour, against anyone who violates the system's norms.

So much for Westermarck. We can now draw on his theory, thus sketched, to answer a question I posed earlier concerning the function of moral disapproval. Although moral disapproval is no more directed at a conscious aim than are anger and vengence, it does, like these latter, perform a vital function—it is a defensive reaction against someone who tramples upon one's moral values. To the exent that others fully realise that an assault will give rise to reactions of anger and vengeance, or moral disapproval, preparedness for these reactions furnishes a motive to refrain from the assault. These reactions and being prepared for them thus have a behaviour-guiding, *preventive* effect. *Retribution is by definition prevention.*

The behaviour-guiding effect of disapproval operates through a two-fold motivation mechanism. In the first place disapproval, as we described in more detail in section 3, is an evil. People do not like censure, not even when it is just verbal. And the same applies even more if the hostile attitude inherent in disapproval expresses itself in overt action. When the perpetrator of an act knows under what circumstances he can expect disapproval from his surroundings, an interested motive is formed in him to avoid invoking the unpleasant reaction. The motive is called " interested " because it arises from an interest, fear of an evil. Secondly, disapproval is also admonitory.[47] It brings a presupposed and common system of norms' demands to bear upon a person by appealing to his own acceptance of the norms in question—an acceptance which may have become weakened or supplanted in his mind by counter motives and which therefore needs to be brought home to him and strengthened. The element of admonition can take the form of a direct reference to norms and duties, or be latent in expressions

[47] *Cf.* Alf Ross, *Directives and Norms*, 1968, para. 12.

such as " you certainly cannot do that," " you cannot mean to . . . ," " are you not ashamed of yourself? " etc. Such appeals form in the person at whom they are directed a *disinterested motive* to act correctly. The motive is called disinterested because it arises not from fear of some evil, but from a pure duty felt to be binding in respect of the demands of the normative system.[48]

There is now reason to believe that because man is an animal capable of learning (*i.e.* not one whose reactions are set in unalterable, instinctive stereotypes), these reactions will be adapted, in changing cultural circumstances and with increasing insight, to harmonise with their function. The small child strikes out in anger without distinguishing the living from the lifeless, the guilty from the innocent. Indeed we can all detect a tendency in moments of frustration to be angry with inanimate things, just as we feel an immediate impulse to react against someone who treads on our toes, both literally and metaphorically. It requires a certain spiritual development, experience, and maturity to distinguish between accident and volition. In societies where kinship solidarity plays an important role physical assault is not imputed to the actual assailant, but to the family to which he belongs, and vengeance is wreaked upon it, thus preserving the balance of power. With the advent of a state power, that is to say, when the right to exercise violence becomes monopolised and clan rule is broken, vengeance is directed at the individual, as punishment in the name of the State. The assailant's deed is attributed to the assailant, not to his kin.

These reflections should lend support to the already credible hypothesis that the conditions under which assault elicits retribution, that is, aggressive ill-will, are determined by the vital beneficial effects of the reaction, namely its preventive function. Why do we react differently to the person who treads on our toes when we realise he did so accidentally? Because we understand that the action does not reflect an attitude, a type of personality, which leads one to fear similar aggression to similar situations. A reaction that has a preventive, attitude-influencing function is therefore *unnecessary, uncalled-for,* and *pointless.* Why do reasonable parents stop censuring and punishing a child who wets his bed while asleep? Why do we not reproach a child with a low IQ for being unable to learn mathematics? Obviously because, having learnt from experience, we know that retaliatory responses in these cases do not have the desired effect—they are *ineffective, useless.*

Whatever one thinks of the genetic hypothesis (the verification

[48] *Cf.* Alf Ross, *On Law and Justice,* 1958, para. 85, *cf.* para. 84.

of which naturally requires basic investigations which I am in no position to undertake), it is in any case pragmatic considerations like these which I take to be decisive in a critical test of the conditions of responsibility that we find in positive law or positive morality. Moral disapproval is an act which must be judged as an action-guiding, preventive reaction, and the conditions under which the reaction is justified must be determined accordingly. Censure (punishment) is an act of aggression, in itself an evil, and therefore only justified to the extent that it serves a useful, praiseworthy purpose, and so long as one cannot point to counter, restrictive considerations which, whatever the utility of the reaction, count in favour of restricting it.

10. The Question of Determinism or Indeterminism is of no Significance in a Rational Appraisal of the Conditions of Moral Responsibility

The question now is what part do determinism or indeterminism play in a rational, pragmatically governed fixing of the conditions of moral responsibility. And the answer is, none, absolutely none. The only necessary presupposition for reacting to certain acts by invoking moral responsibility is that human conduct (within certain limits) is susceptible to the behaviour-guiding influences that are elicited by awareness of the retaliatory actions that can be expected. But this indubitable empirical fact is compatible with both deterministic and indeterministic presuppositions.[49]

If we now, on this basis, rationally appraise the three requirements which Hedenius thinks are involved as conditions of moral responsibility in our moral understanding, we shall see that the first two are altogether acceptable, but the third not.

(1) First, it is understandable that we exonerate someone who could not have acted otherwise in the sense that he did not have freedom of action—an outer or inner compulsion prevented him from doing what he wanted. He could not have done it even if he had wanted to. The "fault," therefore, lay not in his will, his mental state, but in the compelling circumstances. It is understandable, I say, that in these circumstances we excuse the agent —precisely because his conduct gives no indication that his will needs the boosting and corrective influence which moral censure can provide. Disapproval here is unnecessary, pointless.

The pragmatic approach nevertheless opens our eyes to the fact that this basis for excuse needs to be modified in a way that

[49] Libertarians do not claim that all human decisions and choices are expressions of an indeterminate free will; see, *e.g.* C. A. Campbell, *On Selfhood and Godhood*, 1957, pp. 172 *et seq.*

Hedenius seems not to have noticed. He seems to suppose that when we say that *A* has freedom of action when he carries out the action *if he wills to do so,* there are two clear alternatives presented here: either *A* wills to do so, or he does not. Correspondingly, either *A* acts under compulsion, or he does not. But this overlooks the fact that the effort of will which *A* can exert in attempting to overcome the coercion can be of many different degrees.[50] It is often said—and this perhaps is Hedenius's tacit assumption—that compulsion excuses when it is *irresistible.* But when is it that, and how can it be established that it is? In actual cases we can only assert that it was not in fact successfully resisted. But how can we know that it could not have been? It certainly is not possible to prove that an impulse is absolutely irresistible, and therefore impervious to any motive forces that might be mobilised against it. A person who, after an heroic fight, succumbs to a craving for nicotine or alcohol may say that his craving was irresistible, and we others may perhaps, on the basis of our general experience of similar cases, agree with him. But this does not exclude the possibility that the same person in the same situation might have overcome his craving if he had been offered a million pounds to postpone gratification for a certain time; or if he had been threatened with instant, inescapable, and violent pain if he gave way to his craving.

From rational, pragmatic considerations the boundary between compulsion that excuses and that which does not must be drawn in such a way that we excuse in those situations in which censure is useless because from general human experience it appears that efforts of will of the strength that can be evoked by appeal to a sense of duty and to fear of sanctions is not enough to enable the average man to overcome the constraining influence. Therefore we excuse, for example, the drug addict for his continued use of drugs, because we know that he is acting under—in the sense in question —an irresistible compulsion.

(2) Secondly, from similar considerations it can also be rationally accepted that we excuse such actions as are imputable not to their perpetrators' characters or personalities, but to unusual external stimuli, *cf.* p. 115, above.

(3) However, I must demur when it comes to Hedenius's third condition, the requirement that *A*'s character must not be determined or co-determined by causes over which he has no control, such as his inherited traits and his environment.

[50] Hedenius (*op. cit.*, pp. 146 *et seq.*) seems particularly to have outer physical compulsion in mind, which might explain why he has not taken note of differences in degree of compulsion.

First I must note in this respect that I am doubtful just how far any reasonable sense can be given to this distinction between *A* himself and *A*'s character or personality. When I think of a person, *e.g.* Ingemar Hedenius, I think of this personality as the sum of all the traits I have learned to recognise and appreciate. By " trait " I do not think of moral qualities alone, but also of intellectual, artistic, and other qualities which characterise the man and make him precisely Ingemar Hedenius and no one else. I find it difficult to know what " Ingemar Hedenius himself " could be apart from the personality Ingemar Hedenius is, and what it would mean to ask how much " Ingemar Hedenius himself " has or has not shaped the " personality Ingemar Hedenius." I believe that on this point he operates with a dualism reminiscent of Kant's distinction between the empirical and the intelligibile character, and which is just as hopeless.[51] Kant, too, was not content to rest the notion of moral responsibility on an action being attributable to the agent's empirical character. As a link in the phenomenal world, this character is for Kant, fully subject to the law of causation, so that an action arising from it is predictable with as much certainty as an eclipse of the sun or the moon. So Kant postulates an intelligible, but for us inapprehensible, character behind the empirical. It does not exist in time, and reason operates in it as a free cause. It is here that the freedom exists which the moral law postulates as the presupposition of morality. The intelligible character determines the empircal one, a different intelligible character would have given a different empirical one. But this presents Kant with the awkward question of what determines the fact that one man has a good and another a bad intelligible character. In one place Kant says that the intelligible character is a consequence of freely accepted principles. In another that the question transcends the limits of reason and cannot be answered. It is not difficult to show that by inventing an intelligible character behind the empirical one, Kant has not solved the problem of freedom but only put it in another place. Why have people different intelligible characters? A similar question arises as regards Hedenius's requirement that " he himself " should have formed his (empirical) character: what

[51] The following discussion of Kant concerns one of the most complicated points in his philosophy, his curious theory that the human will is at once bound by law (exhaustively predictable) and free as postulated by the moral law. To be fully intelligible the presentation here would have to have been much more detailed. I refer to Kant, *Kritik der praktischen Vernunft* (in *Werke*, ed. by Ernst Cassirer, 1922, Bd. V), pp. 98 *et seq.*, especially pp. 105–109; and *Kritik der reinen Vernunft*, *op. cit.*, Bd. III, pp. 380 *et seq.*, especially 384–389.

would it be that determined that one man formed a good character and another a bad one?

Furthermore, I must contest the claim that such a requirement (Hedenius's third condition) resides in " our moral consciousness; " and if it did, I would have to regard it, in a critical moral discussion, as irrational and unacceptable.

Suppose I am witness to a base action for which there are no exculpating circumstances—no compulsion or unusual stimuli. The action reflects a villainous character. I react spontaneously by condemning and disapproving of this attack upon values with which I identify myself. I know also that my and others' similar reactions in this and similar situations have the useful function of helping to prevent reprehensible actions and thus of upholding the moral system I defend. My reaction is natural, useful, and rational. I see no reason why I should not, with good conscience, follow my spontaneous moral impulse, however much this man's character may at least in part be the result of forces, inherited traits, and an environment over which he has no control.

There are two things given here. (1) There is an act and a character which on the moral principles I uphold I must judge to be mean and undesirable, an attack upon and a danger to the value system I believe in. My negative appraisal of these things is in no way diminished because I am convinced that this terrible fellow's character is not a product of his will, but of ancestry and environment—any more than my admiration of a woman's beauty or of a man's intelligence is in any way diminished because I fully realise that these qualities, too, depend on matters outside the individual's will. Intelligence, beauty, integrity—these are three qualities I value positively. Stupidity, ugliness and corruption—these are three qualities I value negatively. But it is only to the last of each of these three that I react with praise and blame. Why? Because experience has taught me that it is only action and character, not mental ability and appearance, that can be influenced through friendly and hostile reactions.

Then (2) there is the fact that the moral reaction which expresses itself in disapproval (and commendation) is both a natural and an appropriate reaction. To say that it is natural means that, like anger and vengeance, it is one of man's spontaneous forms of response. To say that it is appropriate means that it has a behaviour-guiding (preventive) function in consolidating and defending the moral system from which it springs. This fact, too, is in no way affected by the fact that a man's character, like everything else that pertains to him, has developed on the basis of inherited abilities and under the influence of the environment.

Therefore, since (1) and (2) stand firm, I have everything I need —quite independently of whether the will is free in an indeterministic sense or not—for a rational justification of moral disapproval and for fixing its conditions. *Mein Leibchen, was willst du mehr?*

Hedenius (and other hard determinists) are certainly aware of the behaviour-guiding effect of the moral reaction, but claim that a purely pragmatic justification would rob the moral judgment and moral disapproval of their true meaning. Hedenius says:

> We will not assume that there are heroes and scoundrels, people who are morally laudable and blameworthy, just because it is useful from considerations of upbringing to hold this opinion. Rationally we should stop using our concepts of " hero," " scoundrel," " virtue," and " vice " both to ourselves and to others, once we have understood that the conditions which our own principles lay down for correctly calling someone a hero or a villain, or something a virtue or a vice, cannot be satisfied by reality. *There are scoundrels, Sophie!* in itself certainly sounds like good sense, but it is also possible that it is plain thoughtlessness (pp. 150–51).

That is: on the basis of determinism (which is supposed to render the requirements in question unsatisfiable) one cannot seriously, honestly, pass moral judgments. It is a kind of humbug if one nonetheless passes them with a pragmatic objective.[52]

This is perfectly correct *according to Hedenius's presuppositions.* It is a logical consequence of the presupposition that free will in an indeterministic sense is a condition of moral condemnation. On this assumption one clearly cannot rightfully condemn a man if one accepts that he does not possess a will that is free in that sense. Nor can it in any way alter this fact that one is convinced that moral reaction is a tool for the control of behaviour.

It is thus the presupposed moral postulate that guilt is conditional upon an indeterministically free will which precludes the pragmatic justification, not determinism as such. Once we get rid of this postulate there is nothing to prevent the determinist with genuine indignation and all seriousness branding someone a villain. It must be remembered that the moral reaction is a spontaneous expression without any conscious aim in view, and that it is something other and more than an instrument for the control of

[52] See Richard Taylor, in Hook (ed.), *Determinism and Freedom in the Age of Modern Science*, Collier Books, 1961, pp. 226–227; Gabriel de Tarde, in Herbert Morris (ed.), *Freedom and Responsibility*, 1961, pp. 46–47.

behaviour.[53] Disapproval is the sanction which presupposes a judgment of the action and agent. The moral judgment is the thought act which, on the basis of a given moral system, intends to state a correct appraisal of the action as an offence and of the agent as its guilty author. If the judgment turns out to be a conviction, it implies in addition a demand that the offence be disapproved of. It is this condemnation and disapproval which together find expression when, with genuinely felt anger, we brand the guilty author of a contemptible deed a villian. The fact that we are at the same time convinced on moral-philosophical reflection that the moral reaction serves a function, and try rationally to adapt the reaction to it, detracts nothing from the genuineness and seriousness of the indignation. Anger is a spontaneous reaction, but we learn gradually to overcome the impulse when we see that circumstances preclude its useful function.

11. Hedenius's Theory Involves the Absurdity that Society Would be Destroyed if Everyone Shared his Insight

"Let us not imagine," says Hedenius about moral condemnation, "that this form of moral anger . . . has become dispensable . . . To bring about the disappearance of retributive reactions through education or a change in cultural conditions is certainly neither possible nor desirable."[54] In this I am in total agreement. The fact is, indeed, that without moral notions and emotions all social life would be impossible.

Social life at all levels, from the primary groups and up to the most complex organisations, is based upon various kinds of norms of behaviour, legal, moral, conventional. These norms form the common ideology which gives the social acts of the individual their specific meaning, makes them mutually conditional upon one another and integrates them into a meaningful social interrelationship, as opposed to a cacophony of isolated voices. The simple model is that of the rules of chess. Without them no chess game would be possible. It is by virtue of them that the transferring of a

[53] "In our judgment of human conduct we may be mostly concerned with maintaining or improving the general level of behaviour in the community; but we also think that bad conduct should be exposed for what it is, and good conduct acclaimed for what it is. In other words, we do not condemn wrong-doing merely to deter people by the fear of shame from misbehaving. To improve people's behaviour is not the only thing that matters: It is also important that this behaviour should have its worth correctly stamped upon it." O. C. Jensen, "Responsibility, Freedom, and Punishment," *Mind*, 1966, pp. 235–236. See also J. Charvet, "Criticism and Punishment," *Mind*, 1966, p. 579.

[54] "Om gengældelse," *Vindrosen*, 1966, No. 2, pp. 64 *et seq.*, 68, 72.

piece from one square to another acquires its special meaning as a "move" which conditions and is conditioned by the opponent's counter-moves. The rules of chess join the two players together in a (temporary) community of expectations, demands, and obligations. The rules integrate the players' individual actions into a game and create the possibility, within certain limits, of predicting each other's reactions. And something similar applies in the case of all other social norms—they regulate and organise social life, create expectations and predictability, and co-ordinate the actions and reactions of individuals into harmonious interplay, the social phenomenon we know as the community.

That a social norm exists (or is "in force") in a certain community means, as I have argued in detail elsewhere,[55] that it is by and large complied with by the members of the community in the consciousness that they follow a rule and are duty bound to do so. The experience of *being bound* or of something as *binding* is the fundamental social phenomenon. Incitement to duty is experienced as a spontaneous impulse to act in a way that it is not dictated by one's own interests and needs, and it therefore presents itself to the individual with a remarkable, almost mystical character as a dictate originating from somewhere outside himself.[56] The tie which the individual experiences in this way, so far as his own actions are concerned, corresponds to the expectations he entertains and the demands he makes as an observer of the actions of others. If then the norm is violated by another of the community's members, that is, if the experienced demands and expectations in respect of his social surroundings are disappointed, emotional reactions of various degrees take effect and are made known in the various ways we have referred to under the common label *disapproval.* From the social surroundings they appear in the more or less explicit form of anger, hostility, and aggression; in the guilty party himself as feelings of guilt, shame, and remorse, which is anger and aggression directed at the self.

This short sketch is an absolutely minimal concentrate of thoughts which in my works in legal philosophy I have developed at length with regard to the norms of law.[57] The basis of the

[55] *Directives and Norms*, 1968, para. 21; *On Law and Justice*, 1953, chap. I, para. 3, and chap. II.

[56] Concerning the experience of duty see Alf Ross, *Kritik der sogenannten praktischen Erkenntnis*, 1933, chap. VII, pp. 1–2; *On Law and Justice*, 1953, para. 90.

[57] *Directives and Norms*, 1968, pp. 86, 102, 117; *On Law and Justice*, 1953, para. 11; *Towards a Realistic Jurisprudence*, 1934, chap. V, p. 3.

legal system is not, as some have believed, a physical force or power " behind " the law, but the feeling of loyalty and obligation which at least the great majority of people have for a common constitution and common institutions. The use of physical force (deprivation of freedom, seizure of property) and fear of it naturally also play an important part as a motive for law-abidingness. But this kind of power is itself conditional upon normative attitudes, namely the legal consciousness and allegiance which decides whom it is that the populace accepts as a lawful authority competent to administer the use of the instruments of power.

If this basic viewpoint is correct it lends support and greater meaning to the claim that no society is possible without disapproval, without emotional reactions: no disapproval, no norms; no norms, no society.

In this, as we have said, Hedenius agrees. Nevertheless the prevailing Western morality, according to him, contains requirements which exclude any disapproval of the first degree, *i.e.* disapproval of human actions that are not themselves acts of disapproval. Hedenius himself tries hard not to give in to the natural tendency to judge and wax angry. But he well understands that this attitude must be a luxury preserved for the " subtle-minded." Therefore his theory of a double morality.[58] But is it not a fantastic idea that society can only maintain itself by virtue of the misunderstanding by dullards of their own morality, and would therefore be threatened with ruin if we were all gradually, and with growing enlightenment, to attain to Hedenius's own level of subtlety and acumen?

Moral nihilism—I mean genuine moral nihilism, the theory that one can never rightfully censure anyone for anything, that all talk of morality and of moral responsibility is vacuous and should therefore be dispensed with by those with sufficient insight to realise the unsatisfiability of the conditions of responsibility[59]—is in my view one of those patent absurdities, well-known in the history of philosophy, which could only have been brought about by philosophical speculation, and which in fact no one, not even the philosophers in question, has taken seriously. In this respect it can be compared, for example, with solipsism, the theory that

[58] See above, s. 5.

[59] I stress this because the expression " moral nihilism " is often used as a designation of the Uppsala School's theory of the logical nature of moral utterances.

nothing outside me exists, or Zeno's argument for the impossibility of motion.[60]

12. The Pragmatic Version of Incompatibilism

In section 4 we mentioned that incompatibilism occurs in two versions, a moral and a pragmatic. So far we have dealt with the moral version, the basic idea of which is that " our moral consciousness " makes it a condition of holding a man responsible for a certain act that he not only had freedom of action—*i.e.* that he could have done as morality dictated if he had wanted to—but also freedom of will in the sense that his will and character must not be determined or co-determined by factors, *e.g.* inherited traits and environment, over which he has no control. The will must be in an absolute sense free, uncaused; consequently morality and determinism are incompatible.

I turn now in this and the following sections to the second version of incompatibilism, what I have called its pragmatic version. Its basic idea is that the moral reaction embodies an aim, or performs a function, namely that of influencing people (oneself or others) to act otherwise than they would have done if they had not been confronted with the demands of morality. But if all events in the world, including human inferences and choice, occur necessarily in accordance with inexorable laws, then all moral efforts, demands, judgments, and reactions must be condemned in advance as in vain. Determination makes all morality meaningless in the sense that the intention to influence human conduct, which, consciously or unconsciously, is integral to all moral discourse and response, aims at something that cannot be realised. If human will and action are subject to the law of causation then the demands of the moral law will be without rational meaning, for men cannot act otherwise than they in fact do.

I know of no author who has made a point of developing this thesis. It perhaps appears more frequently as an unarticulated hypothesis, taken as self-evident, than as a well-argued theory. In the introduction to this chapter (section 1, at note 4 and 5) I mention that many authors assume, as though it were quite unproblematic and self-evident, that morality and determinism are incompatible. Perhaps there is little point in surmising what ideas may have motivated this view, precisely because it is held quite uncritically. Still, I am inclined to believe that Lönquist would find support among many of the others when he presents incompatibilism in this simple, pragmatic version:

[60] See " The Campaign against Punishment," s. 5.

> If determinism is right, then it is properly speaking meaningless to set forth requirements as to how we men are to act. We act with necessity inasmuch as we act. The very thought that we should act otherwise is already meaningless.[61]

In myth and poetry the idea of men's helplessness and total impotence in the face of exalted and inexorable ruling powers, fate or God, has been an oft-repeated and diversely elaborated theme from the Greek tragedies to our own day. Fate had decreed that Oedipus should kill his father and marry his mother—and so it came to pass, in spite of all the guile and ingenuity exercised in trying to avoid this fate. God will not be derided. The appointment in Samarra.[62] Not a sparrow falls to the earth without my father's will. " Are you not afraid, Hælle? " " I do not know." " For we shall soon go out and fight. . . ." " Whether one lives or dies is not for oneself to decide. It rests in the hands of the Creator." [63]

It is amazing how this theme, despite its complete lack of meaning unless backed by a theological metaphysics which, however, only very few believe in, has preserved its power to captivate the mind, a power that it loses, of course, if reinterpreted rationalistically as a banal piece of depth-psychological causation. Its appeal is perhaps due to its satisfying a need at once to bemoan the lot of man and to hold in awe the exalted powers which—with indifference or concern, mercifully or unyieldingly, but in any case with unlimited sovereignty—rule the world in inscrutable and incomprehensible ways; and perhaps also to the possibility of interpreting the power that we are subject to as a cosmic principle of justice which, whatever our antics, our plans and dreams, our philosophy and cunning, leads all things to their rightful but

[61] Conrad Lönquist, " Viljans frihet och fysikens orsakslag," *Religion och kultur*, 1961, pp. 13 *et seq.*

[62] " *Death Speaks*: There was a merchant in Baghdad who sent his servant to market to buy provisions and in a little while the servant came back, white and trembling, and said, Master, just now when I was in the marketplace I was jostled by a woman in the crowd and when I turned I saw it was Death that jostled me. She looked at me and made a threatening gesture; now, lend me your horse, and I will ride away from this city and avoid my fate. I will go to Samarra and there Death will not find me. The merchant lent him his horse, and the servant mounted it, and dug his spurs in its flanks and as fast as the horse could gallop he went. Then the merchant went down to the market-place and he saw me standing in the crowd and he came to me and said, why did you make a threatening gesture to my servant when you saw him this morning? That was not a threatening gesture, I said, it was only a start of surprise. I was astonished to see him in Baghdad, for I had an appointment with him to-night in Samarra." W. Somerset Maugham, quoted as a motto in John O'Hara, *Appointment in Samarra.*

[63] Petter Nissen, *Den röda märden.*

unknown destination, while we ourselves are whisked away like grains of sand in a storm.

However this mythology of fate is not in a real sense deterministic. It does not rest on the idea that the course of existence is determined uniquely by laws and is therefore predictable, while all striving, choosing, and inferring are, on the contrary, illusory. In the fatalist view man's will is not illusory but impotent because human guile comes off second best in a contest with the gods of fate. We can certainly join in the game, but there is an opponent who meets our moves with superior insight and power and brings them to nought. In theological philosophy determinism and fate appear respectively as God's omniscience and omipotence. Determinism is expressed in the idea that from the dawn of time God has foreseen and known all that will happen—an idea which logically excludes his omnipotence, his ability to take a hand in things and change the foreseeable—which indeed would void the truth of the prediction. The idea of fate, however, is voluntaristic, it is the idea of God's omnipotence, his ability, whatever the opposing forces, to lead things in the direction he has ordained for them. But here omniscience must go by the board. The capacity to foresee an action and the capacity to reach a decision about it are logically incompatible.

In the philosophical literature, however, real determinism, including the idea that all human striving is in vain, simply an appearance, has often found marked expression. There is the famous passage in Spinoza where he says:

> Therefore, on applying my mind to politics, I have resolved to demonstrate by a certain and undoubted course of argument, or to deduce from the very condition of human nature, not what is new and unheard of, but only such things as agree best with practice. And that I might investigate the subject-matter of this science with the same freedom of spirit as we generally use in mathematics, I have laboured carefully, not to mock, lament, or execrate, but to understand human actions; and to this end I have looked upon passions, such as love, hatred anger, envy, ambition, pity, and the other perturbations of the mind, not in the light of vices of human nature, but as properties just as pertinent to it, as are heat, cold, storm, thunder, and the like to the nature of the atmosphere, which phenomena, though inconvenient, are yet necessary, and have fixed causes, by means of which we endeavour to understand their nature, and the mind has just as much pleasure in

viewing them aright, as in knowing such things as flatter the senses.[64]

From Paul Edwards I borrow these examples.[65] Holbach, for example writes:

> You will say that I feel free. This 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.

And Schopenhauer:

> Every man, being what he is and placed in the circumstances which for the moment obtain, but which on their part also arise by strict necessity, can absolutely never do anything else than just what at that moment he does do. Accordingly, the whole course of a man's life, in all its incidents great and small, is as necessarily pre-determined as the course of a clock.

And Voltaire:

> Everything happens through immutable laws . . . everything is necessary. "There are," some persons say, "some events which are necessary and others which are not." It would be very comic that one part of the world was arranged, and the other were not; that one part of what happens had to happen and that another part of what happens did not have to happen. If one looks closely at it, one sees that the doctrine contrary to that of destiny is absurd; but there are many people destined to reason badly; others not to reason at all, others to persecute those who reason . . . . I necessarily have the passion for writing this, and you have the passion for condemning me; both of us are equally fools, equally the toy of destiny. Your nature is to do harm, mine is to love truth, and to make it public in spite of you.

Possibly Edwards is right when he says that careful reading will show that in fact none of these authors (or none of the hard determinists) would ever seriously deny that human desires, strivings, and choices play a part in determining what happen in the

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[64] Trans. by R. H. M. Elwes, *The Chief Works of Benedict de Spinoza*, Vol. I, Dover Publications, New York, 1951, pp. 288–289.

[65] In Hook (ed.), *Determinism and Freedom, in the Age of Modern Science*, Collier Books, New York, 1961, p. 120.

world. They do not maintain fatalism. But this makes no difference as far as the question of the possibility of morality is concerned. It only puts the problem one stage further back. Yes, they will say, it is true enough that human striving and will help to determine the course of events. But where do they themselves come from? According to determinism there can be no doubt as to the answer. In the final analysis, our desires and our will, like anything else in our nature, are determined by our genetic constitution and by forces in the environment, and are therefore themselves uniquely determined. To acknowledge the importance of these factors therefore in no way undermines the thesis that all that happens does so with a uniquely determined necessity which precludes any thought that existence might have been other than it is.

13. If Determinism Implies that the Future is Exhaustively Predictable, then Determinism is Indeed Incompatible with Morality

That the world is necessarily as it is and so could not be otherwise; that men act necessarily as they do and so could not have acted otherwise; and that, in consequence, all moral demands, judgments, and reactions are empty gestures based on an illusory belief in the possibility of altering the unalterable—this in brief is the hard determinist's thesis of morality's pragmatic incompatibility with philosophical determinism. In this section I shall discuss the standing argument with which soft determinists have always countered this thesis, and try to show that this argument, its correctness notwithstanding, is not capable of rebutting the incompatibilist thesis.

This standing argument is to the effect that the theory of incompatibility replaces determinism with fatalism. We find this argument fully elaborated already in Augustine. He turns, with religious fervour, against Cicero who, in order to demolish Stoic fatalism, had thought it necessary to deny that anyone, even God, could have knowledge of the future. What Cicero feared, so Augustine thought, was that God's foreknowledge must presuppose that all things happen according to a fixed order and from fixed causes.

> But if there is a certain order of causes according to which everything happens which does happen, then by fate, says he, all things happen which do happen. But if this be so, then is there nothing in our own power, and there is no such thing as freedom of will; and if we grant that, says he, the whole economy of human life is subverted. In vain are laws enacted.

> In vain are reproaches, praises, chidings, exhortations had recourse to; and there is no justice whatever in the appointment of rewards for the good, and punishments for the wicked. And that consequences so disgraceful, and absurd, and pernicious to humanity may not follow, Cicero chooses to reject the foreknowledge of future things, and shuts up the religious mind to this alternative, to make choice between two things, either that something is in our own power, or that there is foreknowledge,—both of which cannot be true! [66]

But Augustine naturally cannot accept that God is not omniscient. Since he is also convinced that man possesses a free will (as a precondition of his moral responsibility) his task must be to explain that man's free will is not incompatible with God's foreknowledge of what will happen. And his explanation is as follows:

> It does not follow that, though there is for God a certain order of all causes, there must therefore be nothing depending on the free exercise of our own wills, for our wills themselves are included in that order of causes which is certain to God, and is embraced by His foreknowledge, for human wills are also causes of human actions; and He who foreknows all the causes of things would certainly among those causes not have been ignorant of our wills.[67]

The mistake in Cicero's reasoning therefore consists, according to Augustine, in his uncritically identifying determinism (universal regularity, God's foreknowledge) with a *mechanical* regularity, which has to do only with *physical* items and laws determining the course of the causal chain. Cicero identifies determinism (regularity) with fatalism, that is with closed regularity which excludes in advance from the circle of influence all human effort and will. If we drop this arbitrary assumption and restrict ourselves to the simple idea of a regular order and foreknowledge, there is nothing to stop human will having a say in what happens.

In our own day, R. E. Hobart offers a similar rebuttal of Eddington, who wrote:

> What significance is there in my mental struggle to-night whether I shall or shall not give up smoking, if the laws which govern the matter of the physical universe already pre-ordain for the morrow a configuration of matter consisting of pipe, tobacco, and smoke connected with my lips? [68]

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[66] St. Augustine, *The City of God* (trans. and ed. by Marcus Dods, 1892), quoted from Berofsky (ed.), *Free Will and Determinism*, 1966, p. 271.
[67] *Op. cit.*, pp. 272–273.
[68] *Philosophy*, 1933, p. 41.

To which Hobart replies:

> No laws, according to determinism, pre-ordain such a configuration, unless I give up the struggle. . . . Fatalism says that my morrow is determined no matter how I struggle. This is of course a superstition. Determinism says that my morrow is determined through my struggle. There is this significance in my mental effort, that it is deciding the event. The stream of causation runs through my deliberations and decisions, and if it did not run as it does run the event would be different. . . . Determinism . . . says that the coming result is " pre-ordained " (literally, caused) at each stage, and therefore the whole following series for to-morrow may be described as already determined; so that did we know all about the struggler, how strong of purpose he was and how he was influenced (which is humanly impossible) we could tell what he would do. But for the struggler this fact (supposing it to be such) is not pertinent. If, believing it, he ceases to struggle, he is merely revealing that the forces within him have brought about that cessation.[69]

Augustine and Hobart (and many other soft determinists) are, in my view, undoubtedly correct in claiming that there is nothing in the notion of the universal applicability of laws of natures, *i.e.* universal regularity in itself which necessitates the assumption that the course of events is unaffected by human effort or other mental factors. Fatalism is a theory not simply about the universal applicability of such laws to events, but also about the nature and content of the laws. In particular it states that only physical elements and their configurations determine the developing course of events. (As mentioned in the previous section, it can also be a voluntaristic metaphysics concerning a superior cosmic will which directs all things to their allotted goals.) It is clear that the deterministic direction of modern science is in no way fatalist in character. Quite the contrary, it is self-evident that scientists are willing as far as possible to embrace man in his full psychophysical unity within the law-governed order that they assume and search for.

Certainly no one in our day, then, would maintain that the deterministic strain in science, the belief in an all-embracing regularity, implies that mental factors—human insight, striving, and planning—are of no significance in determining the course of events. This, however, is not the crux of the matter. Even if moral

[69] Berofsky (ed.), *op. cit.*. p. 82.

demands, deliberations, and struggles are recognised as parts of the causal nexus in which the course of events is described, this does not imply that moral struggles and decisions have the significance and effect which they lay claim to.

Doubts in any case must arise if we think a little more closely about Eddington's smoker struggling against his vice—as Hobart presents him. This man's moral struggle, says Hobart, is not an illusion, but decisive for what the morrow brings. He adds that from a deterministic viewpoint all we others, if we only knew the man well enough, every trait of his character and all the factors which exert an influence on him, would quite certainly be in a position to predict the outcome of the struggle. Even though this in fact lies beyond the bounds of human possibility, in principle it is nonetheless the case that *if* we had all the necessary knowledge and all the necessary insight into the relevant laws, we would be able to predict any future event, including the outcome of this struggle. But surely there is something rather strange about the idea of us others smilingly regarding the man fighting his moral fight and thinking: " Yes, fight you may, my friend, like Job with God. With your given character and qualifications you cannot do otherwise. But do not imagine you can surprise us. We know how it will end and that tomorrow morning at five minutes past ten you will light your first cigarette."

In other words, the moral struggle only has meaning for the man because he himself is ignorant of its outcome. He does not, however, need to be ignorant of the outcome. If we others are in principle in a position to foresee the outcome, the same must be true of the man himself. This is a consequence of what could be called the " invariance of truth " in regard to communication. If a proposition *p*—*e.g.* that Napoleon died in 1821 or that *A* will light a cigarette at five past ten tomorrow morning—is true, its truth can be in no way affected by its being conveyed, say, over the radio or communicated in any other way. It is not a valid objection that the agent's own knowledge of the prediction can conceivably motivate him to act so as to falsify the prediction—say by simply waiting until six minutes past ten before lighting up. This is not a valid objection because all it shows is that the prediction was false. What I have maintained is simply that *if* the prediction is true, then its truth cannot be affected by communication.

We have now reached this result, that *inasmuch* as determinism implies that it is in principle possible for a sufficiently well-informed intelligence with adequate knowledge of the causal laws to predict with any required degree of exactitude what will happen in the future, then it must be conceded that the agent, too, can

in principle be in possession of the same certain knowledge of the outcome of his moral struggle. But this is absurd. It is plain nonsense to talk about someone deliberating about something, fighting a moral battle with himself, and coming to a final decision—and at the same time to maintain that this man had, or could have had, from the very first moment, certain knowledge about the content and timing of his decision.[70]

This means, furthermore, that we are so far unable to repudiate the hard determinist's claim that determinism excludes morality. It is not enough to show that determinism is not identical with fatalism. *If* the determinism in question implies that the future, given certain conceivably if not actually fulfilled assumptions, is predeterminable to any desired degree of accuracy, *then* one must accept that such a determinism makes all human deliberation and decision, and thus all morality, meaningless.

14. The Oedipus Effect Makes a Determinism of the Kind Discussed Above a Logical Impossibility

In discussing, as we are the thesis that determinism and morality are incompatible, the question of what is meant here by "determinism" is inescapable. Unfortunately the proponents of the thesis have generally eschewed a definition. In most cases, to be sure, determinism has been identified as the presupposition upon which modern science is based, and the correctness of which science has established. Science looks for regularity within definite areas of existence, and the criterion for the successful discovery and formulation of a regularity, that is, of a law of nature, is that it retrospectively enables us to *explain* reconstructively what has happened, and prospectively enables us to *predict* what will happen. In both cases it is assumed that within a certain range of phenomena one has knowledge of a number of relevant initial positions. The validity of the law is documented by one's ability, on this basis and in connection with the law's formulae and a number of calculations, to determine later positions within the system. The "law of causation," or "determinism," is not a new law alongside the others, but the assumption that *all* phenomena in exis-

[70] So also, *e.g.* Maurice Cranston, *Freedom. A New Analysis*, 1953, pp. 160 *et seq.*; P. Herbst, "Freedom and Prediction," *Mind*, 1957, pp. 1 *et seq.*; A. C. MacIntyre, "Determinism," *Mind*, 1957, pp. 28 *et seq.*; D. M. MacKay, "On the Logical Indeterminacy of a Free Choice," *Mind*, 1960, pp. 31 *et seq.*; Gilbert Ryle, *The Concept of Mind*, 1949, chap. VI, s. 7; Arthur Pap in *Determinism and Freedom in the Age of Modern Science* Hook (ed.), Collier Books, 1961, pp. 212 *et seq.*; C. J. Ducasse, *op. cit.*, pp. 160 *et seq.*; Richard Taylor, "Deliberation and Foreknowledge," *American Philosophical Quarterly*, 1964, reprinted in part in Berofsky (ed.), *Free Will and Determinism*, 1966, pp. 277 *et seq.*

tence are subject to such laws—even if it has not yet proved, and may never prove, possible to formulate all the laws.

Calculability, predictability, is thus the decisive criterion for the determinateness of an area of phenomena. If we generalise this viewpoint we can, with Bertrand Russell, formulate the " law of causation " in the following way:

> There are such invariable relations between different events at the same or different times that, given the state of the whole universe throughout any finite time, however short, every previous and subsequent event can theoretically be determined as a function of the given events during that time.[71]

If, then, in accordance with these considerations, we assume that the " determinism " referred to by incompatibilists implies that the future is (in principle) predictable, then by virtue of the results we have arrived at in the previous section we must grant that determinism and morality are incompatible.

But—and here we come to the crux of the matter—a determinism with this content is not only very far from being a " scientifically proven truth " (*cf.* section 1 above) or even a reasonable or merely possible hypothesis, it is simply logically meaningless.

The reason is to be found in what Popper has termed the " Oedipus effect." The author writes:

> By the name " Oedipus effect " I wish to allude to a certain aspect of the story of Oedipus whose fate was predicted by the oracle, with the result that the prediction induced Oedipus' father to those very actions which ultimately brought about the predicted events. The effect of a prediction (or a similar piece of information) upon the events or objects to which the prediction refers—for example, by promoting or by preventing the predicted events—I have called the " Oedipus effect." [72]

By a rigorous argument Popper has shown that not just quantum physics but classical physics, too, is indeterministic, and in a more fundamental sense than that in which quantum physics is usually termed indeterministic. Indeed, according to Popper, the indeterminism applies to any scientific prediction whatsoever. No

[71] *Our knowledge of the External World*, 1914, p. 221. Karl R. Popper, in, " Indeterminism in Quantum Physics and in Classical Physics," *British Journal for the Philosophy of Science*, 1950, pp. 120 *et seq.*, has rightly objected to definitions of this kind, which operate with the idea of exhaustive knowledge of the whole universe, on the grounds that they are unverifiable (metaphysical), and has therefore suggested another, empirically finite definition. The aims of this essay do not require us to take account of these niceties.

[72] Popper, *op. cit.*, pp. 188–189.

" predictor " (whether a human being or an apparatus) is capable of answering all questions concerning its own future, however much information one provides it with. The reason for this, according to Popper, lies in the fact that it is impossible for a predictor to possess complete up-to-date initial information about itself. Popper's general conclusion is therefore a vindication of the current common-sense view in which there are some actions which can be predicted, and are therefore called " determined," and others which cannot be predicted, and are therefore called " undetermined." [73]

A number of other authors have, for similar reasons, maintained a *logical indeterminism* with respect, in particular, to human processes of decision.[74] In what follows I shall try in an informal and, as far as possible, non-technical way to explain why I believe, as these authors do, that complete determinism (exhaustive predictability) is logically impossible.

Let A be an agent who is to make a decision, a choice, and O one or more observers who with unlimited access to information and in unlimited possession of theoretical insight try to predict the outcome of A's ratiocination. Suppose the latter concerns the choice of a white or a black ball. If O now presents the prediction P_1, that A will choose the white ball, and then A hears of this it is possible that this information, for one reason or another, perhaps only to put predicting into disrepute, will motivate A to choose the black one. (It is clear that if the prediction is concerned with more vital matters, *e.g.* A's departure on a plane that will crash, A can, in so far as he believes the prediction, be strongly motivated by self-interest to act in defiance of the prediction.)

This means that P_1, in the given case, proves to be false. One may try to save the situation by claiming that the unsuccessful outcome is due to deficient calculation on the part of O. He has forgotten to take the Oedipus effect that is linked with P_1 into consideration. He should have been able to foresee this, and therefore have revised $P_1 + OEF_1$ (*i.e.* F_1's Oedipus effect) to P_2, that A will choose the black ball. But of course this does not help. For P_2 also has its own Oedipus effect and must be revised to P_3, that A will choose the white ball; and so on. O's prediction " to be successful, must allow for any relevant effect its formulation and communication will have on A's brain; but these effects could not all in general be calculated unless the prediction itself were already known, so that in general the exact calculation can never be completed." [75]

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[73] *Ibid.*, pp. 117–118, 191, 195.
[74] See Note 70.
[75] D. M. MacKay, *op. cit.*, p. 32.

One might try to save determinism by introducing the qualification into the prediction that it only applies on the assumption that A has no knowledge of it. O should in that case present the prediction P'_1, that P_1 applies on the assumption that A does not know about P_1. But this is a blind alley. For P'_1 also has its own Oedipus effect and so the game has to be played once more.

I can subscribe to MacKay's view when he says that:

> Our firm subjective conviction of freedom . . . is the entirely justifiable corollary of these peculiar logical facts. For us agents, any purported prediction of our normal choices as "certain" is strictly *incredible*, and the key evidence for it unformulable. It is not that the evidence is unknown to us; in the nature of the case, no evidence-for-us at that point exists. To us, our choice is logically indeterminate, until we make it. For us, choosing is not something to be observed or predicted, but to be done. . . .[76]

Oddly enough, no one, to my knowledge, has dealt with the consequences of exhaustive predictability for the life of thought—in spite of their absurdity being no less glaring.[77] If the course of events is absolutely determined and therefore in principle exhaustively predictable, it must have been possible at any time to predict that Einstein in 1915 would formulate his general theory of relativity with such and such content. It would also have been possible to convey this knowledge to Einstein, *e.g.* in 1905 when he formulated the special theory of relativity. But it is a contradiction to say that in 1905 Einstein could have known that in the next ten years he would struggle on to a certain result, and at the same time claim that he already knew this result in 1905 along with all the arguments by which he would eventually come to it.

It must be stressed that the indeterminism we have attained to, particularly in regard to human action and thought, naturally does not mean a denial of regularity and of predictability, but only that there is a final insurmountable barrier to full determinacy and predictability—an unpredictability which at the intellectual and moral level means that no one can come to me and say:

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[76] *Ibid.*, p. 37. I must nevertheless make the reservation that in view of the principle of the invariance of truth (s. 13 above) I cannot agree that the logical indeterminacy applies only to the agent.

[77] Since this was written I have learnt that Karl Popper has done so; see *Of Clouds and Clocks. An Approach to the Problem of Rationality and the Freedom of Man.* The Arthur Holly Compton Memorial Lecture. Washington University (1966), p. 11.

" your reasonings and moral deliberations are illusory in the sense that we are able even now to tell you their outcome."

In section 13 I had to grant that the hard determinists would be correct in asserting the incompatibility of determinism and morality inasmuch as the determinism in question implies that the future is absolutely determined and exhaustively predictable. I think I have now shown that a determinism with such a content is a logical absurdity.

A limited determinism, however, is not only *not* incompatible with morality, it is a necessary assumption if the latter is to be understood as a pragmatic technique. While the limitation we have referred to guarantees the meaningfulness of morality as an inner experience of deliberation and decision on the part of the agent himself, the regularity in human behaviour guarantees the meaningfulness of morality as a pragmatic technique with the aim (or function) of influencing human conduct. Like all other techniques it too is only conceivable through modes of intervention adapted to a basic regularity. Just as it is knowledge of the laws of nature that condition our capacity to exert physical control upon nature, so too is it knowledge of the regularity in human behaviour that conditions our capacity to exert behavioural control upon men.

One can imagine the objection that although the above considerations indeed show that a determinism which implies that the future is in principle exhaustively predictable is a logical impossibility, they do not, however, affect a determinism which, without claiming this, simply postulates that the future is uniquely determined. Such a determinism would also make moral deliberations and struggles meaningless. For the agent who knows that his thoughts can only lead to one result (though not himself knowing what that result will be) is also logically barred from undertaking deliberations and making decisions. It would be like saying: " There is one and only one thing I can do, but I have not decided yet what it is going to be."

The reply to the objection must be that such a determinism is in fact indistinguishable from one which implies exhaustive predictability. For what can unique determination be except that the outcome, given the required knowledge and intelligence, is predictable. To maintain that the outcome is uniquely determined by laws and at the same time deny that it can be calculated by someone who has the necessary insight into both the laws and the relevant facts is a contradiction.

15. Alternatively: Even if Existence is Assumed to be Absolutely Determined, this Assumption Provides no Basis for a Practical Conclusion

Should the above arguments against pragmatic incompatibilism have failed to convince the reader, there is still an alternative argument to that offered in the previous section.[78] It is to the effect that even if one accepts that the course of events is absolutely and uniquely determined, and therefore in principle exhaustively predictable, this assumption will still not provide a basis for any practical conclusions, in particular those concerning problems of moral guilt or criminal policy.

Already in the Stoics one finds the *futility argument.* It is to the effect that it is always futile to make an effort to achieve or to avoid something, to take precautionary or other measures. If a man is sick, either he will pull through or he will not. If he does, then he will do so whether he calls a doctor or not. From which it follows, the argument continues, that if determinism is true one might as well save the expense of medical help. The flaw in the argument is obvious: if everything is predetermined then whether he calls the doctor or not is also determined. It is a contradiction to conclude in favour of a certain decision on the basis of an argument one of whose premisses precisely excludes all decision. Similarly in the field of morals. Determinism cannot justify one's giving up the moral struggle, or reacting morally to the actions of others. Everyone must do precisely what it is determined that he should do. The point can be illustrated by the story of the thief who pleaded that since it was determined that he should act in just the way that he did, and could not possibly have escaped the inviolable necessity of the law of causation, it was senseless and unjust to punish him. "Yes, you are right," said the judge. "Your action was determined and you could not escape the necessity that rules the whole universe. But the same is true of society and of me its representative. Society is similarly determined to defend itself against attacks like yours and therefore I must pass sentence upon you."

It makes no difference, therefore, whether one adopts deterministic or indeterministic assumptions. Let *A* be an indeterminist who makes moral decisions in the belief that, by doing so, he adds something new to the world, in the sense that his decision was not completely determined or predictable before he made it; and let *A* become convinced through the study of philosophy that

[78] Since the following remarks rest on an assumption that I cannot accept, the misleading impression may be conveyed that on certain points I am contradicting what I have said above.

complete determinism is correct. He has no justification, then on the basis of his new philosophy to derive the consequence that he might "just as well" give up moralising. For according to this philosophy no one can "just as well" do anything other than what he does.

It might seem that what I have said in this section contradicts what I said earlier in section 13. All things considered, I do not think this is the case. In section 13 I maintained in general that exhaustive predictability is logically incompatible with all human deliberation, choice, and decision, and therefore with all morality. Here I make a special application of this point, namely that one cannot invoke the determinist doctrine in support of a *decision* in respect of *choosing* to refrain from moralising.

I believe that I have demonstrated the incorrectness of incompatibilism in its two versions, that is, established that it is neither immoral nor futile to moralise. It would be natural in this connection to try to explain how the misunderstanding has arisen that determinism and morality exclude each other. On this point I confine myself to the explanation already offered by Hume. It is to the effect that the misunderstanding is due to the confusion of determinism with compulsion. In moral matters, just as much as in legal ones, compulsion strong enough to be said to nullify freedom of action is generally accepted as an excuse which absolves the person so compelled of guilt and responsibility. At the same time there undoubtedly linger in the concept of cause remnants of metaphysical-anthropomorphic ideas about the cause possessing a power which compels its effect.[79] These remnants are to be seen in the concept of necessity. This *can* be no more than an expression

[79] R. G. Collingwood, in "On the So-called Idea of Causation," *Proceedings of the Aristotelian Society*, 1938, pp. 85 *et seq.*; reprinted in part in Morris (ed.), *Freedom and Responsibility*, 1961, pp. 303 *et seq.*, has convincingly maintained that this is the case. The original function of the concept of causation, he says, is to express the power or might that man has, by suitable intervention, to influence (compel) other men or nature. He shows how these anthropomorphic ideas, by virtue of the Greek animistic interpretation of nature, have been transferred into natural science and been preserved there by the power of tradition even after a mechanical interpretation had replaced the animistic one in scientific circles in the sixteenth and seventeenth centuries. Thus even Newton understands cause as a kind of compulsion exerted by one potent object over another. "Taken *au pied de la lettre*, Newton is implying that a billiard-ball struck by another and set in motion would have liked to be left in peace; it is reluctant to move, and this reluctance, which is called inertia, has to be overcome by an effort on the part of the ball that strikes it. This effort costs the striker something, namely, part of its own momentum, which it pays over to the sluggard ball as an inducement to move. I am not suggesting that this reduction of physics to social psychology is the doctrine Newton set out to teach; all I say is that he expounded it, no doubt as a metaphor beneath which the truths of physics are concealed."

of invariable relations between different events and their resultant predictability (within certain bounds), and this has nothing to do with compulsion. But we also use the terminology of necessity in order to convey that an action was done under compulsion; it is in precisely this way that the word is used in legal language when " necessity " is invoked as a justifying circumstance. One can very well surmise that it is this hybrid sense, transferring the exculpating effect of compulsive necessity to the necessity of regularity, which has led people astray.

16. Understanding Elicits Sympathetic Feelings which can Co-exist with Feelings of Moral Antipathy

But perhaps one or another reader who would concede that he has followed me thus far down the twisting track of the argument without finding a mistake will now say: yes, so far so good, but the argument finally fails in the face of a simple fact of common experience. The better and more deeply we understand a human action, appreciate all the factors and circumstances that combine in the life situation to give rise to the action, and trace the whole life story that led up to this situation, the more inclined we will be to withold our moral judgment. With growing insight and understanding the area within which moral reactions are appropriate contracts gradually to zero. *Comprendre, c'est pardonner; tout comprendre, c'est tout pardonner.*

As we mentioned (section 5) Hedenius maintains that we ought to give up moralising because our moral consciousness poses as a condition for its appropriateness a requirement that cannot be fulfilled. To that extent his thesis is a *moral* one. But alongside this there is a thesis expressed in *psychological* terms about causal explanation and moral indignation excluding one another. " As everyone knows," says Hedenius, " devotion to such investigations [into the causes of an offence] has a remarkable effect. The bad feeling so necessary for all retribution becomes suppressed in the investigator or altogether leaves him. Tracing the various causal factors, and appraising their importance for the emergence of responsibility, divides attention and in this way undermines the bad feeling." [80] This psychological understanding is also shared by an author who otherwise disagrees with Hedenius's view that determinism and morality are mutually exclusive.

Per Olof Ekelöf writes:

> Be a crime ever so bestial, if I absorb myself in its causes, moral indignation disappears. Although it is to exaggerate a

[80] " Om gengældelse," in *Vindrosen*, 1966, No. 2, pp. 64 *et seq.*, 76.

> little, one could say that moral indignation presupposes that consideration of causes should not be pursued beyond the point needed to establish that a certain person was the perpetrator of the crime. And for the person who sees punishment in its social function, the administering of a punishment cannot be seen at the same time as a moral appeal. The critical judgment and the moral appraisal proceed, so to speak, on different mental planes.[81]

And elsewhere:

> One can . . . not at one time concentrate attention upon the mental cause of the criminal action and feel moral indignation for it. For the emotive reaction is bound up with the idea of the culprit's guilt for the action, which in its turn presupposes that the causal consideration should not be pursued further than is necessary to establish who performed the action in question. One does not consider a man guilty of an inherited or environmentally formed mental defect. *Tout comprendre, c'est tout pardonner.*[82]

There is certainly an element of truth in this line of thought. We all know how the first wave of condemnation and anger at a wicked and evil-minded action weakens and retreats into the background of our minds in proportion to the information we acquire about the culprit, his upbringing and environment—information which, if it does not excuse his action, nevertheless explains it, and makes it psychologically intelligible why things went as they did. The more we have regard to the motives and weaknesses with which we are not altogether unfamiliar ourselves, the more we recognise a human being in the person we could at first consider nothing but a poisonous reptile, a vicious gorilla. Here there is an appeal to human sympathy and the desire to help, that is, to feelings which are quite counter to the hostile attitude expressed in moral condemnation and indignation.

But I cannot accept that these contrary feelings are incapable of co-existing in the same breast, that increased insight—as Hedenius maintains—will kill the desire or capacity to harbour moral ill will. I can more easily accept Ekelöf's view that causal consideration and moral reaction occur on different "mental planes"—which presumably means that one cannot at the same time concentrate attention to both "perspectives."

Common experience shows that in fact we are able here, as in

[81] *Svensk Juristtidning*, 1946, p. 171.
[82] *Straffet, skådeståndet och vitet*, 1942, p. 65.

so many other areas, to adopt an ambivalent attitude to the same phenomenon. There is nothing to prevent me, despite all my sympathy and understanding, from keeping my moral anger and expression alive, knowing that it is justified and necessary in defence of the value system I subscribe to. I could not put it better than in Hobart's words:

> The supervening of a sympathetic mental insight upon moral indignation is not a displacement, but the turning of attention upon facts that call out other feelings too. To comprehend all is neither to pardon all nor to acquit of all; overlooking the disvalue of acts and intentions would not be comprehension; but it is to appreciate the human plight; the capacity for suffering, the poor contracted outlook, the plausibilities that entice the will. This elicits a sympathy or concern co-existing with disapproval. That which is moral in moral indignation and behind it, if we faithfully turn to it and listen, will not let us entirely wash our hands even of the torturer, his feelings and his fate; certainly it will not permit us to take satisfaction in seeing him in turn tortured, merely for the torture's sake. His act was execrable because of its effect on sentient beings, but he is also a sentient being. The humanity that made us reprobate his crime has not ceased to have jurisdiction. The morality that hates the sin has in that very fact the secret of its undiscourageable interest in the sinner. We come, not to discredit indignation and penalty, nor to tamper with their meaning, but to see their office and place in life and the implications wrapped up in their very fitness.[83]

This truth, moreover, is precisely that expressed in the maxim, *comprendre, c'est pardonner.* For it is indeed a question of pardoning, forgiving, and that is not an act which denies guilt, but precisely presupposes it, nor one that nullifies moral anger, but simply lets its expression lapse for the future. The corresponding measures in law include conditional sentencing, reprieve, and the like.

Further, it should be noted that a deeper insight into the criminal's psyche and those attendant circumstances which are liable to evoke gentler feelings and justify forgiveness is in no way identical with a theoretical insight into causal connections. *Comprendre* corresponds to " to understand." Now, of course, one can indeed use this word to denote the understanding of a situation which is based on adequate theoretical insight into causal relations, as, for

[83] Berofsky (ed.), *Free Will and Determinism*, 1966, p. 89.

example, when one technician says to another: "can you understand why this machine will not work?" And this might even be considered the central meaning of the word. But it can also be used in a secondary sense to denote an emotional association with persons, in particular personal solidarity and sympathy. The unfaithful husband's classical complaint: "my wife does not understand me," is not meant to convey that his wife lacks theoretical insight into the functioning of his psyche, but that the couple are no longer on sympathetic wave-lengths with regard to one another. And it is in this sense, I believe, that the word should be taken in the maxim—or else it does not, in my opinion, express a straightforward truth.

This is obvious from the examples typically cited in illustration of the maxim. A familiar character here is the juvenile thief who has inherited from his parents a very weak intelligence and has grown up from the very depths of society where from early childhood he has learned to get along by stealing. Clearly in such a case there are abnormal *special circumstances* which can have an exonerating influence: youth, deficient mental capacity, neglected upbringing. In view of this it can be appropriate to suspend the normal moral-legal reaction (condemnation, punishment) and instead try to provide the young man with the upbringing and instruction he has had to go without. That it is just these special circumstances and not the causal explanation as such which is decisive in the choice of this lenient reaction can be seen from the fact that the same reaction would not occur were the culprit a mature man with a good upbringing, intelligence, and education. These circumstances would on the contrary, reinforce the punitive reaction. We say then that he had the best qualifications for knowing what he was doing. But an action performed in these latter circumstances is no less a link in a causal chain. In other words, causes as such are not excuses.

The result of these considerations must be that the maxim, *comprendre, c'est pardonner*, expresses a psychological truth which in no way undermines this essay's thesis that determinism (where this thesis is taken in a logically valid sense) and morality are not irreconcilable. The psychological truth is this, that the more we know of a man and of the misdeed he has performed, and the more we can fill in the details of his inheritance, environment, and life story—the more likely it is that we will come across circumstances which can mitigate the anger we feel towards the man, but not our judgment of his deed. However, if no circumstances of this kind come to light, the mere incorporation of the deed into a

causal nexus will be without any significance whatsoever for the moral judgment.

17. The Pragmatic View of Morality

In this essay I have maintained, among other things a number of theses which together can be said to convey what one could call the pragmatic view of morality: (1) the moral judgment is not just an indicative thought-act in which it is stated that a person is guilty of the violation of a moral norm; it is also a directive demand for disapproval of the violation (*cf.* sections 3, 9, and 10); (2) disapproval in the sanction imposed in moral judgment. It is not an idea, a meaning, but an action, or a preparedness for action, expressive of an emotive reaction of ill will towards the person assumed guilty (*cf.* sections 3, 9, and 10); (3) although disapproval, like anger and vengeance, is a spontaneous reaction, and consequently has no aim, it nevertheless performs a vital function in defence of a presupposed system of values. The moral reaction has a behaviour-guiding function; retribution is by definition prevention (*cf.* sections 9 and 10); (4) it must be assumed that, with growing experience, the moral reaction has, in the course of time, become unconsciously adapted to suit its function, particularly in such a way as to be dispensed with or suppressed under conditions where it would be either unrequired or pointless (*cf.* section 9); (5) as an empirical phenomenon, morality exists as positive morality, that is to say as the moral view prevailing within a certain group of people. A positive morality can be subjected to critical evaluations which result in a personal, critical morality different from the positive morality (*cf.* sections 2 and 8); (6) a critical discussion of the conditions of responsibility laid down by a particular positive morality must be carried out with due consideration of the action-guiding function of disapproval. This involves a conscious adaptation to function in continuation of the unconscious adaptation mentioned in (4).

The core of this set of theses is that morality has no higher "meaning," or "justification," than the pragmatic one of being instrumental in the defence of a presupposed system of values. This view is opposed to: (1) aprioristic moral philosophy according to which morality is based on an immediate rational insight, independent of all experience; (2) analytical moral philosophy inasmuch as analysts, with Campbell, Hedenius, and many others, base morality upon "our moral consciousness" as a final, undiscussable foundation (*cf.* sections 4 and 8); and (3) the

view that a morality based on pragmatic considerations loses its true meaning and is only a kind of humbug (*cf.* section 10, notes 52 and 53).[84]

However, this pragmatic view of moral philosophy does not, as such, conflict with a cognitivist philosophy of values. For it simply does not go into the justification of the values which moral reactions defend.

A pragmatic moral view, and a fixing of the conditions of guilt in accordance with it, is no new product on the philosophical market. But, at least to my knowledge, such a view has never so far been subjected to any really thorough examination, with its integral theses identified and explicated. Arguments in support of the view are to be found, so far as I know, only in a few authors,[85] while several have accepted or presupposed without discussion, a pragmatic foundation of the conditions of moral responsibility.[86]

There is a certain parallel between the pragmatic view of morality —which regards disapproval as a moral sanction—and the juridical theory of punishment. It is remarkable that while it has long been recognised that punishment serves a practical end, and that it would be desirable if the legal conditions of responsibility were brought into harmony with it, there has been no general support for a corresponding view of disapproval and the moral

[84] Connected with this is the widespread view that children and animals cannot be made morally responsible. One can, of course, it is said, induce motives by distribution of rewards and punishments which will influence their future behaviour. But since children and animals lack rational insight into good and evil this animal-trainer's technique cannot be regarded as a means of expressing praise and blame. See, *e.g.* Aristotle, *Nicomachean Ethics*, Bk. III, chap. 2; Edward Westermarck, *The Origin and Development of the Moral Ideas*, 2nd ed., 1924, p. 249; *cf.* pp. 264, 265, 316; C. A. Campbell in Berofsky (ed.), *Free Will and Determinism*, 1966, p. 114; A. J. Melden, "Action," *Philosophical Review*, 1956, p. 523; H. Fingarette, "Responsibility," *Mind*, 1966, pp. 58 *et seq.*, 60. These authors make a distinction without justification in facts. In point of fact we do censure children and the more highly developed animals, *e.g.* dogs. That a child can know that it is guilty is obvious; and dogs can act in ways that make it look as if they know they have done something they should not. It is another matter that lack of understanding will often preclude guilt, so that the area of responsibility is correspondingly decreased.

[85] See *e.g.* G. E. Moore, *Ethics*, 1912, pp. 133–134; R. E. Hobart, "Free Will as Involving Determination," *Mind*, 1934, reprinted in Berofsky (ed.), *Free Will and Determinism*, 1966, pp. 63 *et seq.*, 85 *et seq.*, 92; Charles L. Stevenson, *Ethics and Language*, 1945, pp. 302 *et seq.*, 306; P. H. Nowell-Smith, *Ethics*, 1954, pp. 294 *et seq.*, 301, 303.

[86] See *e.g.* Harald Höffding, *Etik*, 1913, p. 122; Moritz Schlick in Berofsky (ed.), *Free Will and Determinism*, 1966, p. 61; C. J. Ducasse in Hook (ed.), *Determinism in the Age of Modern Science*, Collier Books, 1961, p. 168; Sidney Hook, *op. cit.*, pp. 188–189.

conditions of responsibility. It is the basis of such a view which the present essay has attempted to provide, in so far as it claims that a rational determination of the conditions of moral responsibility cannot be elicited from "our moral consciousness," but must be secured in the light of morality's capacity to guide human behaviour.

CHAPTER 6

HE COULD HAVE ACTED OTHERWISE

1. THE INTENSIVE PHILOSOPHICAL INTEREST IN THIS SENTENCE CAN BE ATTRIBUTED TO ITS SEEMING RELEVANCE TO THE PROBLEM OF FREE WILL AS A REQUIREMENT FOR RESPONSIBILITY

IN recent philosophical literature, much attention has been devoted to the sentence " He could have acted otherwise." [1] The reason for this interest is the assumption that this sentence expresses an essential condition for the assignment of guilt and responsibility. Why this is assumed is often not explained. This condition is taken to be a self-evident element of " our moral consciousness;" or it is taken to be obviously futile to assign responsibility to a person once it is admitted that he could not have acted other than he did.

This can sound very convincing. But even so, there is something odd in this discussion. The sentence is taken to express a condition of mind that excludes guilt. And, no doubt, it is true that sometimes we excuse an offence by admitting that the agent could not have acted other than he did. So, for example, we excuse a member of the Resistance who under torture has informed against comrades; or a narcotics addict who has stolen drugs when overcome by his insuperable cravings. The sentence is thus employed in ordinary language in reference to certain internal or external situations in which we believe that the agent has been under such internal or external pressure that he may be excused for his acts. It is, however, odd that this kind of excuse to which such great interest has been given is far from the one most often invoked, let alone the only one. It is far more common to plead mistake or ignorance or lack of evil intent as an excuse. This is so, for example, in the event of an accidental shooting or if the agent could not foresee that by waving to a friend he would distract the driver of a passing vehicle and thereby cause an accident. Excuses of this sort are expressed in such current phrases as " he did not mean to do it," " he did not intend anything wrong by it," " he did not know what he was doing," and the like. These excuses have nothing to do with the

[1] See especially P. H. Nowell-Smith, *Ethics* (1954), 273 *et seq.*; " Ifs and Cans," *Theoria* 1960, 85; J. L. Austin, " Ifs and Cans," *Proceedings of the British Academy* 1956, reprinted in *Philosophical Papers* (1961); Gilbert Ryle, *Concept of Mind* (Penguin 1963), 69 *et seq.*; C. A. Campbell, " Is ' free will ' a Pseudo-Problem? " *Mind* 1951, 446 *et seq.*; G. E. Moore, *Ethics* (1912), 122 *et seq.*; Richard Taylor, " I can," *Ph. Review* 1960, 78; M. R. Ayers, *The Refutation of Determinism* (1968) 119 *et seq.*

idea that the agent could not have acted other than he did. Why has the excuse of coercion alone been selected for such painstaking philosophical attention?

The explanation must apparently be sought in the relationship that is assumed to exist between the excusing statement " he could not have acted otherwise " and the philosophical problems of the freedom of will and of the compatibility of determinism with moral guilt and responsibility. Some philosophers believe that the demand that the agent should have been able to act otherwise indicates only that his not having done that which he should have must be due to his own will and not to external circumstances. That he could have done the right thing therefore means that actually he would have done so if he had *so willed* (wished, wanted to). This is not the case if he acted under internal or external restraint, and in such cases we therefore excuse the agent of guilt and responsibility. But this has nothing to do with the will's independence of the law of causation. Others claim that the sentence is not to be understood in this manner. To be able to say that indeed he could have done that which he should have done, it is not sufficient that he would have done so if he had so willed. It must further be required that he *could have willed it.* But this he could not, it is said, if his entire personality, his character and willpower, through his genetic inheritance, upbringing, and milieu, is subject to the necessity of the law of causation. Taken in this sense, the sentence encompasses a demand for non-deterministic freedom of will as a condition for guilt and responsibility. It is the sentence's possible relevance to an ancient and still unsolved philosophical problem which explains the acuteness of interest with which philosophers—but not lawyers!—have taken up the analysis of it.

The object of this paper is to show that the sentence cannot be understood to encompass a demand for a metaphysical freedom of will. I shall attempt to support this assertion by showing that the sentence " he could not have acted otherwise " used as an excuse for an offence committed under coercion is a loose manner of speaking. Its real meaning is to express emphatically that, under the circumstances, the agent *could not be expected* to act otherwise. But this, of course, is something other than saying that he *could not* have acted differently. If I am right in this interpretation, the sentence loses every connection with the problem of determinism and thus the fundamental philosophic relevance that has been attached to it.

2. "*X Can A*" Analysed in Relation to Ability, Opportunity, and Motivation to Carry Out *A*

In order to clarify the meaning of the sentence we are concerned with in this discussion, we shall in this section look more closely at "can" statements in general, *i.e.* statements of the type *X can a* in which *X* is a particular person and *a* is a more or less concretely or abstractly described action, for example: *Peter can play the piano*; *Peter can play Beethoven's "Für Elisa."*

The investigation, however, is limited to statements which have something to say about Peter's ability, opportunity, or power to carry out an action. This is to say that we will ignore statements of the type *Peter can come tonight*, if this does not state that it is *possible for* Peter to come tonight but that Peter might come (that it is *possible that* Peter will come). Understood in this sense, the sentence says nothing about what it is in Peter's power to do, but is an expression of the speaker's lack of knowledge as to what will happen. The statement may be contradicted by a better informed person who explains that it is excluded that Peter might come, for he knows that Peter has decided to remain at home. Even so, it is equally true that Peter can come in the sense that it is possible for Peter to come: there is nothing to stop him if he should change his mind.[2]

It might be pertinent as a way of introduction to examine a corresponding statement in which *X* stands, not for a person, but for a thing, for example: *this car can go 150 kilometres per hour*.[3] If *A* says to his friend *B* about his newly obtained automobile but *B* doubts the validity of the statement, how can it be determined whether *A* is right or not? Perhaps he will refer to a sales brochure describing the automobile and its properties. But it is clear that *B* need not accept this as evidence. Coming down to hard facts, there is only one decisive test: *A* must take *B* for a drive and demonstrate that the car under certain conditions does in fact attain this speed.

It is obvious that the test cannot be said to prove a failure if the car quickly stops because it is out of petrol. That there is petrol in the car is one of the necessary pre-conditions for the test. In addition it is required that the driver carries out the necessary hand and foot manoeuvres, that there is air in the tyres, oil in the engine and transmission, power in the battery, etc. Let us call the necessary conditions for the test to take place *a, b,*

[2] The difference between epistemic possibility (possible *to*) and the possibility for choice (possible *for*) is developed by M. R. Ayers, *The Refutation of Determinism* (1968), pp. 12 *et seq.*

[3] *Cf.* Ayers' analysis, *op. cit.*, pp. 68 *et seq.*

and *c*. We can then say that the decisive proof of the statement that the automobile can attain 150 km per hour is that, given *a*, *b*, and *c*, it actually does attain that speed.

But there are limits to the circumstances that *a*, *b*, and *c* may stand for. Let us assume that *A* claims that his ancient Ford can go at this speed, stating that in fact it will do so, if there is petrol in the tank, etc. . . . and if the engine is exchanged for a new 8-cylinder engine. This statement can obviously not be accepted, for it is no longer *this* car we are speaking about. There must be made a distinction between the circumstances which are concerned with the car's identity and those which are not, but which are external circumstances. Perhaps in certain cases there will be difficulties in drawing this boundary, but the principle is clear enough: the car's identity is determined by those elements which are essential to its construction and function as a vehicle and which differentiate it from other makes of automobiles. The car would change its identity if the engine were exchanged but not if the tank were filled with petrol.

We can, consequently, say that from *X can go 150 km per hour* (1) it follows that *given a, b, and c, X actually runs at 150 km per hour*; (2) and that it is the second statement which must be used to test the validity of the first.

Even so, it cannot be correct to say that (1) means (2) or that (1) can be analysed as identical to (2).[4] This is obvious when we consider that two sets of conditions must be fulfilled before the car actually goes at the mentioned speed. The first set is concerned with the construction of the car, especially the specifications of its engine. The other set includes the conditions that must be present to allow the engine to develop its horsepower. Let us call the first set the constructional and the second set the occasional requirements. We then see that, unlike statement (2), statement (1) is not a statement of what will take place under certain conditions but a *categorical statement about the present situation.* It states that the constructional requirements are fulfilled—that the automobile has an engine and is otherwise constructed so that it in fact will go 150 km/hr when the occasional requirements are fulfilled. It is a statement of the car's properties in the same way as statements about its colour, length, and weight. That the car *can* go 150 km/hr may also be expressed by ascribing a particular property to it: it has the *power to*, it is capable of going at this speed.

[4] This is maintained by Ayers, *op. cit.*, p. 69. To assert that (1) means (2) because (1) can only be tested via (2) presupposes the postulate of logical empiricism that a statement's meaning is determined by the requirements for verification of the statement, a tenet that has now been generally abandoned.

As the automobile's constructional characteristics do not change the moment it is locked in a garage or is emptied of fuel, it would be misleading to say that it can go a certain speed if it is on an open highway, if there is petrol in it, etc.[5] For these statements imply that this power does not exist if these conditions are not fulfilled—which is not true. Nor does a salesman lie if he says that the automobile (empty of petrol) he is showing in the salesroom can go at a certain speed. But usage is loose. If one asked: "Can this automobile go at a speed of 150 km per hour if there is no petrol in the tank?" most people would answer "no." But the answer, if one is to be consistent with other usages of the verb "can," should be "yes." One mixes power, which is always present, with its actual development which can only take place when the occasional requirements are fulfilled.

This way of speaking may, however, also be interpreted in another way. If a certain quality of an automobile (for example, simply the power to run without further specification of speed) is assumed to be given, "can" statements in ordinary usage indicate that the occasional requirements are fulfilled. If, for example, an automobile has stopped, one may ask: "Why can it not run?" and be answered: "Because it is out of petrol." After refuelling, it is natural to say: "Now it can run again."

If we now turn our attention to statements about the capability of a person, for example, the statement *Peter can play Beethoven's "Für Elisa,"* we can see that also in this connection it is possible to differentiate between constructional, or perhaps in this case a better term would be *constitutional,* requirements and the *occasional* requirements for the act to take place. The first requirement is that Peter has learned to play the piano, in particular that he has learned to play this composition. This is equivalent to saying that Peter's organism has, through practice, been developed and adapted in precisely that way which can be expressed by saying that he has the *ability* or the *capability* to perform the act of playing "*Für Elisa.*" Next, various circumstances must be present to give Peter the *opportunity* to play. Of course, there must be a piano available, perhaps also the proper sheet of music, in addition he must not be hindered by cramps in his fingers or some other indisposition, or by what else. But there is a major difference between an automobile and Peter: whereas the first will develop its power as soon as the occasional requirements are present, this is not the case with Peter. He does not play "*Für Elisa*" simply because he has learned this piece

[5] On such pseudo-conditional statements, see Ayers, *op. cit.*, pp. 95 *et seq.*

of music and has the opportunity to play it. In his case, performance of the act requires that a third set of requirements be fulfilled, requirements which have no correspondence in the case of an automobile: He plays only if he *wills* to, if he *wants* to, if he so *chooses*—or however else one might express the fact that the actual performance of the act is further dependent upon certain motivating factors in Peter at the moment of the act, factors that are different from the more or less permanent constitutional requirements. It is one thing that he *can* play the music (has learned to), it is another that he now *wills* to do so. It is this which distinguishes him from a machine and makes it possible to say of him, but not of the automobile: "Yes, he *can* do it, but he will not."

The human act therefore demands fulfilment of three sets of requirements: the constitutional, the occasional, and the motivational. We might also say that it demands that the agent has *ability* as well as *opportunity* and *will* or *motivation* to perform the act. Too much importance should not be given to these expressions. They are only labels; simple, short terms for the above-discussed three sets of requirements. The expression "will" especially should not be interpreted to mean a more precise description of the mental conditions that make up the third set of requirements. And especially it should not be assumed to demand anything like choice, deliberation, and decision to result in an "act of will." There is nothing to prevent Peter, the moment he sees a piano, from sitting down without thinking about it and beginning spontaneously to play—because, as we say, he feels like it. But there must be one or another motivation to explain why Peter plays instead of not playing.

If, remembering this discussion, we now analyse statements of the type *X can a*, it can be seen that, according to the circumstances, they mean various things. This is more clearly shown in the following examples:

(1) *X can a* means that the first set of requirements is fulfilled or, we might also say, that *X* has the *ability* to perform *a*. For example: "Peter can play the piano, speak English, swim, sing, play bridge, etc." As with the claim that a certain automobile can go at a certain speed, these statements of a person's ability can only be proven if Peter actually, when given the opportunity, demonstrates his accomplishments by performing the particular acts. One difficulty arises here in that a negative result might only indicate that Peter does not want to perform the act, although he can do so. If Peter gives this explanation, one may either believe

him or not, but proof of the existence or non-existence of the ability is apparently not possible.

Although statements of ability can only be tested under the conditional implication that if the opportunity is present and if Peter is willing, then he actually performs the act in question, the statement of ability is, however, in itself a categorical statement. It is concerned with what now is present, namely, how Peter's organism is adapted. That Peter can speak English means that his brain, through learning and practice, is organised in a particular way. We cannot prove that this is the case by direct inspection, only by observing how he reacts under circumstances in which the conditions for display of the ability are present. But this is not sufficient reason to deny the categorical nature of the expression.[6] To advocate this would also require denial that a statement such as "a certain object is made up of chalk" is a categorical statement. For this too cannot be verified other than by observing how the material in question reacts under various circumstances: whether it makes a white mark when it is moved across a blackboard, whether it reacts chemically when submerged in hydrochloric acid, etc.

When "can" implies an ability, it would be incorrect to say that Peter only can play "*Für Elisa*" if there is a piano for him to play on. That Peter can play this music, that he *has learned* it, that he is *capable* of playing it, is a statement about a characteristic in Peter which is part of his life history and which is independent of whether a piano is available to him or not.[7]

Statements of ability may also be conjugated in the indicative as well as the subjunctive mood: *Peter can speak English*; *Peter could speak English*; *Peter could have spoken English* (if he had remained resident in England).

(2) *X can a* means that the second set of requirements is fulfilled, thus that there is *opportunity* to display a particular activity. This usage is applicable, for example, in situations in

[6] Conversely, P. H. Nowell-Smith, *Ethics* (1954), p. 278: "The thesis that 'he could have acted otherwise' is categorical, is equivalent to the thesis that it could be verified or falsified by direct observation of the situation to which it refers." Incidentally it might perhaps be said that it is not *in principle* impossible to determine by direct examination of Peter's brain whether he can speak English or not.

[7] I therefore disagree with P. H. Nowell-Smith, who wrote in *Theoria* (1960), pp. 9 *et seq.*: "The presence of cards, three other players, etc. may be collectively described as constituting an opportunity to play bridge; so that when we say of someone that he has the ability to play bridge we are saying that he has it when these conditions are fulfilled." But it is possible that Nowell-Smith's opinion is simply due to the fact that "to be able to" is taken by him to mean something other and more than "can," *viz.* "to be in a position to" which implies not only ability but also opportunity.

which a person's ability and desire to perform the act are taken for granted and it is now only a matter of opportunity. " Now you can dance," the host says to the guests when the room has been cleared. " You can shoot that animal," the guide says to the hunter. The same usage is also natural when one is alone concerned with describing the opportunity provided by the circumstances without regard to anyone's capability or desire to take advantage of it. " You can ride and play tennis there," I might say to a friend while discussing a hotel, without necessarily being concerned with his ability or desire to do either.

(3) *X can a* means that the motivational requirements for *X* to perform *a* are present, thus that *X* has the necessary *will* (desire, mental state, motivation, willingness, need) to perform the act. This usage occurs, for example, when capability and/or opportunity are not present to point out good (or evil) will. Expressions such as " I can do anything for you," " I can murder you," " I could have strangled him with my bare hands " may according to the circumstances be understood in this way. In the same way, negating statements may be used to indicate that a state of mind is missing although capability and opportunity are present; for example, " he could not hurt a fly."

(4) *X can a* means that the first and second sets of requirements are fulfilled, thus that *X* has both ability and opportunity to perform *a*. It may also be said that *it is in X's power* to perform *a*. Thus in this situation it depends upon *X*'s motivation alone whether *a* will be performed or not. If he so wills it, *a* will be performed; if he does not will it, *a* is not performed, thus the result is *not - a*. That is to say, if *a* is within *X*'s *power*, so is *not - a*.

This usage will arise in situations in which one wishes to emphasise that *X* has the possibility of choice: as he has both the capability and the opportunity to perform *a*, it is entirely dependent upon him whether it shall occur or not. Often in such statements, the word " can " (" could ") is stressed. For example: " the king can pardon him," that is, according to the constitution, the king has this power and the opportunity is provided by the convicted person's appeal. The king can, but he may very well not. Or " he can play trumps " (or another card); " he can forgive her " (or not); " he can shoot her " (because he knows how to use a gun, is armed, and she is within range—but he also may reconsider and not do it). The same is the case in the past tense: *He could shoot her* (1) means that the situation was such that it

was in his power to shoot her.[8] (This still presupposes that stress is placed upon "could." If it is placed on "shoot" the meaning is as under (3): he hated her sufficiently to shoot her.)

What is the difference if one instead says: *He could have shot her* (2). None. Regarded as an independent, complete sentence, it also (see footnote 8) is grammatically an indicative sentence and logically a categorical statement in which it is assumed that it was within his power to shoot her. But this sentence (like (1)) may also be understood as a subjunctive clause, an elliptical statement which requires completion with an if-clause, for example "if the revolver had been loaded."

Statements (1) and (2) are in so far identical as they are both true under the same conditions: if (1) is true, (2) is also and vice versa. The difference between them consists in that whereas (1)—understood as indicative/categorical—states only that he had it in his power to shoot her without indicating whether he actually used this power or not, in (2) there is an implied presumption that he did not make use of this power. This can be seen in that whereas (1) might be used in a context which continues "and he did so" or "but he did not" this is not true of (2). It may only be continued with "but did not" or "but as you know did not." Thus (2), in addition to that which is directly spoken of (*i.e.* what *X* had in his power to do), also hints at something else (*i.e.* that *X* did not exercise his power).

If, on the other hand, we say: *He would have been able to shoot her* (3) we have grammatically a subjunctive sentence, logically a conditional statement, which requires extension with an if-clause. The sentence says that in fact he did not have it within his power to shoot her but would have had it under certain circumstances.

3. It is Shown that the Sentence "He Could not have Acted Otherwise," Used in Situations of Compulsion, Means "He Could not have been Expected to Act Otherwise, Even Though he Could have Done so"

From the foregoing analysis it should not be difficult to understand what is meant by the assertion that the agent *could have acted otherwise than he did*; nor why this is considered to be a fundamental requirement for responsibility. This view becomes

[8] Understood in this sense, the sentence is grammatically an indicative, logically a categorical statement. It may also be understood as a non-indicative part of a conditional statement which demands completion with an if-clause, for example, "he could shoot her if the revolver were loaded," which is equivalent to: "it would have been within his power to shoot her if the revolver had been loaded."

intelligible if " can " is taken in the above-given fourth definition, that is as concerned with what stood in the actor's power to perform. The presupposition is that an offence has in fact been committed. The idea is that the agent (X) is guilty in so far as it was within his power to act as demanded. For this, as we have seen, means that he had both the ability and the opportunity to behave correctly, and that, therefore, it was only because of his " will " or motivation that he did not. If his motivation had in a certain way been different, he would have conducted himself properly! Thus, for example, if he had had a greater sense of duty or a better understanding of the consequences of his contravention for himself, he would not have committed the offence. In such circumstances, therefore, it seems to make good sense to hold him responsible (assuming, of course, that other grounds for release from responsibility do not exist, for example, that he was not aware of what he was doing). For the sanctions connected with the responsibility (blame, punishment) are intended to force upon the agent (or others who might possibly or actually be in a similar situation) a motivation to behave properly. And the opposite is also true: if it was not within his power to behave properly—*i.e.* if he lacked either the ability or the opportunity or both to do so—it is futile to hold him responsible.

Use of the sentence in ordinary language is often in good agreement with this interpretation. Thus, when it is used to excuse a person who *lacks the ability* to fulfil certain demands or expectations. One does not chastise an unmusical child for not learning to play the violin or a person of limited intelligence for not learning advanced mathematics. If X does not help a drowning child, he is not held responsible if the reason for this is that he cannot swim. If a shipwreck occurs because an ordinary seaman is forced to take the bridge of a ship, he cannot be blamed for mistakes which led to the accident. In these and similar cases it may be said that he could not have acted other and better than he did because he was not capable of it. This is correspondingly true if his failure to act correctly was because the circumstances *did not give him the opportunity* to do so. A person cannot be blamed if he did not shout warning of an assault if he had been gagged; neither if he did not help someone in need because he was chained. A concert singer is not responsible if he cancels a concert because of laryngitis. Disease can strike down anyone, with the consequence that it was not within his power to fulfil his duties. If a soldier surrenders because he has no more ammunition, it is not his fault.

But it is not cases such as these—in which there is good reason for saying that *X* could not have acted other (better) than he did —that are thought of when the meaning of the sentence is discussed in philosophical literature. The sentence is undeniably also used in situations involving restraint in which the force is not of a physical nature (chains, imprisonment, gags) but consists of threats, of what is called compulsive force. Just above a case was mentioned in which a man did not give warning because he was gagged. It is obvious that in this situation, it was not within his power to act otherwise. But what about the situation in which the reason for his silence is that beside him is another man pressing a loaded revolver into his side so that he knows that he will be shot the moment he makes a sound? Or if under frightful torture he provides the enemy with military secrets? Or if the torture is " endogenous," for example, a narcotic addict's torturing cravings for drugs and the suffering that arises from denial? In cases of this sort, too, if the compulsion has been of sufficient strength, one will excuse the person by saying that he could not have acted otherwise, that it was not within his power to rise to duty. The idea behind this reasoning obviously is that he is excused because his *will was not free*. But is it really accurate in these cases to say that he could not have acted otherwise? This question leads us to look more closely at situations of compulsion.

To act freely and to act under compulsion are regarded as opposite experiences.

One who acts freely has the feeling that his action unreservedly and harmoniously arises out of himself. He can without reservation accept it as " his." On the other hand, one who has acted under compulsion feels that the action was forced upon him, as it were, by forces outside himself. The task must be to discover what are the circumstances that condition the feelings of freedom and of compulsion.

Let us consider a typical situation of compulsion. A Gestapo agent demands, under threats of torture, that I disclose a secret of military importance. If, out of fear of the threats, I surrender my secrets, people will say that I was forced to do so. If, on the other hand, I keep silent, I can also be said to have been forced, that is, to submit to torture in order to maintain my secret. It is the very situation that is one of compulsion. I have a choice and however I choose I act under compulsion.

The decisive point in this situation is the conflict between two irreconcilable desires. I wish at once both to maintain my secret and to avoid torture. In this situation these desires are incompatible and I know it. I know that whatever I do, fulfilment

of one of these desires means acting against the other, thus in any case I must act contrary to my own desire and in that sense against " myself."

As far as I can see, a corresponding set of circumstances exists in every other situation of compulsion. The essential feature is always a conflict between irreconcilable desires. There is nothing remarkable about this. No matter what the external circumstances are which affect my actions, they only affect me insofar as they appeal to a motive within me. Conflicts between " that which compels me " and " myself " must, psychologically speaking, consist in a conflict between different motives in myself.

The irreconcilability of my desires may depend upon various circumstances so that they give rise to various types of compulsion.

Firstly, the irreconcilability may be a simple consequence of natural laws. I cannot eat my cake and have it too. Nor can I simultaneously be at home having dinner and at the concert hall. If I desire both things at the same time, I must choose, and my one desire forces me to act contrary to the other. My fear of the discomfort of hunger compels me to give up the concert.

Secondly, the irreconcilability may arise from social conditions, that is from other persons' reactions to my actions, as in the Gestapo case just analysed. The same is true of all cases of individual or collective " commands," " orders," or " demands " that are presented to the individual by his social environment, especially in the form of conventional norms or legal rules. The irreconcilability here means that I cannot perform a particular act, for example, steal, and at the same time avoid disapproval or even more discomforting reactions from my fellowmen. It is obvious that it is chiefly these cases that interest the social scientists.

Finally, the irreconcilability may, as in the case of a narcotic addict, depend upon something within myself. The desire or wish that I feel may be in conflict with what I consider to best serve my health or what I feel to be my moral duty. In such a case I am forced either by reason or by duty to act against my own desires or am forced as a slave of my vices to act contrary to " my better self."

Accordingly we may differentiate between compulsion arising from nature, from external social forces, and from internalised moral norms. In all cases the sense of compulsion or lack of freedom arises from a situation in which my act must necessarily, no matter what I choose, be contrary to something within my self, be against my own will. I cannot unreservedly " accept " it

as " mine " because it is at least partly opposed to what I will. Therefore I regard the circumstances which give rise to the conflict as the actual " compelling causes " behind my action. The sense of freedom, on the other hand, comes about in a situation in which all motives harmoniously tend in the same direction. If, for example, during a war I can provide my fellow countrymen with important military information, then my desire to promote our common cause is reconcilable with my wish to be of service and to win recognition. In no way do I act against myself, against my own wish, therefore I can unreservedly accept my action as " mine," as deriving wholly and fully of my own " free will."

Now we must turn to the question of whether it is pertinent to say that persons under compulsion could not have acted other than they did.

The situation of compulsion is, as we have seen, one in which a person is trapped in a maze from which there is no acceptable exit. Exactly like a rat which in an experiment is placed upon a board from which it dares not jump and at the same time is subjected to a powerful stream of air which it cannot endure. If the stream is strong enough, the rat will jump—but will be neurotic the rest of its life. Someone who, under the threat of execution, is forced to provide information to the enemy is also in a trap: he must either betray his comrades or die himself.

But this is not to say that he has no choice. Psychologically speaking, a situation of compulsion is like any other situation of choice: the " strongest " motive determines the result. The choice in such a situation may be difficult since whatever is chosen, the result is unacceptable in relation to certain desires. From the same point of view, a free choice may be easy, for one of the alternatives harmonises with all desires. But the choice under compulsion is not necessarily difficult in the sense that a decision is difficult because the opposing forces balance each other out. The fear of torture may be so overwhelming that the outcome is given from the start. On the other hand, a free choice may be difficult because I really do not know which cake I like best.

To be sure, we do say of a person under compulsion that " he did not have any choice; there was only one thing to do." But this is a manner of speaking which should not be taken literally. It actually says that the choice in the particular situation could be *expected* to lead only to one outcome according to ordinary human experience. Such is the case, for example, of a man who, under threat of death, is forced to act in a way that would lead to only minor harm to others. " He had no choice " then is actually to say that the choice is regarded as obvious. Any normal

person would, under these circumstances, choose to save his own life. No one could *expect* anything else.

Correspondingly, it must be recognised that the person under compulsion could have acted otherwise. A person who is forced by a revolver in his back not to shout a warning to his friends does in fact have it in his power to do so. He has both the ability and the opportunity to shout the warning: he can speak the language, he is not gagged, his friends are within hearing. The decision is thus entirely dependent upon his motivation ("will") and this is what we mean when we say that he could have acted otherwise.

It is true that it is current usage to say that the person under compulsion could not have acted otherwise. But this way of speaking must be interpreted in the same manner as the version that he did not have a choice. The meaning is that, according to ordinary human experience, he *could not be expected* to have acted otherwise under the circumstances.

When Luther in 1521 before the Diet of Worms refused to retract his heretical views and said: "Here I stand. I cannot do otherwise. So help me God!" it was not his intention to say that it was not within his power to do otherwise. He *could* have retracted his Theses. He had the ability and the opportunity to do so. What he meant to say was that the dictates of his conscience were so strong that his decision, in spite of all threats and dangers, could have but one outcome: to stand firm. This was how Luther saw it, for his conscience was of greater than ordinary strength. If he had retraced his Theses, perhaps his contemporaries would have said: "he could not have done otherwise," because the pressure on him was so great that, according to ordinary standards, he *could not have been expected* to have resisted it.

Although it must be recognised that the person under compulsion could have acted other than he did, it is equally well founded to exempt him from responsibility if the compulsion has been of such strength that, according to ordinary experience and standards, it could not have been expected that he would have acted otherwise. For, that it was not "to be expected" is precisely to say that a person with a normally developed intelligence and sense of duty would have acted in the same way in his place. Thus there is nothing in his motivation or character that indicates that he (and others in his situation) needs stimulation of his awareness of responsibility to behave properly. Even though it is misleading to say of a person under compulsion that he could not have acted otherwise, this usage serves its function in its proper setting. For its function is to exempt from responsibility.

Considerations corresponding exactly to those discussed for situations in which the compulsion is external are also valid if the compulsion is " endogenous." It is generally said that an agent should be exempted from responsibility if he is in the grip of an irresistible impulse. In such case, he cannot act other than he does. Apart from completely automatic reactions (which are not acts and therefore do not carry with them responsibility) and cases in which emotion so blinds reason that the agent does not know what he is doing (and for this reason is not responsible)— a person who succumbs to violent cravings has made his choice: He has chosen crime with all of its consequences as a lesser evil than the pangs of denial. But under the circumstances it *could not be expected* that he would have chosen otherwise and acted differently. Therefore, if the impulse was " irresistible," he must be exempted. But, the expression " irresistible " should not be taken literally but should be interpreted in agreement with standards of expectation. There are very few impulses which are absolutely irresistible, *i.e.* entirely unaffected by every contrary stimulus (promises of great advantages, threats of certain, immediate and violent pain). The salient point is that the impulse is called " irresistible " when of such strength that according to common experience (or the opinion of experts) it cannot be *expected* to be overcome, neither by moral appeals, threats of sanctions (which are not certain, immediate and violent), nor appeals to self-interest.

4. Misinterpretation of the Situation of Compulsion Leads to a Deceptive Argument in Support of Incompatibilism

It appears from the above analysis that the phrase " he could not have acted otherwise " is used to justify exemption from responsibility in two groups of cases. First, in those cases in which it is actually true that it was not within the person's power to act otherwise (because he lacked the ability or the opportunity or both). Secondly, it is used in cases of external or internal compulsion, in which the statement is merely a figure of speech, the real meaning of which is that under the circumstances the agent could not be expected to have acted other than he did. This latter group has given rise to a philosophical complication in the form of a deceptive argument in favour of incompatibilism; the doctrine that determinism (" the will's subordinance to causation ") excludes guilt and moral responsibility.

Let us once again look at a situation of compulsion. The person under compulsion (X) had a choice and made his choice. The

mechanics of the decision are the same as in every other situation of choice. If, under torture, he gave in and provided the information, this means that he was motivated by the desire to avoid the continued horrors of torture. And if he resisted, this means that his choice was motivated by the wish not to harm the cause he is fighting for, and probably also by moral ideas about the demands of duty and honour. This choice and this decision are both as free as any other in the sense that the outcome of the choice alone depends upon the motivations of *X*. The decision is reached in the same way as in any other situation of choice: we say that the " strongest " motive wins (whatever this may mean). When a situation is experienced as a situation of compulsion and the decision as imposed, this is due exclusively to the external circumstance that the alternatives available are unacceptable to *X* because they all conflict with a strong desire within him. What he did was done *with will*—but not with his good will, as it is said.

There is an agreement that *X*, assuming that the compulsion is in proportion to his offence, should be excused. The real reason is that under these circumstances it could not be *expected* that he would have acted other than he did. If now, without differentiating between mechanical constraint (the man in chains) and psychological compulsion, it is said also of this situation that "*X* could not have acted other than he did," the way is opened for fallacies and delusions. If it is accepted that he *could not have* acted otherwise, this is equivalent to saying that he *had no choice.* On the other hand, since it is impossible to deny that *X* acted deliberately, that is, willing and knowing what he did, it is necessary, in order to exempt him from responsibility, to claim that his *will was not free.* What this is to mean different from the view that his choice was limited to two unacceptable alternatives, is a mystery. Or properly speaking, it is meaningless, it is just an empty figure of speech. The only reality in conceptions of compulsion is that which has been shown in the above analysis.

However, once one has accepted the idea that the expression " he could not have acted otherwise " establishes exemption from responsibility because the will is not " free," one is induced to accept also the belief that exemption from responsibility must be a consequence also of the will's not being " free " because it is subordinate to the necessities of the law of cause and effect. In this way ordinary usage of the expression is taken as an argument in support of incompatibilism. It is obvious that this argument is untenable. For, as we have seen, the use of the expression " he could not have acted otherwise " has, properly understood,

nothing to do with "freedom" of will. The untenability of this argument is demonstrated in more detail in the following section.

5. Common Usage of the Statement "He Could Have Acted Otherwise" as a Requirement for Moral Responsibility does not Provide an Argument in Support of Incompatibilism

In this chapter we are concerned with the following problem. It is regarded as generally accepted that one requirement for moral responsibility is that the agent could have acted other than he did. The problem is whether this assumption provides an argument in support of incompatibilism. The argument should look something like this: (1) it is a condition for moral responsibility that the agent could have acted other than he did; (2) determinism implies that no one could in any case have acted other than he in fact did; (3) conclusion: therefore no one is ever morally responsible.

The problem is whether this conclusion is tenable. I (and many others) argue that it is not. The argument for this point of view looks somewhat like this: (a) in ordinary usage there is a certain meaning of the statement "he could have acted other than he did" in which it is undeniable that the statement may be, according to the circumstances, true. From this it follows that if the second premise of the above-mentioned conclusion is true, the phrase "could have acted otherwise" in it cannot be employed in this meaning; (b) in premise (1) the statement "he could have acted otherwise" is used in precisely the sense mentioned in (a); (c) from this, it follows that the progression from (1) + (2) to (3) is not tenable, because the statement "he could have acted otherwise" is not used with the same meaning in (1) and (2). As to (a): G. E. Moore was, as far as is known to me, the first to point out the fact that there is a certain meaning in which it may with undeniable correctness be said that a person could have done something that he in fact did not do. Moore illustrates this meaning with the statement "I *could* have walked a mile in twenty minutes this morning, but certainly I could *not* have run two miles in five minutes"—on the assumption that Moore on the morning in question sat at his desk.[9] We must consequently when presented with the things that Moore did not do that morning differentiate between those which he—in a certain sense—could have done and those which he could not have done.

Once this is established, the task becomes to define analytically

[9] G. E. Moore, *Ethics* (1912), p. 128.

the meaning that is intended here. It is that which has been attempted in the preceding sections of this paper where it is asserted that *X can a* in this connection means that it is within *X*'s power to perform *a*, which is again to say that he has the ability and the opportunity to do so, so that it is exclusively dependent upon his situation-determined motivation ("will") whether *a* is performed or not. That Moore on that morning could have walked a mile in twenty minutes means (1) that as a child he learned to walk and has since retained this accomplishment and that his constitution is otherwise such that he has the ability to walk at a certain speed; (2) that he had the opportunity that morning to walk (he was not imprisoned, had not broken his leg, etc.); from which follows (3) that it was alone dependent upon his motivation that morning whether this mile was walked or not.

This analysis is in general the same as that given by Moore, Stevenson, Nowell-Smith, and others,[10] although with the difference that the statement of what was within *X*'s power to do, in my view, is a categorical statement that the capability and opportunity to perform *a* were present, and not a conditional statement that *a* would have been performed under a particular condition (that *X* had the necessary motivation).[11] It is certainly correct that if the categorical statement is true, the conditional is also and vice versa—but this is no proof that the two statements have the same meaning.

As to (b): I can see no reason to doubt that it is exactly in this sense that the phrase is employed when it is assumed that it is a condition for moral responsibility that *X* could have acted other than he did when he committed an offence. This agrees well with the way in which the phrase is used in ordinary speech and with the pragmatic function of responsibility. On this point I refer to what was said above in section 3.

Some of the objections that have been presented to this interpretation are due to an incorrect formulation of the analysis. Moore was at one place so unfortunate (for I do not believe that the words used represented his intention) as to write that "I could have . . . " means "that I could, *if* I had chosen." Hereby

[10] Charles L. Stevenson, *Ethics and Language* (1944), Chap. XLV; P. H. Nowell-Smith, *Ethics* (1954), Chap. 19, "Ifs and Cans," *Theoria* (1960), pp. 85 *et seq.*; Gilbert Ryle, *The Concept of Mind* (Penguin 1963), pp. 69 *et seq.*; W. D. Ross, *Foundation of Ethics* (1939), pp. 240 *et seq.*; C. J. Ducasse in *Determinism and Freedom in the Age of Modern Science*, ed. Sidney Hook (Collier ed. 1961), p. 167.

[11] This difference is of major importance because the discussed analysis has often been rejected on the ground that our moral consciousness requires that the sentence be understood as a categorical statement.

" to be able to do something " is made into something hypothetical, that could only occur under a particular condition, a condition furthermore that was not fulfilled if the act was not performed. To this it may rightly be objected that the could-statement in Moore's example is a categorical statement that the action under the given conditions was possible to perform.[12] What Moore should have said was that from " I could have . . . " it follows that " I would have . . . if I had so desired."

The most important objection is of another type. It is maintained that according to " our moral consciousness," moral responsibility requires that the person could have done the proper thing *not only* in this particular sense—that it was within his power to do it and that he therefore would have done it if he had " willed " it—but *furthermore* in the sense that he *could have willed it.* Responsibility presupposes not only freedom of action but also freedom of will.[13]

In the preceding Chapter, *On Determinism and Morality,* I have argued that such a demand does not lie within " our moral consciousness " and that a theory based upon this assumption leads to logical absurdities and to pragmatically unacceptable consequences.

It may also be maintained that the formulation " X could have willed *a* " is a logical fallacy. It should, in agreement with the analysis of " could have," mean that it was within *X*'s power to will *a,* and that therefore he would have willed *a* in so far as he had *willed to will it.* This again requires that he *could have willed to will it.* And so on infinitely. The formulation is meaningless.

The central question in this paper is, however, different. We are not concerned here with the extent to which a demand for freedom of will in the given sense is contained within " our moral consciousness " nor even with the extent to which such demand has any meaning whatsoever. It is solely concerned with the extent to which in ordinary usage the phrase " *X* could have acted otherwise " affords an argument in support of the demand for freedom of will. This must be denied. The analysis given in this paper of the statement " *X* could have done *a* " at no point leads to assumptions about " freedom of will." When I say that

[12] J. L. Austin, *Philosophical Papers* (1961), pp. 154 *et seq.*

[13] Thus for example, Ingemar Hedenius, " Idén om viljans frihet," *Harald Nordenson 60 år* (1946). Similarly C. A. Campbell in his essay " Is Free Will a Pseudoproblem? " *Mind* (1951), pp. 446 *et seq.*, reprinted in *Free Will and Determinism,* ed. Bernard Berofsky (1966), pp. 112 *et seq.*, see especially pp. 120 *et seq.*; C. D. Broad, *op. cit.* pp. 141 *et seq.*; Ted Honderich, *Punishment, The Supposed Justification* (1969), pp. 108 *et seq.*

this morning I could have taken a stroll, all that this statement means is that I had both the ability and the opportunity to take a stroll and that what actually happened was therefore a matter of whether I had the " desire " or the " will " to do so. No other additional meaning concerned with how my " desire " or " will " comes about is implied by the statement.

It still remains to explain how the common misapprehension could have come about, according to which the demand that the agent could have acted other than he did implies a demand for the metaphysical freedom of the will, its independence of the law of cause and effect. Two circumstances may be pointed out.

The first is an incorrect analysis of the situation of compulsion. When one mistakenly assumes that exemption from responsibility for the person under compulsion comes about because he had no choice, that the act was not an expression of his free will, it is easy to proceed to the idea that exemption from responsibility must take place also if the will is bound or " compelled " by the causal setting. The concept of causation undoubtedly contains remnants of a metaphysical-anthropomorphic approach in which the cause is considered to possess a power that compels the effect.[14] This appears in the notion of necessity. The principle of determinism is called also the principle of necessity. And " necessity " is at the same time the word used to designate an exculpating situation of compulsion. In the notion of necessity the idea of invariable relations between different events merges with the idea of exculpating compulsion.

The second factor leading to misunderstanding is that for other, more basic but subconscious reasons, we are committed by prejudice to the idea that guilt and responsibility presuppose a " free will." If this be true, it is understandable that attempts are made to incorporate this idea into the demand that the agent should have been able to have acted other than he did. The prejudice I hint at is inspired by a religious conception which still, consciously or subconsciously, influences current thinking. It is the ancient idea that sin is disobedience to God, the revolt of the will against the order of the universe. This idea implies that the disobedient will is independent of God: God gave man free will. Correspondingly, if instead of God, one postulates a universal order, a set of universal laws: If the individual is subordinate to

[14] R. G. Collingwood, " On the So-called Idea of Causation," *Proceedings of the Aristotelian Society*, 1938, pp. 85 *et seq.*: (partly reprinted in *Freedom and Responsibility*, ed. by Herbert Morris (1961), pp. 303 *et seq.*), has convincingly maintained that such is the case.

this order, is but a mote carried on in the stream of allness, then man is totally without independence and responsibility.

It is, of course, merely a bold suggestion that metaphorical language of this type, handed down in the Christian tradition, may still play a role in philosophical thought today, even for those who are not Christians. I do not find it unlikely.

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