

**PUNISHMENT  
and  
RESPONSIBILITY**

Essays in the Philosophy of Law

BY

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*✓ see inside. See law  
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## PREFACE

These nine essays, written during the last ten years, are arranged here, not in chronological order, but with some attention to similarity of subject-matter. Chapters I, II and III are each in part concerned with the rationale of the doctrine of *mens rea*, though my main reason for reprinting the essay forming Chapter III is its relevance, in conjunction with the later legal and statistical material added in the Notes, to the discussion of capital punishment which will shortly again be an issue in this country, since the period of abolition secured by the Murder Act 1965 runs out in 1970. Chapters IV, V and VI are each mainly concerned with the analysis of a specific condition of criminal responsibility ('acts of will', intention, and negligence). Chapters VII and VIII confront the claim that the criminal law could and should dispense with mental conditions of responsibility. In Chapter IX, I attempt to distinguish and relate the bewilderingly many meanings of 'responsibility' and 'retribution'.

I have not reprinted here, in spite of some requests, my earliest venture into this field: 'The Ascription of Responsibility and Rights', published in the *Proceedings of the Aristotelian Society* (1948-9). My reason for excluding it is simply that its main contentions no longer seem to me defensible, and that the main criticisms of it made in recent years are justified.<sup>1</sup>

I am deeply indebted to Mr. A. J. Baxter who identified and corrected more inaccurate quotations and references, and more infelicities of grammar, punctuation and style, than I care to contemplate. I am responsible for those that remain. I am also grateful to Miss Joan Watson for her assistance in the preparation of the Notes.

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<sup>1</sup> See, for example, P. T. Geach, 'Ascriptivism', *Philosophical Review* (1960), p. 221, and G. Pitcher, 'Hart on Action and Responsibility', *ibid.*, p. 226.

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These figures show how different the magnitude of the murder problem in the United States is from the problem in England, and it would be possible to present this difference in many dramatic ways. In Chicago alone, for example, the number of murders and non-negligent homicides in each of the three years 1950-2 (257, 249, and 289) was nearly double the number of murders in the whole of England and Wales (139, 132, and 146).<sup>36</sup>

During the ten-year period between 1945 and 1954, 775 persons were executed for murder by the civil authorities, an average of seventy-seven per year. This, compared with the average annual estimated number of murders and non-negligent manslaughters for those years (7,268), gives a ratio of less than 1:100;<sup>37</sup> in England [the ratio of executions to murders known to the police for the fifty years 1900-49 was about 1:12.

Though we lack satisfactory figures, most authorities share the view that the number of murders committed by professional criminals is far greater in the United States than it is in England; a far greater proportion of murder in England is due to jealousy, drink, quarrel, lust, and even irritation than in the United States. The Royal Commission estimated that for the period 1900-49 20 per cent of convicted murderers in England, at the most, were professional criminals.<sup>38</sup> In England insanity, defined even by the stringent legal criteria used (until 1957) for assessing criminal responsibility, plays a very great part: of the total of 3,129 persons committed to trial for murder during the fifty years 1900-49, 428 were held unfit to plead and 798 adjudged guilty but insane under the M'Naghten rules. The combined figures for these two

<sup>36</sup> All American figures in this paragraph are from 21 *Uniform Crime Reports*, 90, 92, 95 (1950); 22 *ibid.* at 87, 89, 93 (1951); 23 *ibid.* at 93, 95, 99 (1952). For England and Wales see *Royal Commission Report*, App. 3, Table 1.

<sup>37</sup> See *Bureau of Census, Dept of Commerce, Statistical Abstract of the United States* (1955) p. 154, Table 188.

<sup>38</sup> See *Royal Commission Report*, App. 6, Table 2 and paras. 12, 13. In 1930 Judge Marcus Kavanagh told the Select Committee on Capital Punishment that 'the larger number of people who are killed in the United States are killed by criminals.' *Ibid.* para. 12.

categories of insanity (1,226) were slightly greater than the total of those convicted and sentenced to death for murder (1,210) during this period.<sup>39</sup> The relevant figures for the United States are apparently not available.

## 4

Let us now turn to the principles to which men appeal when they argue for or against the death penalty. In any public discussion of this subject the question that is likely to be the central one is 'What is the character and weight of the evidence that the death penalty is required for the protection of society? What is the evidence that it has a uniquely deterrent force compared with the alternative of imprisonment?'<sup>40</sup> Later we shall examine what evidence there is to answer this question, but first we should consider what is implied if this question is treated—as undoubtedly most ordinary men now do treat it—as the root of the matter, as the fundamental question in considering whether the death penalty should be abolished or retained.

To treat this question as the root of the matter is implicitly to adopt what is called, I think unhappily, a theory of

<sup>39</sup> *Royal Commission Report*, App. 3, Table 1. Respite was granted an additional forty-seven persons, after sentence of death, by the Home Secretary on grounds of insanity. *Ibid.*, at p. 301.

<sup>40</sup> A careful examination of the English Parliamentary debates confirms this, although it is certainly not apparent at first sight. Thus the Archbishop of York, in the Lords debate in July 1956, insisted 'on the moral necessity of retribution within our penal code'. The Lord Chancellor agreed with the view elsewhere expressed by Lord Justice Denning that 'the ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime'. 198 *H.L. Deb.* 576 (1956). But the Lord Chancellor also said that 'the real crux' of the question at issue is whether capital punishment is a uniquely effective deterrent; *ibid.*, at 577. The Archbishop stated that 'the question of deterrence comes to the head as a vitally important matter'; *ibid.*, at 597. See also Lord Salisbury (a retentionist): 'For me, as for many others, it is on the deterrent value of capital punishment that the whole balance of the argument must turn'; *Ibid.*, at 820. For an illuminating philosophical analysis of the arguments in this debate see Gallie, 'The Lords Debate on Hanging, July 1956: Interpretation and Comment,' *Philosophy*, Vol. 32 (Apr. 1957), p. 132.

punishment. I say 'unhappily' because theories of punishment are not theories in any normal sense. They are not, as scientific theories are, assertions or contentions as to what is or what is not the case; the atomic theory or the kinetic theory of gases is a theory of this sort. On the contrary, those major positions concerning punishment which are called deterrent or retributive or reformative 'theories' of punishment are moral claims as to what justifies the practice of punishment—claims as to why, morally, it *should or may* be used. Accordingly, if it is held that the central question concerning the death penalty is whether or not it is needed to protect society from harm, then, although *this* question is itself a question of fact, the moral claim (or 'theory' of punishment) implied is the 'utilitarian' position that what justifies the practice of punishment is its propensity to protect society from harm. Let us call this implicit moral claim 'the utilitarian position'.

There are indeed ways of defending and criticizing the death penalty which are quite independent of the utilitarian position and of the questions of fact which the utilitarian will consider as crucial. These are perhaps more commonly expressed in England than in America. For some people the death penalty is ruled out entirely as something absolutely evil which, like torture, should never be used however many lives it might save. Those who take this view find that they are sometimes met by the counter-assertion that the death penalty is something which morality actually demands, a uniquely appropriate means of retribution or 'reprobation' for the worst of crimes, even if its use adds nothing to the protection of human life. Here we have two sharply opposed yet similar attitudes: for the one the death penalty is morally excluded; for the other it is a moral necessity: but both alike are independent of any question of fact or evidence as to what the use of the death penalty does by way of furthering the protection of society. Argument in support of views as absolute as these can consist only of an invitation, on the one hand, to consider in detail the execution of a human being, and on the other hand, to consider in detail some awful murder, and then to await the emergence either of a conviction that the death

penalty must never be used or, alternatively, that it must never be completely abandoned.

It is important to realize that what differentiates the utilitarian position from these absolute attitudes is not that the latter adopt a specific moral attitude while the utilitarian position confines itself to 'the facts'. The utilitarian position, which treats the welfare of society as the justification of punishment, is also a moral claim just as these absolute positions are; what differentiates them is that the utilitarian position commits one, as the absolute positions do not, to a factual inquiry as to the effects upon society of the use of the death penalty.

Is the utilitarian position coherent? Is it possible to hold it without paradox or without commitment to consequences against which most ordinary people's moral sense would rebel? Or when the consequences of the utilitarian position are exposed do men feel compelled by other moral principles which they hold at least as firmly to abandon or qualify the utilitarian position? What are these other moral principles? Do they imply the tacit admission that something going under the ambiguous name of 'retribution' or 'reprobation' requires attention in any acceptable 'theory' of punishment? If so, to what specific aspect of punishment are these notions relevant? I think that most of the puzzles about the principles of punishment which trouble ordinary men can be reduced to these questions.

Let us consider some of the claims that are urged against the utilitarian position. They are often obscurely presented and I shall try to put them clearly.

The first is this. It is often said that men punish and always have punished for a vast number of different reasons. They have punished to secure obedience to laws, to gratify feelings of revenge, to satisfy a public demand for severe reprisals for outrageous crimes, because they believed a deity demands punishment, to match with suffering the moral evil inherent in the perpetration of a crime, or simply out of respect for tradition. If there are these many reasons, why should we select the protection of society from harm and give this primacy as the 'basis' of punishment? Surely it is only one reason

among many which stand on an equal level in so far as a claim upon our attention is concerned.

Here plainly we must distinguish two questions commonly confused. They are, first 'Why do men in fact punish?' This is a question of fact to which there may be many different answers such as those exemplified above. The second question, to be carefully distinguished from the first, is 'What justifies men in punishing? Why is it morally good or morally permissible for them to punish?' It is clear that no demonstration that in fact men have punished or do punish for certain reasons can amount *per se* to a justification for this practice unless we subscribe to what is itself a most implausible moral position, namely, that whatever is generally done is justified or morally right. Short of this, if we think that punishment is justified because, for example, it satisfies a public demand or because it meets the evil of misconduct with suffering, we must add to our statement of fact that men in fact do punish for such reasons, the further moral claim that it is good or at least morally permissible to punish for such reasons.

When this simple point is made clear and the two questions 'Why do men punish?' and 'What justifies punishment?' are forced apart, very often the objector to the utilitarian position will turn out to be a utilitarian of a wider and perhaps more imaginative sort. He will perhaps say that what justifies punishment is that it satisfies a popular demand (perhaps even for revenge) and explain that it is good that it satisfies this demand because if it did not there would be disorder in society, disrespect for the law, or even lynching. Such a point of view, of course, raises disputable questions of fact as to the extent to which satisfaction of popular demand is important in the ways indicated. None the less, this objection itself turns out to be a utilitarian position, emphasizing that the good to be secured by punishment must not be narrowly conceived as simply protecting society from the harm represented by the particular type of crime punished, but also as a protection from a wider set of injuries to society.

Very often, however, because the question of fact and the question of justification are not thus distinguished, the fact, or

the alleged fact, of a public demand for punishment (or a particular kind of punishment) is cited as if it were *per se* a justification; or, at least, the precise moral principle which treats such a demand (or some element of it) as a justification for punishment is never clearly stated or exposed for criticism.

But the objector who criticizes the utilitarian position by reminding us of the diversity of reasons for which men punish may not always turn out to be a wider utilitarian in the way I have suggested. Sometimes the objector will take his stand on absolutes and claim that meeting the moral evil of misconduct with suffering is, as Kant urged, good *per se*, so that, even on the last day of society, the murderer not only may but must be executed. But before we say that no argument is possible between the utilitarian and objectors of this sort, it is necessary to inquire whether the objector would hold his position unless he also believed that punishment was necessary to protect society from harm. Would he really rely on his absolutist position to justify going *beyond* the limits of what the utilitarian would admit by way of punishment, and inflict a punishment more severe than one required on utilitarian principles?<sup>41</sup> Sometimes the answer is 'yes' and then we are left to a clash of fundamental moral claims in which the absolutist must simply expose for inspection and acceptance his claim that there is somehow some intrinsic total good in meeting the moral evil of misconduct with suffering; this, he must say, is something morally 'called for' independently of its place in a social mechanism designed for the protection of society or other beneficial effects.

Consider now a more fundamental objection, to the utilitarian position which is implied in holding the central question *in relation to the death penalty* to be the question 'What is the evidence that it is needed to protect society?' 'Surely', says the objector, 'the protection of society cannot be your justification, for if it were, why should you stop where you not only do stop, but think you ought to stop, in using punishment as an

<sup>41</sup> It seems that the Archbishop of York and the Lord Chancellor, while insisting that the primary purpose of punishment is retribution (see *supra*, p. 71, n. 40), would have said 'no' at this point.

## VII

PUNISHMENT AND THE  
ELIMINATION OF RESPONSIBILITY

## I

IN Dostoevsky's novel *Crime and Punishment*, a minor character, Lebezyatnikov, who is described as 'a follower of the latest ideas', explains that 'in this age the sentiment of compassion is actually prohibited by science, and that is how they order things in England where they have political economy'. This is a mocking reference to the social philosophy compounded out of Utilitarianism and scientific rationalism which was then regarded, with some reason, as typically English. Among a nation of shopkeepers, this philosophy might rank as progressive and enlightened, but it was viewed by Dostoevsky as a contagion from the West, to be hated and feared. Its spread would, he thought, blind men to the realities of human nature and experience, and would pervert institutions which gave expression, however clumsily, to spiritual values of profound importance. Utilitarianism and science between them would transform the government of responsible human beings into the manipulation of things.

Among the institutions which Dostoevsky most wished to preserve from perversion by the social philosophy of the West was the institution of punishment; and his novels make real to us, in a way that no abstract statement ever can, a conception of punishment which, since he wrote, has come to occupy a much diminished place in the penal policy and practice of this country, as it has in every country where the reduction of crime is felt to be one of the most urgent social problems. This older conception of punishment is sharply distinguished from mere social hygiene: it does not make primary, as modern thought does, the reduction of crime or the protection of

society from the criminal; instead it makes primary the meting out to a responsible wrongdoer of his just deserts. Dostoevsky passionately believed that society was morally justified in punishing people simply because they had done wrong; he also believed that psychologically the criminal needed his punishment to heal the laceration of the bonds that joined him to his society. So, in the end, Raskolnikov the murderer thirsts for his punishment. Many of us here today—perhaps most of us—may hate these ideas as useless obstructions to rational thought about the worst of our social problems. Perhaps some of us would wish to hasten the disappearance of these ideas not only from public policy and the criminal law, but from human consciousness altogether. Nonetheless, we still need to understand the moral and psychological appeal which these ideas have, for they have not disappeared yet nor have they been relegated wholly to the sphere of private moral censure. In an attenuated form they still have a place among the now complicated and partly inconsistent set of ideas that jostle together in the mind of an English judge when he sentences the criminals convicted in his court.

In this lecture I shall attempt to describe the position which these ideas have come to hold in our penal practices and policies. I shall take from Hobhouse, in whose memory these lectures are founded, a lucid statement of what he himself termed 'the new order of ideas' of punishment.

'Punishment', he wrote, 'is compelled to justify itself by its actual effect, on society, in maintaining order without legalizing brutality, on the criminal, in deterring him or in aiding his reform.'<sup>1</sup> And punishment 'is not, like reward, a part of ideal justice, it is a mechanical and dangerous means of protection which it requires the greatest wisdom and humanity to convert into an agency of reform.'<sup>2</sup>

For such an outlook, the moral justification for punishment lies in its effects—in its contribution to the prevention of crime and the social readjustment of the criminal. It is essentially forward-looking: it considers the future good we can do to society including the criminal. In the pursuit of these

<sup>1</sup> *Morals in Evolution* (3rd edn.), p. 130.

<sup>2</sup> *The Elements of Social Justice*, p. 128.

forward-looking aims, we need all the resources of reason, experience and science; we cannot here be guided by our intuitions; we cannot know by looking only at what the criminal has done, what should be done to him. His act, lying in the past, is important merely as a symptom—one symptom among others—of his character, mind and disposition; it helps us to diagnose what he is like and predict the effects of our action on him and on society. So, if what we do to him is to advance any rational social purpose, we must understand his crime; but it cannot by itself dictate the kind or severity of punishment.

For this forward-looking Utilitarian approach the traditional conception of punishment has always presented difficulties. At two points, traditional punishment looks backward not forward. One of these points corresponds to the conviction by a Court, and the other to the Court's sentence. At both these stages the criminal's act is something more than a symptom on which diagnosis and prognosis may be based. It has an altogether different status. At the conviction stage, if punishment is to be justified at all, the criminal's act must be that of a responsible agent: that is, it must be the act of one who *could have kept the law* which he has broken. And at the sentence stage, the punishment must bear some sort of relationship to the act: it must in some sense 'fit' it or be 'proportionate' to it. Only if both these backward-looking requirements are satisfied can it be said that this man deserved punishment for this offence. These two backward-looking requirements are in fact closely related and because scepticism about one leads to scepticism about the other, I have chosen to discuss them both under the title of 'The Elimination of Responsibility'. But in fact it has only comparatively recently been openly urged that we should, while retaining a system of criminal law, eliminate legal responsibility or allow it to wither away; whereas the impact of penal reform on the old idea that the punishment should be fitted to the crime, rather than the criminal, has been much longer sustained and more severe. So although conviction comes before sentence I shall discuss the sentence aspect first.

Like many other features of punishment the idea of a sentence 'fitted' to a crime is susceptible of many different interpretations; as Bentham said, words like 'fit' or 'proportionate' are 'more oracular than instructive'. In its crudest form it is the notion that what the criminal has done should be done to him, and wherever thinking about punishment is primitive, as it often is, this crude idea reasserts itself: the killer should be killed; the violent assailant should be flogged. But as Blackstone pointed out—he was a reformer surprisingly enough on this aspect of punishment—this idea is incapable of generalization without absurdity. 'There are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery . . .'<sup>3</sup> Moreover, as he adds, even in the crude cases where the penalty seems to be dictated by 'natural reason' we may be deluded: there may appear to be an exact 'correspondence' in the case of the death penalty for murder, but the punishment may yet not be really equivalent to the crime. As he somewhat quaintly says, 'the execution of a needy decrepit assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune'.<sup>4</sup> Yet once we leave this crude version of the principle, things become difficult. The first refinement is the idea that the suffering imposed by punishment should be in some sense equal to or proportionate to the wickedness of the crime. But in what sense? How measure either wickedness or suffering in the absence of units of either? Even if we had more than the limited insight which is available to human judges into a criminal's motives, powers and temptations, there is no natural relationship to be discerned between wickedness and punishment of a certain degree or kind, so that we can say the latter naturally 'fits' the former. Those who see these difficulties and yet insist that punishment must somehow be related to wickedness or

<sup>3</sup> Blackstone, *Commentaries*, Book IV, Chap. I; II.3    <sup>4</sup> *Ibid.*

'culpability' present their principle in a different form: what is required is not some ideally appropriate relationship between a single crime and its punishment, but that on a scale or tariff of punishments and offences, punishments for different crimes should be 'proportionate' to the relative wickedness or seriousness of the crime. For though we cannot say *how* wicked any given crime is, perhaps we can say that one is *more* wicked than another and we should express this ordinal relation in a corresponding scale of penalties. Trivial offences causing little harm must not be punished as severely as offences causing great harm; causing harm intentionally must be punished more severely than causing the same harm unintentionally.

Of course even this way of relating the severity of punishment to the seriousness of the crime is beset by many difficulties if we attempt to apply it at all literally. The first of these is relatively trivial; even if it were possible to arrange all crimes on a scale of relative seriousness, our starting point or base of comparison must be a crime for which a penalty is fixed otherwise than by comparison with others. We must start somewhere, and in practice the starting point is apt to be just the traditional or usual penalty for a given offence.<sup>5</sup> Secondly it is not clear what, as between the objective harm caused by a crime and the subjective evil intention inspiring it, is to be the measure of 'seriousness'. Is negligently causing the destruction of a city worse than the intentional wounding of a single policeman? Or are we to pay attention to both objective harm done and subjective wickedness? Thirdly if the subjective wickedness of the criminal act is relevant, can human judges discover and make comparisons between the motives, temptations, opportunities and wickedness of different individuals? No doubt if we consider *types* of crime—average cases—only loosely representative of actual individual crimes, a rough approximation can be made to the idea of adapting the severity of punishment to the different 'culpability' or seriousness of different offences. We can lay down a few rough discriminations

<sup>5</sup> See Grünhut, *Penal Reform*, p. 5, and *Report of Departmental Committee on Persistent Offenders* (1932), p. 10.

between intentional and unintentional injury: we can recognize standard types of temptation and weakness, and use these to mitigate or aggravate the severity of the standard punishment for a given type. We shall consider later the social purpose of such a rough conventional tariff. But it is well to remember its roughness. As Sir Ernest Gowers said, 'The fact is that the considerations that determine the culpability of any crime are infinite in number and variety, depending on the criminal as well as the crime, and cannot possibly be catalogued objectively without gross error in the application of the definition to particular cases.'<sup>6</sup>

So undoubtedly there is, for modern minds, something obscure and difficult in the idea that we should think in choosing punishment of some right intrinsic relation which it must bear to the wickedness of the criminal's act, rather than the effect of the punishment on society and on him.

Bentham himself offered a quite different theory of relative proportion between penalties and crime within a Utilitarian framework of individual and general prevention. Here the guiding considerations were forward-looking principles: minor harms were not to be punished with a severity that created greater misery than the offence unchecked; the potential offender must be supplied with an inducement in the shape of lesser penalties to commit a less harmful offence rather than a more harmful one. We may well think that Bentham's complex doctrines rested on an uncritical belief in the part played by calculation in anti-social behaviour. Nonetheless we may think the general direction right; whereas the obscure notions of fitness, equivalence or proportion to the act done seem to turn our thoughts uselessly in the wrong direction. Even Plato thought that looking back to the past deed (except as a symptom indicating what was likely to cure or prevent) was irrational. To measure punishment by reference to it was, he said, like 'lashing a rock'.<sup>7</sup>

But what part has this backward-looking idea, measuring

<sup>6</sup> *A Life for a Life*, p. 38.

<sup>7</sup> *Protagoras*, 324.

Plato

punishment by wickedness, played in our policies and how has it been combined with the Utilitarian forward-looking elements in our penal practices?

In answering this question it is important to remember the variety and complexity of our penal institutions. We have first the action of the legislature fixing only maximum penalties<sup>8</sup> for crime, except in very rare cases, such as murder when there is no alternative penalty. Then we have the announced plans and policies of the executive responsible for prison administration. Thirdly, we have the actual practices of judges choosing sentences in the exercise of the vast discretion which for more than 100 years has been left to them. Here, it is safe to say, the ideas of fitness and proportion have had their fullest play, though it is true that the history of this fascinating side of the law has still to be written and it is extraordinarily difficult to find out how judges have viewed their task. What is clear is this: until the turn of the century there was nothing to place on our judges the duty of choosing penalties designed for reform or rehabilitation, or of adapting the punishment in any other way to the needs or potentialities of the criminal. There was nothing to stop a judge giving exclusive attention, if he wished to, to the wickedness of the crime and allowing his estimate of it to determine his sentence. Of course there were great penal reforms in the nineteenth century, but they were largely reforms not of what judges were to do in sentencing but what prisons were to do to those whom the judges had sentenced. The great maxims of the reformers—individualization of punishment, rehabilitation, training—so far as they made headway in the last century did so primarily inside the prisons in altering the life lived there by prisoners. The judges took no part in this and their sentencing powers were for long unaffected by it. Their operations were thought of as

<sup>8</sup> Many of these maximum penalties now need revision. Thus among the offences still punishable with life imprisonment are destruction of registers of births (Forgery Act, 1861, ss. 36-37), larceny of wills (Larceny Act, 1916, s. 6), sacrilege (Larceny Act, 1916, s. 24), and trading with pirates (Piracy Act, 1721, s. 1).

something given; and the new penal ideas worked within the given framework.<sup>9</sup>

Of course we know a good deal about the opposition which the reformers met in the last century. But it seems clear that the main opposition to ideas of re-education and reform came less from those who stressed retributive ideas of proportion to wickedness than from another wing in the Utilitarian camp: those who stressed the need to make punishment a general deterrent by example. The argument that milder reforming treatment might reduce recidivism was often met with the Utilitarian reminder: that to focus on the actual offender might jeopardize what was believed to be the quantitatively more important influence which the threat of severe punishment might have on potential offenders. And of course the dreary Utilitarian principle of 'lesser eligibility' figured frequently in the arguments over prison policy. Conditions inside must not be made preferable to life in the stinking alleys from which the prisoner came.

As long as the sentencing powers of judges were left outside the scope of reform there was little a judge could do, even if he were so minded, to adapt his sentence to reforming aims. But the series of great measures which in the end followed the Gladstone Report of 1895 brought about an immense change in the judges' powers and responsibilities. For the first time they were charged with the duty of considering the suitability of a sentence whose aim was sharply differentiated from retribution for past wickedness. The possibilities now included (besides what we may call ordinary imprisonment), probation, borstal training, corrective training and preventive detention, and wide powers of absolute and conditional discharge. So individualized treatment within prisons, adapted at least in theory to the needs and potentialities of the prisoner, was now complemented by the idea of individualized sentence; and the judges were made to participate in an activity which in the main had been a matter for administrators.

<sup>9</sup> See G. Rose, *The Struggle for Penal Reform*, esp. Chap. XVIII.

What signs of a clash were there and are there between these forward-looking ideas and the old ideas of proportion? Certainly there was some judicial restiveness, but in considering it, it is well to remember that the new individualized measures (particularly preventive detention for habitual criminals) did not always mean a sentence which criminals themselves liked better: very often it meant for them something much longer than what they would get from judges operating rough ideas of proportion. The strength of the old idea that the amount of punishment was, in spite of the new individualizing aims, something which ought to be measured by the crime showed itself in the way in which the earliest form of preventive detention was introduced in 1908. The system known on the Continent as the 'double track' was adopted. The habitual offender who satisfied the requirements for this form of treatment was to receive two sentences: one was the punishment fixed on conventional lines for his last offence; the other was the special individualized measure. So his crime had two aspects: one was that of a responsible piece of wickedness deserving as such a certain punishment; the other was that of a symptom of disposition or character and an index of appropriate preventive treatment. On the Continent the 'double-track' system has been elaborated in ways which may seem to us somewhat metaphysical: punishment which is to be 'guilt adequate', i.e. orientated towards the criminal act, is carefully distinguished from mere 'measures' orientated to the criminal's character and the needs of society.<sup>10</sup> The recent German Penal Code preserves this distinction though it is regretted as artificial by many.<sup>11</sup> Certainly the prisoner who after serving a three-year sentence is told that his punishment is over but that a seven-year period of preventive detention awaits him and that this is a 'measure' of social protection, not a punishment, might think he was being tormented by a barren piece of

<sup>10</sup> See "Rule of Law" in Criminal Justice', by H. Silving, in *Essays in Criminal Science* (1961), ed. J. Mueller, pp. 98 et seq.

<sup>11</sup> See 'German Criminal Law Reform', by H-H. Jescheck, in op. cit., ed. Mueller, p. 395.

conceptualism—though he might not express himself in that way.

But these expedients, or—as some may think of them—subterfuges, are signs of the vitality of the old ideas. If we look for signs of their persistence in current English judicial practice we can find them easily enough. Though the double-track system has been abandoned here, our judges have always felt uneasy when faced with a conflict between what they consider to be a punishment appropriate to the seriousness of a crime, and the steps which one of the individualized forms of punishment might require. Sometimes this emerges into the light of day in reported cases. Thus it is now the law that a young offender may be sent to borstal training which may last as long as three years, although his last offence is punishable by a maximum penalty of one year. But, for many years, courts of first instance have refused to do this and the Court of Criminal Appeal upheld them in this until last year when, by a sudden reversal of principle, hard indeed to reconcile with a doctrine of binding precedent, the offender's last offence was allowed to figure as a symptom of the need for reformative treatment rather than as determining by itself the measure of punishment.<sup>12</sup>

But we now have other evidence of the importance attached by English judges to the idea that punishment should be proportioned to the seriousness of the offence. The recent report of the Interdepartmental Committee on the Business of the Criminal Courts (known after its chairman as the Streatfield report)<sup>13</sup> makes quite plain how prominent a place in sentencing the idea of a tariff has had and indeed still has. It gives us first a glimpse into the recent past: 'Sentencing used to be a comparatively simple matter. The primary objective was to fix a sentence proportionate to the offender's culpability, and the system has been loosely described as the "tariff system". . . . In addition, the courts have

<sup>12</sup> *R. v. Amos* (1960), 45 Cr. App. Rep. 42. See also *R. v. McCarthy* (1955), 39 Cr. App. Rep. 118, and *R. v. Ball* (1951), 35 Cr. App. Rep. 164.

<sup>13</sup> *Report of the Interdepartmental Committee on the Business of the Criminal Courts*, Cmd. 1289 (1961).

always had in mind the need to protect society from the persistent offender, to deter potential offenders and to deter or reform the individual offender. But in general it was thought that the "tariff system" took the three other objectives in its stride: giving an offender the punishment he deserved was thought to be the best way of deterring him and others and of protecting society.<sup>14</sup> That this tariff idea has overshadowed forward-looking measures seems clear from the Committee's statement that the key to advance in this field is to recognize the fundamental difference between assessing culpability and the other objectives of sentencing. The Committee itself indeed emphasized that the offender's culpability is still a factor to be weighed in the choice of sentence; but its main recommendations are designed to secure that Courts should be equipped with information which will enable them to make an intelligent choice between the forward-looking measures now available. Many of the judges who gave evidence expressed satisfaction with things as they are: but the Committee expressed the view that there are now 'difficulties and anomalies' in the supply of information to the Courts and that 'sentencers are provided with inadequate information about what the various forms of sentence involve and achieve'.<sup>15</sup>

It is indeed difficult not to conclude that the satisfaction with things as they are, expressed by so many witnesses must be due in large part to the fact that the idea of a 'tariff' is still for many English judges a primary determinant of punishment. And of course psychologically there is every reason why they should be inclined to this view. When an English judge reaches the bench and assumes the responsibilities of sentencing he may have spent many arduous years dealing with civil or commercial cases. Very few new judges will have had recent contact with criminal law or criminals, or have practised regularly in the criminal courts, though many will have sat as Recorders for perhaps ten days a year in the intervals of a busy practice. There is little or nothing in the usual social background of an English barrister or in his education or training or (unless he specializes in criminal work) in his

<sup>14</sup> *Ibid.*, paras. 257-8.

<sup>15</sup> *Ibid.*, para. 265.

career, to give him any particular understanding of the social conditions, and the psychology of criminals, of the methods or aims of new penal measures or of the relevant social sciences. What he will have are qualities which make an English judge an incomparable master of the art of a fair trial: an exactly trained sense of justice and fairness and great common sense. It is altogether natural that he should give primacy to that aspect of sentencing which relies most on these qualities and least on the technical or expert knowledge which he has not got. But though natural it does not follow that this is as it should be.

But there is something more than these somewhat inarticulate practices to go on. We have in England an articulate judicial doctrine or reinterpretation of the idea that a punishment must fit a crime. Nowhere has this been more powerfully expounded than by the great Victorian judge James Fitzjames Stephen in his history of the criminal law and his book *Liberty, Equality, Fraternity* written in reply to Mill on Liberty. Of course not all judges share his views, but in our own day very much the same views have been expressed by distinguished judges. Stephen, like his successors today, emphasized the interdependence and interpenetration of law and morals, not only as a fact to be observed but as something we should foster and intensify. In his view the object of the criminal law could not be stated either in the old Utilitarian language of deterrence or in the newer language of reform and rehabilitation. He insisted that the criminal law did and should operate to 'give distinct shape' to moral indignation, and hatred of the criminal. Because the criminal law has this function 'Everything which is regarded as enhancing the moral guilt of a particular offence is recognized as a reason for increasing the severity of the punishment . . . the sentence of the law is to the moral sentiment of the public what a seal is to hot wax'.<sup>16</sup> This is of course strong stuff and it would be surprising to find our judges repeating today Stephen's assertions concerning the moral rectitude of *hating* criminals, nor would they speak as Stephen did about the

<sup>16</sup> *A History of the Criminal Law in England*, Vol. II, Chap. XVII, p. 81.

duty of the judge to express that desire for vengeance which crime excites in a healthy mind.<sup>17</sup> Nonetheless Stephen's view of the relation of criminal law to morality and what may be called his expressive or denunciatory theory of criminal punishment is with us still. Thus Lord Denning told the Royal Commission on Capital Punishment that 'the punishment for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake', he said, 'to consider the object of punishment as being deterrent or reformatory or preventive and nothing else. . . . The ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of a crime: and from this point of view there are some murders which, in the present state of public opinion, demand the most emphatic denunciation of all, namely the death penalty'.<sup>18</sup>

What are the merits of this denunciatory theory of punishment? Does it offer an acceptable interpretation of what makes a punishment fit a crime? Or does it exaggerate the claim that that idea should have on the attention of judges passing sentence? Again, because of their training and situation, this view of punishment is one which usually is likely to commend itself to most English judges; for, in exercising the great discretion which the law leaves to them in sentencing, they wish neither to appear to be acting arbitrarily nor to be applying abstract or scientific penological techniques of which they have little knowledge or experience. It is therefore natural for them to claim to be the mouthpiece of the moral sentiments of society. Yet I think we should distrust this theory for at least three reasons:

*First.* One has every sympathy with judges in their difficult task but this theory makes things altogether too easy both for judges and the community. To tell judges that the expression

<sup>17</sup> But Lord Goddard said in the Lords debate on capital punishment in 1956: 'I do not see how it can be said to be either non-Christian or can be regarded in any other way than as praiseworthy that the country should be willing to avenge crime.' 198 *H.L. Deb.*, 743 (1956).

<sup>18</sup> *The Royal Commission on Capital Punishment*, Cmd. 8932, para. 53.

of the community's moral indignation is 'the ultimate justification of punishment' is to tempt them from the task of acquiring knowledge of and thinking about the effects of what they are doing. And for the community to think that there is something sacrosanct about its scale of moral evaluations may, as Mill long ago told us, stultify its advance. For these evaluations may plainly rest on inadequate understanding or appreciation of facts. Should we, for example, wish common estimates of the moral seriousness of bad driving on the roads to be taken as the prime determinant of punishments? Or should we hope that the law might, here and elsewhere, not passively reflect uninstructed opinion but actively help to shape moral sentiments to rational common ends?

*Secondly.* The operation of this theory may be very deceptive. It is true that for all social moralities certain major evaluations hold good. Intentional killing is worse than unintentional killing; inflicting minor harm is less bad than inflicting major harm; wounding is worse than stealing apples. But it is sociologically very naïve to think that there is even in England a single homogeneous social morality whose mouthpiece the judge can be in fixing sentence, and in admitting one thing and rejecting another as a mitigating or aggravating factor. Our society, whether we like it or not, is morally a plural society; and judgments of the relative seriousness of different crimes vary within it far more than this simple theory recognizes.<sup>19</sup> Judges talk much of the judgments of the 'ordinary reasonable man' and claim to be able to discover what he thinks. But the method used is usually introspection and this is because the judgment of the reasonable man very often is a mere projected shadow, cast by the judge's own moral views or those of his own social class.

*Thirdly.* It is indeed important that the law should not in its scale of punishments gratuitously flout any well-marked

<sup>19</sup> Research into these matters is still in its infancy but there is little to suggest that there is much general agreement. See the results of the B.B.C. Audience Research quoted by J. Silvey in 'The Criminal Law and Public Opinion' in *Crim. L.R.* (1961), at p. 355. No offence was agreed to be the 'most serious' by more than one in four.

common moral distinctions. But this is because the claim of justice that 'like cases should be treated alike' should always be heard; and where the law appears to depart from common estimates of relative wickedness it should make clear what moral aims require this. The double track system at least had the merit of doing this. But respect for justice between different offenders expressed in the injunction 'treat like cases alike' is not to be identified with a denunciatory theory of punishment; it does not involve search for a penalty the severity of which, like a gesture, will aptly express a specific feeling of revulsion or moral indignation. This is indeed a semi-aesthetic idea which has wandered into the theory of punishment. Surely to think of the apt expression of feeling—even if we call it moral indignation rather than revenge—as the ultimate *justification* of punishment is to subordinate what is primary to what is ancillary. We do not live in society in order to condemn, though we may condemn in order to live. On the other hand the injunction 'treat like cases alike' with its corollary 'treat different cases differently' has indeed a place as a *prima facie* principle of fairness between offenders, but not as something which warrants going beyond the requirements of the forward-looking aims of deterrence, prevention and reform to find some apt expression of moral feeling. Fairness between different offenders expressed in terms of different punishments is not an end in itself, but a method of pursuing other aims which has indeed a moral claim on our attention; and we should give effect to it where it does not impede the pursuit of the main aims of punishment. Very often English judges have looked upon claims to equal treatment for different offenders in just this light. When a crime has become exceptionally or dangerously frequent judges have defended punishing an offender more severely than previous offenders on the ground that this step is necessary to check a major evil. It is well that this and other sacrifices of principles of equality between different offenders should be made only with hesitation and with full explanation; for there is always great danger that they may be made in moments of panic or without reliable evidence that they will prevent a worse evil. The idea of

proportion interpreted in this way—as respect for a principle of fairness between different offenders—has still a place in an account of the values which a theory of punishment should recognize. But it is a modest place, and judging by the available evidence it is different from that assigned to ideas of proportion in much current judicial practice and theory.<sup>20</sup>

## 3

So much then for the backward-looking aspect of the sentence, fitting the punishment to the past crime rather than to future needs either of society or of the criminal himself. If we are sceptical about claims that this is a primary object of punishment, how does the scepticism bear on the other backward-looking aspect of punishment—conviction by a court? Here the conventional doctrine says that if punishment is to be justified at all it must be punishment for a responsible act. This is a more complex topic and is made so by three things. First, the idea of personal responsibility—indeed the very word 'responsibility'—is no less susceptible of different interpretations than the idea of a punishment fitting a crime. Secondly, discussions of this topic are often clouded by philosophical assumptions, sometimes concealed, especially those which concern determinism and free will. Thirdly, the extent

<sup>20</sup> It is important to distinguish the principle of justice that offences of different gravity be treated differently, from the general principle that trivial offences should not be punished with great severity, which rests on the simple Utilitarian ground that the law should not inflict greater suffering than it is likely to prevent. Conflicts between both these principles and modern reformatory or preventive methods (whether called 'treatment' or punishment) are perhaps most acute in the juvenile court. Where magistrates consider the home background to be bad, conviction for a petty offence may be the occasion for removing a child from his home for a long period. This may appear to both child and parents as a disproportionate sentence for a crime, even if intended as a measure of welfare or protection. Further, if there are grounds for doubting the efficacy of such methods ('they turn out the same in the end whatever you do') the moral case for administering what is in effect a severe penalty is correspondingly doubtful. See W. E. Cavanagh, *The Child and the Court*, esp. Chaps. VII and VIII, and the *Report of the Committee on Children and Young Persons* (Cmd. 1191) (the 'Ingleby Report'), esp. paras. 60-66.

and the forms in which our legal system has recognized this principle have varied at different periods in quite complicated ways.

What is clear is at least this. For some centuries English law, like most civilized legal systems, has made liability to punishment for serious crime depend, not only on the accused doing the outward acts which the law forbids, but on his having done them in certain conditions which may broadly be termed mental. These mental conditions of responsibility are commonly referred to by lawyers as *mens rea*. This has meant that, subject to certain important qualifications, liability to punishment is excluded if the law was broken unintentionally, under duress or by a person judged to be below the age of responsibility or to be suffering from certain types of mental disease. But nowhere on its face does English law explain why these conditions are required, and it does not indeed refer to any general requirement of a responsible or voluntary act; only recently has the word 'responsibility' crept into our criminal statutes. For the most part English law merely recognizes as excuses the absence of certain crucial mental elements. Nonetheless, most lawyers, laymen and moralists, considering the legal doctrine of *mens rea* and the excuses that the law admits, would conclude that what the law has done here is to reflect, albeit imperfectly, a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it. This is how Blackstone at the beginning of modern legal history looked at the various excuses which the law accepted. He said they were accepted because 'the concurrence of the will when it has its choice either to do or avoid the act in question, [is] the only thing that renders human actions praiseworthy or culpable'.<sup>21</sup>

But now a number of factors complicate the story and make debatable the moral basis of this requirement. The first is that though the law approximates in its doctrine of the mental conditions of responsibility to what the moralist requires for moral blame, it is an approximation only and not a complete

<sup>21</sup> *Commentaries*, Book IV, Chap. II.

convergence. One reason why this is so is that the law has to compromise with a number of different claims, besides the claim that liability to punishment must be dependent on a voluntary responsible act. Proof of mental elements—especially to juries—is a difficult matter, and the law has often abandoned the attempt to discover whether a person charged with crime actually intended to do it, and has used instead certain presumptions, such as that a man intends the natural consequences of his action, or has used what are called objective tests, so that it is enough for conviction that an ordinary man who behaved as the accused did, would have foreseen certain consequences. Perhaps I need not remind you that the law still takes this view so far as murder is concerned, and the objective test of intention has recently received the approbation of the House of Lords, so that in the Lord Chancellor's words, 'once the jury are satisfied that the accused was unlawfully and voluntarily doing something to someone it matters not what the accused in fact contemplated as the probable result or whether he even contemplated at all'.<sup>22</sup>

But the law's reception of the principle that a person should not be liable to punishment except for a voluntary act has been limited in other ways. In its admission of excuses it has concentrated almost exclusively on lack of knowledge rather than on the defects of volition or will. So it has given only a minor place to the pleas of provocation, duress, and necessity, and only after a long struggle has it admitted, in cases of homicide, that a man may still not be fully responsible even if he knew what he did and that it was illegal. One reason for this is that the question whether a man did a given act knowingly or not is a question which, even when it is difficult, is simple compared with the question whether a man could have abstained from doing what he in fact did. The question

<sup>22</sup> *D.P.P. v. Smith* (1961) A.C. 290. But Lord Denning, who was one of the Law Lords who heard the appeal in this case, still claims that, notwithstanding the decision, 'ultimately the question is: Did he intend to cause death or grievous bodily harm?' See *Responsibility before the Law* (Jerusalem, 1961), p. 30. It seems difficult to reconcile this view with the language of the Lord Chancellor.

whether a person had sufficient capacity or will power to conform to the law's requirements opens wider general issues and what shall count as evidence for or against is far from clear. Another factor making for concentration on cognitive elements in responsibility is the survival of the belief, in spite of psychological doctrines to the contrary, that if a man knows what he is doing, it *must* be true that he has a capacity to adjust his behaviour to the requirements of the law.

Thirdly, and this is a development of the last hundred years, the general principle that for criminal liability there must be *mens rea* has been qualified by the admission into the body of the law of a number of offences where liability is said to be 'strict'. For the most part these offences are petty and punished by fines. They concern the maintainance of standards in the manufacture of goods, though recently they have been extended to embrace more serious offences such as dangerous driving where penalties may be considerable. Where liability is strict it is no defence that the accused did not intend to do the act which the law forbids and could not, by the exercise of reasonable care, have avoided doing it.<sup>23</sup>

Strict liability is held in some considerable odium by most academic writers and by many judges. But why? What is so precious in the normal requirements of *mens rea* and how does this normal requirement fit together with our general aims in punishing? It is at this point that scepticism about the old idea that the primary measure of punishment is the wickedness of the criminal act leads to further scepticism about the importance of a responsible act as a condition of punishment. So long as punishment is viewed as a return of pain or suffering for moral evil done, justified by the intrinsic fitness of sentence to crime, or so long as a denunciatory theory is accepted, in which the ultimate justification of punishment is held to be its function as an expression of a community's moral indignation, it is easy to give an explanation of the importance of the requirement of a voluntary act as a condition

<sup>23</sup> See Glanville Williams, *Criminal Law: The General Part* (2nd edn.), Chap. VI for an account and criticism of 'Strict Responsibility' in English law.

of punishment. For in most western morality 'ought' implies 'can' and a person who could not help doing what he did is not morally guilty. But the case is altered if we no longer justify punishment in these ways; if we think of it as justified by its social aims and effects in protecting society and reforming the criminal, and if principles of proportion have only the minor place that I assigned to them. Either we must think again and find a new reason for requiring a responsible act as a condition of criminal punishment, or we must admit that there is no reason for retaining this feature of our institutions. Why should we not eliminate it altogether?

## 4

One major reason, then, for querying the importance of the principle of responsibility is the belief that it only has a place if punishment is backward-looking and retributive in aim. This is not the only reason for scepticism and I shall mention some others later. But I shall first attempt to assess the balance of forces as between conservatives and reformers on this issue. They are not so neatly aligned or divided as they are on the previous question of sentencing policy, and recent legal history on this matter does not show a continuous development but a movement of conflicting tendencies. Generally speaking, those who have taken a forward Utilitarian view of punishment have till recently also taken very seriously the notion of responsibility. On the whole their efforts have been directed to making more complete the law's imperfect recognition of this principle. They have tried to secure that enquiries into the state of mind of the accused person should be genuine and not matters of presumption or objective tests. Similarly, there has been great and partly successful pressure exerted upon the law to abandon old ideas of constructive crime and, especially in the case of mental disease, to shed its narrow concentration on cognitive elements. The most recent chapter in this history was the introduction in the Homicide Act of

1957 of the notion of diminished responsibility to supplement the old M'Naghten tests. In many states of America the movement took the overt form of requiring the law to find, as a condition of liability of a person suffering from mental disease, that he could have conformed to the law's requirements. Our own expedient has been a compromise, and a queerly worded one at that, in which 'impaired mental responsibility' is accepted, not as an excuse, but as reducing what would otherwise be murder to manslaughter not in any case punishable with death. So too, those who have taken a forward-looking view of the aims of punishment protested, though less successfully, against strict liability as a form of injustice which, apparently because of difficulties of proof, would convict, as guilty of the same crime, those who intended along with those who did not intend to do what the law forbids. These tendencies are evident in the work of such Utilitarian jurists as Dr. Glanville Williams in this country and Professor Herbert Wechsler of Columbia University in the United States.

But other voices are certainly to be heard within the camp of those who are united in rejecting retributive views of punishment and would agree that the principle that a punishment is required to be measured by moral guilt has only a subordinate part to play. Certain Utilitarian-minded thinkers share a scepticism about the whole idea that the courts can usefully enquire into whether or not a person could have done what he did not do, and to them the enlightened policy seems to be the one in which we by-pass this question: we should neither assert nor deny that the accused could have done otherwise than he did. Instead we should look upon his act merely as a symptom of the need for either punishment or treatment.<sup>24</sup> Such a proposal to eliminate responsibility may be more or less extreme. Some no doubt, at any rate as a first instalment, would confine it to cases where there is a prima facie evidence of mental abnormality, generously interpreted to include the psychopath. In this less extreme version the doctrine of *mens*

<sup>24</sup> See Barbara Wootton, *Social Science and Social Pathology*, esp. Chap. VIII; and 'Diminished Responsibility: A Layman's View', 76 *L.Q.R.* (1960) p. 224.

*rea* would be left in the law and 'normal' persons at least would continue to be excused if they could show that they acted unintentionally or under duress, &c., as they are at present. Presumably the justification of this halfway measure would be that in most cases of mere accidental or unintentional conduct, or crimes committed under duress, the accused is not likely to repeat his crime and punishment or treatment is not necessary. Bentham indeed attempted to reinterpret in this way the whole doctrine of *mens rea*; the various 'mental excuses' admitted by the law were for him not *indicia* of the fact that the accused could not help what he did, but mere evidences that his punishment could not be useful to society.<sup>25</sup> But it seems clear that he was wrong in thinking that punishment of those who acted without *mens rea* could not be socially 'useful'. Strict liability may be objectionable on many different grounds but the utilitarian argument that it prevents evasion of the law by those who would be prepared to fabricate pleas of mistake or accident has some plausibility.<sup>26</sup>

But as I have said, many factors besides the decay of retributive ideas have contributed to the modern scepticism of the idea that a necessary condition of criminal punishment should be an act which the criminal could have avoided doing. Among these other factors is a certain interpretation of determinism. It is not unnatural that those who in general take a scientific approach to social problems should be powerfully influenced by what may be termed the ideology of science, and think that loyalty to scientific principles requires that we should abandon the idea that a man could have done something which he in fact did not do. Secondly, scientific ideology prompts the suggestion that what is in a man's mind—his power or capacity to resist temptation—not being open to observation by others is not something which we can discover by rational methods.<sup>27</sup>

But even if these two objections are waived many may be impressed by the great difficulty in specifying clear criteria

<sup>25</sup> *Principles of Morals and Legislation*, Chap. XIII.

<sup>26</sup> See Prolegomenon to the Principles of Punishment, Chap. I, *supra*.

<sup>27</sup> See Glanville Williams, 'Diminished Responsibility', in *Medicine, Science and Law* (Oct. 1960), p. 41, and Barbara Wootton, *op. cit.*, 76 *L.Q.R.* (1960) pp. 232, 235.

by which we are to judge whether a person who acted in a certain way had the power or capacity to act otherwise. As Lady Wootton has claimed in her study of the cases of diminished responsibility, it often seems that the criteria formulated are circular or irrelevant. Sometimes an attempt is made to infer a lack of capacity to obey the law from the mere fact of repeated disobedience; sometimes the lack of capacity is illicitly deduced from the existence of a variety of mental conditions, depression or anger, and no convincing evidence of connexion exists. It is impossible not to sympathize with her conclusion that for the most part in these cases of mental abnormality all that we can do is to use the evidence to diagnose those whose mental abnormalities are likely to result in harmful conduct, and to predict what treatment will best prevent their repeating it. The moral that she draws is that the sooner we get down to this piece of honest toil instead of claiming to discover the undiscoverable the better.<sup>28</sup>

I shall not deal here with these objections or the details of such arguments as Lady Wootton's, designed to show that responsibility, in the sense of capacity to conform to the law's requirement, is not something whose presence or absence we can discover by rational means. Full consideration of the arguments involves quite complex logical issues, and I shall only say here that I do not regard all the arguments as conclusive. Here however I wish to reconsider the assumption, which seems to me to be very widespread, that only within the framework of a theory which sees punishment in a retributive or denunciatory light does the doctrine of responsibility make sense. There is, I believe, at this point something to defend, a moral position which ought not to be evacuated as if the decay of retributive ideas had made it untenable. There are values quite distinct from those of retributive punishment which the system of responsibility does maintain, and which remain of great importance even if our aims in punishing are the forward-looking aims of social protection. Perhaps there is

<sup>28</sup> *Social Science and Social Pathology*, Chap. VIII.

something stale and outmoded in the terms in which we tend to discuss the morality of punishment—as if we were forced to choose between retribution and an Erewhon where we never raise the question 'could he help it?' What is needed is a reinterpretation of the notions of desert and responsibility, and fresh accounts of the importance of the principle that a voluntary act should normally be required as a condition of liability to punishment. Such a reinterpretation would not stress, as our legal moralists do, the importance of judgments of degrees of wickedness about which there is far less agreement than they suppose. Instead it would stress the much more nearly universal ideas of fairness or justice and of the value of individual liberty.

Thus a primary vindication of the principle of responsibility could rest on the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him. Even if we punish men not as wicked but as nuisances, this is something we should still respect. Such a doctrine of fair opportunity would not only provide a rationale for most of the existing excuses which the law admits in its doctrine of *mens rea* but it could also function as a critical principle to demand more from the law than it gives. That is, in its light we might question English law's general adherence to the doctrine that ignorance of the law does not excuse and in its light we might press further objections to strict liability.

But more could be said by way of reinterpretation of the principle of responsibility. Its importance emerges afresh if for the moment we imagine that we had eliminated this principle and changed to a system in which all liability was strict. What should we lose? Among other things, we should lose the ability which the present system in some degree guarantees to us, to predict and plan the future course of our lives within the coercive framework of the law. For the system which makes liability to the law's sanctions dependent upon a voluntary act not only maximizes the power of the individual to determine by his choice his future fate; it also maximizes his power to identify in advance the space which will be left open to

him free from the law's interference. Whereas a system from which responsibility was eliminated so that he was liable for what he did by mistake or accident would leave each individual not only less able to exclude the future interference by the law with his life, but also less able to foresee the times of the law's interference.

Thirdly, there is this. At present the law which makes liability to punishment depend on a voluntary act calls for the exercise of powers of self-control but not for complete success in conforming to law. It is illuminating to look at the various excuses which the law admits, like accident or mistake, as ways of rewarding self-restraint. In effect the law says that even if things go wrong, as they do when mistakes are made or accidents occur, a man whose choices are right and who has done his best to keep the law will not suffer. If we contrast this system with one in which men were conditioned to obey the law by psychological or other means, or one in which they were liable to punishment or 'treatment' whether they had voluntarily offended or not, it is plain that our system takes a risk which these alternative systems do not. Our system does not interfere till harm has been done and has been proved to have been done with the appropriate *mens rea*. But the risk that is here taken is not taken for nothing. It is the price we pay for general recognition that a man's fate should depend upon his choice and this is to foster the prime social virtue of self-restraint.

Underlying these separate points there is I think a more important general principle. Human society is a society of persons; and persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other's movements as manifestations of intention and choices, and these subjective factors are often more important to their social relations than the movements by which they are manifested or their effects. If one person hits another, the person struck does not think of the other as *just* a cause of pain to him; for it is of crucial importance to him whether the blow was deliberate or involuntary. If the

blow was light but deliberate, it has a significance for the person struck quite different from an accidental much heavier blow. No doubt the moral judgments to be passed are among the things affected by this crucial distinction; but this is perhaps the least important thing so affected. If you strike me, the judgment that the blow was deliberate will elicit fear, indignation, anger, resentment: these are not voluntary responses; but the same judgment will enter into deliberations about my future voluntary conduct towards you and will colour all my social relations with you. Shall I be your friend or enemy? Offer soothing words? Or return the blow? All this will be different if the blow is not voluntary. This is how human nature in human society actually is and as yet we have no power to alter it. The bearing of this fundamental fact on the law is this. If as our legal moralists maintain it is important for the law to reflect common judgments of morality, it is surely even more important that it should in general reflect in its judgments on human conduct distinctions which not only underly morality, but pervade the whole of our social life. This it would fail to do if it treated men merely as alterable, predictable, curable or manipulable things.

For these reasons then I think there will be a place for the principle of responsibility even when retributive and denunciatory ideas of punishment are dead. But it is important to be realistic: to be aware of the social costs of making the control of anti-social behaviour dependent on this principle and to recognize cases where the benefits secured by it are minimal. We must be prepared *both* to consider exceptions to the principle on their merits *and* to be careful that unnecessary invasions of it are not made even in the guise of 'treatment' instead of frankly penal methods. At present we have in strict liability clear exceptions to the principle, but no very persuasive evidence that the sacrifice of principle is warranted here by the amount of dishonest evasion of conviction which would ensue if liability were not strict. On the other hand we may find that certain cases fall between the two stools of criminal punishment and medical treatment. In February 1961 a man charged with murder of a woman pleaded that he had

killed her in his sleep.<sup>29</sup> He was acquitted and discharged. Though there is no reason to doubt the honesty of this man it is clear that every defence of this sort both opens the door to possible frauds and may mean freedom for dangerous persons. Yet it may be thought that both risks are too slight to warrant any alteration of the law.

The most difficult problems are presented by young children and the mentally abnormal. The latest proposals<sup>30</sup> for the treatment of young offenders are that the age of responsibility be raised from 8 to 12, and that measures hitherto applied to children under 12 in the exercise of a criminal jurisdiction to offenders judged responsible shall henceforth be applied in the exercise of a civil jurisdiction as measures of 'care and discipline' without any enquiry into their responsibility. It may be thought that the benefits to very young children of a system of responsibility are too small to weigh conclusively against the need to save them from a criminal career, even if the attempt to save them involves measures which may be difficult (in spite of the formal differences) for them or their parents to distinguish from punishment and in some cases from a heavy punishment for a trivial offence.

No less important are the provisions in the Mental Health Act, 1959, in relation to psychopaths: these empower the courts to send persons who have done what the law forbids either to prison or to hospital although there may be no real evidence *either* that they were on account of their mental condition incapable of acting otherwise than they did *or*, on the other hand, that like ordinary criminals they were capable of conforming to law.<sup>31</sup> This, as Lady Wootton has persuasively argued, is in substance to by-pass the question of responsibility. The wisdom and justice of these and other departures from

<sup>29</sup> See the case of Staff-Sergeant Boshears, *The Times*, 18 Feb. 1961.

<sup>30</sup> In the *Report of the Committee on Children and Young Persons* (Cmd. 1191).

<sup>31</sup> See the Mental Act, 1959, s. 60. This section does not apply to offences for which a penalty is fixed by law, e.g. murder. For compulsory detention in hospital under this section, the medical evidence required is that the offender is suffering from mental illness, psychopathic disorder, subnormality or severe subnormality and the mental disorder is such as to warrant detention in hospital.

the principle of responsibility may be debated. But I shall not debate them at this hour. My concern has only been to show that the principle of responsibility, which may be sacrificed when the social cost of maintaining it is too high, has a value and importance quite independent of retributive or denunciatory theories of punishment which we may very well discard.

and, in the last essay, two meanings of 'responsibility'. The distinctions I made there have drawn fire from some critics, and it is plain from the criticism that some more comprehensive account of the complexities and ambiguities of these notions is required. The purpose of this postscript is to supply it.

## IX POSTSCRIPT: RESPONSIBILITY AND RETRIBUTION

THE essays in this volume are all concerned with the legal doctrine which requires, as a normal condition of liability to punishment, that the person to be punished should, at the time of his offence, have had a certain knowledge or intention, or possessed certain powers of understanding and control. This doctrine prescribing the psychological criteria of responsibility takes different forms in different legal systems, but in all its forms it has presented both problems of analysis and problems of policy and moral justification. It is no easy matter to determine precisely what English law actually requires when it is said to require, or to treat as sufficient for liability, a certain 'intention' or an 'act of will' or 'recklessness' or 'negligence'; hence some of the preceding essays are concerned in part with such problems of analysis. But most of them are also concerned with problems of justification: with the credentials of principles or 'theories of punishment' which require liability to punishment to be restricted by reference to such psychological conditions, and with the claims of newer theories that would eliminate these restrictions either completely or in part. A central theme of these essays is that it is not only within the framework of a retributive theory of punishment that insistence on the importance of these restrictions makes sense; there are important reasons, both moral and prudential, for adhering to these restrictions which are perfectly consistent with a general utilitarian conception of the aim of punishment.

In most of these essays I have attempted to confront these issues without any full-scale discussion of the notions of Responsibility and Retribution, though I turned aside to distinguish, in the first of these essays, two meanings of 'retribution'

### Part One: Responsibility

#### I

A wide range of different, though connected, ideas is covered by the expressions 'responsibility', 'responsible', and 'responsible for', as these are standardly used in and out of the law. Though connexions exist between these different ideas, they are often very indirect, and it seems appropriate to speak of different *senses* of these expressions. The following simple story of a drunken sea captain who lost his ship at sea can be told in the terminology of responsibility to illustrate, with stylistically horrible clarity, these differences of sense.

'As captain of the ship, X was responsible for the safety of his passengers and crew. But on his last voyage he got drunk every night and was responsible for the loss of the ship with all aboard. It was rumoured that he was insane, but the doctors considered that he was responsible for his actions. Throughout the voyage he behaved quite irresponsibly, and various incidents in his career showed that he was not a responsible person. He always maintained that the exceptional winter storms were responsible for the loss of the ship, but in the legal proceedings brought against him he was found criminally responsible for his negligent conduct, and in separate civil proceedings he was held legally responsible for the loss of life and property. He is still alive and he is morally responsible for the deaths of many women and children.'

This welter of distinguishable senses of the word 'responsibility' and its grammatical cognates can, I think, be profitably reduced by division and classification. I shall distinguish four heads of classification to which I shall assign the following names:

- (a) Role-Responsibility
- (b) Causal-Responsibility
- (c) Liability-Responsibility
- (d) Capacity-Responsibility.

I hope that in drawing these dividing lines, and in the exposition which follows, I have avoided the arbitrary pedantries of classificatory systematics, and that my divisions pick out and clarify the main, though not all, varieties of responsibility to which reference is constantly made, explicitly or implicitly, by moralists, lawyers, historians, and ordinary men. I relegate to the notes<sup>1</sup> discussion of what unifies these varieties and explains the extension of the terminology of responsibility.

## 2. ROLE-RESPONSIBILITY

A sea captain is responsible for the safety of his ship, and that is his responsibility, or one of his responsibilities. A husband is responsible for the maintenance of his wife; parents for the upbringing of their children; a sentry for alerting the guard at the enemy's approach; a clerk for keeping the accounts of his firm. These examples of a person's responsibilities suggest the generalization that, whenever a person occupies a distinctive place or office in a social organization, to which specific duties are attached to provide for the welfare of others or to advance in some specific way the aims or purposes of the organization, he is properly said to be responsible for the performance of these duties, or for doing what is necessary to fulfil them. Such duties are a person's responsibilities. As a guide to this sense of responsibility this generalization is, I think, adequate, but the idea of a distinct role or place or office is, of course, a vague one, and I cannot undertake to make it very precise. Doubts about its extension to marginal cases will always arise. If two friends, out on a mountaineering expedition, agree that the one shall look after the food and the other the maps, then the one is correctly said to be responsible for the food, and the other for the maps, and I would classify this as a case of role-responsibility. Yet such fugitive or temporary assignments with specific duties would not usually be considered

<sup>1</sup> *infra*. pp. 264-5.

by sociologists, who mainly use the word, as an example of a 'role'. So 'role' in my classification is extended to include a task assigned to any person by agreement or otherwise. But it is also important to notice that not all the duties which a man has in virtue of occupying what in a quite strict sense of role is a distinct role, are thought or spoken of as 'responsibilities'. A private soldier has a duty to obey his superior officer and, if commanded by him to form fours or present arms on a given occasion, has a duty to do so. But to form fours or present arms would scarcely be said to be the private's responsibility; nor would he be said to be responsible for doing it. If on the other hand a soldier was ordered to deliver a message to H.Q. or to conduct prisoners to a base camp, he might well be said to be responsible for doing these things, and these things to be his responsibility. I think, though I confess to not being sure, that what distinguishes those duties of a role which are singled out as responsibilities is that they are duties of a relatively complex or extensive kind, defining a 'sphere of responsibility' requiring care and attention over a protracted period of time, while short-lived duties of a very simple kind, to do or not do some specific act on a particular occasion, are not termed responsibilities. Thus a soldier detailed off to keep the camp clean and tidy for the general's visit of inspection has this as his sphere of responsibility and is responsible for it. But if merely told to remove a piece of paper from the approaching general's path, this would be at most his duty.

A 'responsible person', 'behaving responsibly' (not 'irresponsibly'), require for their elucidation a reference to role-responsibility. A responsible person is one who is disposed to take his duties seriously; to think about them, and to make serious efforts to fulfil them. To behave responsibly is to behave as a man would who took his duties in this serious way. Responsibilities in this sense may be either legal or moral, or fall outside this dichotomy. Thus a man may be morally as well as legally responsible for the maintenance of his wife and children, but a host's responsibility for the comfort of his guests, and a referee's responsibility for the control of the

players is neither legal nor moral, unless the word 'moral' is unilluminatingly used simply to exclude legal responsibility.

### 3. CAUSAL RESPONSIBILITY

'The long drought was responsible for the famine in India'. In many contexts, as in this one, it is possible to substitute for the expression 'was responsible for' the words 'caused' or 'produced' or some other causal expression in referring to consequences, results, or outcomes. The converse, however, is not always true. Examples of this causal sense of responsibility are legion. 'His neglect was responsible for her distress.' 'The Prime Minister's speech was responsible for the panic.' 'Disraeli was responsible for the defeat of the Government.' 'The icy condition of the road was responsible for the accident.' The past tense of the verb used in this causal sense of the expression 'responsible for' should be noticed. If it is said of a living person, who has in fact caused some disaster, that he *is* responsible for it, this is not, or not merely, an example of causal responsibility, but of what I term 'liability-responsibility'; it asserts his liability on account of the disaster, even though it is also true that he is responsible in that sense *because* he caused the disaster, and that he caused the disaster may be expressed by saying that he was responsible for it. On the other hand, if it is said of a person no longer living that he was responsible for some disaster, this may be either a simple causal statement or a statement of liability-responsibility, or both.

From the above examples it is clear that in this causal sense not only human beings but also their actions or omissions, and things, conditions, and events, may be said to be responsible for outcomes. It is perhaps true that only where an outcome is thought unfortunate or felicitous is its cause commonly spoken of as responsible for it. But this may not reflect any aspect of the meaning of the expression 'responsible for'; it may only reflect the fact that, except in such cases, it may be pointless and hence rare to pick out the causes of events. It is sometimes suggested that, though we may speak of a human

being's action as responsible for some outcome in a purely causal sense, we do not speak of a person, as distinct from his actions, as responsible for an outcome, unless he is felt to deserve censure or praise. This is, I think, a mistake. History books are full of examples to the contrary. 'Disraeli was responsible for the defeat of the Government' need not carry even an implication that he was deserving of censure or praise; it may be purely a statement concerned with the contribution made by one human being to an outcome of importance, and be entirely neutral as to its moral or other merits. The contrary view depends, I think, on the failure to appreciate sufficiently the ambiguity of statements of the form '*X was responsible for Y*' as distinct from '*X is responsible for Y*' to which I have drawn attention above. The former expression in the case of a person no longer living may be (though it *need not be*) a statement of liability-responsibility.

### 4. LEGAL LIABILITY-RESPONSIBILITY

Though it was noted that role-responsibility might take either legal or moral form, it was not found necessary to treat these separately. But in the case of the present topic of liability-responsibility, separate treatment seems advisable. For responsibility seems to have a wider extension in relation to the law than it does in relation to morals, and it is a question to be considered whether this is due merely to the general differences between law and morality, or to some differences in the sense of responsibility involved.

When legal rules require men to act or abstain from action, one who breaks the law is usually liable, according to other legal rules, to punishment for his misdeeds, or to make compensation to persons injured thereby, and very often he is liable to both punishment and enforced compensation. He is thus liable to be 'made to pay' for what he has done in either or both of the senses which the expression 'He'll pay for it' may bear in ordinary usage. But most legal systems go much further than this. A man may be legally punished on account of what his servant has done, even if he in no way caused or instigated or even knew of the servant's action, or knew of

the likelihood of his servant so acting. Liability in such circumstances is rare in modern systems of criminal law; but it is common in all systems of civil law for men to be made to pay compensation for injuries caused by others, generally their servants or employees. The law of most countries goes further still. A man may be liable to pay compensation for harm suffered by others, though neither he nor his servants have caused it. This is so, for example, in Anglo-American law when the harm is caused by dangerous things which escape from a man's possession, even if their escape is not due to any act or omission of his or his servants, or if harm is caused to a man's employees by defective machinery whose defective condition he could not have discovered.

It will be observed that the facts referred to in the last paragraph are expressed in terms of 'liability' and not 'responsibility'. In the preceding essay in this volume I ventured the general statement that to say that someone is legally responsible for something often means that under legal rules he is liable to be made either to suffer or to pay compensation in certain eventualities. But I now think that this simple account of liability-responsibility is in need of some considerable modification. Undoubtedly, expressions of the form 'he is legally responsible for Y' (where Y is some action or harm) and 'he is legally liable to be punished or to be made to pay compensation for Y' are very closely connected, and sometimes they are used as if they were identical in meaning. Thus, where one legal writer speaks of 'strict responsibility' and 'vicarious responsibility', another speaks of 'strict liability' and 'vicarious liability'; and even in the work of a single writer the expressions 'vicarious responsibility' and 'vicarious liability' are to be found used without any apparent difference in meaning, implication, or emphasis. Hence, in arguing that it was for the law to determine the mental conditions of responsibility, Fitzjames Stephen claimed that this must be so because 'the meaning of responsibility is liability to punishment'.<sup>2</sup>

But though the abstract expressions 'responsibility' and 'liability' are virtually equivalent in many contexts, the

<sup>2</sup> *A History of The Criminal Law*, Vol. II, p. 183.

statement that a man is responsible for his actions, or for some act or some harm, is usually not identical in meaning with the statement that he is liable to be punished or to be made to pay compensation for the act or the harm, but is directed to a narrower and more specific issue. It is in this respect that my previous account of liability-responsibility needs qualification.

The question whether a man is or is not legally liable to be punished for some action that he has done opens up the quite general issue whether all of the various requirements for criminal liability have been satisfied, and so will include the question whether the kind of action done, whatever mental element accompanied it, was ever punishable by law. But the question whether he is or is not legally responsible for some action or some harm is usually not concerned with this general issue, but with the narrower issue whether any of a certain range of conditions (mainly, but not exclusively, psychological) are satisfied, it being assumed that all other conditions are satisfied. Because of this difference in scope between questions of liability to punishment and questions of responsibility, it would be somewhat misleading, though not unintelligible, to say of a man who had refused to rescue a baby drowning in a foot of water, that he was not, according to English law, legally responsible for leaving the baby to drown or for the baby's death, if all that is meant is that he was not liable to punishment because refusing aid to those in danger is not generally a crime in English law. Similarly, a book or article entitled 'Criminal Responsibility' would not be expected to contain the whole of the substantive criminal law determining the conditions of liability, but only to be concerned with a specialized range of topics such as mental abnormality, immaturity, *mens rea*, strict and vicarious liability, proximate cause, or other general forms of connexion between acts and harm sufficient for liability. These are the specialized topics which are, in general, thought and spoken of as 'criteria' of responsibility. They may be divided into three classes: (i) mental or psychological conditions; (ii) causal or other forms of connexion between act and harm; (iii) personal relationships

rendering one man liable to be punished or to pay for the acts of another. Each of these three classes requires some separate discussion.

(i) *Mental or psychological criteria of responsibility.* In the criminal law the most frequent issue raised by questions of responsibility, as distinct from the wider question of liability, is whether or not an accused person satisfied some mental or psychological condition required for liability, or whether liability was strict or absolute, so that the usual mental or psychological conditions were not required. It is, however, important to notice that these psychological conditions are of two sorts, of which the first is far more closely associated with the use of the word responsibility than the second. On the one hand, the law of most countries requires that the person liable to be punished should at the time of his crime have had the capacity to understand what he is required by law to do or not to do, to deliberate and to decide what to do, and to control his conduct in the light of such decisions. Normal adults are generally assumed to have these capacities, but they may be lacking where there is mental disorder or immaturity, and the possession of these normal capacities is very often signified by the expression 'responsible for his actions'. This is the fourth sense of responsibility which I discuss below under the heading of 'Capacity-Responsibility'. On the other hand, except where responsibility is strict, the law may excuse from punishment persons of normal capacity if, on particular occasions where their outward conduct fits the definition of the crime, some element of intention or knowledge, or some other of the familiar constituents of *mens rea*, was absent, so that the particular action done was defective, though the agent had the normal capacity of understanding and control. Continental codes usually make a firm distinction between these two main types of psychological conditions: questions concerning general capacity are described as matters of responsibility or 'imputability', whereas questions concerning the presence or absence of knowledge or intention on particular occasions are not described as matters of 'imputability', but are referred to the topic of 'fault' (*schuld, faute, dolo, &c.*).

English law and English legal writers do not mark quite so firmly this contrast between general capacity and the knowledge or intention accompanying a particular action; for the expression *mens rea* is now often used to cover all the variety of psychological conditions required for liability by the law, so that both the person who is excused from punishment because of lack of intention or some ordinary accident or mistake on a particular occasion and the person held not to be criminally responsible on account of immaturity or insanity are said not to have the requisite *mens rea*. Yet the distinction thus blurred by the extensive use of the expression *mens rea* between a persistent incapacity and a particular defective action is indirectly marked in terms of responsibility in most Anglo-American legal writing, in the following way. When a person is said to be not responsible for a particular act or crime, or when (as in the formulation of the M'Naghten Rules and s. 2 of the Homicide Act, 1957) he is said not to be responsible for his 'acts and omissions in doing' some action on a particular occasion, the reason for saying this is usually some mental abnormality or disorder. I have not succeeded in finding cases where a normal person, merely lacking some ordinary element of knowledge or intention on a particular occasion, is said for that reason not to be responsible for that particular action, even though he is for that reason not liable to punishment. But though there is this tendency in statements of liability-responsibility to confine the use of the expression 'responsible' and 'not responsible' to questions of mental abnormality or general incapacity, yet all the psychological conditions of liability are to be found discussed by legal writers under such headings as 'Criminal Responsibility' or 'Principles of Criminal Responsibility'. Accordingly I classify them here as criteria of responsibility. I do so with a clear conscience, since little is to be gained in clarity by a rigid division which the contemporary use of the expression *mens rea* often ignores.

The situation is, however, complicated by a further feature of English legal and non-legal usage. The phrase 'responsible for his actions' is, as I have observed, frequently used to refer

to the capacity-responsibility of the normal person, and, so used, refers to one of the major criteria of liability-responsibility. It is so used in s. 2 of the Homicide Act 1957, which speaks of a person's mental 'responsibility' for his actions being *impaired*, and in the rubric to the section, which speaks of persons 'suffering from diminished responsibility'. In this sense the expression is the name or description of a psychological condition. But the expression is also used to signify liability-responsibility itself, that is, liability to punishment so far as such liability depends on psychological conditions, and is so used when the law is said to 'relieve insane persons of responsibility for their actions'. It was probably also so used in the form of verdict returned in cases of successful pleas of insanity under English law until this was altered by the Insanity Act 1964: the verdict was 'guilty but insane so as not to be responsible according to law for his actions'.

(ii) *Causal or other forms of connexion with harm.* Questions of legal liability-responsibility are not limited in their scope to psychological conditions of either of the two sorts distinguished above. Such questions are also (though more frequently in the law of tort than in the criminal law) concerned with the issue whether some form of connexion between a person's act and some harmful outcome is sufficient according to law to make him liable; so if a person is accused of murder the question whether he was or was not legally responsible for the death may be intended to raise the issue whether the death was too remote a consequence of his acts for them to count as its cause. If the law, as frequently in tort, is not that the defendant's action should have caused the harm, but that there be some other form of connexion or relationship between the defendant and the harm, e.g. that it should have been caused by some dangerous thing escaping from the defendant's land, this connexion or relationship is a condition of civil responsibility for harm, and, where it holds, the defendant is said to be legally responsible for the harm. No doubt such questions of connexion with harm are also frequently phrased in terms of liability.

(iii) *Relationship with the agent.* Normally in criminal law the

minimum condition required for liability for punishment is that the person to be punished should himself have done what the law forbids, at least so far as outward conduct is concerned; even if liability is 'strict'; it is not enough to render him liable for punishment that someone else should have done it. This is often expressed in the terminology of responsibility (though here, too, 'liability' is frequently used instead of 'responsibility') by saying that, generally, vicarious responsibility is not known to the criminal law. But there are exceptional cases; an innkeeper is liable to punishment if his servants, without his knowledge and against his orders, sell liquor on his premises after hours. In this case he is vicariously responsible for the sale, and of course, in the civil law of tort there are many situations in which a master or employer is liable to pay compensation for the torts of his servant or employee, and is said to be vicariously responsible.

It appears, therefore, that there are diverse types of criteria of legal liability-responsibility: the most prominent consist of certain mental elements, but there are also causal or other connexions between a person and harm, or the presence of some relationship, such as that of master and servant, between different persons. It is natural to ask why these very diverse conditions are singled out as criteria of responsibility, and so are within the scope of questions about responsibility, as distinct from the wider question concerning liability for punishment. I think that the following somewhat Cartesian figure may explain this fact. If we conceive of a person as an embodied mind and will, we may draw a distinction between two questions concerning the conditions of liability and punishment. The first question is what general types of outer conduct (*actus reus*) or what sorts of harm are required for liability? The second question is how closely connected with such conduct or such harm must the embodied mind or will of an individual person be to render him liable to punishment? Or, as some would put it, to what extent must the embodied mind or will be the author of the conduct or the harm in order to render him liable? Is it enough that the person made the appropriate bodily movements? Or is it required that he did

so when possessed of a certain capacity of control and with a certain knowledge or intention? Or that he caused the harm or stood in some other relationship to it, or to the actual doer of the deed? The legal rules, or parts of legal rules, that answer these various questions define the various forms of connexion which are adequate for liability, and these constitute conditions of legal responsibility which form only a part of the total conditions of liability for punishment, which also include the definitions of the *actus reus* of the various crimes.

We may therefore summarize this long discussion of legal liability-responsibility by saying that, though in certain general contexts legal responsibility and legal liability have the same meaning, to say that a man is legally responsible for some act or harm is to state that his connexion with the act or harm is sufficient according to law for liability. Because responsibility and liability are distinguishable in this way, it will make sense to say that because a person is legally responsible for some action he is liable to be punished for it.

##### 5. LEGAL LIABILITY RESPONSIBILITY AND MORAL BLAME

My previous account of legal liability-responsibility, in which I claimed that in one important sense to say that a person is legally responsible meant that he was legally liable for punishment or could be made to pay compensation, has been criticized on two scores. Since these criticisms apply equally to the above amended version of my original account, in which I distinguish the general issue of liability from the narrower issue of responsibility, I shall consider these criticisms here. The first criticism, made by Mr. A. W. B. Simpson,<sup>3</sup> insists on the strong connexion between statements of legal responsibility and moral judgment, and claims that even lawyers tend to confine statements that a person is legally responsible for something to cases where he is considered morally blameworthy,

<sup>3</sup> In a review of 'Changing Conceptions & Responsibility', Chap. VIII, *supra*, in *Crim. L. R.* (1966) 124.

and, where this is not so, tend to use the expression 'liability' rather than 'responsibility'. But, though moral blame and legal responsibility may be connected in some ways, it is surely not in this simple way. Against any such view not only is there the frequent use already mentioned of the expressions 'strict responsibility' and 'vicarious responsibility', which are obviously independent of moral blameworthiness, but there is the more important fact that we can, and frequently do, intelligibly debate the question whether a mentally disordered or very young person who has been held legally responsible for a crime is morally blameworthy. The coincidence of legal responsibility with moral blameworthiness may be a laudable ideal, but it is not a necessary truth nor even an accomplished fact.

The suggestion that the statement that a man is responsible generally means that he is blameworthy and not that he is liable to punishment is said to be supported by the fact that it is possible to cite, without redundancy, the fact that a person is responsible as a ground or reason for saying that he is liable to punishment. But, if the various kinds or senses of responsibility are distinguished, it is plain that there are many explanations of this last mentioned fact, which are quite independent of any essential connexion between legal responsibility and moral blameworthiness. Thus cases where the statement that the man is responsible constitutes a reason for saying that he is liable to punishment may be cases of role-responsibility (the master is legally responsible for the safety of his ship, therefore he is liable to punishment if he loses it) or capacity-responsibility (he was responsible for his actions therefore he is liable to punishment for his crimes); or they may even be statements of liability-responsibility, since such statements refer to part only of the conditions of liability and may therefore be given, without redundancy, as a reason for liability to punishment. In any case this criticism may be turned against the suggestion that responsibility is to be equated with moral blameworthiness; for plainly the statement that someone is responsible may be given as part of the reason for saying that he is morally blameworthy.

### 6. LIABILITY RESPONSIBILITY FOR PARTICULAR ACTIONS

An independent objection is the following, made by Mr. George Pitcher.<sup>4</sup> The wide extension I have claimed for the notion of liability-responsibility permits us to say not only that a man is legally responsible in this sense for the consequences of his action, but also for his action or actions. According to Mr. Pitcher 'this is an improper way of talking', though common amongst philosophers. Mr. Pitcher is concerned primarily with moral, not legal, responsibility, but even in a moral context it is plain that there is a very well established use of the expression 'responsible for his actions' to refer to capacity-responsibility for which Mr. Pitcher makes no allowance. As far as the law is concerned, many examples may be cited from both sides of the Atlantic where a person may be said to be responsible for his actions, or for his act, or for his crime, or for his conduct. Mr. Pitcher gives, as a reason for saying that it is improper to speak of a man being responsible for his own actions, the fact that a man does not produce or cause his own actions. But this argument would prove far too much. It would rule out as improper not only the expression 'responsible for his actions', but also our saying that a man was responsible vicariously or otherwise for harmful outcomes which he had not caused, which is a perfectly well established legal usage.

None the less, there are elements of truth in Mr Pitcher's objection. First, it seems to be the case that even where a man is said to be legally responsible for what he has done, it is rare to find this expressed by a phrase conjoining the verb of action with the expression 'responsible for'. Hence, 'he is legally responsible for killing her' is not usually found, whereas 'he is legally responsible for her death' is common, as are the expressions 'legally responsible for his act (in killing her)'; 'legally responsible for his crime'; or, as in the official formulation of the M'Naghten Rules, 'responsible for his actions or omissions in doing or being a party to the killing'. These

<sup>4</sup> In 'Hart on Action and Responsibility', *The Philosophical Review* (1960), p. 266.

common expressions in which a noun, not a verb, follows the phrase 'responsible for' are grammatically similar to statements of causal responsibility, and the tendency to use the same form no doubt shows how strongly the overtones of causal responsibility influence the terminology ordinarily used to make statements of liability-responsibility. There is, however, also in support of Mr. Pitcher's view, the point already cited that, even in legal writing, where a person is said to be responsible for his act or his conduct, the relevant mental element is usually the question of insanity or immaturity, so that the ground in such cases for the assertion that the person is responsible or is not responsible for his act is the presence or absence of 'responsibility for actions' in the sense of capacity-responsibility, and not merely the presence or absence of knowledge or intention in relation to the particular act.

### 7. MORAL LIABILITY-RESPONSIBILITY

How far can the account given above of legal liability-responsibility be applied *mutatis mutandis* to moral responsibility? The *mutanda* seem to be the following: 'deserving blame' or 'blameworthy' will have to be substituted for 'liable to punishment', and 'morally bound to make amends or pay compensation' for 'liable to be made to pay compensation'. Then the moral counterpart to the account given of legal liability-responsibility would be the following: to say that a person is morally responsible for something he has done or for some harmful outcome of his own or others' conduct, is to say that he is morally blameworthy, or morally obliged to make amends for the harm, so far as this depends on certain conditions: these conditions relate to the character or extent of a man's control over his own conduct, or to the causal or other connexion between his action and harmful occurrences, or to his relationship with the person who actually did the harm.

In general, such an account of the meaning of 'morally responsible' seems correct, and the striking differences between legal and moral responsibility are due to substantive differences between the content of legal and moral rules and

principles rather than to any variation in meaning of responsibility when conjoined with the word 'moral' rather than 'legal'. Thus, both in the legal and the moral case, the criteria of responsibility seem to be restricted to the psychological elements involved in the control of conduct, to causal or other connexions between acts and harm, and to the relationships with the actual doer of misdeeds. The interesting differences between legal and moral responsibility arise from the differences in the particular criteria falling under these general heads. Thus a system of criminal law may make responsibility strict, or even absolute, not even exempting very young children or the grossly insane from punishment; or it may vicariously punish one man for what another has done, even though the former had no control of the latter; or it may punish an individual or make him compensate another for harm which he neither intended nor could have foreseen as likely to arise from his conduct. We may condemn such a legal system which extends strict or vicarious responsibility in these ways as barbarous or unjust, but there are no conceptual barriers to be overcome in speaking of such a system as a legal system, though it is certainly arguable that we should not speak of 'punishment' where liability is vicarious or strict. In the moral case, however, greater conceptual barriers exist: the hypothesis that we might hold individuals morally blameworthy for doing things which they could not have avoided doing, or for things done by others over whom they had no control, conflicts with too many of the central features of the idea of morality to be treated merely as speculation about a rare or inferior kind of moral system. It may be an exaggeration to say that there could not logically be such a morality or that blame administered according to principles of strict or vicarious responsibility, even in a minority of cases, could not logically be moral blame; none the less, admission of such a system as a morality would require a profound modification in our present concept of morality, and there is no similar requirement in the case of law.

Some of the most familiar contexts in which the expression 'responsibility' appears confirm these general parallels be-

tween legal and moral liability-responsibility. Thus in the famous question 'Is moral responsibility compatible with determinism?' the expression 'moral responsibility' is apt just because the bogey raised by determinism specifically relates to the usual criteria of responsibility; for it opens the question whether, if 'determinism' were true, the capacities of human beings to control their conduct would still exist or could be regarded as adequate to justify moral blame.

In less abstract or philosophical contexts, where there is a present question of blaming someone for some particular act, the assertion or denial that a person is morally responsible for his actions is common. But this expression is as ambiguous in the moral as in the legal case: it is most frequently used to refer to what I have termed 'capacity-responsibility', which is the most important criterion of moral liability-responsibility; but in some contexts it may also refer to moral liability-responsibility itself. Perhaps the most frequent use in moral contexts of the expression 'responsible for' is in cases where persons are said to be morally responsible for the outcomes or results of morally wrong conduct, although Mr. Pitcher's claim that men are never said in ordinary usage to be responsible for their actions is, as I have attempted to demonstrate above with counter-examples, an exaggerated claim.

#### 8. CAPACITY-RESPONSIBILITY

In most contexts, as I have already stressed, the expression 'he is responsible for his actions' is used to assert that a person has certain normal capacities. These constitute the most important criteria of moral liability-responsibility, though it is characteristic of most legal systems that they have given only a partial or tardy recognition to all these capacities as general criteria of legal responsibility. The capacities in question are those of understanding, reasoning, and control of conduct: the ability to understand what conduct legal rules or morality require, to deliberate and reach decisions concerning these requirements, and to conform to decisions when made. Because 'responsible for his actions' in this sense refers not to a

legal status but to certain complex psychological characteristics of persons, a person's responsibility for his actions may intelligibly be said to be 'diminished' or 'impaired' as well as altogether absent, and persons may be said to be 'suffering from diminished responsibility' much as a wounded man may be said to be suffering from a diminished capacity to control the movements of his limbs.

No doubt the most frequent occasions for asserting or denying that a person is 'responsible for his actions' are cases where questions of blame or punishment for particular actions are in issue. But, as with other expressions used to denote criteria of responsibility, this one also may be used where no particular question of blame or punishment is in issue, and it is then used simply to describe a person's psychological condition. Hence it may be said purely by way of description of some harmless inmate of a mental institution, even though there is no present question of his misconduct, that he is a person who is not responsible for his actions. No doubt if there were no social practice of blaming and punishing people for their misdeeds, and excusing them from punishment because they lack the normal capacities of understanding and control, we should lack this shorthand description for describing their condition which we now derive from these social practices. In that case we should have to describe the condition of the inmate directly, by saying that he could not understand what people told him to do, or could not reason about it, or come to, or adhere to any decisions about his conduct.

Legal systems left to themselves may be very niggardly in their admission of the relevance of liability to legal punishment of the several capacities, possession of which are necessary to render a man morally responsible for his actions. So much is evident from the history sketched in the preceding chapter of the painfully slow emancipation of English criminal law from the narrow, cognitive criteria of responsibility formulated in the M'Naghten Rules. Though some continental legal systems have been willing to confront squarely the question whether the accused 'lacked the ability to recognize the wrongness of his conduct and to act in accord-

ance with that recognition,'<sup>5</sup> such an issue, if taken seriously, raises formidable difficulties of proof, especially before juries. For this reason I think that, instead of a close determination of such questions of capacity, the apparently coarser-grained technique of exempting persons from liability to punishment if they fall into certain recognized categories of mental disorder is likely to be increasingly used. Such exemption by general category is a technique long known to English law; for in the case of very young children it has made no attempt to determine, as a condition of liability, the question whether on account of their immaturity they could have understood what the law required and could have conformed to its requirements, or whether their responsibility on account of their immaturity was 'substantially impaired', but exempts them from liability for punishment if under a specified age. It seems likely that exemption by medical category rather than by individualized findings of absent or diminished capacity will be found more likely to lead in practice to satisfactory results, in spite of the difficulties pointed out in the last essay in the discussion of s. 60 of the Mental Health Act, 1959.

Though a legal system may fail to incorporate in its rules any psychological criteria of responsibility, and so may apply its sanction to those who are not morally blameworthy, it is none the less dependent for its efficacy on the possession by a sufficient number of those whose conduct it seeks to control of the capacities of understanding and control of conduct which constitute capacity-responsibility. For if a large proportion of those concerned could not understand what the law required them to do or could not form and keep a decision to obey, no legal system could come into existence or continue to exist. The general possession of such capacities is therefore a condition of the *efficacy* of law, even though it is not made a condition of liability to legal sanctions. The same condition of efficacy attaches to all attempts to regulate or control human conduct by forms of *communication*: such as orders, commands, the invocation of moral or other rules or principles, argument, and advice.

<sup>5</sup> German Criminal Code, Art. 51.

'The notion of prevention through the medium of the mind assumes mental ability adequate to restraint'. This was clearly seen by Bentham and by Austin, who perhaps influenced the seventh report of the Criminal Law Commissioners of 1833 containing this sentence. But they overstressed the point; for they wrongly assumed that this condition of efficacy must also be incorporated in legal rules as a condition of liability. This mistaken assumption is to be found not only in the explanation of the doctrine of *mens rea* given in Bentham's and Austin's works, but is explicit in the Commissioners' statement preceding the sentence quoted above that 'the object of penal law being the prevention of wrong, the principle does not extend to mere involuntary acts or even to harmful consequences the result of inevitable accident'. The case of morality is however different in precisely this respect: the possession by those to whom its injunctions are addressed of 'mental ability adequate to restraint' (capacity-responsibility) has there a double status and importance. It is not only a condition of the efficacy of morality; but a system or practice which did not regard the possession of these capacities as a necessary condition of liability, and so treated blame as appropriate even in the case of those who lacked them, would not, as morality is at present understood, be a morality.

## Part Two: Retribution


### I

IN the first of these essays I made some attempt to clarify the idea of retribution by distinguishing what I there called Retribution as a General Justifying Aim from retribution in the distribution of punishment. But it is plain enough that I have not done justice to the variety and complexity of this notion, and some rather unrewarding disputes about the morality of punishment continue to flourish, in part at least, because some of its ambiguities are still undetected. So in the

effort to bring them to light, I shall explore here some further reaches of the subject.

One principal source of trouble is obvious: it is always necessary to bear in mind, and fatally easy to forget, the number of different questions about punishment which theories of punishment ambitiously seek to answer. I thought when I wrote the first essay in this volume that all that was necessary to dispel the mist from the idea of retribution was to identify these different questions. But I now see that it is necessary also to stress the fact that, at least in the broader modern use of the term 'retribution', there are many different answers to each of these questions, which may be styled 'retributive' and have often earned the title of 'retributive' for the theory of which they form part, even if the theory also contains reformative or deterrent elements normally contrasted with retribution. It is, of course, also true that a stricter or narrower usage of the term still survives, and some writers only allow the title of 'retributive' to theories which give a retributive answer to all the main questions to which a theory of punishment is addressed.

### 2. A MODEL OF RETRIBUTIVE THEORY

It is I think helpful to start with a simple, indeed a crude, model of a retributive theory which would satisfy this stricter usage. Such a theory will assert three things: first, that a person may be punished if, and only if, he has voluntarily done something morally wrong; secondly, that his punishment must in some way match, or be the equivalent of, the wickedness of his offence; and thirdly, that the justification for punishing men under such conditions is that the return of suffering for moral evil voluntarily done, is itself just or morally good. So the theory gives a retributive answer to the three questions, 'What sort of conduct may be punished?', 'How severely?', and 'What is the justification for the punishment?' 

Few people would now advocate so thoroughgoing a variety of retribution, or think it reasonable for a legal

system to conform to it, especially if we add to it (as Kant did), to avoid the serpent-windings of Utilitarianism, a further feature: that the satisfaction of the conditions required by the theory does not merely make the punishment of the offender permissible, but makes it obligatory, even on the eve of a dissolution of a society against whose laws the person to be punished has offended. But though this model of retributive theory may well be a parody of modern retributivism, it is, I think, illuminating to classify theories which are now termed retributive (either by their advocates or critics) by reference to the ways in which they vary from this severe model.

The range of such theories is very great. I have been astonished to find that Lady Wootton's theories, which I examined in the last two of these essays, are spoken of by some as retributive. This is surprising because Lady Wootton not only criticizes the doctrine of *mens rea* and hopes that it will wither away, but looks forward to the day when the sentence of a criminal court will no longer be thought or spoken of as punishment. ~~To many~~ such a theory, with its great emphasis on the forward-looking aims of penal treatment, and its abandonment of any concern with the mind or will of the offender as it was at the time of the offence, as a condition of liability to conviction, seems the very antithesis of retribution. But is is not quite at the extreme point; for there are those who would wish to eliminate one element that distinguishes the official treatment of crime advocated by Lady Wootton from pure social hygiene, and constitutes a last tenuous connexion between her theory and what would still be called theories of punishment. This element is the requirement that for conviction and subsequent compulsory treatment there must be an offender who has, at least so far as outward conduct is concerned, committed an offence. From the point of view of pure social hygiene it is absurd to wait until crimes have been committed: where there is reliable evidence of anti-social or criminal tendencies, this is enough to justify compulsory measures. Just as Lady Wootton says (wrongly in my view) that the doctrine of *mens rea* has no place within a system of criminal law which aims at the prevention of crime, and

attributes loyalty to that doctrine to lingering traces of retributivism, so those who would go further than she does regard as retribution her insistence on a criminal act (i.e. the outward elements of crime) as a necessary condition of conviction. *A fortiori*, the middle way, which I myself have attempted to tread, between a purely forward-looking scheme of social hygiene and theories which treat retribution as a general justifying aim, has itself been regarded as a form of retributive theory. This is because this middle way not only insists on the restriction of punishment to an offender, but also on the general retention of the doctrine of *mens rea*, and allows some place, though a subordinate one, to ideas of equality and proportion in the gradation of the severity of punishment.

It is, however, clear that current controversy about the role and respectability of 'retributive', as opposed to 'utilitarian', theories is not concerned with these weakened versions of the retribution, but with theories which, while allowing certain modifications or modernization of some features of the model, preserve in some form, as being essential to retribution, the principle that the voluntary doing of what is morally wrong itself calls for the punishment of the offender, and the moral gravity of the offence is in itself a proper determinant of the severity of punishment. I shall therefore consider three main modifications of the model, distinguishing the various forms in which it preserves these essential retributive features.

### 3. MODIFICATION OF THE MODEL

*I. Punishment proportionate to the gravity of the offence.* To many the most perplexing feature of the model is its requirement that the punishment should in some way 'match' the crime. The simple equivalencies of an eye for an eye or a death for a death seem either repugnant or inapplicable to most offences, and even if a refined version of equivalence in demanding a degree of suffering equivalent to the degree of the offender's wickedness is intelligible, there seems to be no way of determining these degrees. Hence, instead of equivalence between particular

punishments and particular crimes, modern retributive theory is concerned with proportionality. But this idea, as Bentham's elaborate treatment of it shows, is susceptible of both a Utilitarian and a Retributive interpretation. In both interpretations it is concerned with the relationships within a system of punishment between penalties for different crimes, and not with the relationship between particular crimes and particular offences. On the retributive interpretation, the relative gravity of punishments is to reflect moral gravity of offences; murder is to be punished more severely than theft; intentional killing more severely than unintentionally causing death through carelessness. It is to such ideas of proportionality that critics of the sentences passed in the Great Train Robbery case,<sup>6</sup> or the decision of the House of Lords in Smith's case, made their appeal. Of course, the conception of the relative moral gravity of different offences is far from simple, and some of its difficulties and the compromises involved in the rough recognition of it as a determinant of the severity of punishment in English courts were explored in the fifth and seventh of these essays. One ambiguity of the idea of the 'gravity' of the offence as a measure of the severity of punishment deserves special notice here since it gives a further inflexion to the idea of retribution. This is the deeply entrenched notion that the measure should not be, or not only be, the subjective wickedness of the offender but the amount of harm done. It is this form of retributive theory that seems to be reflected in the common practice of punishing attempts less severely than the completed crime, or punishing criminal negligence which has a fatal outcome more severely than the same negligence which does not cause death.

*II. Retribution as a justifying aim.* The retributive principle embodied in the model, that wicked conduct injuring others itself calls for punishment, and calls for it even if its infliction is not necessary in order to prevent repetition of that conduct by the offender or by others, has been attacked on many grounds. To some critics it appears to be a mysterious piece of moral alchemy in which the combination of the two evils of

<sup>6</sup> *R. v. Wilson and Others* (1964) 48 Cr. App. Rep. 329.

moral wickedness and suffering are transmuted into good; to others the theory seems to be the abandonment of any serious attempt to provide a moral justification for punishment. Other critics still regard it as a primitive confusion of the principles of punishment with those that should govern the different matter of compensation to be made to the victim of wrong-doing. In its most interesting form modern retributive theory has shifted the emphasis, from the alleged justice or intrinsic goodness of the return of suffering for moral evil done, to the value of the authoritative expression, in the form of punishment, of moral condemnation for the moral wickedness involved in the offence. This theory, expounded in its most convincing form by Bishop Butler in his *Sermon on Resentment*, is termed by some of its modern advocates a theory of reprobation rather than retribution. But it shares with other modern retributive theories two important points of contrast with Utilitarian theories; for like the model it insists that the conduct to be punished must be a species of voluntary moral wrongdoing, and the severity of punishment must be proportionate to the wickedness of the offence. But this form of theory has also at least two different forms: in one of them the public expression of condemnation of the offender by punishment of his offence may be conceived as something valuable in itself; in the other it is valuable only because it tends to certain valuable results, such as the voluntary reform of the offender, his recognition of his moral error, or the maintenance, reinforcement or 'vindication' of the morality of the society against which the person punished has offended. Plainly the latter version of reprobation trembles on the margin of a Utilitarian theory, in which the good to be achieved through punishment is less narrowly conceived than in Bentham's or in other orthodox forms of Utilitarianism.

*III. Combination and compromise with Utilitarian theory.* Finally it remains to be observed that most contemporary forms of retributive theory recognize that any theory of punishment purporting to be relevant to a modern system of criminal law must allot an important place to the Utilitarian conception

that the institution of criminal punishment is to be justified as a method of preventing harmful crime, even if the mechanism of prevention is fear rather than the reinforcement of moral inhibition. This recognition sometimes takes the form of a rough division of the field as follows. It is insisted that in the considerable and crucially important area of conduct where the prohibitions or requirements of criminal law overlap with morality so that the crime is also a moral offence, it should be a primary concern of the law that punishment should be proportionate to the gravity of the crime, or an adequate expression of moral condemnation for it. On the other hand, it is conceded that there is a vast area of the criminal law where what is forbidden or enjoined by the law is so remote from the familiar requirements of morality that the very word 'crime' seems too emphatic a description of law-breaking. Here the law is what it is, often because of variable and disputable conceptions of social and economic policy; and, in this area, many modern retributivists would concede that punishment was to be justified and measured mainly by Utilitarian considerations. Though most would insist that, even here, the doctrine of *mens rea* should be retained, others might here concede a place for strict liability. This division of the field between retributive and Utilitarian theory is a modern counterpart of the ancient distinctions between *mala in se*, or, as Lord Devlin has put it, 'moral offences with legal definitions attached', and *mala prohibita* which may be regarded as 'quasi crimes'.

In addition to this division of the field other forms of partial accommodation to Utilitarian theory are to be found. The fiercest form of our model of retributive theory was mandatory in the sense that it not merely permitted but required a punishment appropriate to the wickedness of the offence. Some modern retributivists would dissent from this and for them the satisfaction of the conditions constitutes no more than a licence to punish the offender, as one who is morally blameworthy and so punishment-worthy; but whether in this case, he should actually be punished is a question to be settled by reference to the effects which punishment is likely to

have on the offender or on the fabric of law and morality in general.

Similar relaxations of the strict requirements of the model may be made in relation to the questions of the amount or severity of punishment, and in the interpretation given to the notion of a proportionate punishment. The sterner forms of retributive theory would regard the moral evil of the offence as justifying a more severe sentence than would be required on deterrent or other Utilitarian grounds: indeed the point is often made that no greater punishment may be needed to deter a murderer than a robber, yet most systems of punishment show their allegiance to retributive ideas by punishing the murderer more severely. But, as was evident in the debates on capital punishment in the House of Lords, many self-styled retributivists treat appropriateness to the crime as setting a *maximum* within which penalties, judged most likely to prevent the repetition of the crime by the offender or others, are to be chosen.

The above does not by any means complete the tale of the variants to be found in current literature or debate on the retributive idea. But it is perhaps enough to serve as a *vade mecum* for the exploration of this now very extensive territory.