



FREE-WILL, RESPONSIBILITY

AND PUNISHMENT

by

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ABSTRACT

One of the purposes of this thesis is to try to examine the concepts of mental sickness and responsibility (and some other related concepts) and see whether or not they can be defended against some of the criticisms that have been made against them. It has, for instance, been argued that the concept of mental sickness is culture relative in a bad sense. If this criticism is valid, then we cannot be justified in saying that mental sickness has impaired a person's responsibility.

Another criticism that has been made is that arguments that use mental sickness to explain and excuse criminal behaviour are circular.

Most of the criticisms that I have discussed are intended to be general, i.e. they are criticisms of the concept of mental disorder in general, not just of a particular kind of mental disorder. Thus though Lady Wootton says that arguments that try to explain the psychopath's anti-social behaviour are circular, she thinks (at least in her more radical moments) that the circular process prevails in other mental disorders as well (e.g. with mental defectives. See Social Science and Social Pathology, page 256 ff.).

Similarly, the argument that different standards of mental defect prevail in different cultures, and that therefore there is something wrong with the concept of mental defect, is intended to be (at least in her more radical moments) a general one, i.e. it is

intended to apply, mutatis mutandis, against other kinds of mental disorders also.

Some of the answers that I have given to the criticisms would also apply, mutatis mutandis, against these criticisms in their general form. For instance, I have tried to show that Lady Wootton is wrong in saying that the process "by which mental abnormality is inferred from anti-social behaviour, while anti-social behaviour is explained by mental abnormality", is a circular one. She is wrong not only when she claims that arguments that try to excuse the psychopath are circular, but also when she claims that arguments that try to excuse other mentally disordered criminals are circular.

I have also tried to defend the concept of mental sickness against the objection that it is value-loaded and therefore cannot be used in explaining and excusing anti-social conduct. I have tried to argue that mental disorder does not necessarily involve the loss of all capacities but only of some, and that we need norms to tell us which capacities are relevant from the point of view of showing a person to be sick. (But though the concept is value-loaded, it is wrong to infer from this that it cannot be used to explain and excuse behaviour. Given certain norms, it becomes an objective matter of fact that some people are sick, while others are not). And I have argued that the difference between the concept of mental sickness and the concept of physical sickness should not be exaggerated.

I have tried to show that once we realise that mental disorder

need not involve the loss of all capacities, but only of some, this can help to solve some related problems, e.g. How can someone like Hitler be both morally blameworthy and be mentally sick? How can a man be both mad and a genius? How is partial insanity possible? The M'Naghten Rules have been criticized for assuming that a person can be deluded in some important areas, but quite sane in other areas. "The Rules mean that one has to subject the warped reasoning of the mentally afflicted to the same critical examination as if they were sane." The mind is, so the argument runs, an integrated whole and so partial insanity is not possible. Against this view, I have tried to argue that partial insanity has not been shown to be impossible. In extreme cases of mental disorder, it is true that the agent has ceased to be a moral agent, and so is not responsible for any of his actions, but in less extreme cases it is not at all obvious why he should not be held responsible for some of his actions.

In discussing the problem whether the concept of mental disorder is value-loaded, I have argued that any system of dealing with the fate of criminals must ultimately involve a value-judgment. Lady Wootton claims that her pragmatic system of dealing with criminals is a scientific system where 'oughts' have been done away with. I have tried to show that Lady Wootton's system also presupposes some such value-judgment as this: Anti-social behaviour ought to be prevented. I have also discussed whether Lady Wootton's

pragmatic system is a more scientific system in the sense of being a more workable system. To discuss this, it is essential to have some idea of what her system is; unfortunately, she is a little confused on this, and so I have felt it essential to construct her system a little. Once we build in all the moral and other qualifications into her system, it appears that her system, even if it is more workable than our system, is not so much more workable than may appear at first sight. Indeed, her system, though it is different in important respects from the present system, is not so different as may first appear.

The concept of mental disorder is value-loaded, and with what norms we should load the concept becomes an important problem. In trying to answer this problem, it is helpful to discuss another related problem, viz.: what is the rationale of excusing people from punishment and blame? That is one of the reasons why in the latter half of this thesis I have discussed the problem about the rationale of excuses.

I have also tried to discuss the role played by concepts like 'can' and I have tried to show that such terms play an important role in our system of excuses. I have criticized the theory according to which terms like 'voluntary', 'can', 'mens rea' are best understood as excluding the presence of the various excuses. I have discussed and criticized the theory according to which we do not excuse a person because he could not have acted otherwise, rather we (according to that theory) first decide whether or not to

excuse the person and then say, accordingly, he could or he could not have acted otherwise. I have tried to show that this view is mistaken.

I have emphasized the extent and the importance of the role of 'can' and I have suggested some principles of justice that may help to account for the important role of 'can' in our system of excuses.

'Can' plays an important role in our system of excuses, and it is therefore worth trying to identify the sense of 'can' that is relevant for excuses, and it is worth discussing how it is related to the other 'cans'. I have felt it worthwhile to say something about the different senses of 'can', and about some of the views of philosophers such as Austin and Nowell-Smith, in the hope that this may throw some light on the 'can' that is relevant for excuses. I have also discussed to some extent other related concepts such as 'voluntary', 'mens rea', and 'difficult'.

Though in this thesis I have dealt with some social, moral, psychological and legal issues, the approach that I have adopted has been primarily theoretical and philosophical.

I have used some abbreviations in my discussion of 'can' in Chapters VII and VIII, and the following is a brief guide to the places where some of these abbreviations are introduced. This may be of some help in the case of those abbreviations that often recur in Chapters VII and VIII

	Pages
Can _X	254-255
Can _Y	254-255
Can _Z	281
Can _G	306-307 & 370-371
Can _A	337
Can _B	337
Can _C	337
Can _E	356
Can _F	356
Condition A	284
Difficult _A	336
Difficult _B	336
Difficult _C	336
Principle (2)	219-220
Principle (2a)	320-321
Principle O	307 and 370-371
Principle Oa	332
Principle L	307-308
Voluntary _M	274-275

PREFACE

Large parts of Chapters I, II, III and V have appeared in Philosophy (1963), Philosophical Quarterly (1965), Philosophy (1964) and Philosophy (1967) respectively. Appendix A, along with large parts of Chapter III has appeared in Aristotle's Ethics: Issues and Interpretations edited by J. Walsh and H. Shapiro (London 1967).

An earlier version of this thesis was submitted in Trinity Term 1966, and I was given permission to revise and resubmit the thesis. Some of the ideas which appeared in my paper "Responsibility" (Aristotelean Society Supplementary Volume XL) and formed Chapter VI of the earlier version of the thesis have now been revised and further developed in Chapters VI, VII and VIII of the present version. Chapter VII of the earlier version is now to be found, in a revised form, as Appendix C. Appendix B in the present version is new.

A few minor changes have been made before p.171 (e.g. pp. 83-83a, 129-129a) but the major revisions and additions are to be found from page 171 onwards.

I should like to thank all those who have helped me during my research. In particular, and most of all, I should like to thank Professor H.L.A. Hart.

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CHAPTER I

THE RESPONSIBILITY OF MENTAL DEFECTIVES

It is generally agreed that at least those who suffer from severe mental subnormality, like idiots, are not responsible for the anti-social actions that they may commit. Even Lady Wootton agrees that in the case of idiots and imbeciles 'the defect is so great that no dispute is likely to arise, either as to the reality of the handicap or as to its effect in impairing capacity to conform to expected standards.'¹ This passage, incidentally, contradicts some of her other views, e.g. the view that we can never make judgments about people's capacity.

It is then chiefly in the milder cases that controversy arises. Here, according to Lady Wootton, mental defectiveness tends to be diagnosed only by the defective's inability to accommodate himself to the demands of the society in which he finds himself.

These controversies are well worth examining for, as a matter of fact, the class of alleged mild defectives is large. Indeed Tizard claims that the number of mildly subnormal is much greater than the number of moderate and severe cases.²

¹ Social Science and Social Pathology, George Allen & Unwin Ltd., (1959) p.254.

² Tizard: 'The Prevalence of Mental Subnormality', N.H.O. Bulletin, 1953.

Curiously, however, when we read some of the argument used by, say, Lady Wootton, against the system of determining the responsibility of the mildly defective, it sometimes seems that the arguments are directed also against the possibility of determining responsibility in the other cases of mental defectives, e.g. idiots and imbeciles.¹

Although it is not at all clear what some of these arguments are intended, by those who advance them, to show, let us try and see what, if anything, they can succeed in proving.

¹ Incidentally, it is worth distinguishing three different arguments.

1. If the responsibility of the mild cases of mental defect is very difficult or impossible to determine, this is one reason for by-passing the problem of responsibility even in the cases of those mental defectives where we could make judgments about their responsibility.

2. That because it is impossible or very difficult to determine the responsibility of the mild cases, therefore is very difficult or impossible to determine the responsibility of the more severe cases, e.g. of idiots.

It is not quite clear which, if any, of the two above arguments Lady Wootton is using. There is nothing to be said for argument No.2. Argument No.1, however, is a better one. Its force will, other things being equal, be greater the greater the proportion of mild cases to the total cases of mental defectives. But it cannot be a decisive argument in favour of Lady Wootton's system, if only because no one has yet constructed her system fully enough.

There is also a third argument that she might use. According to this, some of the arguments that are used against the possibility of determining responsibility in mild cases can also be used against the possibility of determining responsibility in the more severe cases.

Lady Wootton writes:

'The use of an intellectual test to establish mental deficiency has, however, incurred even more criticism than have purely intellectualist conceptions of insanity with the result that more and more emphasis is now laid on the social element in deficiency, and that argument on the subject tends to become more and more frankly circular. Mental defectiveness tends increasingly to be diagnosed only by the defective's inability to accommodate himself to the demands of the society in which he finds himself. Indeed Professor Penrose has remarked that even in the various intelligence or educational tests now employed, it is just the social element which is chiefly valuable. "The practical value of the scholastic type of test is mainly due to its use in estimating just those qualities which make adjustment, in a highly industrialized civilization easy or difficult. Tests dependent upon special sense discrimination are not used for the diagnosis of defect, though it is possible to imagine a civilization in which the recognition of tunes or colours was as important as, say, arithmetic is to us. Some brilliant scholars are less capable of recognising common tunes than are most imbeciles."

¹Social Science and Social Pathology, pp. 256-57.

Is it then possible to imagine a civilisation in which recognition of musical tunes is as important, as, say, arithmetic is to us? It is not clear what we are asked to imagine. Is it that this civilisation is much more musical than ours, with people singing, humming, valuing musical abilities very highly, etc.? If this is what we are asked to imagine, it is true that we can imagine it. In it those who lack musical ability might even find this an important obstacle in their way of answering some social demands, e.g. if Smith in such a society lacks musical ability, he may not be able to earn a living and therefore may not be able to conform, say, to the following social demand: Look after yourself.

But there are other social demands, which it seems, even in such a musical society, such an unmusical man will probably be in no worse position to comply with. One such social demand is: Do not commit murder. Though, perhaps, even here the lack of musical ability might reduce his capacity to conform even to this demand about murder. For instance, a man because he is so unmusical might find it very difficult to make a living, as a result of which he may become frustrated, jealous of others, etc., and this may diminish his capacity to conform to the law about not committing murder.

At any rate, it does seem true that there are some social rules, e.g. Do not commit murder, the capacity to comply with which will not be directly affected by lack of musical abilities (though the capacity may be indirectly affected, as we just saw, by causing frustration etc.). Compare this with intellectual defect which can more directly reduce the capacity to conform to this particular social rule, for if a man is not intelligent, he does not know the nature of what he is doing, and so cannot be responsible. Intelligence may not be a sufficient condition of responsibility, but it is a necessary condition. (A certain minimum degree of intelligence is a necessary condition of being a moral agent. And if one is not a moral agent one is not responsible for any of one's actions. Thus even if some imbeciles are very good at music, yet if in the musical society they just refuse to exercise their musical talents, we will not be justified in holding them responsible if they are not moral agents.¹) Now as a matter of fact, whether in our society or in the more musical society envisaged, inability to understand arithmetic is better evidence of an intellectual defect than, say, the inability to recognise musical tunes is. Hence inability to understand arithmetic, even in the musical society, will

¹See Chapter 4.

be much better evidence of diminished capacity to refrain from murder than inability to recognise musical tunes will be.

Of course, everything, in a sense, is conceivable. Hence a society is even conceivable where inability to understand music affects the capacity to refrain from murder more directly than severe intellectual defect would. Although it would be a very odd state of affairs, it can be conceived.

Here, however, we shall have to make a more radical objection to Lady Wootton's and Penrose's arguments. The objection is this: A does not become bad evidence for B merely because a state of affairs is conceivable where A would be bad evidence for B.

This is a simple point. You cannot disprove a scientific theory merely by pointing out that the contrary is conceivable. Indeed if a theory is scientific its contrary must be conceivable.

In the same way the evidence that we use to establish lack of capacity to conform to a social demand does not become any worse evidence merely because conditions are conceivable where this same evidence would be bad evidence for lack of the same capacity.

Indeed, even if a society exists where A is bad

evidence for B, it does not follow that A would be bad evidence for B in our society. Even if a society were to exist where inability to understand music would affect the capacity to refrain from murder more directly than severe intellectual defect would, still it would not follow that in our society inability to understand music would affect the capacity to refrain from murder more directly than severe intellectual defect would.

Thus the Lady Wootton-Penrose argument about imagining the contrary state of affairs does not establish anything; it does not show that the evidence we use is subjective in any bad sense, nor, of course, does it show that explanations of lack of capacity are circular.

The following seems to me to be one of the chains of reasoning that has led Lady Wootton, Penrose and others to believe that the concept of mental deficiency is subjective and culture-relative in a bad sense. The present system does not consider all defects equally. Certain types of defects, e.g. ignorance of arithmetic, are taken into account other defects, e.g. the inability to recognise musical tunes, are not. On what basis then do we take only certain defects, not others into account? We in the present system select those defects that make adjustment to a highly industrialised and relatively unaesthetic society more difficult. Thus it

is significant that knowledge of arithmetic is more useful in such a society than the ability to recognise musical tunes.

This chain of reasoning, it is worth observing, has been used (though perhaps not explicitly) not only in the case of mental defectives but in the case of mental sickness in general.¹

What then are we to make of this reasoning?

Now it is true that we do not treat all defects on a par. Some defects, e.g. inability to understand arithmetic are regarded as much better evidence of lack of responsibility than some other defects, e.g. musical defects. It may also

¹Kingsley Davies in his article: 'Mental Hygiene and the Class Structure', Psychiatry, 1938, an article very highly thought of by Lady Wootton, uses a similar argument to the one Lady Wootton and Penrose used. Davies says 'Be the causes of mental disorder what they may, it is easy to show that the criteria are always social. Sanity lies in the observance of the normative system of the group ... Thus we all forget, but a man who forgets the wrong things, such as his own home, his own city, or the excretory separation of the sexes, is definitely crazy.' Here again the following seems to me to be the chain of reasoning that has led Davies to regard the criteria as culture-relative: Take the case of forgetting. We only regard the forgetting of some things, e.g. forgetting our name, as signs of sickness; there are other things which we can forget without being regarded as sick. What then is the basis of this distinction? Is it not just our normative system?

I have argued later in this thesis that the concept of mental disorder is value-loaded. But this does not mean that we should load it with the norms that happen to be fashionable in our society. I do not deny that some psychiatrists do succumb to the danger of loading mental disorder with the norm that happen to be fashionable. But we can try to avoid succumbing to such a danger.

be true that many of the defects that are taken as evidence of lack of Responsibility are also the defects that would make adjustment to our own society difficult. Thus a man who cannot add 2 and 2 is much less likely to be able to adjust to our culture than a man who cannot recognise musical tunes. It may also be true that: from the fact that a man cannot adjust to our culture, it does not follow that his capacity to refrain from some social demands, e.g. Do not commit murder, is diminished (though even here, as we saw earlier, the capacity may be diminished by causing frustration, jealousy, etc.).

Yet it does not necessarily follow from all this (and it is this point that shows that the chain of reasoning used by Lady Wootton and others is invalid) that the reason why we regard some defects as evidence of lack of Responsibility is that these defects make adjustment to our own society more difficult. Indeed, we saw earlier, that our reason (in the sense of justification) for regarding arithmetical defects as better evidence of lack of Responsibility was something quite different.

If we claim that A is evidence for B, and also agree that A is evidence for C, it does not follow that the reason (in the sense of justification) for our regarding A as evidence for B is that A is evidence for C.

In talking of a capacity it is not always safe to talk of a capacity to conform to society's demands in general. True, often it may be safe: e.g. idiots cannot conform to most, if not all, social demands. But in less severe cases whether a man can conform might vary with the demand which he is asked to conform to. For some people may have the capacity to conform to some social demands but not to others. Now in deciding issues of responsibility, when we ask whether a man is a mental defective, we are or ought to be really asking whether his mental development is retarded so much that he does not have the capacity to conform to society's demands. But the capacity to conform to society's demands may vary with different social demands: therefore when we decide whether a man is a mental defective (in order to judge his responsibility) the criteria that we ought to use for deciding whether he is a mental defective may vary with the social demand in question. Moreover, even when the social demand in question remains the same, the number of defectives may vary if other relevant conditions change. Perhaps I could try and illustrate this point by considering one of Lady Wootton's arguments that tries to show the concept of mental defect to be culture-relative and subjectiv

'In a less sophisticated age we should have said that one of the merits of full employment was that it made it easier for mental defectives to obtain employment. Now apparently we have to say that it actually reduces the number of such defectives.'¹

She then contrasts mental defect with physical disability:

'Full employment certainly makes it easier for legless persons to get jobs, but no one in his senses would take this to mean that under full employment there are fewer persons without legs. Similarly, full employment makes it easier for ex-prisoners to get jobs; but that is not to say full employment diminishes the number of ex-prisoners... Such statements would be manifestly absurd, but their absurdity well illustrates the difference between a disability which is established by a criterion that is, and one that is established by a criterion that is not independent of current standards of social competence.'

Now there might, on the face of it, seem something absurd in saying that full employment reduces the number of mental defectives. We might feel that as a result of this there is something subjective in the concept of 'mental defectives.' But are we justified in this feeling? I do

¹ *ibn. cit.* page 258.

not think so. Whether a man has a mental defect will depend upon: (1) The criteria that we use to establish mental defect; (2) whether the man satisfies these criteria, (this second point is overlooked by subjectivists like Lady Wootton). It is exactly the same with physical defect. Whether a man is physically defective will depend upon: (1) The criteria we use for physical defect and; (2) whether a man satisfies these criteria.

Now the criteria we use for a concept may have to vary with our purposes and with changing conditions. This applies equally to the concept of mental and physical defect.

In fact, there is nothing absurd in this full employment point. It is not just that whether a man is a mental defective might vary with different social demands. Even given the social demand, whether a man is a mental defective might vary with changing conditions. To say that a man is a mental defective is to say that his mental development is retarded so much that he does not have the capacity to conform to the given social demand. If our given social demand is 'Look after yourself' then a rise in the level of employment will make this same social demand less exacting for those individuals whose opportunities for conforming to this social demand have improved as a result of a change

in the level of employment. Since it has become less exacting, the tests that we ought to use for judging their mental defect (i.e. for judging whether their mental development is retarded so much that they did not have the capacity to conform to the given social demand) might have to be lowered, e.g. the arithmetical tests that we ought to use might be less severe than before. Therefore some individuals who could not pass the tests before, might be able to pass the less severe tests. They will now have the capacity to conform to the given social demand. There is nothing subjective in all this. It is just what we would expect when the social demand becomes less exacting for some individuals.¹

1.

'He could have smashed the lob', sometimes means that he had the ability to smash it, that he is good at smashing it; let us call this sense of 'can' - can_K. 'He could have smashed the lob' sometimes means that he had the opportunity for smashing it; let us call this sense of can - can_L. 'He could have smashed the lob' sometimes means that he had both the ability and the opportunity for smashing the lob; let us call this sense of can - can_M (Austin calls this sense of 'can', the all-in sense or 'fully can.' See Freedom and Responsibility, ed: H. Morris: Stanford 1961. p. 498).

Now whether a man could_M have smashed the lob will depend upon whether he had the requisite ability (He could_K have smashed it) and the opportunity (He could_L have smashed it). Now the worse the opportunity (e.g. if the lob is a very difficult one to smash or if the light is very poor) then the greater the ability that may be required for it to be true to say that 'He could_M have smashed the lob'. There is nothing subjective in this.

Therefore, whether some men have the capacity to conform to certain social demands might well vary with the state of employment. Of course their capacity to conform to certain other social demands may not depend upon the state of employment. For instance, a man's capacity to conform to the social demand 'Do not commit murder' may not vary with whether he can get employment. Although in some cases it may so vary, e.g. lack of employment may cause frustration, jealousy, etc., thus impairing his capacity to answer this social demand, yet there are cases where a man might commit a murder for reasons that have nothing to do with his being unemployed.

Therefore in deciding issues of mental defect with reference to the problem of responsibility, it is important to remember that whether one has the capacity to conform to social demands might vary with different social demands; and even given the social demand the capacity might vary with changes in relevant conditions. And therefore the tests that we ought to use to establish whether a man has the capacity might also vary with such changes. This seems to me to have important practical implications, especially in the border line cases. Often, as we have seen, a thing (e.g. the state of employment) might affect the capacity to

conform to some social demands, yet it may not affect the capacity to conform to some other social demands. In practice, however, the tests to establish mental defect, though they do vary, do not always vary as they ought to. For instance, there is the danger that the administrators may classify a person as ^a_x 'mental defective' now that employment has fallen and this may be used as evidence of lack of responsibility on a murder charge. Now this sort of mistake must be guarded against, but Lady Wootton's suggestion of getting rid of all talk of responsibility is not the only way of avoiding this mistake. For we can avoid it by not allowing the criteria of mental defectives to be influenced by irrelevant factors, remembering that what factors are relevant may vary with different social demands.

The fact that the criteria of mental deficiency ought to vary does not justify our saying that the concept is subjective in any bad sense. For whatever at any point happen to be the criteria for mental deficiency, we can ask which individuals satisfy these criteria and which do not. And in saying that individuals A, B and C satisfy these criteria and others U, V and Y do not, we can be making an objective statement of fact. From the fact that these tests

often vary with our purposes and with changing conditions, it does not follow that the argument from a person's having failed the test to his incapacity is a circular or a bad one.

Lady Wootton exaggerates the difference between physical disabilities and mental disabilities. It is perhaps true that the concept of physical defect is not altered by the state of employment. But it is affected by other factors.

For whether a man has a physical disability will depend, we said earlier, upon, (1) The criteria we use for physical disabilities, and (2) whether he satisfies those criteria.

Now the criteria of physical disability may well vary with our purposes and with changing conditions.

A man may be physically fit for the Civil Service but physically unfit for the Army. And even within the Civil Service the standards used may vary with changing conditions. For instance, if certain jungles have to be developed with the help of civil servants, and if the Government feels that such work requires greater physical abilities, it may raise the criteria for physical fitness, thus, in a sense, increasing the number of physically unfit people.

Hence, in a sense the number of physically unfit people will vary with the purposes, conditions, etc. But there is nothing obviously circular in saying 'The Civil Service found

John Smith unsuitable for the job because he was physically unfit.'

And I do not see anything more circular in saying 'He is not responsible for not conforming to this social demand because he is a mental defective.'

It is true that whether he is a mental defective will vary with our purposes, conditions, etc., but the same is true, as we have seen, of physical fitness.

As long as we know what criteria of mental defect are being used, we can say something informative by saying 'He is not responsible for conforming to this social demand because he is a mental defective'. The same is true of physical defect.

Of course if we do not know what criteria of mental defect are being used, we learn much less by being told 'He is not responsible for conforming to this social demand because he is mentally defective.'

But the same is true of physical fitness. For if we do not know what criteria of physical fitness are being used we will learn much less by being told 'He could not be expected to do the job because he was physically unfit'.

There are concepts whose criteria for application vary relatively little, or not at all, because the corresponding

purposes and conditions do not vary much, if at all. 'red' is perhaps one such concept. The criteria for the application of 'legless persons' also perhaps vary less than do the criteria for the application of 'mental defect' or 'physical defect' - although even with 'legless persons' the criteria could vary, e.g. for some purposes we may include people with wooden legs among people with legs; for certain other purposes we may find it worth while to include them among people without legs.

But explanations containing concepts whose criteria for application are relatively constant are not necessarily better explanations. The only thing is that the more the criteria for the application of concepts vary the greater perhaps the need for us to specify the particular criteria that we use on any occasion. In the case of concepts like 'red' where the criteria hardly vary, we are more likely to know what the criteria are; hence those who use such a concept in explanations need not specify the criteria they are using.

CHAPTER II

THE RESPONSIBILITY OF PSYCHOPATHS

1.

It is sometimes argued that it is paradoxical to excuse the psychopath from punishment and blame, while we continue to punish and blame those who only occasionally commit a crime. For the psychopath commits crimes persistently and is therefore more wicked than the one who commits a crime only occasionally.

This argument assumes that psychopaths are not lacking in responsibility. For wickedness depends not only upon the extent of harm a person has done, but also on whether and how far he was responsible in the sense of having a choice. If we can show that psychopaths are not responsible, then the paradox will disappear. Now there are people who believe that we cannot (logically) show the psychopath to be lacking in responsibility. Thus, Lady Wootton, in her very stimulating book, has argued that the psychopath "is in fact, par excellence, and without shame or qualification, the model of the circular process by which mental abnormality is inferred from anti-social behaviour, while anti-social behaviour is explained by mental abnormality".¹ Now, if we

¹Social Science and Social Pathology (London, 1959), p.250.

assume, as Lady Wootton seems to, that explaining the psychopath's behaviour is a necessary condition of excusing it, and if she is right that arguments that try to explain the psychopath's behaviour are circular, then it follows that arguments that try to excuse his behaviour will also involve circular reasoning. But explaining a person's behaviour is not a sufficient condition of excusing it. So even if Lady Wootton is wrong on this point about circularity, even if we can explain the actions of psychopaths, there is still the problem whether we can show psychopaths to be lacking in responsibility. I shall discuss this problem in the next section. In this section I shall try to show that we can attempt to explain the behaviour of psychopaths, and that Lady Wootton is not right on this point about circular reasoning.

If we know some facts about the psychopath other than the mere fact that he persistently commits anti-social actions, then we can without circularity try to explain his persistent anti-social behaviour with the help of these other facts.

Let us grant Lady Wootton, for the sake of argument, that we can get no data about the psychopath in the clinic. Though even this is a controversial point among the experts.

Lady Wootton says these clinical symptoms are absent and claims the support of Professor Aubrey Lewis, who is an eminent psychiatrist. But there are also eminent psychiatrists who would disagree with this view. Thus Dr. Stafford-Clark says that, on the physical side, a high proportion of psychopaths "display a pattern of electrical activity in their brain, recordable by a special instrument, which has come to be recognized as evidence of immature function and resembles that normally seen only in children".¹ And the study of the formation of capillary loops in the nail bed "shows immature forms in a significantly high proportion of cases".

Now even if we grant this controversial point to Lady Wootton, still I do not think she succeeds in showing the relevant argument to be circular. First of all, and Lady Wootton seems to neglect this point, his criminal behaviour is not our only datum about the psychopath. It is true that we get the psychopath's data by (leaving aside the possibility of getting any data in the clinic) observing him in the social milieu, which includes, of course, observing his criminal behaviour. Perhaps it is even true that observing his criminal behaviour provides much more

¹Psychiatry Today (London (Penguin Books), 1952), p.117.

data about the psychopath's condition than observing the rest of his behaviour in the social setting. But, it is worth noting that we do get data from his non-criminal behaviour also. This point can be verified by reading that illuminating book on psychopaths by Cleckley: The Mask of Sanity. There Cleckley studies the psychopath's behaviour in the social milieu in general and not just his criminal behaviour. Thus Cleckley has studies how some psychopaths have behaved in their respective professional work, e.g. as psychiatrists, business men, physicians, etc.

Have we, then, got out of the charge of circularity? Can we not try to explain the psychopath's persistent criminal behaviour by studying his behaviour in the social milieu in general? It might, however, be argued that this way out of the difficulty shifts the problem. For when we say that the psychopath is sick we are saying that he is sick not just during his criminal actions but also during much if not all of the non-criminal actions that he performs in the social milieu. And here we may be asked: if you only observe the psychopath's behaviour in the social milieu are you not being circular in inferring his sickness from his behaviour in the social milieu and yet using the sickness to explain his behaviour in the social milieu?

I think the answer to this is that through our study of his behaviour in the social milieu (which includes, I repeat, a study of his criminal behaviour) we learn certain things about the psychopath; we can, then, without circularity use these data to explain his behaviour.

For all A's and B's, from the fact that we come to know B through our study of A, it does not follow that B cannot be a candidate for explaining A.

What then are these things that we learn about the psychopath through a study of his behaviour in the social environment?

The following are some of the characteristics of the psychopath that Cleckley claims to have learnt through such a study: unreliability, untruthfulness and insincerity, superficial charm and good intelligence, lack of remorse or shame, inadequately motivated anti-social behaviour, poor judgment and failure to learn by experience, pathologic egocentricity and incapacity for love, general poverty in major affective relations, fantastic and uninviting behaviour with drink and sometimes without, sex life impersonal, trivial and poorly integrated, failure to follow any life plan, good or evil.

Mercier too claims to have learnt about psychopaths

from studying their behaviour in the social milieu. "There are persons who indulge in vice with such persistence, at a cost of punishment so heavy, so certain and so prompt, and who incur their punishment for the sake of pleasure so trifling and so transient that they are by common consent considered insane although they exhibit no other indications of insanity."¹

Cleckley agrees with Mercier's judgment. He (Cleckley) too says something similar. "The criminal (i.e. the ordinary criminal) in short is trying to get something we all want, though he uses methods we shun. On the other hand the psychopath, if he steals or defrauds, seems to do so for a much more obscure purpose. He will repeatedly jeopardize and even deliberately throw away so much in order to seek what is very trivial (by his own evaluation) and very ephemeral. He does not utilize his gains as the criminal does. Often his anti-social actions are quite incomprehensible and are not done for any material gain at all."² To this last point critics of Lady Wootton may add, in order to anticipate a possible objection that Lady Wootton might make (i.e. the objection that Cleckley is a slave of our acquisitive culture,) that the psychopath

¹ Quoted by Cleckley. The Mask of Sanity, p.292.

² op. cit. p.292.

does not act for any spiritual, moral or aesthetic end either.

Dr. Stafford-Clark also claims to have learnt about the psychopath from a study of his behaviour. "On the mental side the outstanding feature is emotional immaturity in its broadest and most comprehensive sense. These people are impulsive, feckless, unwilling to accept the results of experience and unable to profit by them, ... utterly lacking in persistence, plausible but insincere, demanding but indifferent to appeals, dependable only in their constant unreliability, faithful only to infidelity, rootless, unstable, rebellious, and unhappy. A survey of their lives will reveal an endless succession of jobs, few of which have been held for more than six months, many of which have been abandoned after a few days; very little love but a great number of adventures, very little happiness despite a ruthless and determined pursuit of immediate gratification. Such patients are all too often their own worst enemies and nobody's real friend. If, as sometimes happens, they are distinguished by some outstanding gift or talent, they may achieve apparently spectacular success only to throw it away or spoil it at least for themselves by their turbulent and exacting emotional attitude ... they

drift from failure and disappointment through one lost opportunity after another into drug addiction, alcoholism, suicide or prostitution ... characteristic of the psychopath's attitude to sexual emotion and experience is this same shallowness and immaturity combined with a frequently disastrous opportunism, which may lead not merely to the prostitution already mentioned but also to deliberate perversions, to wanton repeated and joyless seduction, and many of the more grotesque ... sexual crimes ... Running through the lives of patients with this fundamental disability seems to be a consistent impulse towards destruction; destruction of their hopes and happiness and ultimately of their health and lives; a destruction all the more consistently sought because the apparent motives for most of the actions which lead from one disaster to another are immediate satisfaction or short-term gain."¹

For reasons that I shall give in the next section, I do not believe that Cleckley, Mercier, etc., are right on all their points about psychopaths. But at least some of the things they tell us about psychopaths - other than the mere fact that they commit anti-social actions - are true;

¹Op. cit., pp. 117-119.

from which it follows that Lady Wootton has not succeeded in showing the relevant argument to be circular.

Actually, Lady Wootton, at least on one occasion,¹ seems aware of some data about the psychopath other than the mere fact that he indulges frequently in anti-social actions. She, however, sums up these data, in what she claims is simpler language, by saying that psychopaths are extremely selfish persons, and then complains that nobody knows what makes them so. I do not know if her language is simpler, but it is certainly more misleading. I do not think the expression 'extremely selfish persons' conveys all that we know about a psychopath. This is an obvious point. One will gain much more knowledge about the characteristics of psychopaths by, say, reading Cleckley's book than by being merely told that psychopaths are extremely selfish people.

What then is the force of her complaint that nobody knows what makes them extremely selfish people? Since she is, misleadingly, using the expression 'extremely selfish persons' to denote all that we know about the characteristics of the psychopath, her complaint boils down to the complaint that nobody knows what makes them have these characteristics.

¹Wootton, op.cit., p.249.

Now is this latter complaint justified? Some psychologists, sociologists, etc., would argue that we do know at least something about the causes of psychopathy. And even if Lady Wootton is right when she says that nobody knows these causes, yet she does not show the relevant argument to be circular. She seems to confuse two different, though related, points.¹

- (i) Why do these people commit crime and other anti-social behaviour?
- (ii) Why do these people have the characteristics that we quoted earlier?

Now even if we do not know the answer to (ii) there is nothing at all circular in trying to answer question (i) by pointing to the various characteristics that we know about the psychopath.

For all A's and for all B's, from the fact that we come to know B through our study of A, and from the fact that we cannot explain B, it does not follow that it would be circular to use B to explain A.

We may know that a man has a disorder, and even that the disorder affects his responsibility, without knowing the cause of the disorder. For example, even if we do not know

¹Lady Wootton is by no means the only one who is confused on these points. The Royal Commission on Capital Punishment (1953, Cmd. 8932, p.137) also laments the fact that the "diagnosis of the psychopathic personality does not carry with it any explanation of the causes of the abnormality".

why a man is an idiot (i.e. the cause of his being an idiot), we may know that he is an idiot from observing his behaviour; and since he is an idiot we know he is not responsible, whatever the causes of his idiocy: his behaviour is not the cause of his idiocy, yet it can be perfectly good evidence of his idiocy. (Though his behaviour cannot explain his idiocy, it can explain (and justify) our belief that he is an idiot.)

Similarly a man's behaviour may be perfectly good evidence of his being a psychopath, or neurotic, etc.; though of course this behaviour is not the cause of his disorder, it is the manifestation of the disorder, and we can infer a disease from its manifestation.

(1) To explain B by A and to explain A by B.

(2) To infer A from B and to infer B from A.

(3) To infer B from A and to explain A by B.

(1) and (2) are circular. But (3) is not circular.¹

That inferring and explaining are different things can be

¹Cf. Kant, who in the Critique of Practical Reason argued that freedom is the condition of the moral law and that freedom is inferred from the moral law. (In the Preface to the Critique of Practical Reason he says "freedom is the condition of the moral law" and "the moral law is the only condition under which freedom can be known".) Kant was not involved in any circularity here. Of course, it would be circular to infer freedom from the moral law and to infer the moral law from freedom.

seen from the following considerations: To explain x involves telling us why x is the case. To infer x, involves telling us how we know that x is the case (or why we believe that x is the case). I may infer that a man has measles from the spots on his body, but I have not explained why he has measles; and then I can explain, without circularity, why he has spots, by saying that he has measles; but I have not inferred his spots from his measles. I know that he has spots because I can see the spots. So there is nothing circular here.

It is true that sometimes we infer x by explaining why x is the case (e.g. we may infer that a man is incapable of running fast, from the fact that he has a wooden leg) but this is by no means always the case.

We can infer that a man has a mental abnormality from his anti-social behaviour, though of course we do not try to explain his mental abnormality by his anti-social behaviour. We can, then, without circularity, try and explain his anti-social behaviour by his mental abnormality. Of course it would be circular if we also tried to infer that he commits anti-social actions from the fact that he has a mental abnormality; but we do not make this inference; we know that he has committed anti-social actions in another way - e.g. because there are witnesses who saw him commit

these anti-social actions. Lady Wootton complains that "it is ~~is~~ almost true to say that illness is the behaviour for which it is also the excuse".¹ Now if A and B are identical then it is absurd to explain A by B, or to excuse A by B. But nothing absurd follows if A is only a part, even a large part, of B. This point needs qualification. For in those cases where the part A is not identified without identifying the whole B to which A belongs, it would be absurd to infer B from A. But in all those cases where the part A is identified independently of B, these absurd results do not follow.

Now in the case of anti-social behaviour we can know that a man commits anti-social behaviour without appealing to his illness. So there is no circularity involved in inferring illness from the anti-social behaviour, even if such behaviour turns out to be a part, even a large part, of the mental illness.

Of course if mental illness and anti-social behaviour were identical, then it would be absurd to use the illness to explain or excuse the anti-social behaviour. But then it is simply wrong to say that mental illness and anti-social behaviour mean the same. (Compare: The Prime Minister is a part of the Cabinet but not the same as the Cabinet).

¹Op. cit., p.225.

We have not, at least not yet, shown that psychopaths are sick. If we know that they are sick then we can try to use this to explain their behaviour. But even if we do not know that they are sick, we can still try to explain their anti-social behaviour. For, as we saw earlier, we do learn at least some things about the characteristics of psychopaths.

I have discussed this point about circularity at some length, because it is considered by Lady Wootton and others to apply not just in the case of psychopaths but in the case of other mental disorders as well. Admittedly the psychopath is, Lady Wootton believes, "par excellence, and without shame or qualification, the model of the circular process"; but this implies that the circular process is supposed to prevail in other disorders as well, though not in such a shameless and unqualified form.

2.

In the last section I tried to show that Lady Wootton has not succeeded in showing that we cannot, without circularity, explain the behaviour of psychopaths. But even if we can explain the actions of psychopaths, why are they not responsible for their actions?

One argument that is often used, e.g. by Cleckley and Mercier, to show that psychopaths are not really sane and responsible is this: they throw away so much, their liberty, happiness, health, family, jobs, etc., in order to seek what is very trivial (by their own evaluation) and very ephemeral.

In assessing this claim it is worth bearing one point in mind. There is a danger that we might presume that it is obvious that the psychopath has broadly the same aims and values as we do. We will then rightly infer that since the behaviour of psychopaths is destructive of these aims and values, therefore psychopaths must be sick. But what reason do we have to think that psychopaths have broadly the same aims and values as we do?

One way in which we can try to find out the aims and values of people is by asking them what their aims and values are. But this method of finding out about people's aims and values has to be handled with care. For people may, at least sometimes, be mistaken about their own aims and values. And with psychopathy there is an additional complication, for psychopaths are notoriously insincere in their dealings with other people. If a psychopath tell us "I really value my health, liberty and job much more

than I do the committing of anti-social acts", we have no reason to think that he is telling the truth.

Another way we have of trying to find out people's aims and values is by studying their behaviour. In the case of ordinary people, their behaviour is broadly directed towards the realization of their aims and values. But the behaviour of psychopaths is often destructive of the aims and values that they are alleged to have - e.g. their liberty, jobs, etc. Now it is of course possible for a person to value A very highly, to value B very poorly, and yet to pursue B. This can happen in the case of sick people - like kleptomaniacs. But we cannot here just assume psychopaths to be sick - for the whole problem is: Are they sick? - in order to show that they really value their liberty, etc., much more than they value their anti-social acts. Indeed, the argument was trying to show that psychopaths were sick by assuming that they really value things like their liberty, jobs, etc., much more than they value their anti-social actions.

Some kleptomaniacs feel very bad about their stealing; they make efforts to conquer their stealing impulses. So we have at least some reason to believe that they really don't like to steal, that they really like to be law-abiding citizens. But as Cleckley himself tells us, the "psychopath

does not show sincere evidence of regretting his conduct or of intending to change it".¹ So what reason do we have to believe that he values his liberty, job, etc., much more than he does the committing of anti-social actions? If he did really value his liberty, job, etc., so much more than he values the committing of anti-social actions, shouldn't he have shown regret after he throws them away, and show some desire to change things in the future?

Cleckley claims that we do have good evidence that psychopaths value their liberty and dislike being locked up. He tells us of the "familiar case of the psychopath who, in full possession of his rational faculties, has gone through the almost indescribably distasteful confinement of many months with delusional and disturbed psychotic patients and, after fretting and counting the days until the time of his release, proceeds at once to get drunk and create disorder which he thoroughly understands will cause him to be returned without delay to the detested wards".²

But this quotation from Cleckley, at most, shows that the psychopath does value his liberty. But it does not show that he values his liberty much more than he values his anti-social actions (e.g. getting drunk and creating disorder). Yet from

¹Cleckley, op.cit., p.289.

²Ibid., p.393.

the mere fact that the psychopath values his liberty it does not follow that he is behaving oddly in throwing away his liberty. Whether or not he is behaving oddly in throwing away his liberty will also depend upon how much he values his anti-social actions.

It might be suggested that the psychopath could not be valuing his anti-social actions much because he does not get much satisfaction out of them. But there are various difficulties with this suggestion. Firstly, satisfaction is not a clear concept. (Sensuous satisfaction? Spiritual satisfaction? Material satisfaction? Aesthetic satisfaction? And how can we compare these different kinds of satisfaction?) Secondly, it seems to assume that psychopaths value things in terms of the satisfactions that it gives them - e.g. if they get more satisfaction from their liberty and from their jobs than from their anti-social actions, then they must value their liberty and jobs higher than they value the committing of anti-social actions. Thirdly, even if we do not challenge the above assumption, there is the problem: How do we know that psychopaths do get more satisfaction from their liberty, jobs, etc., than they do from getting drunk, creating disorder, etc.? Perhaps we do get more satisfaction from our liberty, jobs, families, etc., than from creating disorder, etc., but

we must not assume blindly that psychopaths are like us in this respect. Indeed, it seems to me that many psychopaths like their liberties and their jobs chiefly because their liberties and jobs enable them to indulge in the gratification of their immediate impulses, such as getting drunk and creating disorder. That their liberty is necessary to such indulgence is fairly obvious - for when you "lock up" the psychopath he cannot satisfy so many of his immediate impulses. So the basic reason why psychopaths feel so miserable when locked up is that they cannot satisfy their immediate impulses. Their feeling miserable when locked up does not show that they value their liberty more than they value the gratification of their immediate impulses.

Similarly many psychopaths seem to value their jobs because their jobs provide them with money with which they can indulge in the gratification of their impulses - such as getting drunk. In some cases the psychopaths also seem to value their jobs because their jobs give them a certain prestige which they exploit in order to satisfy their immediate impulses, e.g. seducing women, committing adultery, etc.

So the claim that we have been examining, i.e. that psychopaths throw away so much that they value, for something that is very trivial by their own evaluation - seems

unsubstantiated. And so the corresponding argument that tries to show that psychopaths are sick breaks down.

Though psychopaths do not have the aims and values that they are sometimes alleged to have, it would be wrong to believe that they do not have any scale of preferences at all. Even animals have scales of preferences. Many psychopaths prefer getting drunk, creating disorder, etc., to being locked up. What evidence do we have for this? Their behaviour provides us with such evidence. That they like getting drunk, creating disorder, etc., can be seen from the fact that they indulge so often in these activities. But don't kleptomaniacs indulge so often in stealing, yet it would be wrong to infer that they like stealing? Yes, but that is because the kleptomaniac tries not to steal, feels remorse, etc.; the psychopath, on the other hand, indulges in anti-social activities without any qualms, so in his case indulging in such activities is good evidence that such activities are high in his scale of preferences.

That the psychopath does not like being locked up can be seen from his behaviour while he is locked up.¹ But if he does not like being locked up, why does he not avoid getting locked up? Because, although he dislikes being locked up, he likes committing anti-social activities. Yes, but why does he indulge in these activities, without taking

precautions against getting caught? If he were sane would he not take such precautions? No, not necessarily. Whether it is rational for him to take such precautions also depends upon how much of a nuisance he finds the taking of precautions. The more the psychopath cares for the present compared to the future, and the more he finds a nuisance the taking of such precautions, the more consistent his behaviour becomes. And there is nothing obviously irrational in valuing the present much more than the future, or in finding precautions to be a big nuisance.

It may be true that anyone who does not care at all about the future is not really human and is therefore not responsible. But psychopaths do not discount the future altogether. Perhaps psychopaths do not live a life that is attractive to us, ^{but} they do manage to live fairly long and unsheltered lives, which they could not do if they had lived entirely in the present. Their survival cannot be attributed wholly to good luck. Admittedly, psychopaths, like other human beings, could not survive without being assisted by their environment. But it is also essential that they should care to some extent about their future.

If a psychopath is very thirsty and you offer him a poisonous drink which he believes will lead to his death in the future, you can be pretty sure he will not drink it.

Another argument that tries to show psychopaths not to be responsible is the following: psychopaths are not responsible because their behaviour is not purposive. This does not seem to me to be at all obvious. The psychopath does not always act without any plans. Thus if he wants to get drunk, create disorder, etc., he takes the appropriate means for getting to the place where he is going to get drunk and create disorder. For instance, he may hire a taxi in order to get to the required place; so his taking of the taxi is purposive.

It might be true that psychopaths do not have as long term plans as some other people, but why does this show them to be any less responsible?

It might be the case that punishment is usually much less effective on people like psychopaths - who do not bother much about the future. This may be one utilitarian argument for not punishing such people,¹ but it does not show such people to be less responsible. If we used effectiveness of punishment as a criterion of responsibility - i.e. the less effective punishment is on a particular person, the less responsible he is - this would lead to odd results. Some moral

¹There may, of course, be other utilitarian reasons for punishing such people, e.g. that they cannot commit a crime at least as long as they are in jail. Also, that punishing them may deter other people.

and social reformers (e.g. Gandhi in British India) would not be considered responsible according to this criterion. The more firmly such people believe in their principles, the more difficult it might be for punishment to make them change their ways.

Of course, in many cases the reason why punishment is ineffective is that the criminal is sick. But then punishment can also be ineffective on many who are sane (a) either because they are committed to unconventional moral and social ideals, or (b) because, though not committed to such ideals, they feel that the benefits that accrue to them from the criminal way of life outweigh the disadvantages that may accrue from being punished.

It might be argued that psychopaths are not responsible agents because they have no control over their immediate desires. But how do we know this? It might be argued that self-restraint is something that only comes with practice; we are born with very little, if any, self-restraint. So if there are people who have exercised very little self-restraint, this is good evidence for believing that their power of self-restraint is not very developed. It is, however, not true that psychopaths have had no experience at all of resisting their immediate desires. Many psychopaths, for instance, do often wear a mask of respectability which they

find uncomfortable. Cleckley gives us some instances of this:

"He[a psychopath that Cleckley discusses] is, perhaps like a man who through necessity has given himself over to foreign ways for most of his hours and who goes on fairly patiently but without spontaneity until the time when he can throw it all aside for a while and go wholeheartedly at what he finds really to his taste".¹

"... He[another psychopath] keeps under wraps of outer dignity at the hospital and he's careful not to take them off under circumstances which would cause him to get in serious trouble. He passes as a great gentleman in polite but unsophisticated circles at home. But the cloak must be very uncomfortable. Almost every weekend he makes an opportunity to get it off, and he's always then just the man you saw tonight."²

These instances show - though Cleckley, of course, does not make this inference - that these psychopaths do at least sometimes exercise self-restraint.

But perhaps it could be said that they have exercised much less self-restraint than ordinary people, and consequently their power of self-restraint is much weaker. But here it

¹Op.cit., p.216. Italics mine.

²Ibid., p.243. Italics mine.

might be objected that talk of self-restraint is relevant if the person wants to restrain his immediate desire. Thus it makes sense to talk of the kleptomaniac trying to exercise self-restraint. But when the psychopath indulges in drink, disorder, etc., it is not at all obvious that he wants to restrain his desire for drink, disorder, etc.

Against this it could be argued that whether or not the psychopath wants to restrain his immediate desire, his ability to restrain his immediate desire is not very developed.

For instance, if a man commits a murder that he wanted to commit, then he has the capacity to commit the murder, but it does not follow that he had the capacity to conform to the demand 'Do not commit murder'. Similarly, even if it is true that the psychopath does not want to restrain his desire to commit anti-social actions, this does not show that he could restrain such desires.

But there are more formidable objections to the argument under consideration. It is possible that two people A and B may have had equal experience in resisting their immediate desires, yet A may have greater power of self-restraint than B. Indeed, it is possible that even if A has had less experience in resisting immediate desires than B, yet A may have greater powers of self-restraint than B. These examples show that practice is not the only thing upon which self-control

depends. They do not disprove the theory that practice is one of the things upon which our power of self-restraint depends. The fact that psychopaths have not had as much practice in self-restraint, is one reason for thinking that the psychopath's power of self-restraint is not as well developed as that of ordinary criminals. But in view of the fact that (a) psychopaths have had some experience in self-restraint, and (b) the power of self-restraint also depends upon factors other than practice in controlling immediate desires, the argument that we are considering does not show that psychopaths have significantly less powers of control than ordinary criminals.

And there is another complication. We have seen that the psychopath can control his criminal desires for at least some time. How then do we know that when he did his crime, he had controlled himself for as long as he could? Even if it is true that the psychopath has eventually to give way to a compulsion to commit a crime, it does not follow that whenever he commits a crime, it must be a result of the compulsion. Indeed, if it is true that the psychopath wants to commit crimes - though this does not entail that he could have helped committing crimes - this can make us a little suspicious; for if it is also true that the psychopath can restrain himself for some time, then the fact that he wants

to commit anti-social actions may make him do the criminal actions before he was compelled to do them. So it may be that in the course of his life, the psychopath commits more, perhaps many more, anti-social actions than he is compelled to perform.

In this section we have examined various arguments, none of which succeeded in showing that psychopaths were not responsible. But our criticisms of these arguments were different from Lady Wootton's reasons for rejecting such arguments. We saw in the first section that Lady Wootton and others are wrong in thinking that arguments that try to show psychopaths to be sick must involve circular reasoning. We do know things about the psychopath other than the mere fact that he commits a lot of crimes and we cannot rule out a priori the possibility that some day, when we know more about him, we may be able to show that his responsibility was substantially impaired.

CHAPTER III

ARISTOTLE AND THE PUNISHMENT OF PSYCHOPATHS

In the last chapter I think I succeeded in establishing that we cannot rule out a priori the possibility that psychopaths may be shown to be lacking in responsibility. I also examined some arguments that try to show the psychopath to be lacking in responsibility, but I concluded that these arguments were not very successful. In this chapter I intend to make and examine some more attempts at showing the psychopath to be lacking in responsibility. But before I do that there is one point to keep in mind.

There is one theory according to which no one is responsible. (Some of those who believe in the theory do so because they believe that determinism is true and because they believe that determinism is incompatible with responsibility.) If this theory is correct, then a fortiori, psychopaths are not responsible. But this theory is inconsistent with our present system of criminal and moral responsibility; if we accept this theory then we shall have to get rid of our system of responsibility - for our system of responsibility assumes that some people are responsible, while some are not.

So the point we should keep in mind is this: As long

as we operate within our system of responsibility, any argument that tries to excuse psychopaths will, other things being equal, be much more convincing if it shows why we should excuse psychopaths while we continue to punish many other criminals.

1

It has been said that though in a sense (let us call it the narrower sense) psychopaths know that their behaviour is wrong, i.e. they know that their activities are against the law and against the moral code of the society they are living in, yet in another sense (let us call it the wider sense) they do not know that it is wrong, they are lacking in a conscience, are morally and emotionally hollow and are incapable of really appreciating the nature of what they are doing. As a result of such ignorance, they do not conform to the law, and are

incapable of wanting to conform to the law.¹

Against this it might be pointed out that though this (i.e. the wider sense) may be a perfectly legitimate sense of knowing, it is not the sense which is relevant for excusing a person from blame or punishment. Aristotle and others have argued that every wicked man is ignorant of what he ought to do and what he ought to abstain from, and that such ignorance does not excuse. But what if the agent is not responsible for such ignorance - e.g. suppose he is ignorant because he had a bad education and upbringing? Here it might be said that the problem is not whether the

¹Cf. 'Ley, because of his insanity, lived in a twilight world of distorted values which resulted not so much in his being "incapable of preventing himself" from committing his crime, in the strict sense of those words, as in his being incapable of appreciating, as a sane man would, why he should try to prevent himself from committing it. It seems to us reasonable to argue that the words "incapable of preventing himself" should be construed so as to cover such states of mind; that they should be interpreted as meaning not merely that the accused was incapable of preventing himself if he had tried to do so, but that he was incapable of wishing or of trying to prevent himself, or incapable of realising or attending to considerations which might have prevented him if he had been capable of attending to them. If each of Ley's acts is considered separately, it would be difficult to maintain that he could not have prevented himself from committing them. Yet if his course of conduct is looked at as a whole, it might well be argued that he was incapable of preventing himself from conceiving the murderous scheme, incapable of judging it by other than an insane scale of ethical values, and in that sense, incapable of preventing himself from carrying it out.' Royal Commission on Capital Punishment. (Cmd. 8932.) page 111.

psychopath is incapable of becoming moral, but whether he is incapable of conforming to the law. This point of course does not solve the problem, but only tells us that the problem we have to face needs to be distinguished from another problem. The problem that we shall have to face is this: Even if the psychopath does not have to become moral in order to become law-abiding, in view of the fact of his education, upbringing, etc., is it fair to punish him or to blame him for not conforming to the law? Here two tests seem relevant.

1. How far could he have avoided acquiring criminal values? Even if a man cannot get rid of his criminal values, once he has acquired them, he may have been able to avoid acquiring them in the past.

2. Once he acquired criminal values, how far could he have got rid of them? Even if his criminal values were originally the result of causes outside his control, a man may still be able to get rid of these values.

Now if we judge by these two tests, why is the psychopath any less responsible than most other criminals who have criminal values?

The concept of psychopathy had not been invented in Aristotle's time, but Aristotle¹ says things which commit

¹See The Nicomachean Ethics of Aristotle, Book III, Section 5.

him to saying that psychopaths do pass the first test. I think Aristotle's arguments on this point are not wholly convincing. Aristotle argues that men become unjust and self-indulgent by doing activities in the past which, unless they were thoroughly senseless, they must have known would make them develop an unjust and self-indulgent character. Therefore, they are responsible for acquiring their characters.

One could make more than one criticism of this argument of Aristotle's. Firstly, it may be said that many wicked men (and not only those among them who were thoroughly senseless) though in a sense (i.e. in the narrower sense) they knew in the past that their actions will make them develop a wicked character, yet in another sense (i.e. the wider sense) they did not really know this. Children, for instance, do not know all that is involved in being wicked, for they are morally and emotionally not developed. So Aristotle's argument is either redundant or it is not wholly convincing. For if all that is required for responsibility is knowledge in the narrower sense, then men, even after they have acquired a wicked character, have this knowledge and so we need not try to show that they were responsible for becoming wicked. But if knowledge in the narrower sense is not enough for responsibility, then Aristotle's

argument is not wholly persuasive. For at least in many cases unjust and self-indulgent men in the past may only have had knowledge in the narrower sense.

And there is another criticism that can be made of Aristotle's argument. For this argument of Aristotle's assumes that knowledge is a sufficient condition of responsibility.¹ But this assumption can be criticised. For even if a man knew (both in the narrower and in the wider sense) in the past that by indulging in certain activities he would develop the corresponding character, he may not have had a fair choice. Nature might have been unkind to him in a way that made it difficult for him to exercise self-control. Or even if nature had been kind, the pressure of circumstances might have been very great. Even if one can always try, within the limits set by nature and circumstances, is it not more difficult for him (i.e. the man to whom nature or circumstances have been cruel) to conform to the law, than it is for those who have been more generously treated?

Many of us do believe that other things being equal, the more unkind nature and circumstances have been to a

¹Aristotle does not always assume this. Thus he allows duress as an excuse.

person, the more compassionate we should be in judging that person.

And, a fortiori, we believe that, other things being equal, the more unkind nature and circumstances have been to a criminal the more compassionate we should be in judging that criminal.

This principle is, I think, a good one, and is relevant to the first test (page 49). For whether the criminal had a choice in the past of avoiding criminal values, does depend upon the way that nature and circumstances have treated him.

Now in order to apply this principle two conditions must be satisfied.

1. We should be able to say, at least roughly, what conditions must be satisfied before we are justified in saying that nature or environment has been kind or unkind to a person. This is not an easy problem. For sometimes nature or circumstances may appear harsh when in fact they are giving blessings in disguise. And sometimes nature and environment are really harsh when the opposite appears to be the case. Take, for example, criminals who come from wealthy and 'happy' families. We may be tempted to say that they are more blameworthy than those who come from

poor families. Yet the criminal who comes from the wealthy and 'happy' family may have had his own problems - e.g. he may have been, through no fault of his, spoilt at home as a child, and as a result it might have become difficult for him to stand up in this world and 'face reality'. Lovers of equality, like Rousseau, have been at pains to show that inequalities harm both the poor and the rich.

2. Even if we know what conditions are favourable and what conditions are unfavourable, there is the problem of getting enough evidence about a man's life history to be able to say whether he satisfies the relevant conditions. This is a formidable problem even with people whom we know well; it becomes much more so in the Law Courts, where the criminal is not well known to those who have to decide what is to be done with him.

It is perhaps because of these two difficulties that our legal system does not always go into the question of how far the criminal could have acted otherwise in the past. Thus if a criminal falls under the M'Naghten Rules or the Homicide Act, then we do excuse him, though neither the M'Naghten Rules nor the Homicide Act goes into the question of how far the criminal was responsible for acquiring the

mental disorder.¹ It is true that in applying the Homicide Act and the M'Naghten Rules we do often go into the agent's past (i.e. prior to his committing the crime), but we do this not with a view to finding out how far he could have helped things in the past, how far he was negligent in acquiring his disorder, but with a view to finding out about his mental condition and capacity to choose at the time he did the crime.

In view of all this how do psychopaths fare under the first test (i.e. the first test on page 49)? Because of the difficulties of applying this test, it is not easy to say that psychopaths come off worse than ordinary criminals. Perhaps many psychopaths do come off worse than many 'ordinary' criminals, but some ordinary criminals may come off worse than some psychopaths. It is not at all obvious that it is because a man is a psychopath that he comes off worse under the first test.

¹It is worth contrasting this with Aristotle's position. Aristotle says 'wickedness is like a disease' (ibid., Bk. VII, Section 8). This may seem inconsistent with his view that the wicked ought to be punished and blamed. But this apparent inconsistency would not have worried Aristotle. For he believed that all except the thoroughly senseless are responsible for becoming wicked. Similarly with drunkenness, Aristotle says it is no excuse whenever we are responsible for becoming drunk.

So what follows is that where the difficulties of applying this test are not great, this test should be applied. But this does not show that we ought to excuse a man because he is a psychopath.

Aristotle did not attach importance to the second test, because he believed that all except the thoroughly senseless pass the first test.¹ But we have seen that Aristotle was wrong in thinking that the first test is easy to apply and in thinking that only the thoroughly senseless people fail this test; and since Aristotle was wrong on these points, the second test becomes more important than it otherwise would have been. So let us now see whether the psychopath comes off any worse under the second test than most other criminals.

It might be suggested that the psychopath is more different from the ordinary law-abiding citizen than the ordinary criminal is. Both the ordinary criminal and the psychopath, unlike the ordinary law-abiding citizen, have

¹When I say that a man passes the first test, I mean he could have avoided acquiring criminal values. When I say a man fails the first test I mean he could not have avoided acquiring criminal values. Similarly, by passing the second test, I mean the man could get rid of his criminal values, and by failing it, I mean he could not get rid of his criminal values. If A fails the test, and B passes the test, then A comes off worse under that test.

criminal values. But the way of life of the ordinary criminal is more like the way of life of the ordinary law-abiding citizen than the way of life of the psychopath is. And so it is more difficult for the psychopath to change his condition and become like the law-abiding citizen than it is for the ordinary criminal. And so the psychopath is less responsible for committing crimes than the ordinary criminal is.

This chain of reasoning, it may be objected, contains at least one fallacy.

- (a) Adopt the ways of life of the ordinary law-abiding citizen.
- (b) Become law abiding.

It may be that the psychopath will find it more difficult to answer demand (a) than the ordinary criminal will. But it does not follow that the psychopath will find it more difficult to answer demand (b) than the ordinary criminal will. Now in deciding whether someone should be excused from punishment it is demand (b) that is relevant. The psychopath is not being asked to give up all his 'peculiar' habits but only those which bring him into conflict with the law. Can a man in our society not lead a fairly chaotic and psychopath-like life without committing a crime?

Of course, the psychopath will find it quite difficult to get rid of his criminal values, but as yet we have not shown that he will find this substantially more difficult than the ordinary criminal will find the getting rid of his criminal wants.

But is it not easier in our society for the ordinary criminal¹ to fulfil his needs without committing crimes? For our society offers more non-criminal channels for the satisfaction of conventional needs than for the satisfaction of the unconventional needs that psychopaths have. Perhaps a society could be constructed where the psychopaths will find it as easy, or even easier, to satisfy his needs than

¹The (ordinary) criminal, in short, is usually trying to get something we all want, though he uses methods we shun. On the other hand the psychopath, if he steals or defrauds seems to do so for a much more obscure purpose.' (H. Cleckley, The Mask of Sanity, p.292).

In this chapter, for reasons of space, I shall not say much about the characteristics of psychopaths. I have said something about this in the last chapter. Those who wish to know more about what a psychopath is could read The Mask of Sanity by Cleckley.

In this chapter I have assumed that, though psychopaths may be capable of good theoretical reasoning in moral and intellectual matters, they are lacking in moral sentiments (i.e. they do not have moral principles, they do not feel morally guilty when they do wrong, etc.). And I have also assumed that psychopaths persistently commit anti-social actions and are more different from the average citizen than the ordinary criminal is.

In the last chapter I said that once we realise that psychopaths have different aims and values, some of the arguments that try to show the psychopath to be lacking in responsibility will be seen to break down. It would, however, be quite consistent to go on and try to show that psychopaths ~~are not responsible~~ with the help of the fact that their aims

the 'ordinary' criminal will, but this does not alter the fact that in our society the psychopath finds it more difficult to satisfy his needs without committing a crime. And this makes it more difficult for the psychopath to give up his criminal ways. And so the psychopath is less responsible.

In assessing this argument three points are worth making. Firstly, an ordinary criminal may originally commit a crime out of a conventional motive (e.g. desire for money), but may after some time become addicted to the criminal way of life. He may then find it as difficult to give up his criminal values as a psychopath does. We can describe this situation by saying that the man was an ordinary criminal but after some time he ceased to be an ordinary criminal. And the fact that, once a man has ceased to be an ordinary criminal and has become addicted to crime, he finds it as difficult to give up his way of life as the psychopath does, is quite consistent with the view that while he was an ordinary criminal, it was easier for him to change his criminal ways than it was for the psychopath. The second point worth noticing is this. The reason why the ordinary criminal is likely to find it easier to give up his criminal ways is that since he has conventional needs (e.g. making money) these needs could be satisfied in ways other than

committing a crime. But this is not always so. Sometimes a man may find that his need (e.g. need for food) is a conventional one, but circumstances are such that he has no way of satisfying his need except by committing a crime (e.g. if he is very poor, cannot get a job, if the State makes no provision for the poor, etc.), then for such a man it may be as difficult to give up his ways as it is for the psychopath. (Such a man, it would seem, should be excused, along with the psychopath.) But there will be other ordinary criminals who commit a crime because of conventional needs which they could satisfy in non-criminal ways (e.g. a man has quite a lot of money, but wants some more. He does not want to take the trouble of earning it, so he takes the easy way out and steals some money). Such criminals will find it easier to change their ways than the psychopath will. So it seems that strictly speaking we should say that psychopaths, like some ordinary criminals, but unlike some other ordinary criminals, will fail the second test. Of course, a lot will depend upon how we define 'ordinary criminals'. We could define 'ordinary criminals' in such a way that those who commit a crime to satisfy conventional needs, but who are compelled to resort to criminal ways (e.g. because of economic necessity), are not 'ordinary criminals'.

In this way we would still be able to say that the psychopath, unlike the ordinary criminal, fails the second test. But if under 'ordinary criminals' we include all those who commit a crime to satisfy a conventional need, then we will have to say what we said a little earlier, i.e. psychopaths, like some ordinary criminals, but unlike some other ordinary criminals, fail the second test. And the third point worth observing is this. It is true that not all unconventional needs are difficult to satisfy in our society without breaking the law. Thus if, on getting up every morning, you need to go round and round your bed, this is an unconventional need but it can be easily satisfied without breaking the law. With psychopaths, however, one gets the impression that their unconventional needs are not so innocent; much of their satisfaction, their cheap thrills, seem to consist in being reckless and in committing the crime. It may be true that they are not completely reckless but they are much more reckless than, say, the ordinary criminal or the pleasure-loving hedonist who adheres to the law. And with psychopaths their committing the crime is not just a means to some further end that could be reached in other ways; rather their criminal and anti-social behaviour is, if not the whole, at least a large part of the end they are seeking. But cannot they

stop seeking this end? Even if their need is an unconventional one and cannot be satisfied in non-criminal ways, how do we know that their need is a strong one? It may be answered that they have been spending much of their life seeking these ends, and so have become quite addicted to them.¹

At this point those who do not wish to excuse the psychopath may make a radical objection. They may concede that psychopaths do fail the second test, but they may go on to argue that this test is not a good method of showing lack of responsibility. For according to this test, many political criminals, such as Gandhi and Russell and their followers, will also be found lacking in responsibility. Even if it is true that psychopaths are lacking in a conscience and are morally and emotionally hollow, is it any easier for those who are morally and emotionally stuffed with values that are basically antithetical to those prevailing in the society, to conform to the law? So even if it is true that there is a sense of 'can' in which

¹Aristotle says things which commit him to saying that psychopaths fail the second test. He says about the self-indulgent and unjust men 'Now that they have become so it is not possible for them not to be so' (*ibid.*, Book III, Section 5).

psychopaths cannot conform to the law, it seems that in this sense political criminals also cannot conform to the law. So how could this be the sense of 'can' which is relevant for excuses? It is probably true that political criminals can conform to the law in another sense of 'can', i.e. in the sense that if they choose to conform to the law, then they will succeed in conforming to the law. But in this sense of 'can' it has not been shown that psychopaths cannot conform to the law.

So why should psychopaths not be regarded as responsible, while political criminals are regarded as responsible?

Those wishing to excuse the psychopath may try to reply something like this: True, the sense of 'can' in which the political criminals and psychopaths cannot conform to the law is not sufficient for distinguishing the responsible from those lacking in responsibility, but this sense of 'can' can still be relevant for distinguishing the responsible from those lacking in responsibility. Both the political criminal and the psychopath fail the second test. But there is a difference. For political criminals are mentally healthy, while psychopaths are sick. And so psychopaths should be excused but political criminals should not.

This reasoning assumes that failure of the second test

does not always diminish responsibility. It does so when another condition is also satisfied, namely that the agent is sick.

But what then is the use of the second test? Is it not redundant? Since both the sick and the healthy can fail this test, therefore we must have some independent way of distinguishing the sick and the healthy. And if we have this independent method of distinguishing the sick from the healthy, then why cannot we excuse the sick criminal and punish the healthy criminal without appealing to the second test?

Those wishing to defend the second test have a good answer to this question. They can say that though from the fact that a man has failed the second test we cannot infer that he should be excused, and though we do need an independent method of distinguishing the sick from the healthy, yet this second test is not redundant. For not all mentally sick people are excused, but only a sub-class of them is excused.¹

¹That something like this view is adhered to under our present system can be seen by examining the M'Naghten Rules and Homicide Act. Under the M'Naghten Rules, not all those who suffer from defect of reason due to disease of the mind are excused; only a sub-class of them is excused. The defect of reason must be of such a kind as to show that either (a) the accused did not know the nature or quality of his act or (b) if he did know this, he did not know that it was wrong.

Similarly, under the Homicide Act, it is not enough to show that the accused was suffering from abnormality of mind. Only a sub-class of the mentally abnormal are excused. For the abnormality of mind must be such that it 'substantially impaired his mental responsibility for his acts and omissions in doing or being party to the killing.' (Homicide Act 1957 Sec.

If a man is mentally sick, this is not sufficient to excuse him, but if a man is both (a) mentally sick and as a result of this he (b) fails the second test, then this is jointly sufficient to show that he ought to be excused.¹

Now if what has been said in the last paragraph is true, and I think it at least seems true, then: if psychopaths fail the second test, and if this happens because they are sick, then it follows that they ought to be excused. We have heard a good case for the view that psychopaths fail the second test. But we have not yet shown that psychopaths are sick. So we have yet to show that psychopaths should be excused.

In the next section I shall make another attempt at showing that psychopaths are sick.

2

In the last chapter I discussed the argument that psychopaths are sick because their behaviour is destructive of their aims and values. I think I succeeded in showing

¹Ideally, this point needs qualification. Even if a man satisfies these two conditions, we might feel, as Aristotle would have felt, that he ought not to be excused, if he was responsible for acquiring his illness. But we saw earlier that neither the M'Naghten Rules nor the Homicide Act worry about this.

²~~See pages 327-330.~~

that once we realise that their aims and values may be different from ours, it is not at all obvious that their behaviour is destructive of their aims and values.

But even if we do not show that a man is pursuing means that are destructive of his ends, we might infer that he is mad if he chooses certain ends. This argument is sometimes used by those who are objectivists with regard to values, i.e. those who think that values are part of the universe, are discovered by human beings, and are not just human creations. An example of an objectivist who uses this argument is Sir Isaiah Berlin. He says '... if I say of someone that he is kind or cruel, loves truth or is indifferent to it, he remains human in either case. But if I find a man to whom it literally makes no difference whether he kicks a pebble or kills his family, since either would be an antidote to ennui or inactivity, I shall not be disposed, like consistent relativists, to attribute to him merely a different code of morality from my own or that of most men, or declare that we disagree on essentials, but shall begin to speak of insanity and inhumanity: I shall be inclined to consider him mad, as a man who thinks he is Napoleon is mad...It is considerations such as these, urged

by neo-Aristoteleans and the followers of the later doctrine of Wittgenstein, that have shaken the faith of some devoted empiricists in the complete logical gulf between descriptive statements and statements of value, and have cast doubt on the celebrated distinction derived from Hume.¹ Now this argument can be divided into two parts.

(a) The values that a man has are sometimes good evidence for the view that the man is mentally disordered.

(b) For (a) to be true, it is necessary that values should be objective. Since (a) is true, therefore the celebrated distinction that Hume drew between facts and values breaks down.

Now I think (a) may well be true, but (b) seems true because of a confusion. To clear the confusion, we should distinguish between two senses in which values could be said to exist.

(1) Values exist in the sense that men do as a matter of fact have values. We can make true statements about the values that people have. For instance, it is as a matter of fact true to say that the scale of values of a liberal are different from the scale of values of a Nazi.

(2) Values are real and objective in the sense that there are values in nature. Values are not mere human inventions imposed by man on a valueless reality; they belong to

¹ Philosophy, Politics and Society. Second Series. Edited by Laslett. page 27.

reality and man's job is to discover them.

Both those who are subjectivists with regard to the nature of values (e.g. Hume, Sartre, Ayer, Stevenson) and those who are objectivists (e.g. Plato, Aristotle, Prichard, Mrs. P. Foot) on this issue would agree that values exist in sense one. It is only on the problem about whether values exist in sense two that the subjectivist and the objectivist part company.

Now if we are going to use the values that a man pursues as evidence of his insanity, then values must exist in sense one; but it is not at all obvious that values must exist in sense two.

Once we realise that there is an important sense in which creations exist, we cannot rule out the possibility that even if values are not objective in sense two, we may be able to use the fact that a man has created certain values as evidence about his mental condition. Just as there is nothing absurd in trying to understand about a man's mental condition from the paintings that he has created.

Of course, we have not solved all the problems. Suppose someone says that the values that a psychopath pursues are good evidence of mental disorder, while someone else says: No, they are not. How do we decide who is right?

This is an important difficulty, but this is a difficulty that I think has to be faced both by the subjectivists and by the objectivists. An objectivist may argue that values must exist in sense two if we are going to talk of moral insanity or dissociation from values. Against this, two considerations could be pointed out. First, moral insanity or dissociation from values is not the only kind of insanity that is relevant to excusing a person. There are other species of mental disorder that can exist (e.g. schizophrenia, psychosis, kleptomania) even if values do not exist in sense two. And it is not absurd to use the values that a man is pursuing as evidence of his mental disorder, even if values do not exist in sense two, and even if the disorder does not consist of moral insanity or dissociation from values. Secondly, it could be pointed out that even if values do not exist in sense two, we can still have moral insanity or dissociation from values. Even if values are not objective in sense two, a man may, due to mental disorder, be unable to choose certain ends. He can then be said to be dissociated from these ends.

Of course, there are difficulties here, E.g. how do we distinguish the mentally disordered from the mentally healthy? But such difficulties will have to be faced even if values

are objective in sense two. For suppose values are objective in sense two. Then, of those who do not discover the truth in moral matters, how do we distinguish the dissociated from the rest, e.g. from those who are ignorant in some important moral matters because of their negligence or from those who are sane and yet can not reasonably be expected to know any better? It may be that one need not distinguish the dissociated from those who are sane and yet cannot reasonably be expected to know any better, for the difference may not be an important one from the point of view of excusing people from blame or punishment. But we would still need to distinguish the dissociated from those who are sane and are ignorant in moral matters because of their negligence, for ignorance is no excuse where we could reasonably have avoided being ignorant, and this would be as true of ignorance of moral facts as it is of non-moral facts, (e.g. did Hitler believe in the wrong values because he was mad, or is it merely that he was negligent and did not take enough trouble to find out the truth in moral matters?)

In trying to answer this kind of question three related problems have to be tackled.

1. What conditions have to be satisfied before we can be justified in saying that a man has taken reasonable trouble to find out the truth in moral matters.

2. There is the factual problem of finding out about the life history of the person (in this case about Hitler) in order to decide whether he did take the trouble that he could reasonably be expected to take.

3. It is true that if a man did take enough trouble to find out the truth in moral matters, this shows he was not negligent.

But if he has not taken much trouble to find out the truth in moral matters, this does not necessarily show that he was negligent - for he could have been mad and convinced that his values were right. Thus even if we know that Hitler did not take much trouble to find out the truth in moral matters, this does not necessarily make him culpable for his atrocious values.

And there is another problem that the objectivist will have to face. Of those who have seen the truth in moral matters, but chosen not to adopt the ends that they have discovered, how do we distinguish those who have done this because they are mentally disordered from those who have done this in spite of being healthy (this distinction does seem important for the problem of excuses), e.g. suppose a psychopath discovers that crimes should not be committed, but goes on to choose a criminal way of life, how do we

decide whether he is disordered or not? As long as we allow that there are people who see certain ends, yet try to regulate their lives not by the ends they have discovered but by different ones, can we rule out that many healthy-people may belong to this class of people.¹ Objectivists may adhere to the dogma that those who do not have a strong propensity for doing what they have discovered to be the case in moral matters, must be sick. Or, alternatively, the objectivist may try to show that the class of people who see certain ends, yet try to regulate their lives not by the ends they have discovered, but by different ones, is a null class. They may try to show this by adopting some such metaphysical dogma as this:² Human beings have a strong propensity for doing what they have discovered to be the case in moral matters; or, unless one has a strong propensity

¹This class of people is, of course, not identical with the class of those who want to regulate their lives by certain ends, yet find they are unable to do so, e.g. because of irresistible impulses.

²Of course, some objectivists may not believe in any such dogma. They may take the view that those who choose to regulate their lives by ends that are different from the ends that they have discovered, can be presumed to be healthy unless they can be shown to be sick in some other way, e.g. if a man believes he is the king of France, and if he is indifferent between kicking a pebble and the destruction of his family, we may infer that he is mad, not from the fact that he is indifferent between kicking the pebble and the destruction of his family, but from the fact that he believes he is the king of France.

But, of course, those like Berlin, who wish to use the scale of values that a man has as evidence of his madness cannot take this position.

for doing an action, one cannot discover that one has an obligation to do it.¹ By calling this sort of view a dogma,

¹Aristotle seems to have held some such metaphysical view. It is significant that he believes that wrong doers must either be ignorant of the universal (he says 'all wicked men are ignorant of what they ought to do, and what they ought to abstain from'), or do something against choice (he says 'incontinence is contrary to choice'). He, implicitly, denies the existence of people who choose to regulate their lives by principles that they know to be wrong. And in our own day the theory of the integration of the self has been used (e.g. by Jerome Hall. See his General Principles of Criminal Law, 2nd edition, Chapter 13) to rule out, explicitly or implicitly, the following classes of people: (a) those who know the right ends, but choose to regulate their lives by ends that are radically different, and (b) those who know what is right and good and wish to do what is right and good, but do wrong because their power of self-control is diseased. They rule out the above classes of people on the grounds that the important powers of the personality (e.g. knowledge, volition, emotion) are integrated, and so one important power cannot be impaired, unless all the other important powers are also impaired. ('Serious mental disease is an impairment of all the principal aspects of the personality' (Jerome Hall: General Principles of Criminal Law, 2nd edition, p.49¹). To deny this would entail, so the argument runs, the acceptance of the out-dated faculty psychology, according to which the mind was divided into separate compartments. For if the mind is not divided into separate compartments, a disease that has impaired one important power must have impaired the other important powers also.

It seems to me, however, that one can accept the view that one important power of the mind (e.g. volition) can be diseased while another important power (e.g. knowledge) is unimpaired, without believing in any of the errors of faculty psychology. One can, for instance, agree with Ellis'...a person's ego, id or super-ego cannot do, under its own power, anything whatever. It is in the case of any normal adult human being, the whole person, or individual or organism who thinks, emotes and acts.' (Quoted by Hall, p.597). Yet even if the mind is not divided into separate compartments, even if what Ellis says in the above quotation is correct, it is still possible that some of a person's powers may be seriously impaired while others are not. It is perhaps true that if the mind is not divided into separate compartments and if the disease is contagious between different powers of the mind, then one important power cannot be seriously diseased without impairing the other important powers. But why ~~must the disease always~~ be contagious between different powers of the mind?

I do not necessarily mean that it is false; but that it needs to be supported by argument and empirical evidence. Even if such support is forthcoming, not all problems will be solved for the objectivist. For instance the problem we mentioned a little earlier, about how to distinguish those who are ignorant in moral matters because they are dissociated, from those who are ignorant in moral matters because of negligence, will still need to be solved.

Of course, this method of using a man's values as evidence of his sickness can be used not just in establishing moral sickness, but in establishing non-moral sicknesses also. But both the objectivist and the subjectivist will have the problem of distinguishing the sick from the healthy, e.g. is the fact that a man is indifferent between kicking a pebble and the destruction of his family good evidence that he is psychotic? Or neurotic?

What then are we to make of this method of distinguishing the disordered from the healthy by a study of the ends that people are pursuing?

Berlin may be right in his belief that values exist in sense two, but I have tried to show that Berlin is wrong in implying that this method of showing insanity can only be

used if values exist in sense two.¹ I have tried to show that, whether or not values exist in sense two, it is not absurd to use this method. Hume says 'It is not contrary to reason to prefer the destruction of the whole world to the scratching of my finger. It is not contrary to reason for me to choose my total ruin, to prevent the least uneasiness of an Indian, or person wholly unknown to me.'² This is an illustration of Hume's view that values do not exist in sense two. But it would seem quite consistent for Hume to go on to say that the man who prefers the destruction of the whole world to the scratching of his finger is irrational in the sense that he is insane, even morally insane. This point may need a little qualification. Sometimes a distinction is drawn between mental sickness and insanity. Insanity entails sickness; but the converse is not true. Insanity involves cognitive disorders (e.g. psychosis) as a result of which the patient's vision of facts is impaired - he loses touch with reality. But there are other kinds of mental

¹ I think Berlin, in his valuable and exciting paper, has made this mistake. For he does imply, in the passage that I quoted earlier, that consistent relativists will say that the man who has very different values from us is not mad. But if there is anything of value to be learnt from a discussion of this mistake, it should remain, even if I am wrong in attributing this mistake to Berlin.

² A Treatise of Human Nature, Book 2, Part 3, Section 3.

sicknesses, which involve only volitional disorder, and here the patient may see facts properly, but is unable to control himself (e.g. neurosis).

Similarly one can coin a distinction (as far as I know no one takes the trouble of making this distinction) between moral insanity and moral sickness. Moral insanity would entail moral sickness but the converse would not hold. Moral insanity would involve inability to see moral facts. But there would be other kinds of moral sicknesses which involve not inability to see moral facts, but inability to choose certain values. This inability to choose certain values may itself be a result of (mental) insanity or of some other kind of mental sickness.

We thus have:

1. Mental sicknesses
 - (a) Insanity
 - (b) Other kinds of mental sicknesses.
2. Moral sicknesses
 - (a) Moral insanity
 - (b) Other kinds of moral sicknesses.

There is nothing logically absurd in using the ends that a man is pursuing as evidence of any of the above kinds of sicknesses.

Only 2(a) is incompatible with the thesis of subjectivists like Hume. And it is worth observing that it is only in this sense that moral insanity is incompatible with Hume's position. If we use moral insanity in another sense, in which it is synonymous with moral sickness, then it is not incompatible with Hume's views. Corresponding to the two senses of moral insanity, we can have two senses of 'dissociation from values'. In one sense it means inability, due to mental disorder, to see values properly. In the second sense, it means inability, due to mental disorder, to choose certain values.

Berlin says that the man to whom it makes no difference whether he kicks a pebble or kills his family is mad, as a man who thinks he is Napoleon is mad. Well, this is compatible with Hume's position. For 1(a) (i.e. insanity) is compatible with Hume's position.

And, in a way it is a point in favour of this method that it can be used, without presupposing a particular view about the status of values, for if this method did presuppose a particular view about the status of values, then this method will appear suspicious to all those who do not share that view about the status of values.

I have in this section pointed out some difficulties involved in using this method, not in order to ridicule it, but for two reasons. Firstly, I tried to show that this

method can be used by both objectivists and subjectivists, and that the subjectivists are not the only ones who will encounter difficulties in the use of this method. Secondly, I think this method should be used only in those cases where these difficulties have been overcome - I have not maintained that these difficulties are insurmountable, but only that they need to be surmounted if this method is to be used.

If this method is to be used to diagnose whether certain criminals are sick, then it would be a great help if those who are experts in this method could explain why certain criminal values are evidence of madness, while certain other criminal values are not. Berlin says that certain scales of values are inhuman. But it is not enough to say that if a man has certain values then he remains human, but if he has certain others then he is inhuman. For what is meant by 'human' and 'inhuman'? If a man is inhuman can we infer that he is mad? It may be replied that if a dog or cat does not behave in a human way, this does not show that the dog or the cat is mad; but if a man behaves inhumanly this does show that he is disordered. Even if this reply is convincing, there is another problem still to be solved - viz. how do we decide which criminal values are inhuman and

which criminal values are not inhuman?¹

It may of course be that some people are good at getting the right answer to the question which values are inhuman, without being able to justify their answers. Just as some people are good judges of character, but if you ask them to justify their answers, they may not be able to do so.

But the trouble is that experts seem to disagree in their answer to the question which values are inhuman. Perhaps in some very extreme cases, there is more agreement, e.g. if someone really is indifferent between the destruction of his family and the kicking of a pebble, because both are antidotes to ennui, then there may be considerable agreement that this man is mad: but in less extreme cases there is

¹The view that certain values are inhuman, while others are human, is I think compatible with the view that values do not exist in sense two. Thus a subjectivist could give as his reason for saying that certain values are human while others inhuman, that it is man who has created values and has loaded the term 'human' with certain values, and the term 'inhuman' with certain other values. It will then be an objective matter of fact that certain people, e.g. A, B, C, have values that are inhuman, while certain other people, e.g. X, Y, Z, have values that are human. But this objective fact is compatible with the subjectivist thesis that values do not exist in sense two.

The problem on this view would be with which values should we load the concept 'human'. And there may be considerable dispute on this problem between people who hold different moral views.

likely to be considerable disagreement. Some capitalists may think that the values that Stalin pursued were inhuman, whereas the values that Hitler pursued were very wicked, but not inhuman. More left-wing people might say that the values that Hitler pursued were inhuman, that Hitler was a monster, while Stalin was very wicked, but not inhuman.

To some extent it may be inevitable that our own values should distort our judgments about human beings, but the less the distortion the better. That is why it would be a great help if people like Berlin could also give us their justifications for saying that certain values are inhuman.

There is one important problem that needs to be discussed. What do we mean when we say that a man is 'inhuman'? Is it just that he tends to choose certain ways of life? But then does not mental disorder connote passivity - the man suffering from mental disorder is not, or at least not fully, a choosing agent; he drifts, is passive, a victim of various forces, and not an active agent? And it may be objected, no amount of playing with words like 'inhuman' can remove from us our burden of showing why a man, because he follows certain values, is not a choosing agent.

Our answer to this question could be that madness or mental disorder does not always connote that the person

suffering from it is passive and drifting. This connotation is there|with an important sub-class of mad people (i.e. those suffering from cognitive or volitional disorder). But there is another class of mental disorder - consisting of people who have inhuman values, who are monsters, and not really human. These 'monsters' know what they are doing, and also have control over their behaviour. They are choosing agents but are yet mad because they are monsters and not really human.

But then why should these monsters be excused from punishment? If they committed crimes, and if they were choosing agents, should they not be punished? It may be replied that if we do not have a common moral or social language with a criminal, then we should not punish him.¹

¹Gabriel de Tarde (Freedom and Responsibility, edited by H. Morris, pp. 46-49) believed that we excuse a man from punishment if he is not socially similar to us. And he tried to support this view by saying that this view explains why we excuse from punishment savages, epileptics, etc.

I think Tarde may be right that savages and epileptics are not socially similar to us, but I think these examples do not establish his case conclusively. For our reason for excusing savages and epileptics may be that such people have not had an opportunity of obeying our law.

This does not of course mean that we should let such monsters loose on the community. We should lock them up but not punish them. Of course we need norms to tell us whether we have more of a common moral and social language with A than with B. For a lot will depend upon what respects are relevant and important.

Another way of tackling this problem would be to agree that mental disorder always implies that the capacity of choice is impaired, but that we need norms to decide which capacities really matter. For, at least in the case of less severe abnormalities, those suffering from such abnormalities lack a choice over a certain important range; but there may be other areas where their power of choice is unimpaired. Even psychotics and neurotics can do many things. And conversely those we call sane cannot do many things. So we need some norms to tell us which capacities are relevant in deciding whether a person is mad.¹ But how is the use of norms in deciding whether someone is mad to be reconciled with the view that people are as a matter of objective fact

¹•Earlier in this chapter we saw that the values that a man has may be used as evidence of mental disorder. Now we see that values enter in another way, we need them to tell us what the standards of mental disorder are. Neither of these ways of bringing values into the problem of mental disorder presuppose that values exist in sense two.

either mad or not? I think the reconciliation comes about in this way; Given certain norms, it is a matter of objective fact that some people are mad, while some others are not.

I think now we may be able to see the sort of lines that those of us who want to excuse from punishment the psychopath, but not people like Russell and Gandhi, may be able to take. We could, with the help of norms, argue that we have a common moral and social language with Russell, but not with psychopaths. Or, alternatively, we could try to show with the help of norms that psychopaths are sick, while people like Russell are not. We could grant that the psychopath has certain capacities and lacks others. We could then argue that Russell too has certain capacities and lacks others. Thus, with regard to at least certain sensuous pleasures the psychopath may have capacities which people like Russell and Gandhi do not. But there are other capacities, e.g. the ability to make moral decisions, which people like Russell and Gandhi have, and which psychopaths lack - for psychopaths lack moral sentiments (even though they are capable of good theoretical reasoning in moral and intellectual matters). We could then use our norms to tell

us that the capacities which psychopaths lack are relevant from the point of view of showing a man to be disordered, while the capacities that people like Gandhi and Russell lack are not. (And there is nothing odd in saying that the possession of some capacities is more relevant from the point of view of showing the man to be healthy, than the possession of others. Indeed, it would be odd if all capacities were treated as equally relevant). So people like psychopaths are sick, while people like Russell are not. Now we saw in section one that a good case had been made for the view that, unlike some ordinary criminals, both psychopaths and people like Russell fail the second test. We have now seen the sort of lines along which it could be argued that while psychopaths fail the second test because of sickness, people like Russell are not sick. In this way psychopaths, unlike people like Russell and Gandhi and unlike some ordinary criminals, could be excused from punishment.

It might however be objected that this discussion has been a little over-simplified. For the most that has been shown is that psychopaths (and people like Russell) find it very difficult to pass the second test. For it may be argued that even if one has been 'addicted' to a certain way of life for a long time this makes it difficult but not necessarily impossible to change that way of life.

(Similarly, people like Russell will find it very difficult to pass the second test, but it is not obvious that they will find it impossible to do so).

So it may be argued that the conclusion that we should reach is that, as in the case of, for instance, provocation where the criminal finds it specially difficult to conform to the law, the psychopath if he should not be excused altogether, should be excused from full punishment (i.e. his punishment should be mitigated).

CHAPTER IV
MADNESS AND CHOICE

I

Mental sickness need not involve the loss (or impairment) of all capacities,¹ but only of some.² Once this is realised some of the related problems may become a little less obscure.

It is because sickness involves inability to do some, not all things, that, even after we have shown that the criminal did the crime and is mentally sick, there is the further problem in law and morals - whether the criminal's responsibility for the crime was impaired due to mental sickness. (The mentally disordered may, as we shall see in the last section, possess some capacities not only in the sense in which animals, machines, and young children possess some capacities (if those were the only sort of capacities that the mentally disordered possessed, they would not be responsible for any of their actions) but also in the sense

¹ This is true both of cognitive disorders and of volitional ones. A man suffering from a cognitive disorder is not necessarily ignorant of everything; and a man suffering from volitional disorder is not incapable of controlling every movement of his.

² It would be foolish to infer from this that mental illness is not real but subjective. Just as physical disease, too, involves the loss of only some capacities, not all, but it would be absurd to argue that therefore physical disease is not real but an illusion.

in which some grown-up persons are supposed to have capacities (in this sense animals, machines, and young children do not possess capacities; they cannot help what they are doing.)) It is because of the belief that mental disease is not totally incapacitating, that both the M'Naghten Rules and Homicide Act insist that only a sub-class of the mentally diseased should be excused.

Of course, there may be an additional reason why only a sub-class of the mentally diseased should be excused; even if madness is totally incapacitating, there may be a utilitarian case for not allowing certain kinds of madnesses (i.e. those kinds of madnesses that are easy to feign) to excuse. For in a system that does allow such madnesses to excuse, people are more likely to commit crimes, in the hope that even if they are caught, they may succeed in bluffing the jury into believing that they were mad.

But be that as it may, the M'Naghten Rules and Homicide Act do seem to imply that madness is not totally incapacitating. That is why, in the Homicide Act, it is not enough to establish that the accused was suffering from abnormality of mind; even when abnormality of mind is established, it also needs to be shown that it 'substantially impaired his mental responsibility for his acts and omissions

in doing or being a party to the killing.' Similarly, under M'Naghten Rules, even when it is established that the accused was suffering from a defect of reason due to disease of the mind, this is not enough to excuse the accused; it also needs to be shown that as a result, he did not know the nature or quality of his act, or if he did know this, he did not know that it was wrong.

Sometimes people say that Hitler was mad. But they also like to maintain that Hitler was morally blameworthy. These two positions seem less incompatible once it is realised that madness does not involve the loss of all capacities. If madness was all pervasive, if it did involve the loss of all capacities, would it not be unjust to say of Hitler that he was both mad and morally blameworthy?

Some geniuses are said to be mad, and this causes considerable perplexity. How can a genius be mad? Now it is true that sometimes a genius is said to be mad because of wrong diagnosis. Both the genius and the mad are different from the normal people, and conventional people are sometimes as intolerant of the genius as they are of the mad - and they wrongly lump them together. So sometimes geniuses are wrongly condemned as mad and this just reflects

the ignorance and prejudice of those who diagnose them as mad. But while some geniuses are wrongly condemned as mad, it would not be fair to infer that no genius is mad. Some geniuses could well be mad. It is quite obvious that the same man could be a genius at certain periods of his life - say for 20 years - and then become mad, - so the same man could at different periods of his life be a genius and a madman. But it also seems that even during the same period, a man could be said to be both a genius and a madman. Once we realise that madness does not involve the loss of all capacities, and that genius does not involve excellence in all fields, there is nothing paradoxical in holding of the same man, that he is simultaneously both mad and a genius. If madness did involve the loss of all capacities, then it would be absurd to say of the same man that he is simultaneously both mad and a genius.

It is true that to be a genius it is not enough that you should excel in any field. The field must be an important one. If you excel at ludo we do not call you a genius but we may say "You are a genius at ludo." Compare Dostoevski of whom we say not just that he was a genius at literature, but also that he was a man of genius. Similarly with madness; in the case of some obsessions, such as an

obsession for a woman or for a great cause, we do not say the man is mad - though we may say "He is mad about the woman," but of some other men - for instance about a man who believes he is King of France - we do not just say he is mad about his identity, we say "He is mad." Now it is quite obvious that a man can be a genius at a particular thing and mad about some other thing; but can a man be both a man of genius and be mad? Yes, he can.¹

¹ It is quite obvious that if you are not a man of genius, but just a genius at, say ludo, then you can be an idiot about many important things. But even if you are a man of genius, you can be an idiot about many other important things. For the difference between the man of genius and the man who is just a genius at ludo is that a man of genius is a genius at an important activity (or some important activities); he does not have to be a genius at all important activities.

Similarly, it is quite obvious that if you are not a madman, but are just mad about, say, a woman, then you can be very sane, even a genius, at some other activities. But even if you are a madman, you can excel at certain important activities.

Genius involves excellence in some important capacities, and madness involves lacking some important capacities; but the genius and the madman may be in the same position with regard to responsibility. For both may or may not be responsible for their actions. That some madmen are not responsible is obvious. But some geniuses too are not responsible, they may not even be responsible in the areas in which they are geniuses. For some geniuses may be instruments (e.g. of the unconscious) of forces over which they have no more control than the mad have. A genius could be mentally disordered even in areas in which he is a genius. But how can this be so when genius entails excellence in some important areas, while mental disorder involves some defect in important areas? It can happen because mental disorder

For though both genius and madness are concerned with important capacities, yet they are not exclusive terms; a man of genius can be mad, for to say of a man that he is a man of genius implies that he excels in some important capacities; it does not imply that he excels in all important capacities; and to say of a man that he is mad does not imply that he is lacking in all important capacities. It may even be that some important capacities flourish more when some other important ones are absent. If that is so, madness need not always be an obstacle to genius; it may sometimes even be a stimulus to genius. This is not of course to deny that some kinds of madness are obstacles in the way of some kinds of genius.

Our view of madness can help to solve another controversy. Under the M'Naghten Rules the accused "must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real."¹

A person may kill a man thinking that he himself is God. Here he has a defence, for if he were God he would

(Continuation of Footnote 1, page 88)

does not necessarily involve lack of ability; it may sometimes consist in the fact that the person suffering from it is an instrument of forces (e.g. the unconscious) outside his conscious control. In the case of some geniuses these forces may be very powerful and creative, and not under the control of the genius.

¹ Freedom and Responsibility. Edited by Herbert Morris. P. 395

not be subject to the criminal law. Or again, if he kills because he is under a delusion that X is going to shoot him, then he is excused. For if the facts were as he had supposed them to be, he would be excused. But if he kills because he is under a delusion that X was slandering him, then this does not excuse him. Because, even if the facts were as he supposed them to be, this would not excuse him.

This part of the M'Naghten Rules has met with much criticism. It is said that partial insanity is not possible. "The rules mean that one has to subject the warped reasoning of the mentally afflicted to the same critical examination as if they were sane."¹ "This is virtually saying to a man, 'You are allowed to be insane; ... but have a care how you manifest your insanity; there must be method in your madness. Having once adopted your delusion, all the subsequent steps connected with it must be conformed to the strictest requirements of reason ... In short, having become fairly enveloped in the clouds of mental disorder, the law expects you will move as discreetly and circumspectly as if the undimmed light of reason were shining upon your path' "²

¹ Glanville Williams. The Criminal Law. General Part. London 1961. p.502.

² Maudsley, quoted by Glanville Williams. op. cit. p.504.

"A person does not, when he becomes insane, take leave of his human passions nor cease to be affected by ordinary activities, and when he acts from one of these motives he does not, by doing so, take leave of his insanity; if he kills someone out of revenge for an imagined injury he is still a madman taking his revenge."¹

But it seems to us that 'partial insanity' is possible.² (I shall try to show in the next section that this argument of Maudsley's against the possibility of 'partial sanity' appears plausible because of a confusion between two senses of 'insanity'.) It is of course true that if you are suffering from a 'delusion' this is often good evidence that you are insane in other respects also (the delusion reflects diseased functioning of the mind and the disease could be reflected in other ways also). One should not blindly assume that the deluded man has the same

¹ Maudsley, quoted by Glanville Williams, p.505.

² Some of Freud's findings also seem to confirm the view that partial insanity is possible. Thus he points out that while those who are sick in realms other than the sexual realm, are also sick in the sexual realm, many people are sick in the sexual realm but quite normal in other realms. (See S. Freud: Three Contributions to the Theory of Sex: First Contribution. Section 3.)

capacity in other spheres as the normal one.¹ But it does not follow that the deluded man has no capacities in other directions. Some of his capacities may be left unimpaired by the disease, indeed some of his capacities may even be more developed than that of a normal individual. Which capacities are impaired and which are not is a matter for empirical investigation. It is dogmatic to say that partial insanity is not possible.

It is true that if you are deluded about something, then, if this delusion reflects your insanity, the insanity will probably manifest itself in some other areas, but it does not follow that the insanity will manifest itself in all other areas, not even in all important areas. Just as if you write a wise book, then this book reflects your wisdom, and it would be odd if your wisdom was not reflected in any other area; but, of course, you do not have to be wise in all other directions, not even in all important directions, to write a wise book.

¹ If we make this blind assumption, this can lead to unjust results. Suppose that a man kills another while under the delusion that people are slandering him. Even if the facts were as he supposed them to be, a reasonable man would not be excused for killing to avenge slander. Yet the delusion of this man may be good evidence that his capacity for conforming to the law is impaired.

The view that 'partial insanity' is possible is attacked by Glanville Williams on the grounds that it was based on the outdated theory of the brain as a bundle of independent functions. Glanville Williams points out that this theory of the brain is now obsolete: "The view generally accepted at the present day was expressed by Mercier: 'There is not, and never has been a person who labours under partial delusion only and is not in other respects insane.'"¹

Now it may be that historically the "partial insanity" theory was based on a crude theory of the brain. But it seems that its validity is not dependent upon the truth of this crude theory.²

Glanville Williams seems to admit that even insane people may be affected to some extent by ordinary motives, including the fear of punishment, but he argues against the theory that partial insanity is possible, and quotes the following passage from Mandesley "these motives can only be acted upon in a very cautious way, and if the strain put upon them be too great, the patient is made worse and all control over him lost. It is certain too that a patient

¹ op.cit. p.505.

² See p. 72 of this thesis.

who may one day be amenable to such motives may on another day, in consequence of a different phase in his disease, be altogether beyond the reach of moral influence. I do not see, therefore, how it can justly be maintained that an insane person should be subjected to any sort of punishment to the same degree as a sane person; or how it can be justly argued that he should in any case be under penal rather than medical control."¹ But even if the motives of the insane cannot properly be controlled by penal and moral influence, this does not show that partial insanity is not possible. Failure to respond properly to moral and penal action may be one utilitarian reason against subjecting such people to such action; it does not show they are totally insane.²

So it seems that 'partial insanity' is possible, but it must be admitted that it is difficult to determine exactly how far the insanity has spread, which capacities are impaired and which are not. And this makes it difficult to decide issues of responsibility.

Our theory of madness can also be used to criticize some of Bentham's remarks about madness. Bentham³ seems

¹ Glanville Williams pp. 505 - 506.

² See pages 40 - 41 of this thesis.

³ J. Bentham. Principles of Morals and Legislation. Ch. XIII. paragraph 9.

to have believed that madness was total. He divides excuses into two classes - (a) those where the will cannot be deterred from any act, such as infancy, intoxication, and insanity. And (b) those where the will cannot be deterred from the individual act in question - e.g. if the act is done by mistake or accident etc.

It was dogmatic of Bentham to believe that in insanity (or for that matter in infancy or intoxication) the will cannot be deterred from doing any act.

It is possible, perhaps even useful, to distinguish those defences which relate more to the personal characteristic of the accused, such as insanity, intoxication, infancy, from those defences which relate more to the circumstances of the event, such as many accidents and mistakes. But Bentham had given a wrong rationale for this distinction.

It is interesting to see what led Bentham to believe that insanity must be complete, that an insane man cannot be deterred from any act. He says¹ that the circumstances of insanity of mind corresponds to that of bodily imperfection. But he says that it admits of much less variety than bodily

¹ Principles of Morals and Legislation. Ch. 6. Section 18.

imperfection, for the "soul is (for aught we can perceive) one indivisible thing, not distinguishable, like the body, into parts." Now it is true that things like the soul and mind are unlike the body, not spatially divisible. But it does not follow from this that the soul and the mind have less variety than the body.¹ Variety does not always require spatial divisibility. The view that some parts of the mind are diseased while others are not, does not presuppose the absurd view that the mind must be spatially divisible.

Bentham's second reason for believing that insanity must be total seems to be this. "What lesser degree of imperfection the mind may be susceptible of, seem to be comprisable under the already-mentioned heads of ignorance, weakness of mind, irritability, or unsteadiness; or under such others as are reducible to them. Those which are here in view are those extraordinary species and degrees of mental imperfection, which, wherever they take place, are as unquestionable as lameness or blindness in the body."²

Now it is of course true that insanity is a major disorder of the mind. If there is some minor trouble such as mild irritation, we will just not call it 'insanity'.

¹ Even if the soul is an indivisible thing, without variety, the mind does admit of variety. So why should not mental disorder affect some powers of the mind more than others?

² ~~op. cit.~~ Ch. VI. ^{paragraph} ~~XXIII.~~ XXIII.

But Bentham seems to make two wrong inferences from this.

Firstly, he wrongly seems to infer that an insane man cannot be deterred from any act. It is true that a major disorder of the mind is more likely to affect other parts of the mind than a minor disorder of the mind, but even a major disorder of the mind does not entail that no important capacities of the mind are intact. Some mad people, both in asylums and outside, are known to exploit their madness to their own advantage with considerable shrewdness, which shows they do not take leave of their reason altogether. Again, some mad criminals are very calculating, both in committing the crime and in escaping detection.

Secondly, Bentham wrongly argues that because insanity is a major disorder, therefore it must be conspicuous. There are all kinds of problems - such as the problems about the standards of mental illness; about the border-line between insanity and sanity; about the possibility of malingering etc. and these do not automatically disappear as a result of insanity being a major disorder. If you have a major disorder then it is likely¹ to be easier to know that you have a disorder than if you have a minor disorder. But it does not follow from this that it is easier to know

¹ There are exceptions. Sometimes major disorders are very well hidden, while minor ones are on the surface.

whether you have a major disorder than to know whether you have a minor disorder. Just as if a man is in his fifties, it is likely to be easier to guess from his appearance that he is over 40, than it is to guess from the appearance of a man who is in his forties that he is over 40. (For it is much less likely that a man in his fifties will look under 40, than it is that a man in his forties will look under 40). But it does not follow that it is easier to tell from the appearance of a man in his fifties that he is over 50, than it is to tell from the appearance of a man in his forties that he is over 40.

II

We have maintained that mental sickness does not involve the loss of all capacities, but of some. So we shall need norms to tell us which capacities are relevant for mental sickness. Now in discussing whether mental sickness depends upon norms, we need to distinguish medical insanity from legal insanity. One of the sources of confusion is that there are two senses of insanity which are not always distinguished from each other, though they ought to be. Sometimes insanity refers to medical insanity. Sometimes it refers to legal insanity, i.e. lack of

responsibility for the given social demand arising out of (medical) insanity. Legal insanity is a sub-class of medical insanity. In Chapter One I argued that whether one is legally insane varies with different social demands and different conditions. And there is nothing subjective in this. (One may have the capacity to conform to the law about murder, but not to the law about stealing.) But how do we find out what (medical) insanity is? Is that 'value-free' or is it 'value-soaked'? Here it seems that we need norms to tell us what mental disorder is. (But this does not mean that the concept of mental disorder is subjective in a bad sense. It can figure in explanations of behaviour even though it is value-soaked. For given certain values, it will be an objective matter of fact that certain people are sick).

Whether you are medically insane does not vary with the particular crime in question in the way that whether you are legally insane may vary. If you are (medically) mad and steal, you are a madman who has stolen; and if you then go and murder, you are a madman who has committed murder. But even though you are a madman committing murder you may be responsible for the murder (if you are not legally mad) and you may be lacking in responsibility for your stealing

(if you are legally mad). But this does not prevent us from saying that you are (medically) mad both when you steal and when you commit the murder.

So (medical) insanity, unlike legal insanity, does not vary with which particular social demand is in question in the particular case; but it is value-loaded. According to some standards you may be mad, while according to others you may be sane. All of us lack some capacities, and possess others, and this is true both of mad people and sane people, and we need norms to help us to tell which capacities are more relevant to madness. By our norms, if as a result of your mental troubles, you do not refrain from murdering your servant, this is more relevant to madness than if, as a result of your mental troubles, you do not know how to be courteous to your overbearing boss. (Though according to some other norms - some kind of Fascist or worse than Fascist norms - it may be more important that you are courteous to your superiors than that you should not kill your inferiors). So norms do help to tell us what madness is by telling us which capacities are important and which are not. But if, with the help of norms, you are found to be (medically) mad, then you are (medically) mad whatever you do. (Though whether you are legally mad could vary with which social demand is in question). So it is quite

true that if you are a madman, then you are a madman whether you steal or murder. Maudseley said that if you are mad, then even when you are acting out of ordinary motives such as taking revenge, you are a madman taking revenge. Now, if by mad one means medically mad, then it is quite true that if you are mad, you are mad even when acting out of ordinary motives such as taking revenge. But Maudsley and Glanville Williams have drawn a wrong inference from this - they infer that partial insanity is not possible, that the madman cannot justly be held responsible for any of his actions. (Just as if we see a man of genius such as Einstein playing ludo we can in a sense say 'there is a man of genius playing ludo.' But it would be wrong to infer from this that Einstein is a genius at ludo). Maudseley's inference only appears plausible because of a confusion between medical and legal insanity.

Since (medical) insanity depends upon norms, and since whether one is medically insane or not often has very important consequences, it is very important to load (medical) insanity with the appropriate norms. Which norms we should load insanity with, should depend at least partly upon what the consequences of a man being pronounced sick are. Here we need to distinguish two things: (a) In what way in our system does the fact that you are pronounced

mentally disordered affect your fate? (b) In what way ought the fact that you are pronounced mentally disordered to affect your fate? (a) is important as long as we operate our system, (b) is important since we should not necessarily accept our present system, but try to see what ought to be done with the mentally sick.

So the problem of what is the rationale of ^{EXCUSES} ~~punishment~~ and of our system of compulsory mental treatment is relevant to the problem of with what norms should we load the concept of mental sickness.

Under our present system, if you are (medically) insane, and if as a result of this you could not have conformed to the law, you will not be punished; though you may receive compulsory medical treatment or just compulsory deprivation of liberty. Whereas if you are not mentally abnormal, and if you want to be excused, you will have to look for one of the other excuses - (legal) accident, (legal) mistake, etc. And if you do not fall under one of the specific excuses that the law recognizes, then you will be liable to be punished. You cannot just plead 'I could not have helped it.' You must come under one of the categories of excuses. You must plead that you could not have helped it in one of the specific ways that the law

recognizes. So it is important whether you are insane or not.

There are certain kinds of ignorance - such as ignorance of the law, which may excuse you if your ignorance is due to your insanity, but do not normally excuse you if you are sane. Again, if you are ignorant of the consequences of your act, when a reasonable man could be expected to know the consequences, you will not be held responsible for the consequences of your act if your ignorance was a result of your insanity, but, if you were not insane, you will be held responsible.¹ If you put arsenic in your guest's tea and he dies, and if you did not know it was arsenic, but thought it was sugar, you will be excused from murder; but if you knew it was arsenic, but did not know that arsenic is poison, then this is no excuse unless your ignorance is due to your insanity; if you are sane, mistake as to the particular circumstances of what you are doing is a defence, but mistake regarding the general way that things behave is no defence as long as reasonable men would not make such mistakes.

¹ Thus in *D.P.P. v. Smith* (1961) Smith killed a policeman but there was evidence to show that he neither intended to kill the policeman nor to cause him grievous bodily harm; he did not even know that his actions could have such consequences. But the House of Lords decided that he was guilty since a reasonable man would have known that the act was likely to cause grievous bodily harm or death. Yet if Smith had been mad, and if his ignorance had been due to his madness, he would have been acquitted.

Again, the Mental Health Act, 1959 (See Sections 25 and 26) has provision for compulsory deprivation of liberty of some people who may not even have committed a crime. It is true that mere 'mental disorder' is not enough for these provisions to be applied - the provision applies against those mentally disordered people who are either a danger to themselves or to others. But 'mental disorder' is a necessary condition of these provisions being applied. So if you are not mentally disordered, these provisions will not apply against you.

We have seen some of the ways in which whether you are mentally disordered does affect your fate under our present system. What is the rationale of this? Why do we bother about whether you are mentally sick in deciding whether or not you ought to be excused from punishment, or compulsorily treated?

If you are ignorant of the law, this does not normally excuse you. Ignorance of the law is normally no excuse. I suppose the justification for this is partly that it is very difficult to establish that you were not ignorant of the law, so that, if we did allow such an excuse, everyone would try to exploit this defence; and even if it is established that you were ignorant of the law, there is the problem about how far you could have avoided this ignorance -

and it is felt that this problem, too, would be very difficult to solve in practice. But if your ignorance is a result of your insanity, you can be excused, without so much danger that people would exploit this defence in their favour; for not everyone can successfully pose as insane; of course, the danger of malingering is there, but by having this additional requirement of insanity, the chances that a person will succeed in bluffing the jury that he was ignorant, are reduced.

But why not have some other additional requirement such as the following: if you are blonde, and could not have helped being ignorant, then you are excused? Because if you are mentally disordered, there is a prima facie case for the view that you may find it difficult to know the law and conform to it; whereas the fact that you are blonde is irrelevant to whether you have such capacity. If you are insane, then there is a prima facie case that your ignorance of the law is unavoidable; whereas if you are not insane, we can say 'Even if you were ignorant of the law, it is likely that you had the capacity of knowing what the law is.' A similar justification would, I suppose be given for the rule that you are treated as a reasonable man with regard to your knowledge of the way things generally behave, but if you are insane you are not

expected to behave like a reasonable man.

What about the Mental Health Act? What is the justification for applying the provisions that we mentioned earlier, only against the mentally disordered? Why should they not be applied against the mentally healthy also? Here I suppose some such justification as the following may be given: We have the right to 'pick up' a madman, before he has committed the crime: whereas, if a man is sane, we should treat him as a man; we should not deprive him of his rights until he has given us a licence to do so by voluntarily breaking the law.¹ Or again some people may try to justify these provisions of the Mental Health Act, on the grounds that if we just allow people to be 'picked up' because they are considered a danger to themselves or to others, this would lead to all kinds of abuses; and people would feel much less secure if they felt that they could be 'picked up' whenever they were considered a danger to

¹ F.H. Bradley (Collected Essays, Essay 5), defended social surgery on the mad on the grounds that the concept of justice does not apply to the mad; we respect human beings because they are moral agents - that is the reason why we treat them as ends, not just as means to some end; but, if they are mad, they are no longer moral agents, and so our moral obligations to them cease.

This argument would be criticised by those who believe that we should treat people as ends, even if they are not moral agents, but just because they are sentient creatures. They could argue that we have some moral obligations even to animals, even though the latter are not moral agents. Those who have moral obligations, must be moral agents, but those towards whom we have moral obligations need not be moral agents

themselves and to others; whereas if they felt that only the mentally disordered could be 'picked up' on these grounds, this will chiefly make the mentally disordered feel insecure; but most of the population will feel relatively unaffected by these provisions. But why just pick up from the class of 'mentally disordered'; why not pick up from some other class - say all those with blonde hair? Because the mentally abnormal, unlike those with blonde hair, are the kind of people against whom there is a prima facie case that they are a danger to themselves or to others. But then what about some other class, such as the class of all wicked people? Is there not a prima facie case that they are a danger to others, if not to themselves? Yes, but wickedness is more subjective than 'mental illness'; there is more agreement among experts in our society about who is mentally sick than about who is wicked. And if the picking up was done from the class of all wicked people, we would feel less secure against being picked up than we would if the picking up was done from the class of mentally disordered. For though there is a danger that we may be diagnosed (rightly or wrongly) as mentally disordered, the danger that we might be diagnosed (rightly or wrongly) as wicked would be greater.

The Mental Health Act seems aware of the danger of

equating mental sickness with wickedness. It is to guard against this danger that it has the following provision:

'Nothing in this Act shall be construed as implying that a person may be dealt with under this Act as suffering from mental disorder, or from any form of mental disorder described in this section, by reason only of promiscuity or other immoral conduct.' (Section 4. para. 5)

Another reason why we pick up from the class of 'mentally disordered' is this. In deciding whether certain people should be liable to be 'picked up', we weigh the gains that will accrue from picking them up (e.g. reduction in the crime rate) and balance them against the losses that will accrue by picking up such people. Now ceteris paribus, the losses will be greater the more the people 'picked up' are able to profit from their liberty. Now it is believed that the mentally disordered are less able to profit by their liberty than the sane are, so the losses of picking up from the class of mentally disordered will tend to be less than the losses of picking up from the class of the sane.

Now this justification, too, can help to tell us which the relevant sense of mental sickness is. Thus, the Japanese sense is not the relevant one; for, if we use the Japanese sense, it will no longer be true that the mentally disordered are less able to profit from their liberty than

the same will be.

I have mentioned some of the ways in which whether you are mentally disordered may affect your fate in our system. And I have tried to construct some of the justifications for these practices. It is not essential for my purpose that all the justifications that I gave must be the correct ones - it may be that some of the principles underlying our system are defective, and/or it may be that though some of the principles are all right, their applications are defective, so that some of the practices cannot be justified in terms of these principles. I have, rather, mentioned these justifications as illustrations. The point I want to make is that a study of the role that mental sickness plays in our system, and of the justifications that are advanced for its playing that role, will teach us something about the sense of mental sickness that is relevant to our system.

We have seen that one of the reasons given for making 'mental sickness' play an important role in our system is that if you are mentally sick there is a prima facie case for the view that you find it difficult or impossible to conform to the law. (Only a prima facie case, not a complete case. If there was a complete case, then all mentally sick would be excused; in fact only a sub-class of them is excused - i.e. those where what appears to be the case, in fact turns

out to be the case). This can help us to decide which sense of mental sickness is the relevant one.

I shall try to illustrate this point by examining a criticism that Lady Wootton and others make against our system of responsibility. Lady Wootton argues, with the help of Moloney's findings, that the concept of mental sickness is subjective in a bad sense. Moloney, in his book, Understanding the Japanese Mind points out that the Japanese concept of mental sickness is so different from the Western concept. '... Japanese life is governed chiefly by the id and ... the entire life of a Japanese is directed toward a return to the womb.

The Japanese psychoanalyst, faced with the problem of curing a mentally ill person, must first of all diagnose him as "ill" because he does not adhere to the rigidly prescribed culture patterns I have outlined. The "cure" upon which the analyst then embarks constitutes the opposite of a cure by Western standards. Instead of endeavouring, as do occidental psychoanalysts, to free the individual from his inner thongs, the Japanese analyst actually tightens these thongs. Moreover by the very fact of the analyst's encouraging the patient to believe in the coevality concept, he forces him backward into the status of primitive mankind, where, as we have said, animism reigns.

In essence, the effect is to encourage those regressive tendencies that lead the patient to revert to an embryonic state. The goals of Western psychoanalysis are growth, maturation, and expansiveness; the goals of Japanese psychoanalysis are the opposite.¹

One of the chains of reasoning that has led Lady Wootton to believe that mental sickness and judgments about people's capacities are subjective in a bad sense seems to be this.

1. Mental sickness is used in different senses in different cultures. You may be mentally sick if one uses the Japanese norms, but quite healthy by the Western norms.
2. Therefore mental sickness is subjective.
3. Mental sickness must be objective, if it is to be used as evidence² for lack of capacity to conform to the law.
4. But mental sickness is subjective, therefore it cannot be used as evidence for lack of capacity to conform to the law.

¹ J.C. Moloney. Understanding the Japanese Mind. (Philosophical Library, New York 1954) p.213.

² We have seen that in our present system it is only prima facie evidence of lack of capacity. But this point by itself does not really refute the objection. For it could be asked, if mental sickness is subjective, how is it even prima facie evidence of lack of capacity?

The error in the reasoning is this: True, mental sickness is used in different senses. But we are concerned only with the sense of mental sickness which is relevant for our purposes. From the fact that there are other senses of mental sickness, such as the Japanese one,¹ that are not relevant for our purposes, it does not at all follow that the sense of sickness that is relevant for our purpose is subjective. How do we find out which sense of mental sickness is relevant for our purposes? Now, this is admittedly not easy; but it does not seem insoluble. At least some things can be said by examining our purposes, and by examining the different concepts of mental sickness. We have already mentioned some of the purposes, i.e. why we make mental sickness play the role that it plays in our system. Now it can be seen that the Japanese concept of mental sickness is not the relevant one. For, according to it, most of the people in the West would be diagnosed as mentally sick (they will have to return to the womb to become healthy). But these people will not be the ones against whom there is a prima facie case that they lack the capacity to conform to our laws. Most of us manage to

1.

It is perhaps more accurate to speak of the different standards of mental sickness than of the different senses of mental sickness.

And strictly speaking one should perhaps speak of the Japanese standards of mental sickness as interpreted by Moloney. Many Japanese people, especially among the post-war generation may believe in quite different standards of mental sickness.

conform to the laws even though we have not returned to the womb, or shown much desire to do so. So our justification (that we discussed earlier) for excusing those who are ignorant of the law or of the way things generally behave, if such ignorance is due to mental sickness, would not work if the Japanese concept of mental sickness was used. We should use the sense of mental sickness which is more closely connected with inability to conform to our laws.

Again, the justifications for the provisions of the Mental Health Act that we examined earlier will not work if the Japanese concept of mental sickness is used - e.g. Bradley's justification for social surgery against the mad will not work if one uses the Japanese concept of mental sickness. For those who are mentally sick (by the Japanese norms) are not the ones who have ceased to be moral agents. Indeed, if anything, it seems that it is those who are healthy by Japanese norms, who will have ceased to be moral agents. (For as Moloney tells us, according to Japanese norms, the mentally healthy are those who are not free, who do not have powers of choosing between alternative ways of life, who behave in a robot-like way, etc.). The other justification for restricting the provisions of the Mental Health Act to the mentally sick, was that there was against the mentally sick a good prima facie case that they were a

danger to themselves or to others. But if one uses the Japanese concept of mental sickness, this justification will not work. For many of us would be mentally sick by Japanese standards, but it would be wrong to infer that we were a sufficient danger to ourselves or to others to justify the provisions of the Mental Health Act.

It is sometimes said that according to some definitions mental sickness and wickedness are equated. Now this sense, too, like the Japanese sense, may be a perfectly respectable sense of mental sickness, but it is not the one that is relevant to our purposes. For we saw earlier that we want to guard against the danger of the state 'picking up' the wicked.

So we see that (medical) insanity depends upon norms; we can try to find out what the relevant norms should be by trying to see the role that mental sickness plays in our system and the justifications for its playing the role that it plays. (I have said that the concept mental disorder needs to be loaded with norms. But this does not, of course, mean that we should load it with the norms that happen to be fashionable in the given society or among the given psychiatrists. It is sometimes argued that in our acquisitive society people who do not act out of acquisitive motives tend

to be considered mad;¹ for instance stealing for the sake of making money is a sane motive, but stealing for the fun of it is considered an irrational or insane motive.

Now norms that may happen to prevail in our society should not be blindly accepted as the appropriate norms with which to load the concept of mental sickness. But it would be wrong to infer that there is something wrong with loading the concept of mental disorder with norms. In selecting the norms we should be guided by the role that mental disorder plays and should play in our system, and by the justifications for its playing that role. Once we have got (medical) insanity, there is still the problem of getting legal insanity, which is a sub-class of medical-insanity. We saw that legal insanity may vary with different social demands - e.g. one may be legally insane for stealing, but legally sane for murder, even though one is (medically) insane both when one does the murder and when one does the stealing. The reason for this is that madness does not entail the impairment of all capacities. That is why in deciding whether to excuse a particular criminal, we need to find out, even after we have established his madness, how

¹ See Barbara Wootton: Social Science and Social Pathology. Ch. 8.

far his capacity to conform to the social demand in question was impaired as a result of his madness.

Some people who criticise the present system of responsibility do so on the grounds that it is connected with the concept of mental sickness, which is value-soaked. And defenders of the present system sometimes try to reply that the concept of mental sickness is scientific and not value-loaded. But these defenders seem to agree with the critics of the present system that if 'mental sickness' can be shown to be value-loaded, then the present system will be undermined. Actually they do not need to concede this. For what is wrong if mental sickness is value-loaded? We have seen that it can still figure in explanations. And any system that tries to deal with the fate of criminals must do this with the help of certain values or norms.

It is sometimes said that matters of life and death and individual liberties depend upon which norms are employed. But this would be equally true of any other system of dealing with criminals. The solution is not to do away with 'norms' - that is neither possible nor desirable but to have good norms.

III

We have argued that a madman may be responsible for some of his actions. But against this, it might be objected that mentally disordered people, even though in a sense they have some capacities, are not responsible for any of their actions, because they do not have 'free-will', they are not moral agents, they do not satisfy a necessary condition of responsibility.¹ Thus you may find great painters, or even great men of action, who are instruments of forces (e.g. unconscious forces) outside their control. So it might be argued that they should be excused from punishment and blame, even when they fail to do things which in a sense they have the capacity to do; for, in another important sense, they cannot help what they do.

That possession of capacities (in one sense of capacity) is not a sufficient condition of being a moral agent, of

¹ To say that being a 'moral agent' is a necessary condition of responsibility is, of course, different from saying that being morally guilty is a necessary condition of responsibility. True you cannot be morally guilty unless you are a moral agent. But your being morally guilty for an offence involves more than your being a moral agent; it involves your having done a moral wrong.

having 'free-will' can be seen from the following considerations. Even animals have capacities, yet we do not treat them as moral agents, or as having free-will - even in areas where they have capacities. It is because they are not moral agents that their failure to exercise their capacities is never considered a moral defect. We may, of course, punish them for utilitarian reasons, but we will admit that there is an important sense in which they could not help what they did. Machines, birds and young children, too, have many capacities; at some things they are much better than grown-up human beings are; yet there is a sense in which young children, birds, animals and machines, cannot help what they do; they are not moral agents, and so in one important sense of responsible, they are not responsible for any of their actions, not even for the ones where, in a sense, they had capacity to do what they did not do. A dog may be excellent at finding out where the partridges that you have shot have fallen, but if he refuses to find them, you cannot hold him responsible (in one important sense of responsible) for not finding them.

So it may be argued that, if you are mad, then, true, you may still have some capacities; you may even have some capacities which many 'normal' human beings do not have.

Yet it does not follow that you can be held responsible for the failure to exercise such capacities.

What are we to make of this argument?

Now it must be admitted that possession of capacities (in the sense in which animals, machines, etc. have capacities) is not sufficient to refute the view that the possessor of these capacities is not responsible for any of his actions. To be responsible, in one important sense of responsible, it is also essential that the agent should have 'free-will' - should be a moral agent. Being a moral agent is not a sufficient condition of being responsible for a particular action, (one may, for instance, be a moral agent and yet not be responsible for a particular action that was done due to an unavoidable mistake or accident) but it is a necessary condition for being held responsible for any action. It is because young children, machines, and animals do not satisfy this necessary condition, that they are not responsible for any of their actions in the sense in which persons are responsible for their actions.

But while it must be admitted that being a moral agent is a necessary condition of being responsible (in one important sense of responsible) what reason do we have to think that mentally disordered people do not satisfy

this necessary condition of responsibility? It might be worth trying to see briefly what this necessary condition is.

To be a moral agent involves having the capacity to make and understand moral distinctions. But it involves more than just being good at making 'theoretical' moral judgments. (A man may tell you what the conventional moral code would say on various issues, but he may still not be a moral agent). To be a moral agent also involves a maturity of a certain kind. Of what kind? It is true that some strange definitions of maturity have been given, e.g. in terms of adjustment to the prevailing mores of the society: according to such a definition the social reformer would be considered immature. But though there are difficulties in the concept of 'maturity', it is not an altogether obscure concept. Even though it is difficult to define it in an illuminating and satisfactory way, we can sometimes make judgments about maturity - at least in some extreme cases, e.g. a child of four is not mature; it is not just that he is not physically mature, he is emotionally and intellectually and morally not mature. (He may, of course, be quite mature for his age, but that does not prevent him from being immature in the sense in which a grown-up person is supposed to be mature). Again,

a dog is not a moral agent; his mental and emotional and moral development is so far behind that of the adult human being.

Animals and young children and machines are not capable of mature reflection on the ends that they are pursuing. It is a necessary condition of being a moral agent that one should be able to reflect in a mature way on the kind of life one is leading, and then decide (on the basis of such reflection) which ways of life are open to them and which of these they should pursue. It is true that even grown-up individuals do not on every particular occasion indulge in such reflection. Often they act spontaneously, and if they are moral agents, they could even be held responsible for some of their spontaneous actions. But if they are to be considered moral agents, they must in general be able to reflect in a mature fashion on their way of life. But with young children and animals and machines it is not just that they do not indulge in such reflection; they are incapable of doing so.

We can now come back to our question - are mentally disordered people moral agents? Now in some very extreme cases of mental disorder (e.g. idiocy) it is quite possible

that those suffering from such disorders resemble animals and young children in the relevant respects.¹ So a case could be made for saying that they are not moral agents, and that therefore they are not responsible (in an important sense of responsible)² for any of their actions - not even for the ones which, in a sense, they could have avoided. But in less extreme cases of mental disorder it would be wrong to infer that mentally disordered people are like animals and young children in this respect. This is true even of many cases of insanity, e.g. even if I am suffering from a delusion that I am Napoleon, there may be some areas, even some important areas, in which I can

¹ We must be careful that the respects are the relevant ones. In the case of psychopaths it has been said that they display 'a pattern of electrical activity in their brains, recordable by a special instrument, which has come to be recognised as evidence of immature function and resembles that normally seen only in children'. (D. Stafford Clark, Psychiatry Today. Pelican Books 1959, p.117). The fact that psychopaths resemble children in the pattern of the electrical activity in their brains, cannot be a decisive argument in favour of the view that psychopaths are as immature as children. It is true that children are immature, and that they have a certain pattern of electrical activity in the brain, but it is not obvious why the pattern of electrical activity that they have is always a good test of immaturity.

² They could still be punished and blamed on, for instance pragmatic grounds. But in our system, we do not like to punish and blame people unless they could have helped what they did. (And 'could have helped it' here implies that the agent was a moral agent. That is why in this sense, animals, young children, etc. could not have helped any of the things that they do).

deliberate in a mature fashion. (It is true that insanity is an extreme condition. As we saw earlier, if you have some minor trouble, we will not call it 'insanity'. But 'extreme' is a relative term. Your trouble may be extreme enough to be termed insanity, but it may not be extreme enough to make you cease being a moral agent). Indeed even in areas where I am deluded, I may be able to think quite maturely about certain things. Thus, if I kill someone because I am deluded into thinking that he is slandering me, then, true, I cannot help thinking that he is slandering me, but I may know that I should not kill him and I may be able to control myself from killing him. (It is worth observing that malingering occurs both among the sane and the insane. The sane sometimes pretend that they are mad so that they may be excused; but the mad too can pretend, in the hope of being excused, that their madness is more incapacitating than it is).

So in the case of some extreme kinds of mental disorder perhaps one ceases to be a moral agent (so these mad people are, like young children, animals and machines, not responsible for any of their actions). But in many other cases of mental disorder, you do not cease to be a moral agent; of course, you may still be excused for some of your actions, for being a moral agent is not a

sufficient condition of being responsible for a particular action. As long as you are a moral agent, there is the further problem, even after your madness is established, of whether your capacity to conform to the particular social demand in question was impaired. And there is nothing odd in saying that in some areas the madman may be responsible while in some other areas he is not. A sane moral agent, too, is responsible in some areas but not in others (e.g. when he does an act under duress, or accident etc.) (I have not dealt here with the sceptical theory that no one is free, that no one is a moral agent. Of course, if no one is a moral agent, it follows the mentally disordered are not moral agents. But such radical scepticism is not allowed, as long as we operate within our system of responsibility. I have tried to show that at least in many cases of mental disorders the agent does not, as a result of mental disorder, cease to be a moral agent).

So it seems that mentally disordered people have capacities not only in the sense in which young children, animals and machines may have capacities; they may also have capacities in a way in which young children, machines and animals do not have them. That is why mentally disordered people may sometimes be responsible in a way in

which sane persons are responsible, in a way in which young children, machines and animals never are.

CHAPTER V

A SCIENTIFIC MORALITY?

I

We said in the last chapter that it is neither possible, nor desirable, to have a system of dealing with criminals that does away with norms. But Lady Wootton sometimes talks as if it is possible and desirable to do away with norms. And she claims that ~~is~~ her pragmatic system of dealing with criminals is, unlike our present system, scientific. There are at least two respects (though Lady Wootton does not seem to distinguish these two respects) in which she seems to be claiming that her system is scientific, unlike the present system. Firstly, she seems to think that her system is scientific in the sense of being a workable system; she believes that in her system, leaving aside the moral and other limitations that she mentions, the last word 'is always with the statistician'¹ Under our present system, on the other hand, she argues, we are asked to answer questions - such as, 'could he have helped what he did?' - which are inherently insoluble. (We shall see in Section 2 how far Lady Wootton is justified in saying this.)

¹ Social Science and Social Pathology. p.252.

But she also believes her system is, unlike the present system, scientific in another sense, namely that her system is concerned with is, whereas our system is concerned with ought. 'Forget responsibility and we can ask not whether an offender ought to be punished, but whether (as already in certain cases in Denmark) he is likely to benefit from punishment.' She not only believes that the pragmatic system gets rid of talk of guilt, but also she thinks, or at least says, that it helps to get rid of moral judgments. 'And already' she says triumphantly, 'in one small corner of Europe, the end of the road has been reached: the abdication of morality is complete.'¹ And then to prove her point, she reveals that Luxemburg is the small corner of the world where this has happened; and in Luxemburg those who officially operate the system officially claim 'We do not pass moral judgment, but we try to see only the man as he is.'

And on page 339 of Social Science and Social Pathology she again tells us that medicine is ousting morality. True, she admits there are moral qualifications

¹ Ibid. p.338.

to her system. But she implies that whereas the present system in itself is a moral one, her system, though it is qualified by moral limitations, is essentially a scientific system in the sense of being concerned with facts and not values. For instance, on page 25⁴ of her book she admits that demonstration of effectiveness is not, and cannot be, by itself a command to use; but it seems that the only thing she recognizes as coming between the demonstration of effectiveness and command to use are certain qualifications. Thus she says 'Even so, proof of the probable effectiveness of particular methods of dealing with an offender is not necessarily a conclusive argument for the use of these methods. That argument is subject to two qualifications.'¹

But what Lady Wootton seems to neglect is that her 'scientific' aim of preventing anti-social behaviour, must itself be put forward as a moral aim. Her system presupposes that anti-social behaviour ought to be prevented. Indeed unless her system has a moral aim, not just moral qualifications, how can that system *morally* justify interference with the lives and liberties of

¹ Social Science and Social Pathology. p.252

people? (Though her system gets rid of talk of guilt, it is still interfering with people's lives and liberties). Her system too is, even if you exclude the moral limitations to it, concerned with 'oughts'. It tries to tell us what we (morally) ought to do with anti-social people. Hence her system is not really ousting morality; it is substituting a new morality for an old one.

I have tried to show that her system itself presupposes moral aims, e.g. anti-social behaviour ought to be prevented.

1. Shall we retain moral guilt?

2. Shall we retain moral judgments and morality?

I think Lady Wootton and others, like those who operate the Luxemburg system, often confuse 1 and 2. If you believe, because medicine has shown, or for any other reason, that we cannot make statements about people's capacities, this would be a good argument for by-passing the concept of moral guilt. (Guilt has both an

1. In one sense of 'ought', judgements such as 'one ought to do so' do not entail that morality is not

(See page 129a).

objective and a subjective element, the capacity being relevant to the subjective element. By objective element I mean things like this: other things being equal, a man's moral guilt is greater if he has committed murder than if he committed theft. By subjective element I mean things like this: ceteris paribus, the easier it is for

being ousted. One might, for instance, oust morality and still make judgements such as 'One ought not to drop catches', or 'One ought not to put green and blue next to each other'. But if one reads Lady Wootton's writings one gets the impression that she is, in an important sense, concerned with the 'moral ought'. She is trying to tell us the way of dealing with criminals that is morally the most commendable of all the methods of dealing with the fate of criminals. Since she is committed to some kind of 'moral ought' she cannot, without inconsistency, argue in favour of the ousting of morality.

Though Lady Wootton does not seem to think that things could be as precise in morals as Bentham thought they could be, she does, as do people like Bentham, give the impression of trying to put morality on a scientific basis. So it would be inconsistent for her to argue in favour of the ousting of morality, unless, of course, she just means by 'ousting of morality', the ousting of moralities that are different from the kind of morality that she believes in!.

a man to conform to the law, the more his moral guilt would be if he breaks the law. Both the subjective and the objective element are necessary for the establishment of guilt, so that if you by-pass capacity and the subjective element, you must by-pass guilt. The objective element may still be retained; you may still want to punish crimes like murder more severely than crimes like stealing, but its retention must be justified on some grounds other than the ground that it is essential for judging people's moral guilt. For though it is true that the objective element is essential for judging people's moral guilt, yet, if you by-pass moral guilt, you cannot give moral guilt as your rationale for retaining the objective element).

There is then the further question. If you by-pass moral guilt, does it follow that you should by-pass all morality? Those who answer this question in the affirmative might use one of the following arguments.

Firstly, it might be said that if you by-pass the concept of guilt, you must (logically) by-pass all morality, because guilt is a logically necessary condition of any morality. Sometimes this argument is used dogmatically as a kind of definitional stop that people (e.g. Benn on punishing the innocent) have employed in

other fields. The trouble is that it only shifts the problem. We could still have questions like: Even if you by-pass guilt, why cannot you have rules concerned with the Good Life? Perhaps guilt is an essential pre-requisite of morality, but this needs to be shown; it is not something that should be dogmatically assumed to be the case.

Secondly, it might be said that although you could have a kind of morality (even if you do not call it morality, you could call it by some other word) without retaining the concept of guilt; yet guilt is a morally necessary condition of any morality i.e. any morality to be morally acceptable must retain the concept of guilt; if you get rid of the concept of guilt, no morality will be morally acceptable. Now this is a possible moral position to adopt. But it is not a position open to those like Lady Wootton who want to by-pass the concept of guilt and yet ^{morally} commend the adoption of a new system. Such people are clearly implying that you can have a morally acceptable morality without guilt.

What then are we to make of Lady Wootton's statement that 'medicine is ousting morality in two quarters simultaneously and in consequence large issues are raised as to the nature and origin of moral judgments

Indeed, the struggle between the rival empires of medicine and morality seems to have become the contemporary equivalent of the nineteenth century battle between scientific and religious explanations of cosmic events or of terrestrial evolution the issues are akin and victory seems likely to go the same way. Psychiatrists have been busy doing for man's morals what Darwin and Huxley did for his pedigree and with not much less success.¹

Let us examine each 'quarter' in turn. In the quarter concerned with guilt we have not medicine ousting morality, but at worst (or at best! it depends upon how you look at it) a new kind of morality (i.e. a morality without guilt) replacing an old kind of morality (i.e. a morality with guilt.).

The second quarter in which, according to Lady Wootton, medicine is ousting morality is: 'With the invention of what has been aptly called "mental healthmanship", medicine takes upon itself the business of defining the Good Life.'² In this quarter also Lady Wootton is misdescribing what is happening. The truth

¹ Social Science and Social Pathology. p.339.

² Ibid. p.339.

is that when doctors and psychiatrists tell us what the Good Life is, they are moralizing, whether they know it or not. Hence in this quarter it is not that medicine is ousting morality; what can happen at worst (or at best: again it depends upon how you look at it) is that doctors and psychiatrists will take over the moralizing function in the community.

Lady Wootton, following K. Davids and others, also believes that doctors and psychiatrists reflect the dominant ethics of their culture. Hence it seems in this quarter, medicine will not only not oust morality, it will not even try to oust the dominant morality, but rather to reflect it. In this quarter then, it might be argued, the dominant morality seems quite secure; at worst (or at best) the doctors and psychiatrists will become its guardians and oust its present guardians. (Who are the present guardians of our dominant ethics? Clergymen? Some politicians? Economists?) From this quarter there are, however, two dangers. Firstly, there is the danger to the present guardians, who would be the losers if victory goes to the medical people (Lady Wootton on page 339 predicts that victory will go to medicine). Secondly, there is the danger to the community as a whole and to its dominant ethics, if it happens that our

new guardians are not competent for the job. I think that if any one profession becomes the sole guardian of the nation's morals, the morals will suffer severely. Hence, if Lady Wootton is right that there is a battle for the guardianship of the nation's morals, we must try to prevent any one profession from winning it.

In neither of the two quarters then, is there a battle between medicine and morality. The battle seems to be: in one quarter between morality without guilt vs. morality with guilt: in the other quarter it is psychiatrists and doctors vs. the other contenders for the guardianship of the dominant ethics of our culture. The issue here is: who are to be the new guardians of our dominant ethics?

These two battles cut across one another. (Lady Wootton's description of the battle gives the impression that they do not; that in both quarters it is medicine trying to oust morality. She thus makes the battle sound even more exciting than it is.) It might be that many psychiatrists who are in favour of the new kind of morality, are also the ones who are trying to take over as guardians of our dominant ethics. Although such people are wanting to by-pass one part of our dominant ethics, namely guilt, they perhaps intend being faithful

to the rest. In fact, they must remain faithful if Lady Wootton is right in saying that psychiatrists are slaves of the dominant ethics; for they cannot be slaves and yet subvert too much of the dominant ethics. Perhaps it might be said that these people are only by-passing the unworkable part of the dominant ethics; to the rest they will remain docile.

Anyway, I am quite sure that there are people who would be in favour of the new kind of morality and yet against making medical people the guardians of our nation's morals. Indeed Lady Wootton, at least at times, seems to be one such person. For she is often critical of the claims of medical people to take over as guardians of our morals; though she does predict that the medical people will win, I suppose this is compatible with her belief that they ought not to. But it would only be compatible if she were a pessimist. In fact she seems quite an optimist about the current trends: 'The only solution, as I see it, is to give up trying to draw the line between the responsible and the irresponsible, and to recognize that once we have departed from the comparative security of the M'Naghten formula there is no resting place short of abandoning the question of responsibility altogether. In fact, that is just what

has already happened, under the Mental Health Act. In the case of the psychopath, the question whether he can, or cannot, help is simply not asked: the only issue is his need for, or probable response to treatment. So in the end perhaps we shall come to it in the courts also. In that case everything except treatment - guilt, responsibility and all the rest of it - would become irrelevant. At least such a system would be both humane and effective, which is more than can be said for what we have now.¹

She must, to be consistent, give up one of the following beliefs.

1. That victory will go to the medical people in their battle for the guardianship of the nation's morals.
2. That victory ought not to go to the medical people in their battle for the guardianship of the nation's morals.
3. That she is an optimist.

I have a feeling she will be least disturbed about giving up belief in 1. I think she only believes in 1., or appears to, because she has confused the two battles.

¹ Listener. Sept. 24, 1959. p.482. Italics hers.

Also there might be people who (1) are in favour of increasing the role of psychiatrists among the guardians of the nation's morals and yet (2) are against giving up responsibility. Lady Wootton herself says on page 339 that Stafford-Clark is making extravagant claims on behalf of the medical profession in the battle over who is to be guardian of the nation's morals; and on page 245 she tells us that Stafford-Clark is against giving up the concept of responsibility.

I hope it is clear now what I mean by saying that the two battles cut across one another.

I have tried to discuss what the battles are about because Lady Wootton is confused, or at least her language is confused, on this important point. For instance, on the one hand she talks of the 'struggle between the rival empires of medicine and morality.'¹ On the other hand she believes medical people are slaves of our dominant ethics.

I have also tried to show that Lady Wootton's system itself has a moral aim, not just moral qualifications. Lady Wootton seems to neglect this point. Indeed she contrasts her scientific system with the present one which

¹ Social Science and Social Pathology. p.339.

is, she says, concerned with 'who ought to be punished.' She implies, wrongly, that: if the system is a moral system, then those who help to work it [e.g. by giving evidence in court] must moralize; consequently, she believes, the only way to stop psychiatrists from moralizing is to adopt a scientific system which does not deal with oughts. 'Forget responsibility, and psychiatrists need no longer masquerade as moralists, but can return to their proper role as applied scientists. Forget responsibility and we can ask not whether an offender ought to be punished, but whether (as already in certain cases in Denmark) he is likely to benefit from punishment.'¹

She is however quite wrong in the above implication; and indeed if she was right on this point, it would follow that in her system too those who help to work it would be moralizing; for her system too, as I have argued, is a moral system; it is not true that in her system we can 'forget oughts'.

Under the present system, if I see A kill B, I will be making a non-moral judgment; yet my statement may help to decide what ought to be done with A. Similarly, psychiatrists' evidence may help to decide what ought to be done with A, but it does not follow that psychiatrists

¹ Law Quarterly Review. 1960. p.239.

must be making moral judgments when they try to give evidence about people's capacities.

I have tried to examine here one of the reasons why Lady Wootton may believe that under the present system psychiatrists moralize in court. But there may, of course, be other and better reasons that can be given in support of her view.

II

We have seen that Lady Wootton's system does not do away with norms. But we saw at the beginning of this chapter that there was another sense in which Lady Wootton thinks that her system, unlike the present system, is scientific. The present system is unworkable and chaotic; whereas her system is relatively easy to apply.

One reason that Lady Wootton gives for the present system being so difficult to work is that it is not possible for scientists to tell us when a man is responsible and when he is not; science can only tell us the facts. 'To treat propensity as synonymous with responsibility is to make an enormous leap in the dark; a leap from science to philosophy.'¹ And a little later she says 'Sir David

¹ Law Quarterly Review. 1960. p.232.

Henderson's statement that "under certain conditions of stress and conflict the psychopath person is no more able to control his conduct than the paranoic to control his delusional beliefs" is a philosophical, not a scientific statement. All that science can say is that in certain circumstances the psychopath does not in fact control his conduct. Any judgment as to whether he could do so must necessarily be governed by the philosophical position of those who make them on the eternally unresolved question of the reality of free-will.¹

At other times Lady Wootton is even more sceptical. She not only says that science cannot solve the problems regarding responsibility; these problems are also intellectually insoluble. 'But as the Law now stands they [the Jury] are faced with tasks such as have never before been imposed upon them; for they are required to answer questions which are not only beyond the competence of experts, but are by their very nature unanswerable by anybody.'²

Thus sometimes she says that such problems are philosophical problems, at other times she even says that

¹ Ibid. p.232.

² Ibid. p.236-7.

the problems are inherently insoluble. These two positions seem inconsistent with each other unless she believes that philosophical problems are insoluble.

She has a third position too. For she says that statements about people's capacities are moral judgments. This is different from the view that such statements are philosophical statements. And sometimes she has a fourth position; she says that such problems may be soluble by the person whose capacity is in question, but not by others 'Those on the other hand who take a more conventional view on the subject of free will are still in no position to assess the strength of another man's temptations. On that the evidence lies buried in another man's consciousness, into which no human being can enter.'¹ And sometimes she has a fifth position, that only God may know the answer to such problems.

Is Lady Wootton's scepticism justified?

In fact her scepticism seems at least partly unjustified. We do at least sometimes consider certain evidence as good evidence for establishing that a man could not have acted otherwise. Of course, the evidence does not entail the conclusion, but then no evidence ever does entail the conclusion. Perhaps there is always a gap

¹ Ibid. p. 232. Italics mine.

that the sceptic can exploit between the evidence and the conclusion. But if one is going to be so sceptical, one must deny the very possibility of science and of various other things that we (including Lady Wootton) believe in. We shall therefore not concern ourselves here with this extreme form of scepticism.

Here we may be asked: True, we do not need to produce evidence that will entail judgments about responsibility, but can we even produce evidence that can give us good grounds for making judgments about responsibility? To this the answer is that at least sometimes we can. Indeed Lady Wootton herself admits this, though this admission is inconsistent with her scepticism about judgments of responsibility. Thus she says, 'The strength of the M'Naghten Rules lies, first and foremost, in the fact that by its very narrowness, it provides a safe and commonsensical definition of the minimum group about whose inclusion in the category of irresponsibles there can be no dispute So long as any concept of responsibility survives at all, the man who literally does not know what he is doing, or who literally does not know what are the everyday moral judgments of his own community - the man, in fact, who would have committed his crime "with a

policeman at his elbow" - such a man must surely have the strongest claim to rank as mad to the point of irresponsibility.'¹ And again she admits that 'Anyone in the throes of an epileptic seizure is so obviously disordered and irresponsible.'²

Sometimes Lady Wootton's position seems to be that we can never make judgments about people's capacities, but at other times she seems to have a less radical thesis. She seems to think that as long as the M'Naghten Rules are applied we have a fairly good way of making such judgments about people's capacities, but once we depart from them we have no way of telling who could have helped what he did, and who could not. That is why she believes 'once we allow any movement away from a rigid intellectual test of responsibility on M'Naghten lines, our feet are set upon a slippery slope which offers no real resting place short of the total abandonment of the whole concept of responsibility.'³

Lady Wootton however seems wrong in her belief that once we leave the M'Naghten Rules, we can never make judgments about people's capacities. For sometimes we have evidence

¹ Social Science and Social Pathology. p.229.

² Law Quarterly Review 1960. p.228.

³ Social Science and Social Pathology. p.249

which does establish, if not beyond reasonable doubt, at least on a balance of probabilities, that the criminal's capacity to conform to the law was impaired, even though he may have known what he was doing and that it was wrong. There was in America the Kunak case. Guttmacher tells us 'Kunak, a twenty years soldier has been sentenced to die for shooting an Army officer.... Kunak, a bright twenty year old soldier, became morbidly unhappy under frustrations imposed upon him while on manoeuvres in Texas. He appealed to the Chaplain because of his overpowering desire to kill some officer. He was referred to the Divisional Psychiatrist and had four interviews with him. He then fashioned a missile out of a blank and at four inches distance shot a lieutenant attached to his company, whom he did not know. Two M.P.s were within a few yards of him. He immediately threw his weapon down and stood at rest.'¹

At least sometimes we have as good evidence to show that a person's ability to control his conduct was impaired as we have to show that he did not know the nature and quality of his acts. Now it is probably true that it is easier in general to make judgments about whether a person

¹ Model Penal Code Tentative Draft, No. 4, Appendix C.

is suffering from a cognitive disorder, than about whether he is suffering a volitional disorder. It is, in general, probably more difficult to apply the Homicide Act than it was to apply the M'Naghten Rules. But how workable a system is, though an important consideration, is not the only consideration to be taken into account in deciding which system to adopt. Another obvious consideration to take into account is what values the different systems promote. A most workable¹ system in deciding the fate of criminals would be by tossing the coin - heads he is punished, tails he is excused; but this would clearly not promote desirable results.

Lady Wootton's preferences seem to be as follows: As long as we operate a system of responsibility, the best system is the M'Naghten system. But better still, according to her, is to do away with all talk of responsibility

¹ We do not here include under 'workability', the ease with which the public will allow such a system to work. Of course, the system of tossing the coin to decide the fate of criminals is not at all workable, in the sense that the public will never allow it to work. But there is another sense in which the system of tossing the coin to decide the fate of criminals is very easy to apply. It is in this sense that Lady Wootton would claim that her system is more workable than the present system.

and adopt her pragmatic system. Her reason for preferring the M'Naghten system to the Homicide Act is that the M'Naghten rules are more workable. And it is interesting to see that her favourite system, the pragmatic system, is also the most workable according to her. So she does attach a lot of importance to how workable a system is.

But is Lady Wootton's system much more scientific (in the sense of being more workable) than the present one? In Lady Wootton's system all those who have done the actus reus will be convicted. But of these, some will be punished, some will be medically treated, while some will be let free. What is done with them will, she says, depend not upon whether the man is responsible or not, but on pragmatic considerations. 'Dr. Glueck's concept of the anti-social individual as a sick person must stand or fall not by the compelling logic of psychiatric theories, but simply by the degree to which doctors are more successful than other people in inducing favourable modifications of deplorable behaviour, and that is a matter that can only be demonstrated in statistical terms. No matter who has the first word, the last is always with the statistician.'¹ However, she points out that this aim of reforming the criminal has to be qualified by deterrent considerations. The measures that

¹ Social Science and Social Pathology. p.252.

are required for reform are not always the ones most suitable for deterrent purposes. For often leniency and compassion are required to reform a criminal, but much harsher treatment may be required from the point of view of deterring others who may commit a crime. If this qualification were the only qualification in Lady Wootton's system, her system could still be less complicated than our present system. For this qualification is there in our system also. Deterrence is one of the aims of our system, and it sometimes conflicts with the requirement that those who could not help what they are doing should be excused from punishment.

Indeed her system is less unscientific than it sometimes appears. For she makes it look as if the two objectives of (1) preventing the individual criminal sentenced from committing the crime again and (2) preventing others from committing the crime, cannot be compared scientifically. Lady Wootton says that science cannot determine the relative weight to be given to each of these alternatives, although each by itself is susceptible to scientific investigation.¹ Lady Wootton seems wrong here. If each is subject to scientific investigation, then, since each is a method of crime prevention, you can compare them

¹ Crime and the Criminal Law. (1963) p.97.

scientifically with each other. There is a common standard for comparing them - i.e. the extent to which crime is prevented. It makes perfectly good sense, for instance, to say that method A will give better results from point of view of 1 than method B will; but method B will give much better results than method A from the point of view of 2. And one could even say that on the whole (i.e. taking both 1 and 2 into account) method B prevents more crime.

Of course there are problems about evidence - how do we know that method B will in fact prevent more crime than method A. To answer this problem one would need to collect statistics, information etc. about how well the different methods work. Such evidence may not always be easy to find, but this problem is there even if you are comparing how good different methods are from the point of view of 1. Or again, if you are comparing them from the point of view of 2, you will again have this problem about evidence. Indeed, Lady Jootton herself tells us that 'the deterrent effects upon potential, as distinct from actual, offenders are, however highly elusive, and at once more complex and more difficult to measure than is, I think, always appreciated.'¹

¹ *Ibid.* p.97.

But although this qualification that we have been discussing does not make her system any less scientific, there is another qualification that Lady Wootton mentions, and that is going to complicate her system in an important way. Lady Wootton is not prepared to try to prevent crime at all costs. She seems to be aware of certain moral limitations. In order to see how scientific her system is, it is worth making a distinction, that she does not make, between:

1. Those 'moral' qualifications to her pragmatic considerations (i.e. crime prevention) that ought to be made merely out of deference to popular values, popular prejudice¹ etc. Let us call these qualifications Qa.

2. Those moral qualifications to her pragmatic considerations that ought to be made not merely out of deference to popular values, superstition etc. Let us call these qualifications Qm.

To the extent that the application of her system becomes more complicated because of Qa, the system in itself (i.e. what the system would be if it did not have to make concessions to popular values and superstitions) does not

¹ In those cases where a qualification ought to be made merely out of deference to popular values, it follows that these popular values are really just popular prejudices.

become any less scientific. And even the application of the system will become more scientific (in the sense that it will become less complicated) as these popular prejudices gradually disappear. Moreover, the fact that these popular prejudices ('prejudice' is here being used in a bad sense) exist is not so much an argument against her system as it is an argument in favour of trying to get rid of these prejudices - e.g. by better education.

Qm, on the other hand, complicates her system in a more important way. It also helps to make her system more moral in an important way (not just morally acceptable to the public) than it would be without Qm - unlike Qa which only helps to make the application of her system more expedient. As we said earlier, Lady Wootton does not distinguish Qm from Qa. But it seems that she says things which commit her to saying that neither Qm nor Qa are null classes. That she does not regard Qa to be a null class can be seen, for instance, from the following passage:

'Modern reformation methods of penal treatment, whether based upon psychiatric diagnosis or upon statistical prediction demand that similar offences should entail very dissimilar consequences. Where two men are found guilty of the same offence, perhaps even on a joint charge, differences in personality may indicate that one is likely

to respond favourably to lenient treatment and sympathetic understanding, whilst the other is a bad risk for whom prolonged detention is the only safe course, To a public conditioned to a belief that the punishment should fit the crime, such inequalities of treatment can only appear as monstrous injustices.

Such reactions simply cannot be ignored. The courts must function in the setting of the community which it is their business to serve. Some concessions to popular values must be made, no matter how ardently one may believe that the treatment of anti-social persons should be scientific, in the sense that it should be based on a calculation of a probable success derived from the most accurate available observation of experience. But how far these concessions should go is one of the most difficult questions that face every advocate of reformative treatment who finds himself in a position where he is called upon to pass sentence.¹

Thus the belief about punishment fitting the crime, according to Lady Wootton, belongs to Qa - it is treated by her as a mere concession to popular values.

Nor does Lady Wootton regard Qm as a null class. This point, if it is not so clear from her writings, is clear

¹ Social Science and Social Pathology. p.335-6.

from the fact that she is a humane and moral lady. She is actually against inflicting capital punishment in every case even though she believes this policy to be the most effective way of reducing crime. "This policy alone gives 100 per cent guarantee against recidivism."¹ I am sure she would, since she is so humane, agree that this qualification belongs to Qm. It is not merely out of deference to popular sentiments that Lady Jootton would refrain from supporting such brutality.

Another qualification that belongs to Qm is the moral limitation on the use of treatment. The more science advances, the greater perhaps the possibility of brain-surgery and brain washing, and other forms of treatment, and so the more the moral problems that have to be faced as to what is legitimate and what is not legitimate. (It is true that sometimes it is just prejudice that prevents people from allowing certain kinds of treatment being carried out on themselves or on others. But surely there are also genuine moral limitations on the use of some of the forms of treatment). And it would seem that one of the considerations that would need to be taken into account is how far the treatment affects the patient's freedom.

¹ Social Science and Social Pathology p.253.

Ceteris paribus, the less free the agent becomes as a result of the treatment, the less the case for inflicting that treatment. Sometimes we shall have to weigh the good effects of the treatment (e.g. crime prevention) against the bad effects of treatment (e.g. if it reduces the patient's freedom). Thus, suppose a pill could prevent a man from committing a crime by turning him into an idiot. It might be said that the real reason here why we object to such treatment is that, as a result of such 'treatment', the patient ceases to be human. But this does not bypass the problem of freedom. For being human, in the sense that is relevant here, entails being free. So we do require criteria for distinguishing free from unfree agents. Yet Lady Wootton, at least in her more radical moments, is sceptical of the possibility of making this distinction. [Perhaps it is possible to take a less radical and more consistent line. It could be argued that though we can distinguish responsible agents from agents who are not responsible, (i.e. free agents from those who are not free) - e.g. Russell is a responsible agent, but a child of three is not, yet in our present system we need to do more than this. It is true that if you are not a responsible agent, then you are not responsible for any of your actions; but if you are a responsible agent, there is still the problem

of whether you are responsible for the particular act in question. And it may be argued that we often do not have enough evidence to tell whether the responsible agent was responsible (in the sense of having a fair choice) for a particular action. If it is true that we do not have enough evidence (and a good case could be made for the view that even if in principle we can have good evidence, we often do not have good evidence in the law courts) to decide such questions, this is a good argument against our present system of responsibility where we need to find out whether the agent was responsible for a particular action. And it need not be an argument against another system where we do need to find out whether a person is a responsible agent, but do not need to go into the problem of whether he could have helped a particular action.

But sometimes, especially in her more recent writings, Lady Wootton seems to allow that in her system also, we shall even need to inquire into how far the agent was guilty with regard to a particular act. Concepts like guilt, mens rea, he could have helped it, are not really being bypassed altogether. She points out that these concepts are only being bypassed at the stage before conviction. But once a person has been convicted, it may be relevant to find out about his mens rea, his guilt, his wickedness, in order to

decide what kind of treatment is most suited to him. 'The results of the actions of the careless, the mistaken, the wicked and the merely unfortunate, may be indistinguishable from each other, but each case calls for a different treatment.'¹

This position of hers is inconsistent with the more radical position that she sometimes adopts, i.e. that concepts like guilt, wickedness, etc. are unscientific concepts, create insoluble problems, and so ought to be got rid of.² Her radical position is, however, consistent with another position that she could adopt. It could be argued that concepts like guilt, 'could have helped it',

¹ Crime and the Criminal Law. p.53.

² It might be suggested that concepts like 'could have helped it', 'responsible', 'guilt', are as ordinarily understood muddled concepts, yet they could be defined in pragmatic terms e.g. to say of some actions that they could have been helped means that punishment will 'favourably' affect such conduct, and to say of some other conduct that it could not be helped means that punishment will not 'favourably' affect such conduct. But if this is how we define these terms, then these terms will not be able to play any substantial role in the new system; they will neither be able to qualify the pragmatic system (for they are just derivative from the pragmatic system), nor will they be able to help in the operation of the pragmatic system. One would first have to know whether punishment or some other kind of treatment will be effective on a man, before one can say whether the man could have helped what he did. So 'he could not have helped it' cannot on this view be a reason for excusing people. See Chapter Seven.

responsibility, wickedness, ought to be bypassed (both before and after conviction) yet after a man has been convicted for committing the actus reus, we shall need to inquire into his mental condition with a view to deciding what treatment to give him. To enquire into a man's mental condition does not necessarily involve inquiring into his guilt, or responsibility or wickedness. Even as inquiry into whether the act was done intentionally or accidentally or by mistake, is quite consistent with scepticism about distinguishing those who could have helped their actions from those who could not, about distinguishing the wicked from the non-wicked. (For the intentional, non-intentional, distinction is different from the distinction between 'could have helped it', and 'could not have helped it'. For there are some intentional actions which could not be helped, and there are some unintentional actions - such as actions done negligently - which could be helped.)

Another qualification to her system that Lady Lorton discusses is the principle that penal measures should not be taken against persons 'who, as things are, would be exempt from these on grounds of mental disorder.'¹

¹ Social Science and Social Pathology. p.253.

(Pragmatic considerations alone might sometimes demand punishment, even execution, of some insane criminals, especially of those who cannot be cured). Does this qualification belong to Qm or Qa? Lady Wootton does not seem to give a clear answer to this. In fact, her discussion of this qualification shows that she has not distinguished Qa from Qm. Sometimes she seems to think that this qualification belongs to Qa - 'Such a reversal of present practices, in which a successful plea of mental incapacity precludes or mitigates punishment, might be thought to do too much violence to existing notions of morality; and in this way the discarded concept of responsibility might yet creep its way again through the back door.'¹ But only a few statements earlier she seems to regard this qualification as belonging to Qm: 'merely to delete the distinction between the tiresome and the sick thus offers no easy escape from the claims of morality. Indeed one of the major difficulties to be found in discarding the concept of responsibility, and selecting treatment solely by reference to its probable efficacy, is that this might lead to the use of what are

¹ Ibid. p.254. Italics mine.

now generally regarded as penal measures against persons who, as things are, would be exempt from these on the grounds of mental disorder.¹

Now if this qualification belongs to Qm, this would be a very important additional complication in her 'scientific' system. It would in fact bring back many, if not all, of the difficulties of operating the present system. The objection is not to punishing the (medically) insane (that happens already) but to punishing the legally insane (which is a sub-class of medical insanity). If, as a result of your (medical) mental disorder, your responsibility for a particular crime committed is impaired, then you are legally insane. So if we allow this particular qualification into Lady Wootton's system, her system would also have to face the 'insoluble' problems about whether someone is mentally disordered (which she says is a subjective concept in a bad sense) and whether, as a result of this, his responsibility was impaired.

Perhaps it could be argued that one could adopt a system where in those cases where there is good evidence

¹ Ibid. p.253. Italics mine.

that a person is mentally disordered, and as a result of this his capacity to conform to the law is impaired, we should not punish such a person. But in those cases where we do not have such evidence, pragmatic considerations should dictate what we should do (subject, of course, to the other qualifications that we discussed about the limits of brain surgery etc.)

Even if this qualification about exempting the mentally disordered from punishment were to belong to Qa, it would still complicate the application of her system. But the complication would be less than if this qualification belonged to Qm. For we could try to gradually educate the public out of this prejudice. Also the problem of distinguishing the mentally disordered from the sane, and the responsible from those lacking in responsibility will not be so acute. Not that it will be any easier to find the true answers to such problems; but the need for finding the true answers will be less. If the qualification under discussion belongs to Qa, then the important thing is that it should appear to the public that those lacking in responsibility are being exempt from punishment. And the problem about the criteria for mental sickness and responsibility could be

solved by considering which criteria are the most palatable to the public.¹

So it is important to find out whether this qualification should belong to Qm or Qa. It might be argued that the moral case for not 'punishing' those lacking in responsibility is stronger under the present system than it would be in Lady Wootton's system. For under the present system, at any rate for serious crimes, a person who is punished is in general supposed to be morally guilty, and there is considerable moral disapprobation of the criminal who is punished. So it is unjust to punish someone who could not have helped what he did, for such a man does not deserve moral censure. But under the pragmatic system 'punishment,' including execution, will no longer carry a moral stigma, so this argument against punishing those who could not have helped their crimes will not apply if we adopt the pragmatic system.

It might be suggested that we are reluctant to punish those who could not have helped what they did, not only because we may wrongly impute moral guilt to

¹ Of course, we shall also, in order to find out which are the best criteria to employ, have to take into account the effects of the employment of the criteria on the crime rate.

these people. For even if society did recognize that many people who have been punished were not morally guilty, there would still be a reluctance to punish these people. Against this it might be replied that once you stop imputing moral guilt, there is no point in being morally reluctant to put those criminals who could not have acted otherwise in prison, at any rate in those cases where the alternative is to send these people to mental asylums. If we are prepared to send them to an asylum, why be so reluctant to send them to jail if the pragmatic considerations demand that they should be sent to jail? (In the pragmatic system jails are just one form of treatment among others, and no moral stigma attaches to being sent to jail).

Now it is, of course, important to try to find out what really distinguishes jails from mental asylums. This distinction is getting blurred even in our system,¹ and in a system where no moral guilt is imputed and where questions about responsibility are bypassed, the distinction may get even more blurred. Still, in the pragmatic system there will be different kinds of 'treatments' and one will

¹ "As matters now stand, some 'jails' are less restrictive and punitive and more therapeutic than are some 'hospitals'" Szasz. Columbia Law Review, (1953) 197 note 21.

need to find out the moral limitations on their use. And it may turn out that the moral limitation on the use of some kinds of treatment are different from the moral limitations on the use of other kinds of treatment. Treatment is sometimes used in a broad sense. Thus Lady Wootton calls hanging a form of treatment.¹ In this sense treatment refers to any method of dealing with anti-social people that results in a prevention or reduction of such behaviour. In this sense, if we penalise some people in order to deter other people from committing a crime, this too would be a form of treatment. But the use of 'treatment' in this broad sense does not get rid of the genuine moral limits that may be there on the use of different kinds of 'treatment'; nor does it prevent there being different moral limitations on the use of different kinds of 'treatment'. Thus it may be that the moral limitations on penalising a person in order to protect society from him, may be different from the moral limits on penalising a person in order to deter other people. In our present system we are much less reluctant to deprive a madman of his liberty in order to protect society from him (we do so often lock up dangerous lunatics) than we are to deprive him of his liberty in order to deter other people

¹ Ibid. p.253.

from committing a crime. Is this difference justified on some utilitarian grounds, or some other moral grounds, or is it just a prejudice? This is just one of the many questions that will have to be answered in order to construct Lady Wootton's system. We shall need to find out what belongs to Qm and what to Qa.

So though her main aim of preventing anti-social behaviour is a relatively clear one (though even here there are some complications - e.g. what is anti-social behaviour? How does it differ from criminal behaviour? What is a crime? Yet if these were the only kind of complications in her system, her system would be much more workable¹ than our present system; for in our present

¹ It is worth remembering that how easy a system is to work depends not just upon how clear the meanings of the terms employed by the system are, but also on how much evidence is available for operating the system. Thus even though terms such as crime prevention are relatively clear, it is sometimes very difficult to find out (as Lady Wootton herself admits) what are the best means of preventing crime. Lady Wootton's solution to this difficulty seems to be to concentrate on those means towards crime prevention which have been shown to be effective. (See Crime and the Criminal Law. Stevens and Sons, 1963. p.101).

But ceteris paribus, if the meanings of the terms employed by a system are relatively clear, then even if all the relevant evidence is not available, at least the scientists know what kind of evidence to look for. But in a system where the meaning of terms are not clear, the scientists find it more difficult to know what kind of evidence to look for.

system we have much more difficult problems like what does 'he could have helped it' mean, and what are the criteria for distinguishing those who could have helped what they did from those who could not?) her system becomes much more complicated once we build in all the qualifications (Q_m and Q_a) into her system.

Of course, one could state the main aim of the new pragmatic system in a different way, so that there would be less need for qualifications. That is how people like J.S. Mill stated their moral aim - if the main principle is the greatest happiness of the greatest number, then this would be the ultimate test of judging between different methods of 'treating' anti-social behaviour. And there will be less need for qualifications to this aim than there is to Lady Wootton's main aim, which is to prevent anti-social behaviour. It is obvious that we do not want to prevent anti-social behaviour at all costs. For instance, sometimes we may only be able to prevent anti-social behaviour by increasing the total misery (i.e. where the 'treatment' may cause more misery than it avoids) and in such cases we shall not be justified in using the treatment. But while this is something that is consistent with Mill's principle, it is not consistent with Lady Wootton's main aim. So Lady Wootton's main

aim will have to be qualified to take into account such cases.

All this is not necessarily to deny that Mill's utilitarian principle too may need to be qualified to deal with awkward cases. It is just that it is less in need of qualifications than the simple aim of preventing anti-social behaviour. And the reason for this is obvious: the utilitarian principle is morally more acceptable than the aim of preventing anti-social behaviour at all costs. But though the utilitarian principle is less in need of qualification, it is itself a more complicated aim than the aim of preventing anti-social behaviour. It is more difficult to know whether total utility has increased than it is to know whether anti-social behaviour has increased. So if we were to build up the new system of dealing with criminals on the lines of the principle of utility, the new system, though it has less qualifications than Lady Wootton's principle, will still be quite complicated.

So we see that the new pragmatic system of dealing with anti-social people (whether in the Lady Wootton interpretation, or some other interpretation) will still be quite complicated and not quite so easy to operate

as might appear at first sight. Now it may be that in spite of this, the new system may be less complicated and more workable than our present system. But, of course, how workable a system is ~~is~~ one, but not the only, consideration to be taken into account. Another important consideration is what are the values that are promoted by our system, and what are the values that are promoted by operating the new system? (For similar reasons it is not decisive to argue that because the M'Naghten rules were more workable than the Homicide Act, therefore the M'Naghten rules were better).

We thus see that though Lady Wootton's system is not scientific in the sense of doing away with norms (we have seen that it has not only moral qualifications, but also the main aim is itself a moral aim) it may be more scientific than our present system in the sense of being more workable. There is a danger of inferring from this that Lady Wootton's system is more scientific in the sense that its aim is a scientific one. But this inference is invalid. Lady Wootton, following Kingsley Davis, alleges that under our present system people make ethical recommendations behind a scientific facade.¹ But there is a danger that something like this

¹ 'Mental Hygiene and the Class Structure,' Psychiatry (February 1933).

will happen under the pragmatic system. For to say that the pragmatic aim of preventing anti-social behaviour is itself a scientific aim, really amounts to moralizing. It amounts to saying, behind a scientific facade, that we ought to prevent anti-social behaviour. And the fact, if it be a fact, that Lady Wootton's system is scientific in the sense of being more workable, in a way increases the danger of moralizing behind a scientific facade. For it is possible to confuse the fact that the new system is scientific in the sense of being more workable, with the view that the new system is scientific in the sense that its aim of preventing anti-social behaviour and bypassing responsibility is itself a scientific aim.

But it must be admitted that there is a danger of moralizing behind a scientific facade in our system also. For the present system is quite a difficult and complicated system to operate; the meaning and criteria of terms like 'mental abnormality' and 'responsibility' are not entirely clear. One does not just once and for all create norms (i.e. the standards of terms like 'mental abnormality' and 'responsibility') and say that the application is a matter for scientific investigation. The standards are not completely determinate, and when we 'apply' the system in particular cases, we are sometimes, especially in the

controversial cases, not just applying the system, but also helping to make less indeterminate the standards of terms like 'mental abnormality' and 'responsibility'. (Just as the courts, in other spheres also, do not always just apply the law, but sometimes help in a sense to fill in some of the gaps in the law). Now deciding issues about the standards of terms like 'mental abnormality' and 'responsibility' involves making moral decisions. So sometimes psychiatrists and others who try to 'apply' our system are really moralizing also, while giving the impression of just applying the system. In this way psychiatrists and others 'applying' our system could be moralizing behind a scientific facade. [Now if it is true that Lady Wootton's system is less indeterminate, vague, and complicated, then it is perhaps true that those who apply her system will not be moralizing as much as they do in our system. But they may still be moralizing to some extent, for her system is not a completely clear and determinate one. And even the simplicity of her system can lead to moralizing behind a scientific facade in the way that we saw a little earlier; here the moralizing behind the scientific facade is likely to be done more by those (like Lady Wootton) who talk about the system (e.g. when they say that the aim of the system is a

scientific one) than by those who 'apply' it.] But this danger of moralizing behind a scientific facade is not a decisive criticism against a system. If we are a little careful we can see what goes on behind the facade, and so need not be taken in by the facade. This is not, of course, to deny that moralizing should have an important place; only that if we are to be honest, we must, when we moralize, do so in the open.

The new system that is proposed will not be really so different from the present system. Already we have strict liability in some spheres; and even in areas where we do not have strict liability, utilitarian considerations are often one of the considerations that we take into account in deciding which excuses we should allow. This is quite clear from a study, for instance, of the law about recklessness,¹ negligence, necessity, duress etc.

1 A surgeon who operates on a person may foresee the possibility that the person may die if the operation is unsuccessful; yet he may be justified in taking the risk in the hope of curing the patient. Suppose that the chances that the patient should die were 1 in 1,000, yet the risk may be justified if the patient is very ill and if there is a very good chance that the operation will cure him. Now take another case where a person is out shooting birds, but knows that the chances of killing a man are 1 in 1,000; here he will not be justified in taking the risk.

In deciding whether one is justified in taking a certain degree of risk, one needs to balance the danger, not only against the possible benefits that may accrue to the man who is in danger, but also the benefits that accrue to society from the taking of the risk. Thus driving cars entails a

(Contd. page 170)

So utility is one of the determinants of excuses in our system of responsibility. And, similarly, in the new pragmatic system of dealing with criminals, there will be, as we have seen, some element of responsibility that will still be there. So the difference between the present system and the new pragmatic system seems to be a difference of degree.

The important problem then, is not whether we should have the new morality or the old one, but how far we should go in the direction of the new morality and how far we should retain elements of the old one. In trying to answer this question, it is essential to have some idea of what the new and old systems are, what values they are supposed to promote, how good these values are and what is the best way of promoting these values.

(Continuation of Footnote, page 169)

certain risk to the lives and health of pedestrians; yet this risk is justified because driving cars is supposed to have considerable social utility. Yet, if it did not fulfil this social need, the same degree of risk to the lives and health of the people would not be justified.

CHAPTER VI

RESPONSIBILITY AND SOME RELATED CONCEPTS

Before a man is held liable for moral blame or for punishment (at any rate with regard to serious offences) it is often said that it is a morally necessary condition that certain mental conditions should be satisfied; it is sometimes thought that if a person did not act freely, or voluntarily, or could not have helped what he did, this tends to show that he ought not to be punished or blamed. Now terms like 'can', 'free', 'voluntary', etc., have more than one sense and it is misleading to think that they are all the same. Thus 'can' is sometimes used to refer to logical possibility, and there is no corresponding sense of 'voluntary'. Yet there seems to be a sense in which these terms are sometimes used in statements to refer to what many people regard as the morally necessary conditions of punishment and blame, and it is this sense that we shall try to study now.

I

Some distinguished modern philosophers have argued that terms like 'voluntary', 'mens rea', are not positive terms, but are

defeasible concepts. Hart, for instance, has argued that we should not look for anything that is common to all voluntary actions and missing in all non-voluntary actions. For there is no such thing to look for. The old-fashioned view, according to which a mental occurrence is present in all voluntary actions and is absent in all non-voluntary actions, is not borne out by the facts and leads us into logical difficulties. And modern attempts to find something that is common to all voluntary actions and missing from all non-voluntary actions are, according to this view, equally misguided. For concepts such as 'voluntary action' are not primarily descriptive concepts but ascriptive ones; and they are defeasible concepts; and a defeasible concept, according to Hart, is one that cannot be defined in terms of necessary and sufficient conditions, for, to understand its meaning, it is essential to examine the various heterogeneous ways in which the claim that the concept applies can be defeated. Thus concepts such as 'voluntary' are defeasible because in order to understand them it is essential to examine the various heterogeneous ways in which a man may be excused, e.g. accident, mistake, insanity, duress. If he is excused in one of these ways then his action was not voluntary; if he is not excused in any of these ways then he did it voluntarily. These excuses are a heterogeneous lot. It is possible of course to say that in the case of each of the excuses the agent was not free, or did not act voluntarily, or did not have a choice; but in order to understand

the meaning of these 'general' and positive-looking terms we will have to refer back to the particular excuses, and so these 'general' terms do not provide any genuine unity to the particular excuses, but only a spurious one.

Before discussing this theory it is perhaps worth trying to get a bit clearer about what a defeasible concept is. Now it may be thought that a defeasible concept is not a descriptive concept because it cannot be defined in terms of necessary and sufficient conditions. We shall argue that this reasoning is invalid.¹ A defeasible concept can have necessary conditions. Thus Hart thinks that with 'contract', which according to him is a defeasible concept, one can give certain positive conditions that must be fulfilled before there can be a contract, e.g. there should be at least two parties, an offer by one, acceptance by the other, etc. But these conditions, though necessary and sometimes sufficient, are not always sufficient. For to understand the meaning of contract, it is essential to learn of the various heterogeneous defences that can defeat a claim that there is a valid contract: "No adequate characterization of the legal concept of a contract could be made without reference to these extremely heterogeneous defences and the manner in which they

1. We need not go into the problem about whether Hart reasoned in this way. For we can show the reasoning to be invalid, without attributing it to Hart.

respectively serve to defeat or weaken claims in contract."¹

However Hart points out that it is possible to define a defeasible concept like contract in terms of necessary and sufficient conditions vacuously by specifying as the necessary and sufficient conditions of contract, consent and other positive conditions and the negation of the disjunction of the various defences. But it seems to me not at all obvious why by putting the negation of the disjunction of the various defences into the definition, one makes the definition in terms of necessary and sufficient conditions vacuous. Perhaps Hart is right that the various heterogeneous defences cannot all be subsumed under a truly general formula or general formulae; if one insists on doing this, the 'general' formula or formulae will turn out to be in fact just a restatement or summary of the disjunction of the various heterogeneous defences. But it does not follow from this that the definition in terms of necessary and sufficient conditions will be vacuous if we specify among the conditions the negation of the disjunction of the various defences.

There are perhaps many concepts - e.g. concepts that are vague or open-textured (which Waissman explains in terms of possibility of vagueness) - that cannot be defined in an illuminating way in terms of necessary and sufficient conditions. And it is perhaps

1. Logic and Language (ed. A. Flew), First Series, p. 150.

true that concepts that Hart says are defeasible cannot be defined in an illuminating way in terms of necessary and sufficient conditions. But it seems to me that it is not because they are defeasible that they cannot be so defined. It is true that if the list of defences is not complete, then we will not be able to define the defeasible concept in terms of necessary and sufficient conditions. But this is not the point that Hart is making. For, according to him, it is not an essential feature of the defeasible concept that the list of defences should be incomplete.¹ The essential feature of a defeasible concept, on Hart's theory, is that in order to understand the concept it is essential to examine the various heterogeneous ways in which the claim that the concept applies can be defeated or weakened; also it is essential, according to him, that the various

1. Hart does say in his article "Legal Responsibility and Excuses" that the list of excuses that he gives is incomplete. But it seems from the context that he does not mean that the list must be incomplete, but that the list that he gives is not meant to be complete, and to get a fuller understanding of the list one should look at text-books on the law. That this is his position can also be seen from his article on "The Ascription of Responsibility and Rights" (Logic and Language, first series, p. 149 foot-note).

He does seem to think that the use of the word 'etc.' is essential for an understanding of legal concepts (cf. Logic and Language, p. 147). But that is not the point that he is trying to stress. The essential point for a concept to be defeasible is the fact that to understand a defeasible concept one must understand the various ways in which the claim that it applies can be defeated or weakened. Hart borrows the term 'defeasible' from a legal interest in property which, as he points out, is subject to termination or defeat in a number of different contingencies, but remains intact if no such contingencies mature. It is not essential that these contingencies should be infinite.

defences cannot be subsumed under a general formula or two general formulae (unless these general formulae are not really general but merely a restatement or summary of the disjunction of the various defences). But it does not follow from these essential features that the defeasible concept cannot be defined, except vacuously, in terms of necessary and sufficient conditions. Nor does it follow from the fact that a concept cannot be defined in terms of necessary and sufficient conditions, that therefore the concept is defeasible (for as we have seen the reason could be that it is an ordinary open-textured concept).

It seems to me that the statement that a concept is defeasible is consistent with the statement that the concept can be defined in terms of necessary and sufficient conditions. And if I am right in thinking this, then one, though not the only, reason for believing that defeasible concepts cannot be descriptive concepts will be destroyed. The following reasoning would be invalid: the statement that a concept is defeasible is inconsistent with the statement that it can be defined in terms of necessary and sufficient conditions, and therefore it (i.e. the statement that the concept is defeasible) is inconsistent with the statement that the concept is a descriptive concept.

One reason Hart has for thinking that a defeasible concept cannot be defined except vacuously, in terms of necessary and sufficient conditions, is this: In order to understand a defeasible

concept, it is essential to understand the ways in which the claim that the concept applies can be weakened or modified. The negation of the disjunction of the conditions that modify or weaken the application of the concept are not strictly necessary conditions of the application of the concept. For even when a modifying condition is present, the concept applies, though only in a modified or weakened form.

But surely this applies to so many of our concepts and is not the distinguishing mark of defeasible concepts. Take the concept 'Man'. If someone has all the attributes of 'Man' except that he is only 3' tall, the concept 'Man' still applies though only in a weakened form.

Similarly with the concept 'religion'. If a religion, such as some forms of Buddhism, has most of the attributes of religions, except a belief in God, then the concept 'religion' applies though only in a weakened form.

And so on with so many of our concepts.

Now it may be that in the case of some of the concepts such as contract there are recognised modifiers (whereas with other concepts there are not such recognised ways of telling whether or not something is a modifier or not). Hart tells us that "in a case of contract a defence that the defendant has been deceived by a material fraudulent misrepresentation made by the plaintiff entitles the defendant in certain cases to say that the contract is not valid as claimed, nor

'void', but 'voidable' at his option."¹

But the complication about modifying conditions is consistent with defining the defeasible concept in terms of necessary and sufficient conditions. For we can give two sets of necessary and sufficient conditions: One set which gives the necessary and sufficient conditions of the application of the concept in the full sense, and another set that gives the necessary and sufficient conditions of the application of the concept in the full form or in a weakened form. By looking at these two definitions it will be possible to tell not only the necessary and sufficient conditions of the applications of the concept in the full form, but also it will be possible to tell what the modifying conditions are.

Thus if the necessary and sufficient conditions of the application of the concept in the full form are A, B, C, $\sim D$, $\sim E$, ^FA, G, H, J; and if the necessary and sufficient conditions of the application of the concept in the full form or in a modified form are A, B, C, F, G, H, J, then we can tell by comparing the two definitions that D and E are the modifying conditions, i.e. when D or E is present the concept does not apply in the full form, though the presence of D and/or of E is compatible with the concept applying in a modified form.

It can also be seen that the fact that to understand the concept

1. Logic and Language, first series, p. 148.

it is essential to understand the modifying conditions is quite consistent with the concept being a descriptive concept. For it is ^{that} just in order to understand a concept that has 'modifiers' that we need, as we have seen, two sets of necessary and sufficient conditions. But this is quite consistent with the concept being a descriptive concept.

Hart tells me that another reason why he thought that a defeasible concept could not be defined in terms of necessary and sufficient conditions is that such a definition will obscure the fact that when certain conditions are satisfied, there is a presumption that the concept applies, though the presumption can be defeated if one of the defences is present.¹ Now it seems to me that it is not obvious that one should put so much into the meaning of a concept; it may be better to keep questions of meaning distinct from questions of evidence, and presumptions and burden of proof. And if we do this then Hart's objection will not be relevant. It is, of course, possible to define a defeasible concept in such a way that this question of presumption is part of the meaning of a defeasible concept. But if we do this, it seems that we could still give two sets of definitions in terms of necessary and sufficient conditions, to cope with this problem. Thus one can say, for instance, that X, Y, Z, ~K, ~L, ~M are the necessary

1. He tells me that it was this point about presumption which explains why he thought that the word 'unless' was so vital for an understanding of a defeasible concept and could not be replaced by some such expression as 'and not'.

and sufficient conditions of the concept, while X, Y, Z are the necessary and sufficient conditions of there being a presumption that the concept applies. So this point of Hart's about presumption does not show that the statement that a concept is defeasible is inconsistent with the statement that it can be defined in terms of necessary and sufficient conditions and that it is a descriptive concept.

As we saw earlier at least some concepts that Hart regards as defeasible, such as contract, do have necessary positive conditions. However, there are other concepts such as free, voluntary, mens rea, and it seems that if what Hart says about them is correct they do not have any positive condition at all; their meaning is understood wholly in terms of the heterogeneous exceptions; for they are just used to rule out the presence of the various heterogeneous excuses. Though with some defeasible concepts such as contract we can give a positive necessary condition, yet this positive condition is not sufficient to define the concept, for to understand the concept it is essential to examine the various ways in which the claim that the concept applies can be defeated. However, with some other defeasible concepts such as voluntary, mens rea, etc., one cannot even give a positive necessary condition. For they are just used to rule out the presence of the various excuses.

So, though defeasibility theorists do not make this distinction, we may divide defeasible concepts into two classes: those concepts

that are defeasible, but where we can give a positive necessary condition, let us call these concepts defeasible₁ concepts; and those concepts that are defeasible but where one cannot even give a positive condition, let us call these defeasible₂ concepts. So defeasible₂ concepts are negative concepts in a way in which defeasible₁ concepts are not.

We shall be concerned primarily with concepts such as mens rea, free, voluntary, etc., which are supposed to be defeasible₂.¹ The view that these concepts are defeasible₂ has important similarities to one version of the theory put forward by Austin that 'free' is a trouser word.² According to Austin it is the negative use of free that wears the trousers: "To say that we acted 'freely' ... is to say only that we acted not unfreely ..."³ And he says, "Like 'real', 'free' is only used to rule out the suggestion of some or all of its recognised antitheses ... In examining all the ways in which each action may not be 'free', i.e. cases in which it will not do to say simply 'X did A', we may hope to dispose of the problem of Freedom."⁴

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1. From the fact (if it be a fact) that the concepts such as voluntary, free, etc., are defeasible₂ concepts, it does not necessarily follow that the concepts like voluntary action or free action are also defeasible₂ concepts; though it does follow that they are defeasible concepts (e.g. defeasible₁ or defeasible₂ concepts).
 2. It is curious that Austin should call words like 'free' and 'real' trouser words; for it might be taken to mean that 'free' and 'real' wear the trousers which is the opposite of what Austin is trying to get at.
 3. Philosophical Papers 1961, p. 128.
 4. Ibid., p. 128.

Now the version of his theory that we are concerned with is the theory that it is the negative use of free that wears the trousers and that 'free' is used to exclude all the various heterogeneous ways of being unfree such as accident, mistake, duress.¹ In view of the similarity of his theory (i.e. the version of his theory that we are discussing) to the defeasibility₂ theory, I shall treat him as a defeasibility₂ theorist, even though he did not use that term.

One important thing to notice about this view is its positivistic flavour. The positive-sounding 'general' terms like free, etc., are only understandable in terms of the particular defences, and not vice-versa. And though terms like 'free' are understood as absence of excuses, these excuses themselves are heterogeneous, so that terms like 'unfree', 'non-voluntary', etc., also give only a spurious unity to the particular excuses. A corollary of this view is that terms like 'free' and 'unfree' have a purely derivative role. 'Unfree' is just a summary of the disjunction of the various defences² (it is derived from them, not they from it) and then the residue consists of 'free' actions.

Though on this view terms like 'free' are negative concepts, it is important to see that, according to this view, the negative use

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1. We shall see later that some other versions of Austin's theory are quite different from the defeasibility₂ theory. See ~~Section~~ 2.
 2. This inference does not follow on other versions of Austin theory.

wears the trousers only at the particular level, i.e. it is the specific and heterogeneous ways of being unfree that wear the trousers, that are basic.

The 'general' terms like 'non-voluntary', 'unfree', etc., are not wearing the trousers, any more than their opposites are. (Similarly, with other trouser words like 'real' and 'directly', Austin was against a general criterion of unreal as well as of real. It was the specific way of being unreal that wore the trousers. And again with 'directly', Austin says, "... 'directly' takes whatever sense it has from the contrast with its opposite: while 'indirectly' itself (a) has a use only in special cases, and also (b) has different uses in different cases ...")¹

This is what one would expect. For 'free' and 'unfree' are opposites, according to the defeasibility₂ theory; unlike, say, advertently and inadvertently in ordinary language; an action may not have been done inadvertently, but it does not follow that it was done advertently. That 'free' and 'unfree' are opposites on the defeasibility₂ theory can be seen, for instance, from Austin's remark that we quoted earlier: "To say that we acted 'freely' ... is to say only that we acted not un-freely ..." Since they are opposites, it seems to follow that if 'free' is a defeasible₂ concept, if there is

1. Sense and Sensibilia, Ch. 2, p. 15.

no general criterion of 'free', then there will be no general criterion of 'unfree'. For suppose there was a general criterion of 'unfree'; suppose x were the general criterion of 'unfree', then it would seem to follow that 'free' would have a general criterion; in this case the general criterion of an act being free would be the absence of x , and this would seem to be inconsistent with free being a defeasible₂ concept.

So we see that on this view the negative use wears the trousers only at the particular level, yet in a sense it is true to say that, according to this view, the negative use of 'free' is more basic, for the so-called 'positive' use of 'free' does not wear the trousers, neither at the general level, nor at the particular level (there are not on this view particular ways of being free - or, if there are, they certainly do not wear the trousers).

It would seem then that one cannot consistently believe both that there is a general criterion of distinguishing free actions from unfree ones (or voluntary actions from non-voluntary ones) and yet maintain that free (or voluntary) is a defeasible₂ concept. Yet there are philosophers who have tried to combine the two views. Nowell-Smith, in his book Ethics,¹ has subscribed to the view that voluntary is a defeasible₂ concept, but he also tries to give a general criterion for

1. Ethics, p. 292.

distinguishing voluntary actions from non-voluntary ones. His criterion is that voluntary actions are those that can be favourably influenced by blame and punishment, non-voluntary ones are those that cannot.¹ These two positions of his seem inconsistent with each other. For if one has some such general criterion, then there is something positive that is common to all voluntary actions and missing in all non-voluntary actions, and voluntary would not be a defeasible₂ concept.

For similar reasons, Aristotle too would seem to be involved in an inconsistency, if Austin, Hart, Nowell-Smith² and others are justified in attributing the defeasibility₂ thesis to him. For Aristotle also seems to give a general criterion for distinguishing voluntary actions from non-voluntary actions, viz. voluntary actions are those where "the moving principle is in the agent himself, he being aware of the particular circumstances of the case".³ Another instance where the term 'moving principle' is wearing the trousers, according to Aristotle, is the following: "Now the man acts voluntarily, for the principle that moves the instrumental parts of the body in such actions is in him."⁴ It is true that he says that those things are not

1. See pp 239-241 of this thesis.

2. See Freedom and Responsibility, ed. H. Morris, 1961, pp. 8, 145; also Ethics, p. 292.

3. The Nicomachean Ethics, Book 3, 1111a.

4. Book 3, 1110a.

voluntary, which take place under compulsion or owing to ignorance.

And it might be argued by those who wish to attribute the defeasibility₂ theory to Aristotle, that Aristotle is in effect using a term like 'moving principle' in a defeasible₂, summary way; it is the specific excuses like compulsion and ignorance that are wearing the trousers.¹ But it seems to me that in fact Aristotle uses the term 'moving principle' to explain compulsion. Thus he says:

"That is compulsory of which the moving principle is outside, being a principle in which nothing is contributed by the agent."² And again: "The compulsory, then, seems to be that whose moving principle is outside, the person compelled contributing nothing."³ It is true that Aristotle gives particular examples where nothing is contributed by the agent, where the moving principle is outside him, e.g. if he were carried somewhere by a wind, or by men who had him in their power. But he also gives examples of cases where he believes that the moving principle is in the man himself, e.g. he says men have the power of not getting drunk;⁴ also he says it is in their power to take care.⁵ So it seems on Aristotle's account it is not at all obvious that it is only the negative use of terms like

1. See, for instance, Nowell-Smith, Ethics, p. 292 footnote.

2. Book 3, 1110a.

3. Book 3, 1110b.

4. Book 3, 1113b.

5. Book 4, 1114a.

'voluntary' and 'moving principle' that wear the trousers.

However there is one important complication in Aristotle's account that needs to be discussed. We saw that Aristotle said that voluntary actions are those where the moving principle is in the agent himself, and where he is aware of the particular circumstances of the case. So according to Aristotle's account, that the moving principle is in the agent himself is a necessary but not a sufficient condition of the act being voluntary; it is also essential that he should have knowledge. And it might be argued that Aristotle is using knowledge in a defeasible₂ way, just to rule out certain specific types of ignorance. Thus he says: "By the voluntary I mean, as has been said before, any of the things in a man's own power which he does with knowledge, i.e. not in ignorance either of the person acted on or of the instrument used or of the end that will be attained."¹

Here it might be pointed out that the requirement of knowledge here is not irreducibly defeasible or negative; for Aristotle could define the knowledge requirement in positive terms, i.e. in terms of the knowledge of the person acted on, of the instrument used and of the end that will be attained. Aristotle could then define voluntary in terms of moving principle plus knowledge: i.e. knowledge of the person acted on, of the instrument used, and of the end that will be

1. Book 5, 1135a.

attained. It seems that, at times, Aristotle is aware that the knowledge requirement could be stated in positive terms. Thus he says: "Now if to act unjustly is simply to harm someone voluntarily, and 'voluntary' means 'knowing the person acted on, the instrument, and the manner of one's acting' ..." ¹

And even if the knowledge requirement could not be stated in positive terms, it seems that the most that would follow is that on Aristotle's account voluntary is a defeasible₁ concept. It still would be false that voluntary is, on his account, a defeasible₂ concept. For we have seen that on his account there is a necessary positive condition of voluntary action, i.e. the moving principle must be in the agent himself. Yet Austin, Hart, Nowell-Smith and others ascribed the defeasible₂ thesis to Aristotle.

II

Before proceeding further with a discussion of the role of concepts like 'can' and 'voluntary', in our system of responsibility, it might be worth while to see whether Hart and Austin have in fact adhered to the views that we have attributed to them. This may also have the advantage of getting a bit clearer about different trends in their thinking and about the subject.

1. Book 5, 1136a.

It might be suggested that what we have called the defeasibility₂ theory should be given some other name such as excluder thesis. This suggestion would have the advantage of not confusing what we have called the defeasibility₂ theory with what we have called the defeasibility₁ theory. But while the defeasibility₂ and defeasibility₁ theories should not be confused with each other, they do have some similarities, and calling both of these theses defeasibility theses has the advantage of preserving the similarity. In order to understand both a defeasible₁ concept and a defeasible₂ concept, it is essential to understand the various ways in which the claim that the concept applies can be defeated. But one of the important differences between the two concepts is that defeasibility₂ concepts are, as we saw earlier, not used to characterize anything positive; they are negative concepts in a way that defeasible₁ concepts are not.

The suggestion that we should call defeasibility₂ concepts excluders can also lead to confusion, unless we are careful to distinguish the different versions of the excluder theses. To say that a word is an excluder (or to say that it is the negative use of the term that wears the trousers) can be interpreted in at least two different ways. Firstly - let us call this the excluder₁ thesis - there is the thesis which implies that if a word is an excluder it does not characterize anything positive and we do not know what is being asserted by the statement that something is x, until we know what x is being used to exclude. Secondly ~~or alternatively~~ to say that a word

is an excluder can mean that it does not characterize anything positive and that it is used to exclude all the various heterogeneous ways of a thing not being x - let us call this the excluder_2 thesis. So an excluder_1 word is ambiguous in a way in which an excluder_2 word is not necessarily ambiguous.

Excluder theorists such as Austin, and R. Hall, do not distinguish between the two theses. Let us now distinguish the two with the help of some examples. R. Hall¹ gives 'barbarian' as an example of an excluder, by which he means what we have called an excluder_1 . Barbarian sometimes means non-Greek, sometimes it means non-Christian, and sometimes it means non-cultured. We do not know what is being asserted by the statement that a man is a barbarian until we know what 'barbarian' is being used to exclude. So it seems that 'barbarian' would seem to be an excluder_1 word. If we say that a man is a barbarian, we are not saying that he is neither Christian, nor a Greek, nor civilized. So 'barbarian' is not an excluder_2 .

But the sense in which Hart subscribes to the excluder thesis is different from the sense in which words like 'barbarian' are supposed to be excluders. For Hart, 'mens rea' is not used to assert any positive condition, but is best understood as excluding the various heterogeneous defences such as accident, mistake, duress, etc. The

1. "Excluders", Analysis, 1959.

relation of 'mens rea' to accident and mistake on Hart's theory is quite different from the relation of barbarian to Greek, Christian, and cultured. For 'mens rea' is on Hart's theory used to exclude all the excuses such as accident, mistake, duress, etc. Similarly 'voluntary' on Hart's theory is a negation of the disjunction of all the defences, e.g. accident, mistake, etc. So 'voluntary', too, according to Hart, is an excluder in a different way from the way in which 'barbarian' is an excluder. For when we say that a man is a barbarian we do not mean to say that he is neither a Christian, nor a Greek, nor cultured. While on Hart's theory to say that he acted voluntarily does preclude his being in any of the excusing conditions.

We said earlier that excluder theorists like Austin do not distinguish between excluder₁ and excluder₂ theories. Austin points out that words like 'free' and 'real' are trouser words, and he explains that he means by this that such words are not used to characterize anything positive; it is the negative uses of these words that wear the trousers. Austin usually seems to treat 'free' as an excluder₁ concept. Thus he says, "Is he free?" Well, what have you in mind that he might be instead? In prison? Tied up in prison? Committed to a prior engagement?"¹ Suppose a prisoner is tied up in prison and the Governor enquires whether the prisoner is tied. Here, if the prisoner

1. Sense and Sensibilia, 1962, p. 15.

has been untied, the answer would be 'He is free'. 'He is free' in this case does not exclude other ways of being unfree such as being in prison. So here if 'free' is being used as an excluder, it seems like excluder₁ rather than excluder₂.

The following statement of Austin's seems rather puzzling as it is not clear whether 'free' is being used as an excluder₁ or excluder₂: "While it has been the tradition to present this as a 'positive' term requiring elucidation, there is little doubt that to say that we acted 'freely' (in the philosopher's use which is only faintly related to the everyday use) is to say only that we acted not unfreely, in one or another of the many heterogeneous ways of so acting (under duress or what not). Like 'real', 'free' is only used to rule out the suggestion of some or all of its recognised antitheses." ¹ If 'free' is used to exclude all of its recognised antitheses (which is one of the suggestions in this paragraph) then it would seem that 'free' is an excluder₂ word. But if it is being used to exclude one or another of the various heterogeneous ways of being unfree, then it would seem that 'free' is more like an excluder₁ word than like an excluder₂ word. Similarly if it is meant to rule out the presence of only some of its recognised antitheses, but is compatible with the presence of some other of its recognised antitheses, then it would seem that 'free' is

1. Philosophical Papers, p. 128.

more like an excluder_1 word than an excluder_2 word.

Austin's suggestion that 'free' is an excluder_1 word may work at the level of 'Is the man free?', but Austin is wrong in thinking that it would also work at the level of free action. When we say that an action was free, we rule out not just one thing, but certain sorts of things (e.g. accident, mistake, etc.). It is true that sometimes 'he did it freely' may be explicitly used to rule out a particular defence such as duress, but the assertion would also, implicitly, serve to exclude other valid excuses. Thus suppose a man pleads that he did x under duress. We may then contradict him and say, 'No, you did not do it under duress, you did it freely.' Here, though we could be using 'free' to rebut his excuse of 'duress', yet our assertion that he acted freely could be used in a sense such that it is also incompatible with other ways of acting unfreely, e.g. under provocation; though our assertion explicitly rules out only duress, it could implicitly rule out the other defences. Suppose we say that he acted freely and so rebut the defendant's claim that he acted under duress, we shall have to withdraw our claim that the defendant acted freely if we subsequently discover that he was, for instance, insane (in the relevant sense).

If 'free' is being used in this way, then the relation of 'free' to accident, mistake, duress, etc., is quite different from the relation of barbarian to Greek and cultured, etc. For if a man is not cultured,

we shall say that he is a barbarian, in the sense in which a barbarian is opposed to a cultured person. And if we subsequently discover that this person was a Greek, we shall still not withdraw our assertion that he is a barbarian; though we will agree that in the sense in which barbarian is opposed to Greek, he is not a barbarian.

So it does seem that the 'free' in 'free action' is not like excluder_1 words. But we have also seen that Austin has another suggestion to the effect that 'free' in 'free action' works like an excluder_2 word, and this theory of his is very similar to Hart's theory that words like 'voluntary' are excluder_2 words.¹

So we have distinguished the excluder_1 thesis from the excluder_2 thesis. Earlier we had distinguished the defeasibility_1 theory from defeasibility_2 theory. Defeasibility_2 theory is by our definition the same as the excluder_2 theory. But the defeasibility_1 theory is of course not the same as the excluder_1 theory.

Let us now see if Hart adheres to or implies the views that we have attributed to him.

1. Austin has yet another suggestion. Free he says is a bare minimum or an illusory ideal: "As soon as we turn instead to the numerous other adverbs used in the same connection (accidentally, unwillingly, inadvertently, etc.) no concluding influence of the form 'Ergo, it was done freely (or not freely)' is required. Like freedom, truth is a bare minimum or an illusory ideal" (Philosophical Papers, p. 98). Perhaps Austin's position is that free is an illusory ideal, but if and when we do use it, it in fact serves as an excluder.

It might be objected that it would be wrong to attribute to Hart the view that terms like 'mens rea', 'voluntary', 'could have helped it', etc., are excluders₂ (i.e. defeasible₂ concepts). For it may be argued that Hart is only saying that if someone tries to stretch expressions such as 'could not have helped it', 'did not act voluntarily', etc., to give a summary of the disjunction of the various excuses, then we will get a summary that is intolerably vague. And it might be objected that it would be wrong to imply that on Hart's theory 'could not have helped it' could not be an item on the list of excuses. And again it may be objected that it would be wrong to imply that Hart infers unavoidability from excusability.

In order to assess these objections,¹ it is worth while distinguishing at least three different interpretations of Hart's thesis:

1. According to Hart's theory, terms like 'mens rea', 'voluntary', 'could have helped it' are not positive terms, but are best understood as excluding the presence of the various excuses. Such terms are a negation of the summary of the disjunction of the various excuses.
2. Hart is only saying that someone might say that terms like 'voluntary', 'could not have helped it', etc. are just a summary of the disjunction of the various excuses. He is not identifying himself with this summary approach. He just considers the use of such terms as summaries and says

1. These objections, or something like them, were made by Mr. D.F. Pears against the earlier version of our thesis.

they are intolerably vague. He is saying that if someone tries to stretch these terms to cover all the excusing conditions, then these terms will be derivatives from the various excuses. He could himself treat 'could not have helped it' as one item on the list of excuses.

3. Hart is saying that the concept of human action is defeasible.

These three divisions are just broad ones. Some of them have subdivisions. Thus on pp162-3 I shall consider some of the different ways in which interpretation (1) may be interpreted.

Now it seems to me that of the three broad divisions, both (1) and (3) are correct interpretations of Hart. I am concerned with (1) and with seeing whether Hart is right when so interpreted.

Hart, it appears to me, is saying that concepts such as 'mens rea' 'voluntary', etc., are defeasible₂ concepts (i.e. excluder₂ concepts). Thus he talks of the jurists' having been tempted "to offer a general theory of 'the mental element' in crime (mens rea) of a type which is logically inappropriate because the concepts involved are defeasible and distorted by this form of definition".¹ It can be seen that he talks in the plural of the concepts involved being defeasible. He has himself told me that the concepts that he had in mind here were concepts like 'mens rea', 'voluntary', etc. It can also be seen that Hart is here using defeasible concept to refer to what we have called defeasible₂ concepts, rather than defeasible₁ concepts. For it can be seen from

1. Logic and Language, p. 152.

his writings that concepts such as voluntary, mens rea, etc. are, he thinks, negative concepts in a way in which concepts like contract are not. That Hart regards 'mens rea' as a defeasible₂ concept can also be seen by the following remark: "It is characteristic of our own and all advanced legal systems that the individual's liability to punishment, at any rate for serious crimes carrying severe penalties, is made by law to depend on, among other things, certain mental conditions. These conditions can best be expressed in negative form as excusing conditions. The individual is not liable to punishment if at the time of his doing what would otherwise be a punishable act he is, say, unconscious, mistaken ... subjected to threats (etc.)." ¹

That Hart regarded voluntary as an excluder₂ concept can be seen from the following considerations. He says: "... here, however, I shall not attempt ... to press the view I have urged elsewhere, that the expression 'voluntary' action is best understood as excluding the presence of various excuses." ² The 'elsewhere' seems to refer to his article on "The Ascription of Responsibility and Rights". In that article he seems to subscribe to this view himself and to attribute it to Aristotle: "... the logical character of words like 'voluntary' is anomalous and ill-understood. They are treated in such definitions as words having positive force, yet as can be seen from Aristotle's

1. Determinism and Freedom (ed. S. Hook), p. 83.

2. Ibid., p. 83.

discussion in Book III of the Nicomachean Ethics, the word 'voluntary' in fact serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accident, mistakes, etc., and not to designate a mental element or state ..."¹ It can be seen from the words I have put in italics that Hart does not only have the word 'voluntary' in mind; he is talking in the plural. What then are the other words that he had in mind? He has himself told me that the other words he had in mind were words like 'mens rea', 'intention', 'foresight'. Of course, he did not think that all excluders are equally wide - i.e. he thought some excluders exclude a wider range of things than others - and thus he thought that 'intention', for instance, excluded excuses such as mistake and accident but did not exclude other excuses such as duress,² while excluders like 'voluntary' excluded the presence of any of the excusing conditions.

It seems from some of his writings that he treated 'can' as an excluder also, or at least he said things which seem to imply that 'can' is an excluder.³ Thus he says: "If the individual breaks the law

1. Logic and Language, p. 153.

2. In his more recent writings Hart abandoned his belief that 'intention' is not used to characterize anything positive. See Hampshire and Hart, "Decision, Intention and Certainty", Mind, 1958.

3. Of course, in some of Hart's writings, especially his more recent ones, he does seem to believe that 'can' plays an important role in our system of excuses: cf. his essay on "Negligence, Mens Rea and Criminal Responsibility" in Oxford Essays in Jurisprudence (ed. A. Guest), and his Morality of the Criminal Law, pp. 8, 20 and 23. And

when none of the excusing conditions are present, he is ordinarily said to have acted 'of his own free-will', 'of his own accord', 'voluntarily', or it might be said, 'He could have helped what he did.'¹ Now we have seen that Hart thought that 'voluntary' is not used to characterize anything positive, but is used only to exclude the presence of the various excuses. Now in the passage that we have just quoted it can be seen that Hart believed that if none of the excuses is present, then it follows that 'he could have helped what he did'. So it would follow that if an act is voluntary (i.e. when none of the excusing conditions are present) then the agent could have helped what he did. In other words 'he could have helped it' is a necessary condition of an act being voluntary. But if 'he could have helped it' is a necessary condition of a voluntary act, and if 'he could have helped it' is not an excluder, then the word 'voluntary' would have some positive force; it could still rule out the presence of excuses, but it would not be just

even in his essay "Legal Responsibility and Excuses" Hart explicitly recognises that lack of capacity for self-control is on the list of excuses (there is also in that essay a suggestion that 'can' is a counter-factual). Even in his earliest essay, "Ascription of Responsibility and Rights", one sometimes gets the impression that Hart is aware to some extent that 'can' has a role in our system of excuses. For instance, he seems to think that when a man's hand is forcibly moved by another, this can be explained by saying that he had no control over his body and his decision was or would have been ineffective. This important role of 'can' in the system of excuses seems to be inconsistent with the view (implied by some statements of Hart's) that 'can' is not a positive term but is used to exclude the presence of the excuses. See pp. 275-276 of this thesis, where I point out a similar but more explicit inconsistency in Hart's writings regarding 'voluntary'.

1. Determinism and Freedom (ed. S. Hook), New York 1958, p. 92.

that, it would also have a positive element. But we have seen that Hart thinks that 'voluntary' is not used to characterize anything positive at all, so it follows that on his analysis 'can' is an excluder.¹

That Hart implied that 'can' is an excluder can also be seen in a less roundabout way. He treats 'he acted voluntarily' and 'he could have helped what he did' interchangeably, as can be seen from the following passage: "One necessary condition of the just application of punishment is normally expressed by saying that the agent 'could have helped' doing what he did ... This is a necessary condition (unless strict liability is admitted) for the moral propriety of legal punishment and no doubt also for moral censure; in this respect law and morals are similar. But this similarity as to the one essential condition that there must be a 'voluntary' action if legal punishment or moral ~~moral~~ censure is to be morally permissible ..." ² In the very same article, a few pages earlier, he reaffirms his position that 'voluntary' is best understood as excluding the presence of the various excuses. Now since he also uses 'he could have helped it' and 'he acted voluntarily' interchangeably, it follows that he implies that 'he could have helped it' is also best understood as excluding the

1. A similar argument can be used to show that Hart implies that 'free' functions as an excluder.

2. Determinism and Freedom (ed. Hook), p. 22

presence of the various excuses.

We can now deal with the point that it would be wrong to imply that on Hart's theory 'could have helped it' could not be used as just one item of the list of excuses. It seems to me that if one implies, as Hart seems to do, that 'could have helped it' is used to exclude the various heterogeneous excuses, then how could 'he could not have helped it' be regarded as just one item on the list of excuses? For if it were just one item on the list of excuses, then to say that he could have helped it would not serve to rule out the heterogeneous range of excuses, but only to rule out one item on the list of excuses.

Also we can now discuss the point whether Hart infers unavoidability from excusability. We have seen that Hart sometimes implies that 'he could have helped it' is not a positive term, but is best understood as excluding presence of the various excuses. On this view terms like 'could not have helped it' only give a summary of the disjunction of the various excuses, and when none of these excuses is present then the action could have been helped. Does it not follow from this that terms like 'could not have helped it' are inferred from the various heterogeneous excuses?

Some of the misunderstandings arise because people seem to interpret Hart differently. I have already given quotations, etc., to justify

interpretation (1). Interpretation (2) seems to conflict with interpretation (1), and since I have shown that interpretation (1) is a correct interpretation of Hart, it follows that if interpretation (2) is also a correct interpretation of Hart, then Hart has been inconsistent

Of course if (2) and not (1) is the correct interpretation of Hart, then some of the points that we are making in this thesis would not be inconsistent with Hart's views. Thus we are trying to show that terms like 'can' play an important role in our system of excuses, and are not derivatives from the system of excuses. However, if (2) is the correct interpretation of Hart, then this would not be a criticism of Hart's views. For if he is just saying that someone else may try to stretch terms like he 'could not have helped it' to give a summary of the disjunction of the excuses, then of course he is not saying that these terms in fact play a derivative role in our system. He would just be saying that if someone tries to stretch them to cover all the excuses, then such terms will be derivative from the various heterogeneous excuses.

Again, if interpretation (2) is the correct one, then it seems that Hart could say that 'he could not have helped it' is an item on the list of excuses, and not a summary of the list. For this is consistent with saying that if someone tries to stretch terms like 'could not have helped it' to cover all excuses, then such terms will be just summaries of the disjunction of the various excuses.

So at least some (if not all) of Pears' criticisms of my discussion of Hart seem to be attributable to the fact that he and I interpret Hart in different ways.

I have already given quotations to justify my interpretation. It is worth observing that interpretation (2) seems wrong or, at least, that it is inconsistent with some of the things that Hart says or implies, for according to it, Hart considers the use of 'he could have helped it' as a summary and says it is intolerably vague. I think Hart's position is not that terms like 'voluntary' and 'he could not have helped it' are intolerably vague as summaries, but that they may be intolerably vague if treated as more than summaries. He thinks that they are misleading summaries, in the sense that you may get in a muddle because you may treat them as more than summaries. If for instance you treat them as giving genuine unity to the various excuses, then you get into a muddle (for instance, one may think that the various defences are really admitted as evidence of some single element or two elements; and this would be a muddle); and you may also obscure the defeasible character of the concepts that you are trying to clarify.

The following quotation from Hart may be relevant here. It shows that he objects to the summary approach because the relevant terms may be taken as providing more than a summary: "... attempts to define in general terms 'the mental conditions' of liability, like the general theory of

1. As I argued earlier, some of Hart's statements imply that interpretation (1) is the correct interpretation, and therefore imply that interpretation (2) is not the correct interpretation. However at other times Hart does not identify himself with the 'summary approach' and seems aware that 'can' plays an important role in our system of excuses. See p. 198, footnote 3.

contract suggested in the last paragraph, are only not misleading if their positive and general terms are treated merely as a restatement or summary of the fact that various heterogeneous defences or conceptions are admitted."¹

That interpretation (2) does not properly interpret Hart's views can also be seen from the fact that Hart believes that the various defences such as accident, mistake, etc. are capable of being stated with some precision.² It would be most odd for Hart to also believe that a summary of these defences would become intolerably vague. For how can a summary of fairly precise terms become intolerably vague?

III

It is sometimes argued,³ as we have seen, that the mental conditions required before punishment is justified are best understood in a negative way, as excluding various defences such as accidents, mistakes, duress, etc.

Now we do not want to deny the role of these excusing conditions in an understanding of the 'mental conditions'. But we also think if one is to understand the 'mental conditions' it is also essential to

1. Logic and Language, p. 152.

2. Ibid., p. 164.

3. See, for instance, the quotations from Hart on pp. 196-197 of this thesis.

appeal to terms like foresight, consciousness, can, control, intention, recklessness, knowledge. The view that the 'mental conditions' are only understood as just excluding the various defences (e.g. accident, mistake, duress, insanity) seems to us a gross exaggeration.

We shall see in some detail the important role of 'can' in our system of punishment. We shall also see briefly that consciousness wears the trousers, e.g. in understanding the defence of automatism. Let us now briefly consider the important role of 'intention'. Sometimes it is relevant whether the agent's act or omission was intentional with regard to the relevant circumstances and consequences.

But intention also plays an important role in other ways which are an even more striking refutation of the view that 'mens rea' is understood as just excluding the various defences. Firstly, sometimes for an act to be considered an offence the intention must be present of doing something relevant in the future: for instance in larceny it is essential to ^{intend to} deprive the owner permanently of the thing taken. That this is so and that temporary deprivation of the possession is not sufficient can be seen, for instance, by studying R. v. Crump.¹

Here the intention to do something relevant in the future is an ingredient of the 'mental element', and yet ^{cannot possibly be understood} in terms of the absence of the defences. So if one wants to understand the mental ingredient

¹(1825)I C and P 658.

of crimes like larceny it is a gross exaggeration to say that they are to be understood as just excluding the various excuses.

There are some crimes that require 'specific intent', i.e. that you do one thing with the intention that something else will come about. For instance, with 'attempts' it is necessary that one does something with the intention that the relevant thing will come about. A man who is guilty of attempted murder must have performed his actions with the intention of killing his victim. To understand the mental ingredient of such crimes it is essential to study such cases of 'specific intent' which cannot possibly be 'reduced' to mere absence of defences. We are not here giving an exhaustive account of the role of 'intention'; but we have tried to point out that it plays an important role.

Next, let us discuss briefly the importance of the term 'reckless', which is required in order to understand the 'mental element' of at least some crimes, e.g. murder. It also helps us understand some of the defences such as accident. For not all accidents excuse: in some crimes a man may be punished for an accident if he has been reckless. Thus suppose a bird is sitting on top of B's head, and A tries to shoot

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1. Some defences such as duress also require 'specific intent'. If the defendant committed the crime under duress, then it is necessary that he shall have committed it with the intention of avoiding the threatened evil.

the bird, realising that there is a slight risk of killing B, but believing on good grounds that his chances of killing the bird (without killing or wounding B) are very good. But suppose that in fact he kills B accidentally, intending to kill the bird sitting on top of his head. Here he would be guilty of murder, for he was reckless and therefore what he did was not a legal accident.

Next, let us note very briefly the important role of foresight. 'Foresight' is required to understand the defence of 'accident'. Thus if a man shoots at a crow, does not foresee that he will get the pigeon, his shooting of the pigeon ^{is} ~~is~~ accidental. It is true that sometimes in our legal system there is the complication that the 'reasonable man test' is used. Where this test is used it is not enough that the defendant did not foresee the relevant consequence of his conduct; it is also essential that the reasonable man would not have foreseen it. But this test does not show that the defence 'accident' is ~~wearing~~ ^{important} ~~the trousers~~ any more than 'foresight'. For where 'accident' is a defence, one can try to explain the corresponding 'mental element' in a positive way by saying that foresight of the relevant consequences of the defendant's conduct is an essential condition of the 'mental element'. The complication about the reasonable man can also be dealt with in a positive way. Thus one can say that it is essential that the defendant shall have had foresight of the relevant consequences of his conduct or the reasonable man would have foreseen the relevant consequences.

'Knowledge' too plays an important role in understanding the 'mental element'. Many statutes explicitly require proof of the accused's knowledge of relevant facts by using a word like 'knowledge'. An example of such a statute is Section 142a of the Licenses Act, 1953, which penalises a publican if he knowingly harbours a constable who is on duty. Here is an example where the mental element of a crime does require a positive condition.

But 'knowledge' often plays an important role even when the statutes do not mention it explicitly. One sphere where 'knowledge' plays such a role is the M'Naghten Rules. It is interesting to observe that 'knowledge' has the same sense in the M'Naghten Rules as it does outside them.

(a) 'He did not know that what he did was wrong; but he was quite sane.'

(b) 'He did not, as a result of a defect of reason, from disease of the mind, know that what he did was wrong.'

It is true that (a) does not excuse, and (b) does excuse, but this does not show that 'know' has a different sense in the two cases. Nor does it show that knowledge does not play an important role. It is just that if one does not know that what one did was wrong this is not sufficient to excuse, but if the ignorance is a result of 'defect of reason, from disease of the mind', then one is excused.

1. See, for instance, R. v. Cottle [1958] N.Z.L.R. 999, 1028; also Bratty v. Attorney-General for Northern Ireland [1961] 3 W.L.R. 965. See also p of this thesis.

To understand the defence of automatism,¹ we need terms like 'knowledge'. 'Knowledge'^{also} plays an important role in understanding the defence of mistake, for a mistake is committed when the person does not know the relevant circumstances. There is a complication arising from the fact that in some cases the law requires that the mistake should be reasonable, if it is to be excused. But this complication can be dealt with as follows: In such cases, a legal mistake is committed when the person does not know the relevant circumstances and when the reasonable man would not have known of such circumstances. Instead of saying that the 'mental element' excludes mistake, we can say that it is an essential condition of liability in such cases that the defendant should know the relevant circumstances, or that the reasonable man would know the relevant circumstances.

Our account is perhaps a little over-simplified; one will learn more about mistakes and accidents by also reading various detailed cases than just by reading what we have said!

But we must distinguish two points: (1) The mental element cannot be understood adequately in general terms without also appealing to various cases. (2) The mental element is best understood as excluding the various defences such as accident, duress, etc.

Now it is true that in order to understand the 'mental conditions' it is not sufficient to use general terms such as Knowledge and Control. One must be more specific than that. Knowledge of certain things is

1. See, for instance, R. v. Cottle [1958], N.Z.L.R.999, 1020; also Bratty v. Attorney-General for Northern Ireland [1961] 3 W.L.R.965. See also p 229 of this thesis.

relevant ~~while~~ knowledge of certain other things is not. And one will learn a lot about what circumstances are relevant by studying various cases. But it does not follow from this that ^{the} 'mental conditions' are to be best understood as the absence of accident, etc.

It is true that the mental conditions do vary from crime to crime. As Stephen observed, rape involves intention to have forcible connection with a woman without her consent, murder involves malice aforethought, the offence of receiving stolen goods involves knowledge that the goods were stolen. And in some cases the 'mental element' involves mere inattention: "For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal." ¹

And it seems that even with regard to a particular kind of crime such as murder, the 'mental element' will not be fully understood ² without appealing to the various cases on the subject. But it does not follow from these considerations that the mental conditions are best understood as excluding the various defences.

Terms like accident, mistake, insanity, unconsciousness, are not more illuminating, nor do they play a more important role, than terms like knowledge of the relevant circumstances, foresight of the relevant consequences, sanity, consciousness, capacity, etc. It is perhaps

1. R. v. Tolson (1889), 23 QBD 168.

2. Of course even after the study of particular cases, in a sense we will not understand the mental conditions completely, because of the open texture of legal terms. What we aspire to do is to understand the 'mental conditions' as completely as possible.

true that a study of the former terms will help in the understanding of the latter, but the converse is also true. We are not denying that terms like duress and provocation¹ play an important role; we are saying that terms like intention, capacity, knowledge of the relevant circumstances, etc., play an equally important role.

We have argued that it seems one-sided to understand 'mens rea' as excluding the presence of the various heterogeneous excuses. We can now briefly discuss the significance of the theory that at the level of evidence we presume that people have 'mens rea' until the contrary has been shown by the defendant. But it seems to us that this is not at all obvious. Sometimes it is up to the defendant to show that he was unfree, that he was not free in one of the different ways of being free, e.g. intentionally or recklessly.² Sometimes it is for the prosecution to show that the defendant was not unfree³ in one of the alleged ways of being unfree, e.g. that even though it was an accident, it was a reckless one, so he was not unfree. Where the burden of proof lies is a matter of legal policy. It is true that when the prosecution has the burden of proving 'mens rea' beyond

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1. Even some of the 'defences' like 'inadvertently' that look negative may in fact be positive terms.
 2. Not all intentional actions are free ones, nor are all reckless actions free actions. But it is true that some free actions are intentional, and some are reckless, so there are different ways of acting freely.
 3. Lawyers tend to use language like 'had the requisite mens rea', or 'lacked the requisite mens rea', rather than 'free' and 'unfree'.

reasonable doubt the burden of presenting sufficient evidence to raise an issue is borne by the defendant. But this too is a matter of legal policy. If the list of the heterogeneous excuses were infinite then it perhaps would have followed that the prosecution cannot be asked to rebut every possible defence that may be open to the defence. But it would still seem possible to place upon the prosecution the burden of rebutting (beyond reasonable doubt) any given defence (or given finite set of defences) that may be raised.

Hughes has argued that Hart's thesis is supported "by the reflection ... that the burden of proving mens rea is very infrequently a real burden on the prosecution".¹ Hughes is wrong in thinking that the burden of proving mens rea is very infrequently a real burden on the prosecution. He seems to be generalising from some cases, such as insanity, diminished responsibility and certain statutory offences. And even if it were true that the burden of proving mens rea was seldom a real burden on the prosecution, this seems to me to be a matter of legal policy and it is not obvious how it supports Hart's thesis.

1. Freedom and Responsibility (ed. H. Morris), 1961, p. 230.

CHAPTER VII

'CAN' AND SOME RELATED CONCEPTS

I

We shall now examine the role of 'can' in our system of excuses and shall try to show that it plays an important role in the system. We shall contrast our theory with some other theories about the role of 'can'. There are some theories according to which 'can' plays a derivative (in the sense which implies it plays a redundant) role in our system. Some other theorists recognise that 'can' plays an important role in our system of excuses, but do not seem to recognise the extent to which it does so. They do not seem to recognise that if we look beneath the surface 'can' plays an important role on a very wide scale in determining our system of excuses. Also these theorists, apparently not recognising the manner in which it plays this important role, fail to give an adequate account of why 'can' is relevant in some cases and not in others. Thus the test of relevance that has been suggested by Fitzgerald is that 'can' is relevant after the commencement of conduct. We shall criticize such tests and suggest another test of relevance.

We shall also distinguish our theory from another theory according

to which the function of 'can' is to give unity to the meanings of accident, mistake, duress, etc. We shall argue that 'can' plays an important role in evaluating and reforming our system of excuses. And this implies that 'can' plays an important role in determining the system of excuses that the legal system does have; for the system is changed from time to time to keep pace with our ideas of what it should be. But 'can' also determines the existing system of excuses in a more direct manner, for when we examine our system of excuses, we find that not all accidents excuse, not all cases of insanity excuse, not all cases of duress excuse, etc. So we have the problem of deciding which cases of accidents do excuse, which cases of duress and which cases of insanity do excuse, etc. 'Can' plays an important part in answering this problem, though of course other things besides 'can' are also required to answer it. 'Can' also sometimes helps us to understand the meanings of some of the defences such as automatism and mental abnormality, but to say this is not to say that 'can' tells us what is common to the meaning of accidents, mistakes, insanity, duress, etc., nor to say that duress, accident, mistake, etc. are all evidence of 'he could not have acted otherwise'.

To see the role of 'he could have avoided it' in setting up our system of excuses (i.e. in deciding what conditions should be allowed to excuse) it is essential to realise that, if an act could have been avoided in a particular way this is only relevant if it should

have been avoided in that way. Thus if a man could avoid committing a minor crime by sacrificing his own life, ~~and if~~ we (i.e. society) would not want him to sacrifice his life, it is not true that 'he should have sacrificed his life', and so the fact that he could have avoided committing the crime (by sacrificing his life) will not be relevant to whether or not we should excuse him. Though, of course, we could still not excuse the man for some other reason - e.g. because he could have avoided committing the crime in some other relevant way. For instance, if he could have avoided the crime by running away without any danger to himself, then, since we should want people to run away in these circumstances, the fact that a man could have run away will be relevant to whether or not he should be excused.

Suppose there are n different ways in which a given crime may have been avoided. Then in deciding which of the ways should be relevant for excuses, we have this principle, viz.: a method of avoiding the crime is not relevant if we (i.e. society) would not commend that method. For all values of x , 'He could have used method x ' is not relevant to punishment unless 'He should have used method x '.¹ That a crime could have been avoided by using a particular

1. Of course we need to be careful and not be wise after the event. If a man kills someone accidentally, in spite of driving with due care, etc., it is still true that he could have avoided the death by not driving at all, and we may prefer that he should not have driven at all to what in fact happened. But this is to be wise after the event. For we do prefer that people should drive with due care, etc., than that they should, in order to avoid accidents, cease from driving altogether.

method is only relevant when that method should have been used. This test of relevance tells us which ways of avoiding any given crime are relevant. But whether a particular man could have used a given method is a matter of fact, and does not depend upon society's values. Thus whether a man, who pleads that he committed the crime under duress, could have fled from the scene is a matter of fact. True, whether a particular man could have fled may depend upon which sense of 'could' we are using. For a man could have fled in the sense that he had the 'external' opportunity, but if he did not have ability to run (suppose his legs were fractured) then in another sense he could not have fled. But given that we are using the sense of 'can' relevant for excuses, it is at least often a matter of fact that some people could not have fled from the people who threatened them; also, unless we are going to be sceptical about everyone's capacities, it would be odd to deny that there may be other cases where the man could have fled.

So whether a man could have fled is, in an important sense, independent of whether we want him in such situations to run away. It is, perhaps, true that whether we want such people to run away may give some people the courage to run away, but it is surely true that in some cases a man just could not have run away - however much we may wish him to have done so. Thus take the case of a man who is locked in a room with twenty strong men; he is asked by them to disclose

where the state secret papers are, otherwise he will be shot. Now whether we decide to punish such a man for disclosing the whereabouts of the papers may depend upon our values, but surely we must acknowledge that he could not have run away. Whether or not he could have fled is independent of whether we would prefer him to have fled. It is true that a necessary condition of the relevance of the inquiry 'whether or not he could have fled' to whether or not we should punish him, is that society should prefer that he should have fled, if and when he could have fled. But even when this necessary condition is satisfied there is still the problem: Could he have run away?; and this problem is not solved by wondering if we would have liked him to use this method of avoiding the crime. It may be that we (i.e. society) would be very glad if he had fled, yet he could not have fled.

(1) 'Could Smith have used method x?'

(2) 'Should people use method x as a method of avoiding the crime?'

If the answer to (2) is negative, the first problem becomes irrelevant to whether or not Smith should be punished. If the answer to (2) is yes, then we have the further problem (which is relevant to punishment): Could Smith have used that method?

Of course, even if the answer is that Smith could not have used that method, it does not necessarily follow that he should be excused. For there may be some other method of avoiding the crime that he could and should have used. If, however, there is no method of avoiding

the crime that he both could and should have used, then this shows, or tends to show, that he should be excused. It is perhaps better to say 'tends to show', because there are other considerations, especially pragmatic ones, which also need to be taken into account before we decide to allow certain conditions to excuse. At least partly for pragmatic reasons, our legal system has elements of strict liability and objective liability. In the case of negligence, there may be elements of objective liability, though it is not essential that if we punish negligence we must depart from subjective liability.¹ It is true that at least sometimes there are elements of objective liability in the law. This can also be seen, for instance, by examining the law about mistakes. At least sometimes, it seems that if a man commits a crime by mistake, this is only considered relevant if the reasonable man would have made that mistake. Now it is possible that a man could not have avoided the mistake, even though the reasonable man would not have made that mistake. And so he may be punished, even though he could not have avoided what he did.

So it cannot be denied that often our legal system by-passes the problem of whether the individual man could have avoided what he did. It does so, at least partly, for pragmatic reasons - e.g. due to difficulties of proof it is not always possible to go into people's peculiarities. The Report on Capital Punishment tells us, "Lord Goddard

1. See Hart's essay, "Negligence, Mens Rea and Criminal Responsibility" in Oxford Essays in Jurisprudence (ed. A. Guest).

objected that if the jury were allowed to take into account the fact that the accused was a peculiarly excitable person, it would let in considerations which do not apply to any other branch of the law and which are really imponderable."¹ It is significant that when the individual peculiarities are well marked and less imponderable, then the law does tend to take them into account, or if it does not, it is criticized for not doing so.

So it must be agreed that 'there was a method of avoiding committing the crime that could and should have been used by the agent' is not always a necessary condition of the actual infliction of punishment. Is it always a necessary condition of the morality of the infliction of punishment? Now the mere presence of objective liability or of strict liability in our legal system would not necessarily involve our having to answer the last question in the negative. But if we believe, as many people do, that, at least in some cases, we are justified in having elements of objective liability or strict liability, then it follows that the answer to the question must be in the negative.

So we can^{Now} ~~not~~ see the significance of distinguishing between the following two principles:

(1) It is a necessary condition of the morality of the infliction of punishment, that there was a method of avoiding committing the crime that the agent could and should have used.

(2) If there was no method of avoiding committing the crime that

1. Report of the Royal Commission on Capital Punishment, 1949-53, p. 52.

the agent could and should have used, then this tends to show that he should not be punished.¹

1. It may be objected that, strictly speaking, this principle needs to be stated in a more accurate form. For suppose there was a case where there were two equally good methods of avoiding the committing of the crime that could have been used, then it is in a sense not true that there was a method of avoiding the committing of the crime that could and should have been used; yet this would not tend to excuse.

But 'should' still plays an important role here, for it is true that he should have used one of the two equally good methods of avoiding the committing of the crime. So there was something that he should have done: i.e. he should have used one of the methods. So if we want to be more accurate the principle could be reformulated as follows: If there was nothing that the agent could and should have done to avoid the committing of the crime, then this tends to show that he should be excused.

Another reformulation that would get us out of such difficulties would be the following: If there was no good method of avoiding the committing of the crime that could have been used, this tends to show that he should be excused. A 'good method' here means not one that involves no evil but one which on the whole (i.e. taking into account all the relevant considerations, including distributive considerations) involves more good than evil. It would seem that if there was a good method of avoiding the committing of the crime that could have been used then, since it is also true that crimes should not be committed, it follows that there was something that could and should have been done to avoid the committing of the crime. Similarly if there was something that could and should have been done to avoid the committing of the crime, then it follows that there was at least one good method of avoiding the committing of the crime that could have been used. Perhaps, if we do not talk of crime but of some other activities which are not objectionable, then the fact that there was a good method of avoiding doing it that could have been used does not necessarily show that there was something that could and should have been done to avoid doing it. (See pp. 306-307.)

If it is sometimes justified to have elements of objective liability or strict liability, this would seem to contradict principle (1), but not principle (2). However, principle (1), if suitably modified, can be made consistent with objective liability being sometimes justified. Thus one can reformulate principle (1) as follows: it is a necessary condition of the morality of punishment that there was a method of avoiding the crime which the accused could and should have adopted. There is then the complication that sometimes strict liability is justified. To meet this objection, principle (1) could be modified still further, in the following way: except where strict liability (or elements of strict liability) is justified, it is a necessary condition of the morality of punishment that there was a method of avoiding the crime which the accused could and should have adopted, or which a reasonable man could ^{and} ~~or~~ should have adopted. This principle is very similar to principle (2), but principle (2) is briefer, and so we shall use principle (2). Also, principle (2) has the advantage that it takes into account the fact that even in cases of strict liability and objective liability, when we are evaluating our system of excuses, if there was no method of avoiding the mistake that the individual could and should have adopted, this does tend to show that the individual should be excused; though there may be other (e.g. pragmatic considerations) reasons which overcome this tendency.

Principle (2) also seems better, in a way, than principle (1), for it is not so strong, using the language of 'tendency' rather than

of 'necessary condition' and so being less vulnerable to criticisms. Thus on pp.276 ff. we shall notice certain considerations that will require principle (1) to be modified; but principle (2), since it is only a statement of a tendency, will not have to be modified to cope with such considerations.

It seems to us that (2), or something very like it, is one of the principles that lie at the root of our system of excuses. It is one of the principles used to evaluate, criticize and reform our legal system. Also our legal system, since it changes from time to time to keep pace with our ideas of what excusing conditions the legal system ought to allow, reflects this principle to some extent: not completely, for the legal system also reflects other determinants of the system, such as utility, prejudice, inertia, habit, etc.

We have seen that our principle does not give all the necessary conditions of mens rea. Nor does it give the sufficient conditions of mens rea. Even if a man could and should have used a method of avoiding the crime, it does not necessarily follow that he has satisfied the mens rea requirement. Often there are other elements that also enter into the mens rea requirement. For instance, there is the fact that some crimes, such as murder, require 'intention'. If a man, Mr. A., kills someone, and even if it was true that there was a method of avoiding the crime that he could and should have used, it does not follow that he committed murder; for murder requires malice aforethought.

It does not follow that he was guilty of voluntary manslaughter, for that requires gross negligence. It may, for instance, be that Mr. A. was careless and his carelessness resulted in the death of the other man, and that he could and should have avoided being careless; and yet carelessness may not amount to the gross negligence necessary for (voluntary) manslaughter.

Yet principle (2) is one of the important principles at the root of our excusing system. It helps to account for the important role played by 'can' in our system.

The test we have suggested should not be confused with another test which may appear the same as the one we have suggested. To say (a) that there was a method of avoiding the committing of the crime that could and should have been used is different from saying (b) that the crime should not have been committed and that the committing of the crime could have been avoided. (a) perhaps entails (b), but (b) does not entail (a). Thus suppose a kleptomaniac stole some goods. We are prepared to say: He should not have stolen the goods.¹ Suppose it is also true that he could have refrained from stealing the

1. Hare points out ~~that~~ "we do not say that ordinary people ought not to steal but it is quite all right for the kleptomaniac to do so. On the contrary we all agree that the kleptomaniac ought not to steal; for otherwise there would be no reason for him to go to a psychiatrist in order to be cured of his kleptomania. It is true that we think it pointless to try to persuade him not to steal, and worse than pointless to scold him for stealing" (Proceedings of the Aristotelean Society, Suppl. Vol. XXV, p. 216).
If/.....

goods by killing himself the day before. So it follows that the crime should not have been committed and that he could have avoided the committing of the crime. But it does not follow from this that there was a method of avoiding the committing of the crime that he could and should have used (though it is perhaps true that if there was a method of ^{avoiding} committing the crime that he could and should have used, then it follows that he should not have committed the crime and that he could have avoided committing it).

Let us now examine in some detail the important role of 'can' in our system of excuses.

It seems that in order to understand terms like 'mental abnormality' 'insanity', 'mental disease', etc., we need a term like 'can' or 'capacity', though of course we shall also need other terms. Thus we saw in Chapter IV that there are different standards of insanity, and terms like 'capacity to conform to the law' help us to identify the standards of insanity that are relevant; we saw that the Japanese standards were not relevant because those who are insane according to the Japanese standards are not the ones against whom there is a prima facie case that they could not conform to the law. For analogous reasons a term like 'can' would be needed to tell us which senses of 'mental abnormality' and 'mental disease' are relevant.

... If what Hare says is true it would seem to follow that there is a sense in which it would be true to say that kleptomaniacs should not commit crimes.

'Can' does not occur explicitly in the M'Naghten Rules, but it played an important role in the evaluations and criticisms of the M'Naghten Rules, and even in their understanding and interpretations; for the Rules refer to terms such as 'disease of the mind', and it seems, as we said earlier,¹ that we need 'can' in order to understand terms such as 'mental disease'. Again the M'Naghten Rules do not provide tests of mental disease: they provide tests to be used in addition to the requirement of 'mental disease'. These tests were not altogether clear. In applying them the courts did not always like to interpret them narrowly - if there were cases where the accused was sick and could not conform to the law, the courts sometimes tended to excuse these people by interpreting the rules broadly, by, for instance, interpreting 'knowledge' in a broad sense.

Terms like 'can' were also used to evaluate and criticize the M'Naghten Rules. What the law says, even when it says it clearly, surely cannot be the last word. We do criticize particular legal systems from time to time, e.g. because they have strict liability or objective liability; or again we used to criticize the M'Naghten Rules, and now many people criticize the Homicide Act. And it seems that one reason people give for making these criticisms is that some people who could not have conformed to the law are being punished under

1. See Chapter IV.

strict liability, M'Naghten Rules, etc. Thus the M'Naghten Rules were criticized on the ground that, under that system, people whose intellectual faculties were unimpaired, but who suffered from volitional disorders and could not conform to the law, were being punished. It was at least partly because of such criticisms that the Homicide Act was enacted.

Sometimes, though not always, 'capacity' also played an important role in the arguments of those who tried to defend the M'Naghten Rules, for it was assumed by some that the mind is an integrated whole and if capacity for self-control is absent, the relevant knowledge must be absent also. However, to many others this assumption seems too dogmatic.

We have seen that 'can' played a part in bringing about the enactment of the Homicide Act. 'Can' also plays an important role in the application of the Homicide Act, even though 'can' does not occur explicitly in the section of the Homicide Act that deals with the defence of mental abnormality. The Homicide Act refers to mental abnormality, and tells us that certain conditions in addition to the requirement of mental abnormality must be satisfied before the defence can succeed; but it does not explain what mental abnormality is. It is significant that those who have to implement the Homicide Act, i.e. the courts, do tend to use 'can' to explain what 'mental abnormality' is. Thus in R. v. Byrne, Lord Parker said, "Abnormality of mind appears

to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgement as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgement." ¹ So here it can be seen that terms like ability, will-power, control, play an important role in understanding 'mental abnormality'.

Also, under the Homicide Act, it is clear that not all cases of mental abnormality excuse. In order to find out which ones do, the courts resort to terms like 'could'. Thus in R. v. Byrne, Lord Parker thought that even when there is mental abnormality of mind, we may still have problems such as how to distinguish 'he did not resist his impulse' and 'he could not resist his impulse'. Such problems are, he thought, "incapable of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulse. These problems, which in the present state of medical knowledge are scientifically insoluble, the jury can only approach in a broad, common-sense way ... Inability to exercise will-power to control physical acts, provided that it is due to abnormality of mind from one of the causes mentioned in our subsection is, in our view, sufficient to entitle the accused to the benefit of

1. R. v. Byrne [1960], 2 QB 396.

the section; difficulty in controlling his physical acts, depending on the degree of difficulty, may be. It is for the jury to decide on the whole of the evidence whether such inability or difficulty has, not as a matter of scientific certainty, but on the balance of probabilities, been established" ¹

The Homicide Act does not explicitly use 'can' in helping to derive from the class of mental abnormality the sub-class of those mentally abnormal people who are to be excused. Instead it says that it is essential that the mental abnormality should be such as 'substantially impaired his mental responsibility for his acts in doing or being a party to the killing'. But it seems that in order to understand such an expression we shall need to appeal to a term like can, or control, or power. Thus Parker, C.J., says, "The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts." ²

So we have seen that terms like 'can' seem to play an important role both in understanding the term 'mental abnormality' and in helping to derive from the class of the mentally abnormal the sub-class of those who are to be excused.

1. R. v. Byrne [1960], 2 QB 396.

2. Ibid. *italics mine*

Similarly with 'provocation' it can be seen that we appeal to a term like 'self-control'. Not all cases of provocation diminish the gravity of the crime and in order to understand which ones do and which ones do not, the courts resort to positive terms like 'self-control'. This can be seen, for instance, in Mancini v. Director of Public Prosecutions: "It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death." ¹

And the Homicide Act too (Section 3), though it has changed the law regarding provocation in some respects, uses the term 'self-control' to explain when provocation is an excuse.

Again, in order to understand the defence of automatism, positive terms like 'control of the mind', 'consciousness', seem to be ^{required} ~~wearing~~ the trousers. Thus in Bratty v. Attorney-General for Northern Ireland, Lord Denning said that "automatism - means an act which is done by the muscles without any control by the mind such as spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing such as an act done whilst suffering from concussion or sleepwalking." ²

1. Mancini v. D.P.P. [1942], Ac 1.
2(1966)3 WLR 965.

Another way in which 'can' plays an important role is this. Often a term like 'fault' plays an important role in our system of excuses. And it seems 'can' is one of the determinants of 'fault'. If a man could not have done x or could not have done x except in ways that he is not required to opt for, then it seems to follow that he is not at fault for doing x. This inference would not always hold. It would not hold under objective liability. But even under objective liability 'can' is not derivative from excuses. Rather we by-pass the question whether the particular individual could or could not have done it. The capacities of the reasonable man still play an important role in objective liability. What a reasonable man could do is a necessary condition of what he would do. If a reasonable man could not do x, then it follows that a reasonable man would not do x. And since under objective liability what a reasonable man would do is an important determinant of excuses, it follows that what a reasonable man could not do is indirectly a determinant of the system of excuses. So 'can' is not derivative from excuses, even under objective liability. Hart actually explains objective liability with the help of 'can'.¹ He says that under objective liability we take into account what a reasonable man could and would do. Sometimes people explain objective liability just in terms of what a reasonable man would do. They do

1. See his essay on "Negligence, Mens Rea and Criminal Responsibility" in Oxford Essays in Jurisprudence (ed. A. Guest).

not need to add 'and could do' because that is obvious, for if a reasonable man would do x, it follows that he could do x. Since 'a reasonable man could do x' is a necessary condition of the truth of 'the reasonable man would do x', so the fact that a reasonable man would do x is a sufficient condition for saying that he could do x.

That fault sometimes plays an important role in determining the system of excuses can be seen, for instance, by studying what Salmon, J., said in R. v. Spurge [1961]. An examination of what he says also shows that 'can' is one of the determinants of fault, or blame: "... If, however, a motor-car endangers the public solely by reason of some sudden overwhelming misfortune suffered by the man at the wheel for which he is in no way to blame - if, for example, he suddenly has an epileptic fit or passes into a coma, or is attacked by a swarm of bees or stunned by a blow on the head from a stone, then he is not guilty of driving in a manner dangerous to the public: Hill v. Baxter. It would be otherwise if he had felt an illness coming on but had still continued to drive." ¹ And a little later Salmon says, "... it is also true that the sudden mischance suffered by the man at the wheel totally prevented him from controlling the movements of the motor-car, and that no fault of his in any ^{way} contributed to the danger. On that ground also, it seems to this court that even if the man at the wheel

1. [1961] 2 QB 205.

could in any sense be said to be driving, he would not be guilty of driving in a manner dangerous to the public. There does not seem to this court to be any real distinction between a man being suddenly deprived of all control of a motor-car by some sudden affliction of his person and being so deprived by some defect suddenly manifesting itself in the motor-car. In both cases the motor-car is suddenly out of control of its driver through no fault of his. Supposing a man is driving a motor-car at a slow speed close to his near side of a wide road, keeping a proper lookout and exercising all due care and skill, he is clearly driving in a safe manner. He turns the steering-wheel to negotiate a gentle bend, but owing to a mechanical defect in the steering mechanism of which he has and could have no knowledge, the steering suddenly fails completely and the wheel turns helplessly in his hands so that the motor-car careers across the road into an oncoming vehicle." ¹ It can be seen from these quotations that 'could' plays an important role.

We could continue giving examples from different parts of the law to show that 'can' plays an important and widespread role in our system of excuses; but perhaps it would be tedious to give too many examples in the text, so we have relegated some of the other examples

1. R. v. Spurge, QB 205. Italics mine.

2. Though a little later Salmon suggests that it is sufficient for punishment if the defect in the car should have been discovered by the man if he had exercised reasonable care.

to an appendix (i.e. appendix B).

We are trying to show that 'can' plays an important role in our legal system. Some theorists such as Nowell-Smith and Branaugh¹ have denied that it does so. It is part of the purpose of this chapter to show that these theorists are wrong, and that 'can' does play an important role in our legal system. Some other theorists do seem to be aware that 'can' does play a role, but it is not obvious that they are aware of the extent to which it plays this important role, nor do they seem to have a correct idea of the manner in which it does so. For clearly sometimes it may be true that a man could have avoided something, yet this is quite irrelevant to whether he should be punished. Thus suppose a man is driving a car with due care, etc., but he kills a child by accident. Now such accidents can be avoided by not driving at all. But this, according to Fitzgerald, is not considered relevant to whether such people should be punished. Fitzgerald gives an explanation of why this is not considered relevant. He says that what a person could have done before he commenced on the course of conduct is not relevant to whether he should be punished; but if he could have avoided the crime at any time since the course of conduct had begun, then this is relevant.² But this does not seem to me to be a good test. Suppose one kills a child while driving a car, because the car

1. See Section II of this chapter.

2. Oxford Essays in Jurisprudence (ed. A. Guest), p. 20, especially footnote 2.

is suddenly filled with fumes; then it is true the defendant could have abstained from driving. Now Fitzgerald's answer to this is that this is not relevant because we only take into account what he could have refrained from doing after he had commenced his course of conduct, i.e. driving.

But surely there are other cases¹ where a man can be held responsible for what he did before he 'commenced on his course of conduct' - i.e. suppose he knew that the car was in a very dangerous condition, or suppose he knew he was liable to blackouts while driving. Here, whether he could have refrained from driving at all will be relevant.

Also, this test of Fitzgerald's is not consistent with the fact that even after the man has commenced on the course of conduct, we do not always take into account what the defendant could have done. Thus a man who has commenced driving but kills a child accidentally, say, twenty minutes after he has been driving, could have stopped driving, say, ten minutes after he began driving. Now this would be after the 'course of conduct' had begun, yet we will not take this fact into account, unless we also think that he should have stopped driving.

There is the further difficulty that at least often it is not

1. Fitzgerald seems aware of the existence of such cases but he does not seem to realize that such cases show his general test to be wrong.

clear when a course of conduct commences.

Our method of testing when 'can' is relevant seems more adequate than the method of Fitzgerald's that we have just been considering. We saw that a method of avoiding crime is not relevant unless that method should have been used. This, unlike Fitzgerald's principle, can explain why in some cases it is relevant whether we could have refrained from driving while in other cases it is not.

Another principle of relevance that seems to be used by some theorists is the following. It is thought that in order to justify punishment or blame, it is a necessary condition not just that the agent had a choice, but that he should have had a fair choice,¹ so 'he could have avoided committing the crime' on this view would only be relevant if it is true that he had a fair choice. But in one sense of the word, 'fair' seems a loaded word and does not convey much information; perhaps there is a sense of the expression 'fair choice' that does convey some information: it suggests that the choice was quite a comfortable one; but in this sense of 'fair choice' it seems a considerable exaggeration to say that it is a necessary condition of the morality of punishment that the man should have had a fair choice. Now it is sometimes thought that the reason why duress serves as an excuse is that though the agent had a choice, he did not have a

1. Fitzgerald, Criminal Law and Punishment, p. 126.

fair choice. But if this was the reason for excusing cases of duress, we should excuse many more cases than we in fact do (or at least when we do not excuse, we should feel qualms of the kind that we feel when we punish under strict liability.) It does seem that we do often feel we have a right to punish, even though the defendant did not have a comfortable choice. Take, for instance, the case where a man is threatened with the immediate destruction of all his property, unless he commits murder. He then commits murder and we punish him. Here he has had a choice, and also when we punish him this would be fair (it would not have the odium that is attached to strict liability or objective liability), but it is false to infer from this that he has a fair choice. It is a condition of the morality of punishment that the agent should have a choice, and also that we should be fair to him, but it does not follow that he should be given a fair choice (in the sense of a comfortable choice). In being fair to the individual we balance his interests against the interests of the other relevant party or parties. And so it can be seen why punishing the man in the example under consideration is fair: it is fair because we have used fair principles of justice in balancing his interests against those of the relevant parties. We also regard it as fair that the individual should have an opportunity to conform to the law; but none of this shows that we think it essential that he should be given a fair opportunity of conforming to the law (in the sense that involves a comfortable choice). Our principle is however quite consistent with the fact that

in the example under consideration we do not excuse the man, for there was a method of avoiding the crime that he could and should have used. Of course there is the further problem how we decide which methods should be used, and which should not. To solve this problem, as we shall see in the next chapter, certain principles of justice and perhaps the principle of utility will be needed. Principle (2) is quite consistent with the use of such principles in determining which methods of avoiding crimes should be used.

That our principle is a more adequate one than the 'fair choice principle' can be seen from the fact that when the fair choice principle is violated (as in the example we have just discussed) we do not feel that we have incurred the odium of strict liability. However, if we punish someone when there was nothing that he could and should have done to avoid the committing of the crime, then we do incur the odium of strict liability, we do feel we have sacrificed some principle.

Our principle is not only consistent with some cases (such as the example we just discussed) where we punish the man who did not have a fair choice; it also helps to explain why in some situations, even if the man did the actus reus, and had a fair opportunity (in the sense that involves a comfortable choice) of conforming to the law, we may still excuse the man. Thus suppose A asked B to commit a minor crime, such as stealing ten shillings, otherwise A would torture C. Suppose B hates C (a fact unknown to A), so that B would not mind if

C was tortured. Here it would seem that B has a fair opportunity (in the sense of a comfortable choice) of conforming to the law about not stealing (or at least he does have as comfortable a choice as many other potential criminals have for conforming to the law). Yet we (i.e. society) are not prepared to say that B should have allowed C to get tortured, so even if B had a fair opportunity of conforming to the law about not stealing, it does not follow that there was anything that he could and should have done to avoid committing the crime of stealing. So here our principle can explain why if B were to steal we should excuse him. The fact that we would excuse him if he were to steal is consistent with the fair choice principle, if the fair choice principle is only saying that 'fair choice' is a necessary condition of the morality of punishment (though it would be inconsistent with the 'fair choice' principle if that principle is interpreted as implying that if a man did the actus reus and had a fair choice, this is sufficient for the morality of inflicting punishment); however, though it is consistent with the fair choice principle it is not something that can be explained by the 'fair choice principle'; and so here our principle seems to get more points than the 'fair choice' principle; for it even explains why in this case we think that if B were to commit the minor crime he should be excused. The example we considered earlier about the man who commits murder because all his property is threatened, is perhaps even a better example against the 'fair choice' principle; for it is inconsistent with it.

It is true that if an individual finds it very difficult to conform to the law, we do tend to take this into account at the level of sentencing, if not at the level of conviction. But it is less misleading to use this language of 'difficulty' than to say that in such cases the agent did not have a fair choice. For the expression 'fair choice' seems to us, as we said earlier, to be ambiguous. This is not, of course, to imply that the language of difficulty is not in need of illumination. We shall see in the next chapter that 'difficult' is not an easy term to understand.

Even if we do decide to use the expression 'lack of fair choice' instead of the expression 'having a difficult choice', then 'lack of fair choice' will at best help to explain the practice of mitigation. We will still need some principle of relevance that tells us when 'can' is relevant, in order to deal with the practice of excusing a criminal from punishment altogether. To deal with that practice something like our principle (2), rather than the 'fair choice principle', is required.

II

Let us now examine certain theories according to which 'can' ^{not} does ~~play~~ an important role in the system of excuses, but a derivative and redundant one. According to Nowell-Smith¹ we should distinguish two problems:

1. Mind 1948, p. 58.

- (1) What class of actions are voluntary?
- (2) What is the connection between being voluntary and being liable to blame and punishment?

He says it is customary to try to answer the first problem first, but he thinks this may lead us into insuperable difficulties of libertarianism and also renders the second problem insoluble. So he tackles the second problem first and the solution to this will provide the solution to the first. He offers a utilitarian rationale of excuses, and this rationale provides a criterion for deciding which actions are 'voluntary'. He seems to think that those actions are voluntary which can be affected (sometimes he says 'altered') favourably by punishment and blame, and non-voluntary ones are those that cannot ¹ - let us call this rationale U_A . But sometimes he seems to imply that voluntary actions are those which it will not be useful (or it will do no good) to punish - let us call this rationale U_B .

It seems from his writings that what he says here about 'voluntary' being derivative from punishability is also meant to apply to 'guilt' ² and to 'can'. For instance, he says: "... we use the word 'compulsion' not because we have isolated and identified the object which caused him to do what he did, but because we want to excuse him ... and we want

1. ¹⁹⁴⁸ Mind, pp. 58ff.

2. "A man is not punishable because he is guilty, he is guilty because he is punishable, that is to say, because some useful result is supposed to accrue from punishing him." Ibid., p. 58.

to excuse him for ... We know that it will do no good to punish him." ¹

Some utilitarians such as Nowell-Smith do not bother to distinguish between U_A and U_B , perhaps because they have not distinguished them or thought that the two do not conflict. But if they had to choose between the two, I think they would prefer U_B . For affecting and altering conduct is justified in a utilitarian system because it leads to good results, so when U_A conflicts with U_B , U_B should have preference. And in fact, there is reason to think that U_A will sometimes conflict with U_B . For even if punishment does not favourably affect the actions of those punished, there may still be a utilitarian case for punishing such people if this deters other people; if you cease punishing the sick, this may encourage some healthy criminals to commit crimes in the hope of bluffing the jury into believing that they were sick.²

Even leaving aside this complication, the utilitarian criterion will give strange results and even if it did not, it could (logically) give strange results. For instance, punishment is not only effective on those who can control their actions, who have a choice: it can also be effective on some of those who cannot. This can be seen by considering the following fallacious argument:

1. Ethics, p. 296. See also Mind 1949, p. 59, where it appears that this theory of his is meant to apply not just to 'voluntary', but also to 'could have acted otherwise'.

2. See H.L.A. Hart, Aristotelian Society, 1959-60.

It is argued by some contemporary writers that punishment is ineffective for the following reason: For punishment to be effective, man must have conscious control over his conduct, for punishment alters a man's behaviour via his conscious mind. Modern researches into the human mind reveal how much is a result, not of conscious control, but of subconscious or unconscious processes. Therefore, punishment should give way to some more effective method of coping with our predicament - such as medical treatment.

One of the things that is wrong with this argument is that punishment does not have to operate by working on the conscious mind. Logically, there is no reason why punishment cannot operate through the subconscious or the unconscious. Modern antagonists of the institution of punishment may argue that punishment will not be effective through the unconscious for, if anything, it will work "perversely", since there is an unconscious need to suffer punishment (e.g. in order to alleviate unconscious guilt feelings). Against this, one could point out that the unconscious does not always have to work "perversely"; it has by no means been established that the unconscious is never deterred by punishment. It is true that much of the unconscious material will be different from the material of the conscious, for it is unpalatable to the conscious mind and suppressed by the conscious mind. But it does not follow that the psychology of the unconscious has nothing in common with the psychology of the

conscious. So it seems to me that it cannot be ruled out that at least sometimes the unconscious may be affected favourably by the threat of punishment. So even if a man does not have conscious control over his conduct, punishment may affect his conduct favourably; i.e. 'he could have helped it' is not a necessary condition of punishment being effective. Nor is it a sufficient condition - a man may be able to help what he is doing and yet his conduct may not be altered 'favourably' by the infliction of punishment (e.g. Gandhi in British India).¹

We have seen, then, some objections to the utilitarian criterion for distinguishing conduct which a man could have helped from conduct which he could not.

So the utilitarian 'can' is quite different from the ordinary one. And, even if their denotation were the same, which is not the case, they have different connotations.

At this point, the utilitarians may concede that the utilitarian 'can' is quite different from the ordinary 'can', but why, they may ask, is this a criticism of the utilitarian 'can'? Prejudice, inertia, conservatism, habit, etc., can explain why there is the difference between what utility demands and what people ordinarily say. Why have a slavish regard for ordinary language? Utility offers a coherent solution of the problem whereas, if you try to tackle the problem without it, it will be insoluble for there will be no objective standard to

1. See Chapter II, pp. 40-41 above.

appeal to.

Now it is true that it is not enough to show that the utilitarian 'can' is different from the ordinary language 'can'. But that is not our complaint. Our point is that the non-utilitarian 'can' is relevant for the problem of excuses in our system.

If (a) utility is all one cares for, and (b) if utility is defined and measured independently of 'can', then it may seem plausible to argue that if 'can' comes into the picture at all, it should only be in so far as it is defined in terms of utility, and that if the non-utilitarian 'can' differs from the utilitarian 'can', so much the worse for the former. This last inference is invalid. For even if conditions (a) and (b) are satisfied, it would still not follow that the meaning or criteria of 'can' are derivative from utility. Even if the principle of justice that contains 'can' is not an ultimate principle, but is justified solely as a means to utility, it does not follow that the criteria of 'can' are derivative from utility.

To say that 'can' is derivative from utility may be interpreted in at least two different ways:

A. It may mean that the principle of justice that contains 'can' is not an ultimate principle but is to be justified as a means to utility. This view does not, of course, imply that 'can' is playing a redundant role in the system of excuses.

B. It may mean that the criteria of 'can' are derivative from the

system of excuses. Nowell-Smith seems to adopt this sort of position. In his kind of utilitarian system of excuses, 'can' seems to play a redundant role, as I shall show presently.

My criticisms are directed against B. Whether A can be defended or not is not something to which I shall give a definite answer in this thesis, though some of the discussion in the thesis may have some relevance for that problem.

In our legal and moral system, but not in Nowell-Smith's, we do tend to excuse people because they could not have acted otherwise. I suppose it could be argued that in Nowell-Smith's system the rationale of excuses (i.e. utility) tells us what rules to have for excusing conduct, tells us which kinds of conduct could have been helped and which kinds could not; but once we have got the rules, we will be able to apply these rules in particular cases, and we will be able in particular cases to excuse people because they could not have helped what they did. But the 'can' in the present system, unlike the 'can' in Nowell-Smith's system, does play an important role at the general level also, i.e. in helping to tell us what kinds of excuses ought to be allowed. In other words 'can' in the present system, unlike the 'can' in Nowell-Smith's system, helps to set up the system of excuses, not just to apply it.

It seems, even at the particular level, that Nowell-Smith's system could be stated without 'cans'. We could excuse particular

cases, because cases of this kind should be excused, and we decide that cases of this kind should be excused by appealing to utility. So 'can' seems to play a redundant role in his system, and therefore is different from the 'can' that plays an important role in the present system.

The role of 'can' in Nowell-Smith's system seems to me to be similar to the role of 'can' that has recently been advanced by Bronaugh.¹ Bronaugh minimises the role of 'can'. He says 'could not help it' is not a reason for excusing people: rather we first decide to excuse and then say that such people could not help what they are doing. And, similarly, with certain other people, we first decide to punish such people and then add that such people could have helped what they did.

Bronaugh's argument seems to be as follows: People always could have done other than what they did, and so whenever we could truthfully say, 'He could not have acted otherwise,' we could also say truthfully, 'He could have acted otherwise.' So we cannot give as our reason for excusing people the fact that they could not help what they were doing - rather we first decide whether or not to excuse and then, if we have decided to excuse such people, we say, 'Such people could not have helped it,' and, if we have decided not to excuse, we say, 'Such people

1. "Freedom as the Absence of an Excuse", Ethics April 1964.

could have acted otherwise.'

Now it is true that at least sometimes when we could say, 'He could not have acted otherwise,' we could also say, 'He could have acted otherwise.' Take the case of duress - A threatens to kill B unless he commits treason. Here there is a sense in which A could not have helped committing treason, and a sense in which he could have helped it (he could have chosen to die instead). And the same may be true of many cases of provocation, accident, mistake, insanity, etc. Whether we can help certain accidents and mistakes will vary with how much care we could be expected to take. Accidents and mistakes that could not be prevented with a certain amount of care may be prevented with much more care. Even in certain strict liability offences, such as those regarding the sale of foodstuffs, the defendant could have avoided the crime by not entering the profession.

But is Bronaugh right in thinking that it is always the case that we could have helped what we did?

Bronaugh considers the following ~~example~~ counter-example to his thesis. A person is suddenly, without his knowledge, injected with a drug which makes him violent. Before it wears off he runs wild, injuring people. Is this not a case where the agent just could not have helped what he did - it cannot here also be said that he could have helped it - and so why cannot we excuse this person on the grounds that he could not help what he was doing? Bronaugh's answer to this

is that in this case the person was not doing anything; he was not acting, the injuries were produced by the drug, not by him, and so the question of excusing him does not arise.

So the argument seems to be something like this: whenever there is an act, there must be a choice, therefore we must always be able to help what we do, and so, even where it is also possible to say, 'He could not have helped it,' 'he could not have helped it' cannot be the reason for excusing a person - rather we first decide whether to excuse him, and then accordingly say he could have helped it, or he could not.

There are quite a few fallacies in this ingenious argument. Firstly, even if an action always involves some element of choice, it does not follow that the agent who has done the act and has violated the law could have conformed to the law. 'He could have acted otherwise' does not entail 'he could have conformed to the law'. Of course it is possible to interpret action in such a way that unless one could conform to the law, one has not acted (in the full sense) when one breaks the law. But if this is how one interprets 'action', it becomes even more absurd to maintain that talk of excuses is not relevant when we are not acting.

Secondly, even if Bronaugh were right in believing that whenever talk of excuses is relevant, the agent could have helped violating the law, it may still be relevant, in deciding whether to excuse (or

partially excuse, i.e. mitigation), to find out whether the agent could have conformed to the law easily, or with difficulty, or with great difficulty. Even if all the candidates for a job were intelligent, it does not follow that we should not seek to find out who is more intelligent, so intelligence could still be a reason for selecting the man.

That we do sometimes take into account the difficulty of conforming to the law can be seen by examining the Homicide Act, e.g. the provisions in the Homicide Act relating to provocation, and to the substantial impairment of mental responsibility due to mental abnormality.

Thirdly, even if we accept that actions must involve choice, it is not obvious why talk of excuses is only relevant for our actions. Why is it not relevant to our bodily movements? We do sometimes say we could have helped our bodily movements,¹ and it does not seem to me any more absurd to say of some other bodily movements that we could not help them. Similarly with omissions (where there has not been an action, not even a bodily movement), we sometimes say we could have

1. "... if, knowing himself to be given to sleep walking, he had gone to sleep with the loaded revolver by his side, the putting it there would be an act that might well be sufficiently negligent to make him guilty of manslaughter. A similar view is taken where a driver allows himself to fall asleep at the wheel." Glanville Williams, The Criminal Law: The General Part, 2nd Ed., p. 14.

helped them, and sometimes that we could not.¹ We even discuss whether or not we could help what other people have done: e.g. suppose your servant has been up to some mischief, it is quite in order to wonder whether and how far you could have helped what he did.

So Bronaugh is quite wrong in thinking that talk of excuses is only relevant when we are acting. And he is quite wrong in saying that in cases like the one where the man was suddenly drugged, causing injury to people, talk of 'could have helped it' is not relevant. I think it is relevant, and one reason why we wish to excuse such cases from punishment is that there was nothing that he could and should have done to avoid the crime he has committed.

Fourthly, even if it were true that people always can conform to the law, it would not follow that they could always conform to the law by using a method that they should have used. Even if it is true that whenever talk of excuses is relevant, the agent could have conformed to the law, this is not always a reason for not excusing such conduct. To say that it is a reason is to say something more than just to say that it is there. Even if it is always there, sometimes it is a reason and sometimes it is not. (Sometimes 'can' is there but is idle, as it were. When some other relevant conditions are satisfied 'can' is

1. "Non-compliance with the duty will be excused where compliance is physically impossible. On this ground it was held in *Bamber* (1843) that a person was not responsible for not repairing a road where land over which it had passed was washed away by the sea." *Ibid.*, p. 74.

no longer idle.) And it is important to distinguish cases when it is a reason and those when it is not. Suppose we have strict liability for motoring offences. Suppose there are some cases of duress where motoring offences were committed by people whose lives and whose families' lives were threatened so that they had to break the law in order to avoid the threat. Given liability that is strict enough,¹ we would punish such motorists for breaking the law. Also it would be true to say in a sense that they could have helped committing the crime - they could have died instead. Yet the fact that they had the capacity to conform to the law is not a reason that we can give for not excusing them. For to give that as a reason implies that we should want such people to conform to the law at the cost of their lives, which is not the case. Even though they could conform to the law, and even though when they do not do so, we punish them, our reason for not excusing them is quite different - it is to deter other people.

Now contrast this with another case. Suppose a man steals some money because someone threatened to box his nose if he did not, and suppose his nose and he are not particularly delicate, so that he could easily have put up with the blow, then, if he does go and steal, this will not be a good excuse. And here it is relevant that there was a

1. In practice, even when there are elements of strict liability, liability is at least often not strict enough to rule out duress as a defence.

method of avoiding the crime that he could and should have used.

Even if 'can' does not always play an important role in the system of excuses, it does not follow that 'can' when combined with 'should' (in the way that we have seen in our principle) does not play an important role in our system.

Those wanting to defend Bronaugh's thesis might argue that even in the drug case a man may be able to avoid being forcibly drugged by someone else, by being constantly on the lookout against getting drugged. For instance, he could have slept less, as a precaution against getting forcibly injected with the drug while asleep. To such arguments it could be replied that cases are conceivable where a person just could not have avoided being injected. Thus suppose a man sleeps as little as possible, yet he has to sleep for some time, and suppose when he is asleep he is forcibly injected with the drug. Does it not follow that he could not have avoided being drugged? Someone wishing to defend Bronaugh's thesis might reply, "True, he had to sleep for some time, but it is possible for a man to take precautions before he goes to sleep. Thus a person could employ guards before going to sleep, so that they could protect him from being forcibly drugged." To such replies, it can be objected that cases are conceivable where such precautions do not work, e.g. suppose the guards themselves decided to drug the man when he was asleep. He might take precautions against that happening, for instance by an elaborate espionage system that keeps

a check on the guards, but it is conceivable that such precautions do not work.

It may be argued that a man could also avoid being forcibly drugged while asleep, by taking his life before he goes to sleep. True, we would not want him to take his life, but he could take his life before going to sleep. So he could avoid being forcibly injected.

Against this it could be pointed out that cases are conceivable when a man could not take his life, e.g. because he is of a cowardly nature.

At this point it might be objected that there is an air of unreality about this whole discussion. For surely if a man has, without his knowledge, been drugged while asleep and goes around killing people, we do not normally inquire whether he could have taken his life before he was drugged or whether he could have employed guards to protect him while asleep.

Now it must be admitted that there is an air of unreality in the discussion. But it is important to see why there is this unreality. It might be argued that we (i.e. society) would not want people to opt for certain methods of avoiding being drugged, which is why there is no point in discussing whether the agent could have used these methods. But, as we saw earlier, it would be wrong to infer from this that whether a man could have used a particular method of avoiding the crime depends upon whether that method should be followed. 'Can' still plays

an important role in the present system. For where society would like people to use a method of avoiding the crime, it is important whether or not a man could have used that method.¹

To take an analogy, which is not meant to be an exact one, suppose two criteria are used for employing people for a job: good manners, and intelligence. Then we may reject an intelligent candidate who is not well-mannered, and select another intelligent man who is well-mannered. But it would be quite wrong to infer from this that intelligence is not one of the determinants of selecting the candidate or that whether the candidate is intelligent depends upon whether he has good manners. For the truth is not that whether a man is intelligent depends upon whether he has good manners, but that unless he has good manners, his intelligence by itself will not qualify him for the job.

It will clarify the relation between 'he could have avoided it' on the one hand, and utilitarian considerations and 'he should be punished' on the other, if different senses of 'can' are distinguished. There are at least two senses of 'can' worth distinguishing in this connection. Suppose a kleptomaniac steals some money, and the only way in which he could have avoided stealing the money was by killing himself. Assuming that he had the power to kill himself, we will say that in a sense he could have avoided stealing - let us call this

1. See pp. 215 ff.

sense of 'can' can_X ;¹ yet in another sense he could not - let us call this sense of 'can' can_Y - i.e. there was nothing that he could and should have done to avoid stealing. Both senses of 'can', or something very like them,² exist in ordinary language, but it would be quite wrong to infer from this that 'can' does not play an important role in our system. It is true that whether a man could_Y have done something partly depends upon what he should have done. But it also depends upon what he could_X have done. For, if the individual could_X not have used a given method of avoiding the crime, it is not true that he could_Y have used it. Thus we saw that in cases of duress 'can' plays an important role; it is relevant for instance whether the man could have run away from the scene. It is possible to use 'should' in a sense that entails 'could', and then whether a man could_Y have done

-
- 'can'
1. Later in the thesis we shall say more about ~~'can'~~^{'can'}, and we shall suggest that ideally can_X should be interpreted to refer to can_C .
 2. There is a sense of 'can' in ordinary language that corresponds to can_X , and there is a 'can' in ordinary language that refers to what can be done without using a method that should not be used (i.e. without using a bad or an unreasonable method). Can_Y , which implies that the relevant method should be used, is perhaps a little **stronger** than what is implied by the 'can' in ordinary language that we have just referred to. But it could be argued that with bad actions, such as criminal actions, something stronger does often seem to follow. For, if a crime could be avoided without using a method that should not be used, then it at least often follows that there is some way of avoiding the act that could and should be used. See also p280ff

something will depend wholly upon whether he should have done it; the test as stated on pp. 219-220 could then be stated without using the word 'could', but this is just a verbal trick. For 'can' is still playing an important role; for if 'should' entails 'could', then a necessary condition of the truth of 'he should have done it' is that 'he could have done it'.

So it is true that when a man could_x have used a given method of avoiding committing the crime, whether he could_y have used that method depends upon whether he should have used it. So can_y is partly derivative from values. And so utilitarian considerations could partly determine can_y (if we grant what seems true, that utilitarian considerations are one of the determinants of whether certain methods should be used); i.e. they could be used to answer the question: Should certain methods of avoiding crimes be commended?

But though values play some part in determining whether a man could_y have done something, i.e. whether there was a method of avoiding the crime that he could and should have used, it does not follow that 'can' plays a redundant role in our system, as Nowell-Smith and Bronaugh seem to imply. For if a man could_x not have used a certain method, then however desirable it would have been if he had used that method, it would still be true that he could_y not have used it. It is only when a man could_x have used a certain method that it follows that whether a man could_y have used that method of avoiding the crime

depends solely upon our values.

Another point on which Nowell-Smith and Bronaugh seem wrong is this. They not only exaggerate the extent to which values determine 'can'; they also seem to have a wrong impression of the manner in which values affect 'can'. For they seem to think that whether a man could have avoided a crime depends upon whether he ought to be punished; but this is quite misleading. This view is wrong because it overlooks the fact that can_x is one of the (logical) determinants of can_y ; and also because it overlooks the fact that the other (logical) determinant of can_y is 'should that method of avoiding the crime be used?', rather than 'should such actions be punished?'.

Thus, suppose strict liability is justified for utilitarian reasons in the case of certain traffic offences, because otherwise the crime rate will go up, as people may commit crimes in the hope of bluffing the jury into believing that they were in one of the excusing conditions. Then we will not say that people who commit these offences could have acted otherwise; rather we say that we by-pass the question of whether they could have avoided committing the crime. And similarly when objective liability is justified, we do not say that when a man ought to be punished it follows that he could have avoided what he did; rather we say that we by-pass the problem of whether he could have avoided it.

Even when (a) punishment is justified, and (b) the man could_x have

acted otherwise, it does not follow that he could_Y have acted otherwise. For instance, in the case of certain traffic offences, people could_X avoid committing them by not driving, so condition (b) is satisfied. Supposing, too, that for utilitarian reasons we are justified in having strict liability so that condition (a) is also satisfied, it still does not follow that there was a method of avoiding the crime that the man could and should have used, i.e. it does not follow that he could_Y have avoided committing the crime.¹

Nor does it follow from the fact that certain people ought to be excused that therefore these people could_Y not have conformed to the law. Cases are conceivable where people could have conformed to the law and yet ought to be excused. Thus we may find in some crimes that though there was a method of avoiding the crime that the man could and should have used, yet if the negligence was less than gross, we may decide that the man should be excused.²

We have to be careful about what we include in the analysis of 'can'. Thus if we send people to certain schools this may increase

1. If utility is one of our important values, as it seems to be, then utility affects the system of excuses in at least two ways:

(i) It is one of the determinants of what methods of avoiding the crime should be followed, and so it is one of the determinants of can_Y. And can_Y is one of the determinants of the system of excuses.

(ii) It sometimes (as in strict liability) affects the system of excuses by making us punish people, even though they may not have the capacity_Y to conform to the law.

We shall not here examine the other ways in which values determine the system of excuses, e.g. by being one of the determinants of terms like recklessness; cf. Ch. V.

2. See p. 223.

these people's capacity to conform to the law. But it would be quite wrong to infer that sending people to these schools should enter into the analysis of 'can'. Similarly even if it is true that sometimes as a matter of fact our views about what excuses ought to be allowed influences people's capacities to conform to the law, or makes us commend certain methods of avoiding crimes, this would not be significant from the point of view of analysing the meaning of can_X or can_Y .

We have seen that can_Y is analysed in terms of whether there was a method of avoiding the act that could and should have been used. This is a logical connection. If there was nothing that a man could and should have done to prevent the act, it follows as a matter of logic that he could_Y not have done it. However, for reasons that we have examined, if people ought to be excused it does not necessarily follow that they could not have done the act, and again if people ought to be punished it does not necessarily follow that they could have acted otherwise. These inferences do not follow, whether 'can' is used in the can_X sense, or whether it is used in the can_Y sense.

In Nowell-Smith's and Branaugh's system on the other hand, if a man should be punished, it necessarily follows that he could have avoided the act, and similarly if he should be excused, it necessarily follows that he could not have helped it. In our present system, as we have seen, sometimes when strict liability is justified we say that

a man ought to be punished even though he may not have the capacity to conform to the law; this is something that could never be said in their system.

Indeed 'can' in their system plays such a redundant role that their system has a remarkable similarity to the 'canless' system that Lady Wootton is advocating; though of course Lady Wootton is much more aware that her system is very different from the present system. This similarity, in itself, is not necessarily a criticism of their system, but it shows how wide of the mark they are in implying that their system is roughly the same as our present system.¹

We saw earlier that Nowell-Smith's system could be stated without 'can'. What then is to be lost by stating it without 'can', as Lady Wootton does?

In favour of using 'canless' language it may be said that, if one is going to have a radical break with the present system, it is better to be honest and use new language rather than talk of 'can', which may confuse people; they may think we are still operating the

1. Their system is also different from Kant's in spite of a superficial similarity. Kant said that 'oughts' give us knowledge of 'cans'. But 'cans' are already there, 'oughts' do not, in Kant's system, create 'cans'. Indeed, 'freedom' is a necessary condition of the existence of 'oughts' in Kant's system, even though knowledge of 'oughts' is essential for knowledge of freedom. In Nowell-Smith's and Brønhaug's system it is not just that the knowledge of 'cans' is derived from the knowledge of 'oughts', but also 'cans' are derived from 'oughts'.

old system. Also, against having the new system with the old language of 'can', it could be argued that if there is any value in retaining our present system of 'can', all that is valuable will not necessarily be retained in the new system by the mere use of the word 'can'. If your husband, Mr. Jack, dies, it will be little compensation for you to call your dog "Jack" rather than "Fido".

In favour of having the new system, yet retaining the old language of 'can', it may be said that some of the values of our present system can be preserved in the new system by using the language of 'can'. Thus people will often behave more responsibly if we retain the language of 'can' in the new system, than if we do not - for without such language, they may think they are machines, that they cannot control their actions, and this will tend to make them give way to their criminal tendencies.¹

But against these good results of using the language of 'can' in

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1. It is true that a 'canless' system with canless language does not involve the denial of the view that human beings can control their criminal tendencies; it involves a by-passing of the problem of whether or not they could control their anti-social conduct. Yet in an age where people are already not very confident about their ability to control their actions, even this by-passing of 'can', could have a bad psychological effect. It could be argued that one of the ways of making people control their actions is to encourage them to believe that they have such powers of control; and by using the language of 'can' this belief will be strengthened.

But can such advantages be preserved for long, under the new system, merely by preserving the old language of 'can'?

the new system, we must weigh the evil of any dishonesty or deception involved. People may behave responsibly in the new system because they wrongly think we are still operating the old system. And the more well-known and explicit our new system becomes, the less will people be taken in by the continued use of the word 'can'.

Compare: Suppose you set up a new system of government, and call it a Democracy, because by so calling it you get more support for it, etc. This in itself is not evil and it may even do some good. But suppose the reason why people give you support for your new system of government is that they wrongly think it is like another system of government that they admire. Then the good results must be weighed against the evil of deception.

III

One of the reasons why the theory that 'can' does not wear the trousers but is a negation of the summary of the disjunction of the various defences may sound plausible is that it is not exactly stated. I think once we try to see the different ways in which the theory may be interpreted, we will see that it does not work in any of the interpretations.

(1) All accidents, all mistakes, all threats, all cases of insanity, all cases of duress, etc.

(2) Legal accidents (i.e. accidents that the legal system

excuses), legal mistakes (i.e. mistakes that the legal system excuses), etc.

(3) Accidents that the legal system ought to excuse, mistakes that the legal system ought to excuse, etc.¹

(4) Accidents that could not be helped, mistakes that could not be helped, etc.

(2) and (3) and (4) are sub-classes of (1).

Now it seems to me that if 'can' can be analysed in terms of the absence of one of the above four classes, No. (4) is the most plausible class. But those who think that 'he could not have helped it' does not wear the trousers, but is just a summary of the disjunction of the various specific defences, cannot analyse 'can' in terms of absence of (4), because in (4) 'could not be helped' plays an important role.

It is absurd to say that 'can' is the absence of (1) because there are many accidents, mistakes, etc., which can be helped quite easily.

So this leaves (2) and (3). We have seen that in our present system (unlike some other systems such as Nowell-Smith's and Lady

1. There are variants of (2) and (3). It might, for instance, be suggested that 'can' is derivative from the absence of excuses that our moral system allows or ought to allow. Our criticisms of such suggestions would be analogous to our criticisms against analysing 'can' as absence of (2) or (3); e.g. 'can' helps to determine what excuses our moral system ought to allow and does allow, so you cannot take the trousers off 'can' and put them all on the various excuses.

Wootton's) 'can' plays an important role in determining sub-class (2).

If 'can' was just derivative from the various specific excuses that our system does allow, this would be inconsistent with the following two important functions that 'can' does perform. Firstly we have observed that not all accidents excuse, not all cases of provocation excuse, not all cases of duress excuse, etc. So we have the problem: How do we get sub-class (2) from class (1)? And it seems that 'can' (or rather the principle of justice that contains 'can') helps ¹ to answer this problem. Secondly, 'can' is used to evaluate and reform the system of existing excuses and this function, too, it could not perform if 'can' were just derivative from class (2).² In other words, if the term 'could not have avoided it' was just a summary of the disjunction of the particular excuses that the legal system does allow, then how could this summary be used to evaluate the particular excuses that the law does allow? So it seems that this summary kind of approach is playing into the hands of the critics of the present system such as Lady Wootton. For if we accept that 'could not have avoided it' is

1. To say that 'can' helps to answer this problem does not of course imply that there are not other things, such as utility, that may also help to answer this problem. 'Can' is one of the important determinants of the system of excuses, even though it is not the only determinant.

2. We have seen, earlier in this chapter, the important role played by 'can'. We also saw that in addition to these two functions of 'can', 'can' is sometimes needed to help to understand members of class (1). Thus, we saw that 'can' not only helps to derive the sub-class of legal insanity from the class of insanity, but it also helps to identify the class 'insanity' from which the sub-class of legal insanity is derived.

just a summary of the excuses that our legal system does allow, then if we also insist, as we sometimes do, on using 'can' to help us to tell what our system of excuses is and to evaluate and reform our system, then we are left with insoluble problems.

That leaves class (3). It might be argued that 'can' is the absence of excuses that ought to be allowed, and this could be quite consistent with the fact that 'can' helps us to evaluate the system of excuses that the legal system does allow; for it is perfectly consistent to use one summary (i.e. the summary of the disjunction of the various excuses that ought to be allowed) to evaluate another summary (i.e. the summary of the disjunction of the various excuses that are allowed.)

Now it must be agreed that it is possible to use one summary to evaluate another summary; but it seems to us wrong to think that 'can' is derivative from class (3). That 'can' is not derivative from class (3) can be seen from the following considerations. In cases where elements of strict liability or objective liability are justified (e.g. for utilitarian reasons), we do not say that all those who ought to be punished (i.e. who ought not to be excused) could have conformed to the law; rather we will agree that in cases where elements of strict liability or objective liability are justified, some of the people who are punished may not have the capacity to conform to the law. This could never be agreed to if 'can' was just the absence of excuses that ought to be allowed.

It seems that 'can' is one of the determinants of (3). It is not the only determinant. Another determinant, for instance is utility. But it seems that if there was nothing that a man could have and should have done to avoid committing the crime, this tends to show that he ought to be excused. Of course sometimes other considerations, such as utility, may override this tendency, which is why sometimes objective liability or strict liability is justified. But this only shows that can is not the only determinant of class (3); it does seem to be one of the determinants of class (3).

We have seen that 'can' plays an important role in our system of excuses. It is this important sense of 'can' which is causing so much controversy nowadays. People like Lady Wootton are saying we should bypass all talk of 'cans' in deciding which excuses to allow, whereas defenders of the present system say that we ought to retain our present system where 'can' helps to tell us which excuses ought to be allowed. But both the critics and the defenders of the present system agree that this sense of 'can' does play an important part in our system. The sense of 'can' in which 'can' is derivative from the system of excuses is so derivative and harmless that people like Lady Wootton will have relatively little objection to its presence. For if 'he was excused from punishment' means something like 'he was let off from punishment without denying or justifying his imputed action', then Lady Wootton is not against every system of excusing conditions. Indeed her system could also have excusing conditions.

In Lady Wootton's system, it seems, everyone who has done the actus reus will be convicted and the distinction between punishment and compulsory medical treatment will be blurred and perhaps even disappear. But in her system there will be punishment in the sense of compulsory deprivation of liberty, i.e. some people who have done the actus reus will be locked up, some others who have done the actus reus will be excused in the sense that they will be let off (i.e. set free) without denying or justifying their imputed actions. So one could still say that some people will be excused (from being locked up). So even if everyone in her system who has done the crime will be convicted in her system, some of those who are convicted will be excused, and some will not. And utilitarian criteria will be used in deciding who is to be excused and who is not.

It is possible to understand the expression 'system of excuses' in such a way that a necessary condition of such a system is that there should be pleas. But the existence of pleas is consistent with the adoption of Lady Wootton's system. Thus the offender could in her system still plead things like, 'Excuse me from punishment, for though I committed the crime, I am, as far as the future is concerned, quite harmless to society.' There would then be somebody that would decide how true and how good these pleas are in the particular cases. One would also have some 'higher' body to which the individual could appeal against the decision of the 'lower' body.

So it does seem that Lady Wootton's system could also have a

system of excuses. And if terms like 'can' are derivative from excuses, Lady Wootton would not object so strongly to the presence of such terms. The sense of 'can' that people like her are against is a different one, and they rightly believe that it plays an important part in the present system.

Of course, it is possible to define a system of excuses in such a way that any system such as Lady Wootton's which bypasses 'can' would not be a system of excuses. But in that sense of 'system of excuses' it would be absurd to argue that 'can' is just derivative from excuses.¹

IV

Although we have argued that 'can' plays an important and widespread role in our system of excuses, our view should not be confused with another theory. There is one theory according to which terms like 'can' and 'voluntary' provide a unity to the meaning of all the excusing conditions. But it seems to us that if one wants to understand the meaning of excusing conditions, one can do so in terms of some such expression as 'conditions that let a person off from punishment without denying or justifying his imputed action'.² 'He was excused from a

1. See p. 271 of this thesis.

2. It might be argued that in one important sense of the expression 'system of excuses', it is a necessary condition of such a system that there should be a system of pleas. See p267.

murder charge', 'he was excused from a charge of stealing': 'excused' has the same meaning in the two cases, even though the criteria for excusing a person from murder are different from the criteria for excusing a person from stealing. When people wonder whether the different excusing conditions that our legal system does allow have anything in common, they are really wondering whether there is anything common to them besides the fact that they are excusing conditions.¹ It seems that there is no such thing common to the meanings of the various excusing conditions. Nor does it seem that there is a single thing that is in fact common to all the excusing conditions, though there are certain general principles at the basis of our system of excuses. Even if there ought to be a single factor, such as utility, common to them, other factors such as inertia, habit, prejudice, etc., have crept into our system.

Yet will there not be at least a family resemblance between the different excuses that our legal system allows? Yes, there probably is. But this is not relevant to the meaning of 'excusing conditions'. Indeed, even if all the different pleas happened to have some common element, suppose *x* was present whenever there was an excusing condition.

1. That they are all excusing conditions is something that they genuinely have in common; it is not just that they have the words 'excusing conditions' in common. Each of them lets one off punishment without denying or justifying the imputed action. If Smith is let off from punishment because he acted under duress, and if Jones is let off from punishment because he did the crime accidentally, 'let off from punishment' has the same meaning in the two cases.

present, and absent whenever there was no excusing condition, this would be irrelevant. For however desirable and important *x* may be, it would be a contingent feature accompanying the excusing conditions. The presence or absence of *x* would not be relevant to the meaning of 'excusing conditions'. Even if *x* is at the root of our system of excuses in the sense that it is in fact the reason why we allow the various conditions to excuse, *x* would not form part of the meaning of 'excusing conditions', unless we said that a system of excuses that was not based on *x* would not be a system of excuses at all. If we merely think that a system of excusing conditions that is not based on *x* would be an undesirable and immoral one, this is not sufficient to show that *x* is part of the meaning of 'excusing conditions'.

So it could be argued that any attempt to give a unity to the meaning of 'excusing conditions' (besides the unity that is provided by their being all excusing conditions) that the legal system does recognise will result either in a spurious unity or in a unity which, though important, will be a contingent fact about them and so will not be part of the meaning of 'excusing conditions'. But it would be wrong to infer from this that terms like 'could have helped it' are derivative from the various defences and not vice versa. For the function of 'can' is not to tell us what 'excusing conditions' means. It is perhaps true that if we insist on making 'can' give a unity to the meaning of 'excusing conditions', then 'can' will provide only a

spurious unity. 'Can' does not form part of the meaning of 'excusing conditions', for as we have seen it is possible to have a system of excuses where 'can' has been by-passed. Thus we could have purely pragmatic criteria for deciding who is to be punished and who is to be excused.¹

One could, I suppose, use excusing conditions in a narrower sense than the sense which we have been using. One might make it a logically necessary condition for the existence of a system of excuses that it should by-pass terms like 'can', so that a system of 'excusing conditions' that by-passes such concepts is not really a system of excusing conditions. But if this is how one understands 'excusing conditions', then it would seem that terms like 'can' are required in order to understand the system of excuses and are not just derivative from them.

Perhaps one of the reasons why the function of terms like 'can' may have been misunderstood is the confusion between at least two senses of responsibility:

1. Responsibility in the sense of 'could have helped it'. Let us call this "responsible_C". This sense occurs in the Homicide Act when the Act refers to an impairment of mental responsibility. Also it is in this sense that people like Lady Wootton want to get rid of our

1. See pp. 267-268 of this thesis.

system of responsibility. They do not want to get rid of punishment, so they are not against responsible_P.

2. Responsible in the sense of liable for punishment or, in moral contexts, liable for blame. Let us call this "responsible_P". This sense is used, for instance, when we talk of excusing people from responsibility or holding them responsible.

That the person could have helped what he did (i.e. responsibility_C) is often considered a morally necessary condition of holding him responsible (i.e. responsibility_P). This may explain but does not justify the fact that some people confuse these two senses of responsibility.

Hart said that the various excuses like accident, mistake, etc., are not evidence of the lack of some common mental element, but are multiple criteria defeating the grounds of responsibility. If he means class (2),¹ he is quite right that this class provides multiple criteria defeating responsible_P (i.e. responsibility in the sense of liable for punishment). But it would be quite wrong to say that they are multiple criteria of responsible_C. It would be wrong to suggest² that to deny that they are criteria is to imply that they are evidence of the lack of some common mental element. In fact they are neither evidence of the lack of some common mental element, nor are they multiple criteria

1. See pp. 262-263.

2. We need not go into the problem of whether Hart made this mistake.

of 'could not have helped it' - rather, they reflect 'can' to some extent (not completely, for they also reflect other determinants of our system, e.g. utility, prejudice, habit, ignorance, inertia). Strictly speaking, we should say that class (2) on pp. 262-3, i.e. the class of legal accident, legal mistake, etc., reflects to some extent the principle that contains 'can', i.e. the principle: If there was no method of avoiding the crime that the agent could and should have used, this tends to show that he should not be punished. This also shows that it is misleading to analyse 'can' in terms of ascription of responsibility. It is true that in our present system 'can' is one of the determinants of our excusing conditions, so it does play a part in ascribing responsibility. But this is a contingent feature of 'can' - and, if we adopted Lady Wootton's or Nowell-Smith's system, it would seem that 'can' will not play this role.

Now it seems that there is a logical connection between the excusing conditions that the legal system allows and responsibility_p. If a person is in one of the excusing conditions then he is not liable for punishment and so he is not responsible_p.

But it would be quite wrong to infer that if a person is in one of the excusing conditions, then he is not responsible_c. Thus in some offences, lack of intention, although it may be due to negligence, is not punished, and it is quite possible that even though a man is excused he could and should have conformed to the law. A man should not be

negligent even if the law does not punish negligence.

We have been arguing that 'can' plays an important role in the system of excuses. Now we saw earlier that expressions such as 'he could have acted otherwise' and 'he did it voluntarily' are sometimes used to express the morally necessary condition of the infliction of punishment and blame.¹ Much of what we have been saying about 'can' not being just derivative from accident, mistake, etc., will apply mutatis mutandis to 'voluntary' also. Similarly, some of the discussion earlier about 'mens rea' will apply mutatis mutandis to a discussion of 'voluntary'. In Chapter VI, Section III, we used certain arguments to show that the view that the 'mental conditions' are to be understood as just excluding the various excuses is one-sided. At least some of those arguments can also be applied, mutatis mutandis, to show that it is one-sided to say that 'voluntary' is best understood as excluding the presence of the various defences. Now there may be some sense of 'voluntary' in which voluntary is just derivative from the various excuses but that is not the sense that is relevant when people say that 'he did it voluntarily' is a morally necessary condition of the infliction of punishment and blame.² Let us call the relevant

1. See p171.

2. Strictly speaking this is perhaps too strong. We should say something like, "'He did it voluntarily' tends to be a morally necessary condition of the infliction of punishment."

sense voluntary_m. Now voluntary_m is not the absence of the summary of the disjunction of all accidents, all mistakes, all threats, etc.; because there are some threats, etc., that are compatible with the agent's acting in a voluntary manner. Nor is 'voluntary' absence of the summary of accidents that the law excuses, mistakes that the law excuses, etc. For instance, under objective liability, it is possible that some people are not excused even though they did not act voluntarily. Nor is 'voluntary' absence of excuses that ought to be allowed, for sometimes for utilitarian reasons we may be justified in having elements of objective liability or strict liability, and so it will not be possible to derive 'voluntary' from 'ought to be excused'.

If we adopt some such position as: 'If a crime was not committed voluntarily, this tends to show that the agent should be excused,' 'voluntary' plays an important role in evaluating and determining the system of excuses and is not just derivative from the system of excuses.

Hart in his writings seems to imply that 'voluntary' plays an important role in evaluating and determining the system of excuses,¹ for he says that 'voluntary' provides a necessary condition (unless strict liability is admitted) for the moral propriety of legal punishment. At the same time Hart also believed that voluntary is just used to exclude

1. If it plays an important part in evaluating the system of excuses, then it follows that it plays an important part in determining the system (for the system of excuses is changed from time to time to keep pace with our ideas of what it ought to be. Thus the M'Naghten Rules were supplemented by the Homicide Act.

the various heterogeneous excuses.¹ And that non-voluntary is just a summary of the disjunction of the various excuses. But this would imply that voluntary and non-voluntary are just derivatives from the various heterogeneous excuses!

It might be argued that a necessary condition (if not also a sufficient condition) of a crime that is committed voluntarily_m is that there was a method of avoiding the crime that the agent could and should have used. In other words, can_y is a necessary condition of a crime's having been committed voluntarily_m. If this is so, then it would seem that voluntary_m is not an excluder₂ concept.

The view that it is a necessary condition of a crime being committed voluntarily that the criminal could_y have avoided committing it may need to be modified a little, for it is possible² that there was no method of avoiding the committing of the crime that the agent could and should have used, yet he may have committed it voluntarily. For instance, suppose a man decides to commit a minor crime; and suppose that, after he has decided, people threaten him, saying that he must commit that minor crime, otherwise they will shoot him. Now suppose he then commits the minor crime, but not because of the threat

1. See "Legal Responsibility and Excuses" in Determinism and Freedom (ed. S. Hook).

2. Even leaving aside the complication we noticed earlier on p. 220

(e.g. suppose he did not believe that the threat was genuine, or suppose he did not hear properly so that he never knew there was a threat; or even suppose that he knew the threat was genuine but that did not influence his decision to commit the crime). Here it can be seen that, in a sense, there is no method that he could and should have used of avoiding committing the crime,¹ but it does not follow from this that his committing the crime was not voluntary (in one important sense of voluntary).²

To meet this objection we might say that it is a necessary condition of a voluntary bad act that it was due to factors, at least some (or one) of which were such that the agent could and should have surmounted them. To say that the agent could surmount them means that he could have prevented them from contributing to the action, e.g. by getting rid of them altogether, or that even if he does not get rid of them he could prevent them from helping to bring about the action. Thus a man may have a desire to steal; he may then surmount this desire, either by getting rid of the desire altogether, or by controlling it in such a way that the desire does not issue in the relevant action.

In other words it is a necessary condition of a voluntary bad

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1. For to say that there was a method of avoiding the committing of the crime that could and should have been used (in one sense of that expression) implies that the crime could and should have been avoided.
 2. See p 221-2 for the relevance of these considerations for principle (2).

act that it was due to factors at least some (or one) of which were such that the agent could_y have surmounted them.¹

This is a positive necessary condition, so 'voluntary' (at any rate with regard to evil actions) is not an excluder₂ concept.

But our analysis would require some supplementation if it is to apply to actions that are not bad, e.g. good actions, or actions that are neither good nor bad.

It would seem that there is an important sense of 'can' in which 'can' is a necessary condition of voluntary action. This applies not just to bad actions, but to all actions. There is a sense of 'can' in which it is a necessary condition of the application of the concept that the agent should have a certain degree of maturity. In this sense of 'can' animals, machines, infants and certain mad people cannot avoid

1. To say that the agent could_y have surmounted some (or even all) of the factors that in fact contributed to the act is not necessarily to say that the agent could_y have prevented the occurrence of the act. For it may be that there were some alternative factors, which would have contributed to his doing the act if some or all of the factors that actually contributed to the act had not done so. And it is possible that the agent could_y not have surmounted these alternative factors. Thus, suppose a man does a minor crime of his own accord, because, for instance, he gets some pleasure out of it, and suppose that if he did not do it he would have been shot by others (but the threat was not the reason for his doing the crime). Now assume that he could_y have surmounted his desire for pleasure from issuing in the action. It is still possible that he could_y not have avoided the committing of the crime. For there were alternative factors, which he could_y not have surmounted and which would have contributed to his committing the crime, had he not done so of his own accord.

what they are doing; they are not choosing agents. Though one can try to illustrate the meaning of 'can' and 'choosing agents' by referring to animals, machines, ^{children,} and madmen, etc., it is quite wrong to think that terms like 'can' are just derivative from those conditions. For they are used to tell us things like why certain mad people, ^{children etc.,} should be excused. Now it seems that this sense of 'can' is a necessary condition of voluntary actions. And this is true whether the actions are good, or bad, or indifferent. Of course in one sense of 'voluntary' it may be true that even animals sometimes do things voluntarily, but that is not the 'voluntary'¹ that we are trying to understand.

So we see that it is a necessary condition of the truth of 'he did it voluntarily' that the agent should be capable of making choices. So 'voluntary' is not an excluder₂ concept but does have a positive necessary condition.

We have seen that in the case of bad actions 'voluntary' has a further necessary condition. That further necessary condition could also be adapted and generalised to provide a further necessary condition for non-bad actions as well.

We do talk of 'voluntary' not only for bad actions, but also for non-bad ones. Smith may contribute voluntarily to the famine relief fund while Jones may give because he was compelled to, otherwise he

1. Cf. p 171 and also pp 274-275 of this thesis.

would have been shot. Here 'voluntary' would not only exclude 'compulsion' but other things also, such as the possibility that Smith may have given the money by mistake.

Now it seems that while it is true that it is a necessary condition of voluntary bad actions that they were due to factors at least some (or one) of which were such that the agent could_y have surmounted them; it is not true that this provides a necessary condition of non-bad actions also. Thus in the case of giving money to charity, which is a good thing, it would seem that, at least in some cases of voluntary donations, there are no factors (that helped to bring about the act) that the agent should have surmounted.

We have already seen that there is a necessary condition of all voluntary actions, but we are now searching for a further necessary condition. It seems to me that in order to do this we may require some more jargon. When we do an action, there may be various methods of avoiding an action, or of surmounting the factors that help to bring about the act. Now some of these methods should not be used; but some of the methods are not bad methods - let us call these methods non-bad methods. If a method should be used it follows that that method is a non-bad one, but if it is a non-bad method it does not necessarily follow that it is a method that should be used. To say that C is a bad method of avoiding D implies at most that people should be dissuaded from using C as a means of avoiding D; it does not necessarily imply that people should be punished or morally censured if they use C as a means

of avoiding D. Thus if a man risks his life in order to catch a petty thief, then he has used a bad method even though we may not punish him or morally censure him.

When something could be done without using a bad method, let us say that it could_Z be done; when it could not be done without using a bad method, let us say that it could_Z not be done. Now let us consider the suggestion that it is a necessary condition of a voluntary act that it was due to factors, at least some (or one) of which could_Z be surmounted in a significant way.

We have added 'in a significant way' to deal with certain things such as the following: Suppose a man, due to mental disorder, has an irresistible urge to kill his neighbour's dog; however, he has a choice over which of the two guns he should select out of gun A and gun B. Now suppose he selects gun A and shoots the dog with gun A; here gun A is among the factors that helped to bring about the act of killing the dog. And it is true that he could_Z have surmounted this factor, for he could_Z have used gun B instead. But here we may feel that the fact that he could_Z have surmounted the relevant factor was not significant. Often there is considerable agreement on what is significant, and this is perhaps because there is considerable agreement on what the relevant values are. But of course, if we presuppose different values then what we regard as significant can change. Thus suppose we have a society where people think that for their dog to be killed by a certain

make of gun is much worse than the act of killing their dog with the help of another make of gun (e.g. because it is believed that the former type of gun causes a little more pain during death). That society may well regard it as significant whether the killer could have used the gun which it is less evil to use. Another society, which thinks that the amount of pain caused to the dog in the process of killing is not so important, may well regard the fact that the killer had a choice between the two kinds of guns as irrelevant.

In many, if not all, societies it is often significant not just what we do but with what motive we do it. If a man obeys the law because he likes it and not because of fear of punishment, this is taken into account in deciding whether he obeys the law voluntarily. It would be wrong to say that if an act is voluntary then the agent could_z have avoided it. For it is quite possible, for instance, that a person may like obeying the law, his obeying the law may be voluntary, and yet there was no non-bad method of avoiding obeying the law. However, if the agent likes to obey the law because he has been hypnotized into liking to obey the law or because he has some other obsession, so that he cannot help but obey the law, then the fact that he likes obeying the law will not make us say that he obeys it voluntarily; for in such cases he cannot prevent his liking for the law from issuing in his law-abiding conduct.

It might be objected that the real reason why cases of liking due

to hypnotism make us think that the agent is not acting voluntarily is that in such cases the liking is really external to the agent, it is planted, as it were, from the outside. But this is not the real explanation; it seems to me that the important thing is not whether the liking is external or 'internal' but whether the agent could (without using a bad method) surmount such likes. For suppose we have a case where a man likes to perform an activity because he has been hypnotized into liking it, but suppose he still has enough strength to overcome (without using a bad method) the influence of the hypnosis, then the mere fact that the liking was 'planted' from outside would not show that he did not act voluntarily.¹ Nor does the fact that the 'like' is his own or 'internal' ensure that when he acts he is acting voluntarily. For a madman who is so mad as to have no free-will may have some permanent likes of his own, but in an important sense he is not acting voluntarily, even when he does what he likes. Similarly, animals may often do what they like, but in an important sense they are not acting voluntarily.

Though our society does often think the motive significant from the point of view of assessing whether the act is voluntary, it would seem that in some cases this is not so. Thus suppose A hits B out of

1. I have discussed the case where a person is hypnotized and the hypnosis has influenced his likes and indirectly his actions. I have not discussed the case where hypnosis makes a person do something irrespective of whether or not he likes to do it.

(unjustified) fear. Suppose he could_Z not have refrained from hitting B, but suppose he had a choice between certain motives. He could_Z have got rid of his fear by hating B, so that he could_Z have surmounted the fear, but if he had surmounted his fear he would have become full of unjustified hate and so would still have hit B, though from a different motive. Now those of us who think that hitting because of unjustified hate is not any better or worse than hitting out of unjustified fear will not regard the fact that the agent had a choice between fear and hate as significant.

We have considered the suggestion that it is a necessary condition of a voluntary act that it was due to factors at least some (or one) of which were such that they could_Z have been surmounted in a significant way. Let us call this necessary condition, condition A.

We have been using factors in a generic sense to cover both things like motives, and physical factors like guns. To use factors in this generic sense does not of course imply that there are not important differences between factors like motives and factors like guns. Though there are differences, yet we can talk not only about whether we could_Z have prevented a certain gun or a match from helping to bring about an act, but also about whether we could_Z have prevented our fear, or our jealousy, or our wish to serve others from issuing in the relevant action.

Of course, it is possible that a man originally could_Z have surmounted one of the factors that eventually helped to bring about the

act, though later (say, near the time of the act) he could_z not have surmounted any of the relevant factors. He could still be said to satisfy condition A, for condition A does not require that the agent should, at the time of the act, be able to surmount at least one of the factors that led to the act. Nor is it at all absurd to talk of factors in the past that helped to contribute to the bringing about of an act much later in time. It is probably absurd to think that a factor in the past, say about five years ago, could totally explain an act now, but it is not at all odd to say that it might have contributed to the occurrence of the act now.

It might be objected that condition A is not really a necessary condition of a voluntary act; for suppose a man steals some money because he is a kleptomaniac, suppose he could have ceased to be a kleptomaniac by killing himself, and suppose he did not get rid of his kleptomania by killing himself, but decided to live, though not because he had any real objections to dying. And such a case is quite conceivable, for though killing oneself would be a bad method to use, it is possible that the agent himself did not think so; thus it could be that he decided to live on because he wanted to be a kleptomaniac, and not because he had any real objections to dying. It would seem quite possible that a man should decide of his own accord not to get rid of his kleptomania, even though there was no non-bad method of getting rid of it.

However, it would seem that such a case would not show that condition A is not a necessary condition of a voluntary act. For even if the man who decides of his own accord not to get rid of his kleptomania could_Z not have got rid of the kleptomania, yet he could still satisfy condition A. For when he steals, one of the factors that helped to bring about his stealing was his desire not to get rid of his kleptomania, and it is quite possible that he could_Z have surmounted this desire not to get rid of his kleptomania. To say this does not imply that he could_Z have got rid of his kleptomania.

Of course, if his desire not to get rid of his kleptomania was itself some sort of obsession that he could not surmount, then the fact that he had the desire not to get rid of his kleptomania would not show that he had satisfied condition A; but then nor would we infer that he acted voluntarily.

We have implied that there are not only first-order desires such as the desire to steal, but also higher-order desires which are concerned with the lower-order desires we would want ourselves to have. This seems to be quite realistic. For instance a man may desire some character changes in himself and even go and have treatment or education in order to change his character.

That condition A is a necessary condition of a voluntary act can also help to explain why people like Jones, who gave money to charity

because otherwise he would have been shot, do not act voluntarily. But, it might be objected, could not Jones have just been in a different place, where he would not have been shot? - moreover if he had been in a different place there would be nothing bad in this, so does he not satisfy condition A? To answer this objection we should make a distinction: to say that C is a bad method of avoiding D is not necessarily to say that C is a bad action. Thus it may be perfectly all right if people stay in a given place (say because they wanted to); but if people stayed at that place in order to avoid, say a one-in-a-million chance that they may be forced to do something against their will, then this is a bad method of avoiding doing things under compulsion.¹ (Though, as we said earlier, even if they did choose a bad method this does not necessarily imply that people should be punished or morally censured if they use such a method.)²

Condition A is determined by values in two ways. As we have seen, values help to tell us what is significant. Secondly, values are one of the determinants of can_2 , for they are required to tell us which methods

1. Of course, whether a method is bad may depend upon what is at stake. If the existence of the world is at stake, one may be justified in using certain methods that would be bad ones if there was only a bare possibility that, say, a minor crime might have to be committed.

2. See p 2-81

are bad methods. However, can_x is also one of the determinants of can_z , and so can_z is not wholly derivative from values.¹ So condition A is not wholly derivative from values.

It might be objected that condition A is not always a necessary condition of a voluntary act, for a person may act voluntarily if what he does expresses his character, even if condition A is not satisfied. Thus suppose Smith's character is such that he values service to others above everything, and that throughout his life he has consistently pursued this goal. He gives money to charity in order to serve others; and it may be argued that his act of giving money to charity is voluntary even if condition A is not satisfied. Suppose that he could not have surmounted his desire to serve others, nor could he have surmounted any other relevant factor, yet we may still say that he acted voluntarily.

What are we to make of this objection? It seems that the way we have understood 'voluntary' may not be the only way of understanding it; there may well be other senses of 'voluntary'. It is not obvious that ordinary language gives a clear ruling against our view, and even if it did that would not be a fatal objection to it. It does seem to us that there is some value in preserving some connection between 'can' and one sense of 'voluntary', and one reason for this is that the

1. The arguments to show that can_z is not wholly derivative from values are analogous to the arguments that we used earlier to show that can_y is not wholly derivative from values.

question of 'voluntary' often comes up when talk of moral praiseworthiness or moral blameworthiness is at stake. And though there may not be a close connection between 'can' and non-moral praise and blame (e.g. we blame dogs even if in an important sense they could not but do what they are doing, and even if they do not satisfy condition A), there does however seem to be a closer connection between 'can' on the one hand and the problem of moral blameworthiness and moral praiseworthiness on the other hand. And punishment, at any rate in the case of serious offences, usually involves moral blameworthiness, and as long as that is so, that is one reason for maintaining a connection between the sense of 'voluntary' that is related to 'can' on the one hand and the problem of the morality of punishment on the other hand.¹

However, even if we extend 'voluntary' in such a way that when a man's actions are an expression of his character then he acts voluntarily, this does not show that 'voluntary' is an excluder_2 concept. Indeed, in such actions there would seem to be a positive condition present, e.g. the act was an expression of the agent's character. Suppose, for instance, we were to say that for an act to be voluntary, it is necessary that either condition A should be satisfied or the act should be an expression of the agent's character. It would seem that 'voluntary' would still not be an excluder_2 concept, for there is a

1. Cf. p. 171 ~~above~~.

positive condition, or a disjunct of two positive conditions present.

There is one other complication that needs to be mentioned. It may be objected that when people voluntarily do good actions out of moral considerations, then they may not be able to surmount their propensity to act out of moral considerations without using a bad method. For it may be argued that if acting out of moral considerations (i.e. out of the desire to do what is moral) is the highest motive out of which a man can act, then if he were to use any way of avoiding doing a good action out of that motive, he would, in a sense, be using a bad method. It is true that we (i.e. society) do not insist that people (or atleast some of us) should do good actions out of moral considerations, but we do think that is the best way of doing them, and any other way is less good or worse, and therefore any other method would be a bad method in the sense that any other method would be less good or worse.

Now if we interpret 'bad method' in some such way then we may have to modify the view that condition A is always a necessary condition of a voluntary action; we may, instead, say something like this: It is a necessary condition of a voluntary act that condition A was satisfied or the agent did the relevant (non-bad)¹ action out of moral considerations (i.e. out of the desire to do what is moral).

1. A case could be made for the view that when bad actions are done from a desire to do what is moral, we can still say that condition A is a necessary condition of voluntary bad actions.

Though we considered the suggestion that condition A (or something like it) is a necessary condition of 'voluntary', this is not necessarily to say that it is a sufficient condition. What is sufficient for an act to be voluntary is not something on which there is general agreement. Some people would argue that it is also essential that an action should be intentional¹ or reckless, if it is to be voluntary. Others think that (inadvertent) negligent actions too can be voluntary.² But this is controversial, for some people think that a negligent action, even a grossly negligent (inadvertent) one, is not voluntary or not fully voluntary. This controversy seems to depend at least partly upon what values one has. It seems that in the case of bad actions 'voluntary' is partly derivative from blameworthiness; and it is because people think that ceteris paribus intentional and reckless actions are morally worse than (inadvertent) negligent ones, that they like to think that negligent ones are not as fully voluntary as intentional or reckless ones. In a society where the values were different, where negligent wrong-doing was considered as bad as intentional wrong-doing, it is quite conceivable that negligent actions would be regarded as having the same degree of voluntariness as intentional ones. However,

1. Whiteley says that 'voluntary' is a sub-class of the intentional (Aristotelean Society Supplementary Volume XL, p. 226).

2. Good actions cannot be committed negligently or recklessly. In the case of good actions it is still possible to do the action intentionally. So concepts such as 'intention' and 'can_z' can help to analyse 'voluntary' in the case of good actions.

'voluntary' is only partly derivative from blameworthiness; it is partly determined by other factors such as can_Z .

This analysis is superior to the analysis according to which 'voluntary' is understood as excluding the various excuses. The fact that 'voluntary' is used not only of bad actions but also of good ones again brings out the inadequacies of that thesis. For if a person does a good action, talk of excuses is not relevant. It is true that a person can do a good action under threat or social pressure, etc., but these are not excuses when the action that he does is a good one.

A similar argument would show the inadequacy of the thesis that free action is understood in terms of the absence of excuses. For when a good action is done we can talk of whether it was done freely or not, but talk of excuses is quite irrelevant.

We have tried to use 'can' to illuminate 'voluntary', though we have seen that other things besides 'can' are also required for an understanding of 'voluntary'. Hart does at one point consider a theory that tries to illuminate 'voluntary' with the help of 'can' and it is interesting to see his objections to it, even though the theory that he is criticizing there is not the same as the theory that we have been advocating. He says, "The modern formula according to which to say that an action is voluntary is to say that the agent could have avoided it if he had chosen differently either ignores the heterogeneous character of our criteria qualifying 'He did it' when we use words like

'accidentally', 'by mistake', 'under coercion', etc., or only avoids this by leaving the meaning of the protasis 'If he had chosen differently intolerably vague. Yet our actual criteria for qualifying 'He did it', though multiple and heterogeneous, are capable of being stated with some precision."¹

It seems to me that at least some of our actual criteria are not at all precise, e.g. the criteria for legal insanity. And even with other defences such as accident, mistake, threats, etc., it is easier to give a definition of what an accident or mistake, etc., is, but less easy to tell us precisely which cases of accidents, mistakes, etc., do excuse, and still less easy to tell us which cases of accident, mistake, etc., ought to excuse us.

Anyway, the most that this argument of Hart's shows is that the modern formulae cannot in an illuminating way give a unity to the various heterogeneous excuses. It does not follow that the modern formulae cannot illuminate 'voluntary'. Hart seems to think that this inference follows because he assumes that 'voluntary' is the absence of the various heterogeneous excuses. However, we have seen that this assumption seems false.

Hart points out that if the suggested general formula is used to give unity to all excuses, then there will be a muddle. He says,

1. Logic and Language (ed. A. Flew), p. 164.

"... in the case where a man's hand is forcibly moved by another, the statement 'the agent could not have acted differently if he had chosen' is true in the sense that he had no control over his body and his decision was or would have been ineffective; whereas in, e.g., the case of accident the sense in which the statement is true (if at all) is that though having full control of his body, the agent did not foresee the physical consequences of its movements ... and in cases of coercion by threats or provocation ... can only be comprehended by the suggested general formula if the protasis is used in still different senses so that its comfortable generality evaporates; for there will be as many different senses as there are types of defences." ¹

Now it is perhaps true that if we do use 'can' to tell us what is common to the meanings of accidents, mistakes, threats, etc., then there will be the kind of muddle that Hart describes. But it is not the business of 'can' to tell us what is common to the meanings of accidents, mistakes, etc. As we have said earlier, (a) its job is to help to tell us which accidents should be excused and which should not, which mistakes should be excused and which should not, etc.; (b) it helps to tell us what the system of excuses is and also it helps to evaluate and reform the existing system of excuses; and (c) 'can' also sometimes helps us to understand the meaning of some of the defences,

1. Logic and Language (ed. A. Flew), p. 105.

e.g. automatism, mental abnormality. But to say this is not to say that 'can' tells us what is common to the meanings of accident, provocation, mistake, duress, etc.

Of course, accidents, mistakes, threats, etc., have different meanings¹ but this does not prevent us from using the same general principles in deciding which accidents should be excused, which mistakes should be excused, etc.

Suppose we want to recruit people above 5' 8" and weighing more than 11 stones for certain jobs. We may then get people from both sexes applying for these jobs. Now 'man' and 'woman' have different meanings but this does not prevent us from using the same general principles in deciding which women to recruit, as we do in deciding which men to recruit.

Similarly, the principle 'if there was no method of avoiding the crime that the agent could and should have used, this tends to show that

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1. It is, I suppose, possible to try and put the various pleas into sub-groups according to their meanings. Thus it could be argued that in the case of automatism there is no action; in the case of mistakes and accidents there is action but the crime was done unintentionally; in the case of provocation, duress, etc., it was done intentionally. But it would be misleading to argue, as legal theorists and philosophers sometimes do, that in the case of accident and mistake there was no choice, but in the case of duress and provocation there was choice but no fair choice. 'Can' (at least one important sense of 'can') cuts across these sub-groups. Thus some accidents and mistakes, even some cases of automatism, are easier to avoid than some cases of duress and provocation. Intentional crime is not always easier to avoid committing than negligent crime is.

he should be excused' can help to provide a general principle for distinguishing which cases of accidents, mistakes, duress, etc., should be excused. We can illustrate our point with some examples:

1. C did a crime (under duress) but there was a method of avoiding the committing of the crime that he could and should have used. Suppose he could have run away from the scene.

2. D did a crime (under duress) but there was no method of avoiding the committing of the crime that he could and should have used. Suppose Z intended to kill Y unless D committed a minor crime; and suppose there was no other way out (e.g. running away).

3. A did a crime (by accident), but there was a method of avoiding the committing of the crime that he could and should have used. Suppose he knew his car was in a dangerous condition.

4. B did a crime (by accident) but there was no method of avoiding the committing of the crime that he could and should have used. Suppose he was driving, and killed someone, because bees suddenly stung him.

Now it can be seen that our principle does enable us to compare cases of accidents with cases of duress. Thus we can say that A did a crime accidentally, and there was a method of avoiding the committing of the crime that he could and should have used, while D committed a crime under duress and there was no method of avoiding the crime that he could and should have used. In other words A could_y have conformed to the law, but D could_y not have conformed to the law.

Similarly we could say that C, who did the crime under duress, could_y have conformed to the law, but B could_y not have conformed to the law.

So we see that 'can' does enable us to compare cases of accidents and cases of duress; even though of course the meaning of duress is quite different from the meaning of accident.

And similarly, with other defences such as automatism, mistake, etc., the fact that their meanings are different does not prevent us from using certain general principles to help to tell us which mistakes, automatism, etc., should excuse.

Of course the principle that we have mentioned is only one of the principles that helps to tell us which cases of accidents, mistakes, etc., should be excused; there are other principles also, which are partly discrepant with the principle that we have mentioned. Another principle that seems to be at the root of our system of excuses is as follows: If the average man would have committed the crime under certain conditions, then those conditions tend to excuse. It is true that sometimes the law expects an even higher standard of conduct than what the average man would have done, but it is significant that often, in such cases, the penalty in fact tends to be ^{substantially reduced.} ~~(nominal)~~ (Though when there is strict liability, people may be punished in certain circumstances even though the average man might not have been able to conform to the law in such circumstances.)

In Dudley v. Stephen¹ (where Dudley, with the consent of Stephen, killed the cabin boy in order to eat him and avoid starvation, and they, along with another man, fed upon the boy until they were picked up) it seems that the court expected such a high standard from the individuals charged with murder that even the average man might not have complied with it. Lord Coleridge in that case said, "It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act was wilful murder ..."² However, it is significant that though a sentence of death was passed, it was commuted by the Crown to six months' imprisonment without hard labour.

Yet another principle at the basis of our system of excuses is the following: When punishment will cause more misery than it averts, this tends to show that people should be excused, and when punishment

¹(1884)14 QBD 273.

²(1884)14 QBD 273.

averts more misery than it causes then this tends to show that people should be punished. This principle is one of the principles that determine which accidents should be excused, which cases of insanity should be excused, etc. There are perhaps certain good objections against the utilitarian rationale of excuses if that rationale is suggested as the only rationale of excuses. For instance, sometimes we think we ought to excuse even though there may be some disutility involved in doing so.¹ But such objections would not be fatal to the view that the utilitarian rationale is one of the rationale of excuses.

The principle of justice that we have suggested (i.e. that if there is no method of avoiding the crime that the agent could and should have used, then this tends to show that he should be excused) does sometimes conflict with the utilitarian rationale, and sometimes, for instance, when a lot of utility is at stake, our principle may be overridden by utilitarian considerations. This explains why sometimes people should be punished even though perhaps they could_y not have conformed to the law. 'I could not avoid killing him because I could not control the impulse to kill him' does not by itself (e.g. without the presence of mental abnormality or provocation, etc.) tend to excuse (or even serve to mitigate the punishment); not because it should not tend to excuse if it was true, but because we cannot distinguish genuine

1. See Hart, "Prolegomenon to the Principles of Punishment", Proceedings of the Aristotelean Society 1959-60.

cases from fraudulent ones, and so if we did allow this defence people might commit crimes in the hope of bluffing the jury into believing that they could not control their impulse to kill. And so allowing this defence might cause more misery than it avoided.

That 'can' is only one of the determinants of the system of excuses is quite a simple and obvious point, yet some of the objections to the role of 'can' would perhaps become much less forceful if this was properly appreciated. Thus it is sometimes said that not all compulsions excuse, only some do. We excuse the kleptomaniac and the man under duress, but we do not excuse the hungry man who may be compelled by his hunger and we do not excuse people like Russell when their conscience compels them to break the law. Critics of 'can' argue that since not all compulsions excuse, only some do, the fact that someone is compelled cannot be the reason why they ought to be excused.

This inference is invalid, for the reason why we do not want to excuse the hungry man or people like Russell could be either that, though they are compelled, their compulsion is not as great as that of, say, the kleptomaniac; or it may be that even when their compulsion is as great, the social cost of excusing such people is much greater than the social cost of excusing people like the kleptomaniac. It is perhaps significant that when the social cost of excusing conscientious objections to military service is not great, we do tend to excuse objectors from such service.

The case of those who are compelled by their conscience is, however, quite complicated. For we do say that in a sense Russell was not able to act otherwise than he did, and yet we like to say that Russell acted voluntarily. This example, it might be objected, shows that there is something wrong with the theory that 'can' is a necessary condition of 'voluntary'. However, it seems that we do believe that in another sense people like Russell could (even if with difficulty) conform to the law, and it is this sense that is relevant.

When we punish people like Russell, we do not feel we have incurred the odium of strict liability or objective liability, which shows that we think that they had the capacity to conform to the law in the relevant sense. We may, of course, regret punishing them for some other reason, e.g. because they find it difficult, though possible, to conform to the law, or because they seem nice characters whom we do not really want to see punished, or we may think that the laws they are violating are not good ones. And it may be argued that if we are wrong in believing that Russell could have conformed to the law, in the relevant sense, then we would also have some doubts about whether he acted voluntarily in the relevant sense, and so the connection between 'voluntary' and 'can' is not destroyed.¹

'Voluntary' is sometimes used in a different sense from the sense

1. Though, as we saw earlier (p 288 ff.), the connection between 'voluntary' and 'can' is perhaps a little more complicated than may appear at first sight.

in which we have been using it. Sometimes it is just opposed to 'involuntary'. In this sense, if a man does a minor crime because he was threatened with death unless he did the crime, we shall say that he acted voluntarily. However, there is another sense in which we would say that he did not act voluntarily, and it is this sense that we have been discussing.

We shall not here say much about 'free'. If we use 'free action' as a synonym for 'voluntary action', much of what we have said about voluntary action will apply, mutatis mutandis, to free action. To suggest that there may be a sense of 'free action' and a sense of 'voluntary action' in which the two expressions might mean the same, is not of course to suggest that the words 'free' and 'voluntary' are synonyms. That they are not synonyms can easily be seen. To say of some people that they believe in free trade is not the same as to say that they believe in voluntary trade.

If we consider all the uses of 'free', such as freeholder, free board, free thinker, free-trader, etc., then it seems more plausible to argue that the criteria are heterogeneous, that what is free in one sense is not free in another, that 'free' does not wear the trousers. But if we are concerned with a particular use of 'free' such as the sense in which 'free action' is the same as 'voluntary action', then these arguments appear less plausible. Compare 'good': if we consider all the uses of 'good', such as good murderer, good knife,

good pear, etc., we will not get any general criterion or general criteria for distinguishing good things from bad things. A good man may be a very bad murderer. But if we specify a particular sphere, suppose for instance we are concerned with good knives, then it seems more plausible to think that there may be some general criterion or general criteria for good knives.

CHAPTER VIII

SOME MORE REMARKSON THE RATIONALE OF EXCUSES AND ON 'CAN'

We have seen that 'can' plays an important role in our system of excuses. We have also tried to account for its important role by suggesting a principle of justice.¹ We shall now very briefly construct a more general rationale, and show that 'can' plays an important role at a more general level also; this may help to account for the important role of 'can' at the more particular level of excuses.²

When we are assessing the morality of any action or policy or institution, one, though not the only, thing we do is to balance the losses incurred on the one hand against the losses that are avoided and the gains that accrue on the other.

If the losses that are avoided, and the gains that accrue, outweigh the losses incurred, we tend to say that the institution has done more good than harm. But it does not follow that we cannot criticize the institution. For we can still ask, "Were some of the losses incurred needless? Were there some alternative methods of reducing the losses

1. See principle (2), pp. 219-220 above.

2. We are not here giving a complete account of the role of 'can' or of the various rationale that may help to account for its important role./.....

that could and should have been used?" It does seem that these are some of the problems we must answer before we can judge properly the morality of a state's, or of a particular individual's, action.

If certain losses were incurred by the State that were needless, then it seems that the State has done an evil. (A similar principle applies to individuals - if X causes Y needless pain, this is an evil.)

We have, then, the principle that where needless losses are incurred this is an evil.

Now one might argue that a loss is an evil whether it is needless or not. Some people would say that intrinsically the evil is the same in the two cases. Others may argue that even intrinsically the evil is not the same in the two cases. (Compare: Some people argue that a world where the virtuous are rewarded with happiness is better intrinsically than a world where the total amount of happiness is the same, but where the virtuous are not so well rewarded.) Be that as it may, it would generally be agreed that in some important sense there

... role. There may of course be other ways (i.e. other than the ones we are discussing) in which 'can' enters into our system of punishment: e.g. if we believe that punishment depends at least partly upon the wickedness of the offender, then again 'can' becomes relevant to finding out how wicked people are.

Another way in which 'can' may affect our system of punishment is the following: It may be argued that 'can' is one of the important ends that we value. This can be illustrated from the following example: suppose we could reduce the crime rate by giving potential criminals a pill which deprived them of their capacity to choose and turned them into idiots, we should feel that an important value had been sacrificed.

is an evil involved in the case where a person inflicts an unnecessary loss on another. He can be censured when he does so.

Applying this to the State's action, we clearly do criticize the State's action when it has inflicted unnecessary or needless losses on the people. So we have some such principle as the following: The State should not inflict needless losses on people. It seems that 'can' is playing an important role here. For if a loss is to be justified on the grounds that it is necessary for a certain worthwhile purpose (e.g. in order to prevent a still bigger loss), then there was no method of avoiding the loss that could and should have been used. A corollary of the principle that the State should not inflict needless losses is that when the overall social losses can be reduced, the State should, before inflicting a loss, give people an opportunity of avoiding the loss. Sometimes, of course, even after the State has given people a warning, people will not take heed of the warning, but there are clearly many cases where people will take heed of the warning and the overall social losses may be reduced as a result of the warning.

Suppose we have a system where certain people are threatened with losses. It does seem to be an evil if there was no good method¹ of

1. By a 'good method' we mean a method that society would regard as beneficial. If a person could have avoided having his property burned only by losing his hands and legs, then he could not have avoided having his property burned. Again if Smith could have avoided having his property burned only by having his servant killed, then Smith could not have avoided having his property burned. But if/.....

avoiding losses that people could have used. When there is a good method of avoiding x ,^{that he could have used} let us say that the person could_G have avoided it, and when there is not a good method of avoiding x ,^{that he could have used} let us say that he could_G not have avoided it.

It is an evil if people do not have the capacity_G¹ to avoid losses that may be inflicted on them - let us call this principle "principle 0". Another way of expressing this principle would be as follows: Ceteris paribus, it is better if people have the capacity_G to avoid the losses that may be inflicted on them than if they do not.

It might be argued that one, though not the only, way of trying to justify principle 0 could be by appealing to some such principle as the following: If an individual, of his own free will, helps to bring a loss upon himself then, ceteris paribus, his loss is in a sense not given as much importance (i.e. it is not given as much priority)² as it would be given if the loss were forced upon him - let us call this

... if Smith could have saved the burning of his property by making a telephone call, then he could_G have avoided the burning of his property.

To say that a person could_G have done A does not necessarily imply that he could_y have done it. To say that there is a good method of doing something does not necessarily imply that there is a method of avoiding the loss that should be used; e.g. take a minor loss, such as the closing of a cinema. Smith may have a good method of avoiding the loss, e.g. by going to another cinema, but it does not follow that he should go to the other cinema. To say of a method that it is a good method does not mean that its use does not involve any evil at all, but that, on the whole, it is a beneficial method. See p 220.

1. See pp. 370-371

2. We shall presently give some examples in the hope of clarifying this point about priority.

principle, principle L. Principle L tends to support principle O.

may be argued that
 It is better if people have the capacity to avoid the losses that may
 be inflicted on them, ^{this is morally relevant not only because if they have the capacity} ~~not only because~~ this will make it more likely
 that they will in fact avoid the losses that might otherwise be
 inflicted on them, but also because if some of them do not exercise
 their capacity to avoid the losses, their losses will be self-inflicted
 in a sense, i.e. in the sense that they, of their own free will, will
 have helped to bring the losses upon themselves. And in a sense such
 self-inflicted losses are not given as much importance (i.e. priority)
 as they would be given if they were not self-inflicted.

It might be objected that the importance to be attached to the
 loss depends upon the magnitude of the loss and not upon whether the
 person who underwent it helped to bring it upon himself of his own
 free will.¹

Now, of course, if Mr. A. becomes a life invalid as a result of
 his own carelessness and if Mr. B. fractures a bone in his leg through
 no fault of his, we should not attach more importance to Mr. B.'s loss.
 For whether the person, of his own free will, helped to bring the loss
 upon himself is not the only consideration to be taken into account;
 but it would be wrong to infer from this that it is not one of the
 considerations to be taken into account. Suppose two people C and D

1. Cf. C.H. Whiteley, Aristotelean Society, Supplementary Volume XL,
 p. 233.

have broken their legs, C through his own negligence but D through no fault of his own. Now suppose we have enough medicine to attend to either C or D, but not to both C and D, then it does seem that we should attend to D (provided other things are equal, e.g. the extent of the injury sustained, etc.). Of course if we have enough medicine to go round then we shall treat both C and D, but this does not show that the principle under consideration is of no use. Principles of justice, and this is a general point about principles of justice, may be of no use when there is no scarcity of means, but this does not show that they are useless when there is such a scarcity.

To say that when there is a scarcity of medicine we should attend to D rather than C does not necessarily imply that the total evil was greater in D's case than in C's case. Indeed a case might be made for the view that the total evil was greater in the case of C, for in that case there was, besides the injury, an expression of human folly, whereas if D's injury was forced upon him by nature, there was in a sense less evil present in his case. Yet there is a sense in which we attach more importance to D's injury, as is seen from the fact that when there is a scarcity of medicine we feel we should give priority to D over C.

It is possible, for instance, that a child, out of cussedness, might help to bring about an injury to himself, and we may run the risk of making him a worse character if we neglect his injury. However, in

the case of the child, it would seem that he has not brought the injury upon himself of his own free will in the way that a grown-up moral agent would have done, and so principle L would not entail that any less importance should be attached to the child's injury. Of course, even in the case of grown-up people like C it is possible that if their injury is neglected, this may have bad consequences upon their characters, etc. But it does seem that if there are limited resources available, and if other things are equal, then D should get priority over C.

Another example that may help to support principle L is the following: Suppose a person X, of his own free will, loses most of his fortune gambling, while another person Y, through no fault of his, loses most of his fortune because of a flood (over which he had no control). Now again, the total evil in the first situation is, in a sense, not necessarily any less than in the second case; but there is a sense in which we attach more importance to Y's misfortune. If there are only limited resources available, and if other things are the same, we ought to help Y rather than X.

But in applying this principle one has to be careful. It may be that X's relatives suffer as much, through no fault of theirs, as Y's relatives do, and their suffering is just as important. But this does not conflict with principle L. For what principle L entails is that the losses that a person has of his own free will brought upon himself

(not the ones he has brought upon others) are in a sense not given as much priority as the same amount of losses would be given if the losses were forced upon the person through no fault of his own.

Of course, often there is not enough evidence regarding whether the individual of his own free will helped to bring the loss upon himself. Even when the agent himself knows the answer, others may not know whether he is telling the truth. That is one reason why often principle L cannot in practice be applied. But this does not show that it should not be applied in areas where the relevant evidence is forthcoming.

We have discussed the possibility of defending principle O by appealing to principle L. But it seems that even if it turns out that principle L is not a good principle, principle O could still be defended in some other way. Thus, another justification for principle O is that if people have the capacity_G to avoid the losses that may be inflicted on them, some of the losses are likely to be less than if they did not have the capacity_G to avoid the losses. At least quite often people are likely to exercise their capacity and avoid the losses that would otherwise have befallen them. So it is an evil if people do not have the capacity to avoid the losses that may be inflicted on them.

While it is better that people should have the capacity to avoid the losses that may be inflicted, this does not of course mean that the

State is never justified in inflicting losses that people could not avoid. For, sometimes, losses cannot be avoided by people and yet they may have to be inflicted in order to prevent an even bigger evil. So principle 0 is quite consistent with the fact that sometimes the State may be justified in inflicting a loss that cannot be avoided by those who undergo it, e.g. under strict liability; for principle 0 tells us that such a practice involves an evil. But of course an evil is sometimes necessary in order to prevent a still bigger evil.

We can now see the application of principle 0. Principle 0 applies not just to State action but to the actions of individuals and also of other associations besides the State; so it is quite a general principle. For instance, if Smith threatens to inflict a loss on Brown, then, ceteris paribus, it is worse if Brown does not have the capacity to avoid the loss that may be inflicted on him.

Principle 0 has applications to what the State does, not only in the sphere of criminal punishment but also in other areas. Thus suppose a railway track has to be built across some houses, so that the houses have to be destroyed. Now contrast two cases where the advantages of building the railway are the same but in the first case (1) the State gives notice, six months in advance, to those living in the houses to vacate the houses after six months. In the second case (2) the State gives no such notice to people living in the houses to vacate them. Now, suppose that in case (1) the people were just lazy

and took no notice of the warning given to them by the State; suppose they lose $X + Y$ units, but that they would have lost only X units if they had taken advantage of the warning by making alternative arrangements in advance. Now loss X would have been incurred anyway in the two cases, and so the two cases are the same from the point of view of the incurring of X ; in both cases the loss X was necessary in order to achieve the advantages of the railway. But loss Y might have been avoided in the second case if the people had had the capacity to avoid it; and so the State can be criticized in the second case for not trying to prevent loss Y . It is true that in the first case also loss Y was incurred; but in the first case, unlike the second, the State did do something to try to prevent loss Y . Though loss Y was incurred in the first case, it was the fault of the people who were lazy rather than of the State, and the State is not to be blamed for loss Y , or certainly not to be blamed for loss Y as much as it is to be blamed for loss Y in the second case. In the second case, unlike the first case, there is the evil that loss Y was inflicted by the State which people did not have the capacity to avoid. Now it might be argued that in the first case, too, the total evil was as great, for in both cases loss Y was incurred, and in both cases loss Y was redundant. But it seems to me that even if we grant that in the two situations the total evil was the same, yet in the second case the State is more at fault than in the first case, for it did try to avoid loss Y in the first case in a way in which it did not try to avoid it

in the second. Even if the total evil was the same in the two cases, the State was less to blame in the first case. Perhaps it is true that if the State knows that people will not exercise the capacity to avoid a loss, then the case for inflicting that loss may not be any worse (ceteris paribus) than the case for inflicting a loss that the people could not have avoided. But when there is a possibility that people will exercise their capacity to avoid some of the losses, then, ceteris paribus, it is worse to inflict losses that people cannot avoid.

Let us now see briefly that the sort of thing we have been saying applies at the level of judging the morality of allowing certain conditions to excuse. We said earlier that one, though not the only, consideration to be taken into account in assessing the morality of an institution is the losses of having the institution and balancing ^{them} ~~the~~ against the gains (including the avoidance of losses) that accrue from having the institution. This can be illustrated in the case of the institution of excuses. In deciding what is lost by not allowing certain conditions to excuse, the following are some of the relevant considerations:-

(a) How much would people lose if they conformed to the law? The loss here would include the sacrifice that individuals make when they forego what the law forbids them, both the immediate and the long-run repercussions; the direct and indirect effects of this

sacrifice are relevant. The sacrifice would include also the sacrifice that individuals may have to make in order to avoid coming into conflict with the law - this may happen, for instance, in certain offences where negligence is punished. There may be people who have taken some trouble to conform to the law. This cost must be taken into account. And again in strict liability offences also there are people who may take considerable trouble to avoid coming into conflict with the law. They may take even more than reasonable precautions to avoid an accident, mistake, etc. Also, the fear of breaking the law and undergoing punishment is something that is felt even by many of those who eventually manage to conform to the law. In some cases they may go so far as not to take certain "dangerous" jobs, or to give up these jobs. Thus, if you have strict liability in the law relating to the sale of certain foodstuffs, many people may withdraw from these jobs, or, if they are contemplating going into such jobs, they may give up the idea. In estimating the loss, we should not take into account only the loss to the individual directly affected, but to society as a whole. Thus some individuals may not lose much if they can easily find as good a job in some other field, and some other individuals working in the strict liability trades may shift the burden on to the consumers in the form of higher prices - thus compensating themselves (i.e. the workers in these trades) for the loss they may suffer in these professions from time to time. But, in estimating the losses, we should take into account the net total loss to society and not just to a section of society.

(b) The second consideration relevant to finding out what people would lose is: How much would individuals lose if they did not conform to the law and were punished? Here we need to take into consideration factors like the loss of liberty, the moral disgrace and other hardships that are suffered by those who undergo punishment. Here, also, we need to take into account both the immediate and the long-term effects, the direct and the indirect effects upon human welfare. We would need, for instance, to take into account the repercussions on the agent's relatives. Also important are what Bentham called "the fears of apprehension" - i.e. pain that a man who is going to suffer punishment, or is in danger of suffering it, feels at the thought of undergoing it. This will be felt more under strict liability than under a system that is without it. (This evil will be felt both by some of those who do not conform to the law and by some of those who do.)

(c) The next relevant consideration in estimating losses is the number of people who manage to conform to the law, and the number of those who do not. The more people there are who fall under (a), the bigger the losses under (a) become, and the more the people who fall under (b), the bigger the losses under (b) become.

In deciding whether it is worth incurring these losses, we shall have to balance them against the gains that accrue (including the losses that are avoided) from not allowing the relevant excuses. Here factors

like the extent to which the crime rate will go up if such excuses are allowed would be relevant. The deterrent effect of law will depend partly upon how severe the penalties are, partly on how efficient the State is thought to be in catching criminals (the more the chances of escaping detection are supposed to be, the less, ceteris paribus, the deterrent effect of the law is likely to be), and partly on the nature of the people whom the law is trying to deter. The extent to which the crime rate will go up if we allow a condition to excuse will also depend upon how difficult it is to distinguish genuine cases from fraudulent ones. Ceteris paribus, the more difficult it is to distinguish genuine cases from fraudulent ones, the greater the chances that people may commit crimes in the hope of bluffing the jury into believing that they are to be excused.

We saw earlier that one of the things that need to be gone into before a full assessment of the morality of an institution can be arrived at are questions such as, "Were the losses incurred really necessary? Could the desirable effects of the institution be achieved by more economical means?" This point, too, can be illustrated when considering the institution of punishment and excuses; for in deciding whether the State was justified in punishing certain people, it would be relevant if some of the desirable effects such as crime prevention could be achieved more economically by alternative methods such as better education, medical treatment, etc. What the State could_G have

done is relevant in assessing the morality of State action. It may be that a State is lazy about providing education, etc., for juvenile delinquents; and that if the State did not punish such delinquents the crime rate would go up a lot, as long as the State did not use other methods of dealing with juvenile delinquents; so that the gains that accrue from punishing these people would outweigh the losses that accrue from punishing them. This would at most show that punishing them is better than what would in fact happen if they were not punished. But it would not be enough to justify the punishment, for it may be that the State could and should use alternative methods of dealing with juvenile delinquents, and by not using such methods it is incurring unnecessary losses. So it would still be possible to criticize the morality of what the State is doing.

Another example of this would be in evaluating 'strict liability'. Sometimes strict liability is retained on the grounds that it helps to prevent a considerable increase in the crime rate, for without it, it is argued, people may commit crimes in the hope of bluffing the jury into believing that they were in one of the excusing conditions. In evaluating whether strict liability is justified, it may be relevant to find out how far the increase in the crime rate that is supposed to follow if strict liability is abolished could be prevented by alternative methods such as placing the burden of proof on the defence.

Let us now see briefly the application of principle 0 to the institution of excuses.

We have seen that if there was no method of conforming to the law that could and should have been used, this tends to excuse - principle (2).¹ Now principle (2) can be derived from principle 0.

Take two people A and B. A can_Y conform to the law, but B can_Y not conform to the law; now, ceteris paribus, if both are threatened with punishment, A has the capacity_G to avoid the loss (i.e. the infliction of punishment), but B does not have the capacity_G to avoid the loss (i.e. the infliction of punishment), so, according to principle 0, there is an extra evil involved in the punishment of people like B. So if principle 0 is accepted, ceteris paribus,² the case for punishing people like B is less than the case for punishing people like A.

It may be that B could avoid the infliction of punishment by avoiding detection, but whether he could do this is quite irrelevant. For B does not have the capacity to use a good method of avoiding the infliction of punishment, so he could_G not avoid the loss. Avoiding detection is not a method that society would approve of, so it is irrelevant to whether a person could_G avoid the loss that arises from the infliction of punishment.

It may be objected that in the case of certain bad laws society

1. See pp. 219-220.

2. The ceteris paribus clause is important. If, for instance, a lot of evil can be prevented by punishing people like B, it may be necessary to punish people like B.

might be no worse off if those who broke the laws escaped detection, so why should not people be encouraged to avoid detection? And if we agree that avoiding detection is in such a case a good method, on our rationale, it could be objected that we should punish people who cannot conform to the law but who can avoid punishment by avoiding losses. And it may be objected that this shows our rationale to be at variance with what happens, for in fact whether people could have avoided detection is never considered relevant to whether it is moral to punish them.

But to this objection it may be replied that in the case of bad laws the thing to do is to abolish the laws rather than decide what principles should govern us in deciding how much to punish people. It may, however, be that there is some social prejudice which the State perhaps should try to remove, but to which the State may sometimes to some extent have to pander. We may in such a situation sometimes have to put up with bad laws for some time, and we shall during that time need some principles to decide how much to punish those who violate them. Here it seems to me that one of the principles that should guide us is the following: Punish as little as is necessary (necessary for placating popular opinion) until we have got rid of these laws.

Of course, in practice, the State may have to use this principle discreetly. If it retains a bad law, out of deference to popular opinion, it often has to put up a façade. It may pretend that the

bad law is not really a bad law, for the government might look quite foolish if it shouted from the housetops that the law was a bad one, and yet retained it. And this may make it tend to use, in deciding how much to punish those who violate the bad laws, rules similar to the ones it uses in deciding how much to punish those who have broken the good laws. It is true that there are certain things that the State can often do: for instance, it may concentrate its energies on catching those who break the good laws rather than on catching those who violate the bad laws. This can sometimes be done. But there are other things that it is hardly practicable for the State to do. Thus the State would be in a very odd position if it were to say that with regard to those who have broken bad laws, it was going to punish those criminals who could have avoided detection (but voluntarily co-operated with the State) more severely than those criminals who could not.

I do not think that, even in the case of bad laws, our rationale would involve having greater penalties for those who could avoid detection than for those who could not. On our rationale, in order to justify having greater penalties for those who could easily have avoided detection, one necessary condition that must be satisfied is the following: Society should gain more than it would lose if people who broke the relevant law were to escape detection. This condition should be satisfied if the view that avoiding detection is a good method

of avoiding punishment is to be accepted. Now some people may argue that, even if the law is a bad one, we should try to change it by constitutional means, as long as the legal system as a whole is good; and until the law has been changed, more harm than good will come out of flouting it. But it seems to me that even if this necessary condition is satisfied, the State can hardly acknowledge this fact so openly; for it to acknowledge that society gains more than it loses if those who have broken certain laws escape detection, and that those who break the laws should avoid detection when they can, would involve it in acknowledging that these laws are bad ones. And even if it could openly acknowledge this fact, for the State actually to penalize more severely those who voluntarily co-operate with it and do not make use of their opportunity to escape than those who could not escape detection, would bring the whole legal system into disrepute. So even when in fact society gains more if those who break certain laws escape detection, yet for the State to actually penalize those who could have avoided detection (but voluntarily co-operated with the State) more severely than those who could not, would bring the whole legal system into disrepute. So it would not be true that society will gain more than it loses, if the State were to adopt the practice under consideration.

To come back to our discussion about principle (2) and principle 0, we have seen that principle (2) does not imply that we are never justified in punishing people like B. For we have seen that sometimes

elements of strict liability or objective liability may be justified, e.g. for utilitarian reasons; that is why we used the expression 'tends to excuse', for that allows for the possibility that the tendency could be counteracted by a stronger force in the opposite direction.

What we have just observed is quite consistent with the view that principle (2) is an instance of principle 0. For principle 0 does not entail that we are never justified in punishing people like B. It says that other things being equal, there is an extra evil involved in the punishment of people like B, i.e., ceteris paribus, a system of punishing people like B is worse than a system of punishing people like A. But of course, as we observed earlier, the occurrence of this extra evil may be justified if it is necessary in order to prevent a still greater evil.

Principle (2) is only one of the principles used in evaluating the morality of institutions, actions, etc. The fact that other principles will also be needed is of course quite consistent with this claim. However, we have not been trying to give a complete account of the various rationale underlying the excusing system; we have instead stressed some aspects because they have been neglected, not because we think that the other aspects are not important. Thus we are not, for instance, denying that the retributive theory can help to account for some of the important features of our system of excuses. It is

perhaps possible to try to justify principle (2) by appealing to a retributive theory. Thus it might be argued that at least in the case of serious crimes where punishment involves moral censure, if a man is not morally blameworthy this tends to show he ought not to be punished; and this can explain why, if a man could_Y not avoid committing the crime, this tends to show that he ought to be excused. For a man who could_Y not have avoided committing the crime is not morally blameworthy.

To sum up the relationship between principle 0 and principle (2): One, though not the only reason why we think people should have the capacity_Y to conform to the law if they are to be punished, is that people who have the capacity_Y to conform to the law have the capacity_G to avoid the losses that the State may inflict upon them.

We discussed earlier two ways of trying to justify principle 0.

It must, however, be admitted that sometimes the good effects of a system where unavoidable losses are not inflicted by the State are outweighed by the evil effects of such a system, and this can help to explain that sometimes a case might be made for punishing people even though they could_Y not have conformed to the law. Thus, sometimes, we think there is a good case for having elements of strict liability (if, for instance, the social losses of not having strict liability are considerable: e.g. if it is very difficult to distinguish genuine cases from fraudulent ones, then without strict liability many people may commit crimes in the hope of bluffing the jury into believing that they were in one of the excusing conditions). Sometimes the advantage that

accrues from a system where the State does not inflict losses on people that they (i.e. the people who undergo them) cannot avoid, is outweighed by other social losses involved. Of course, in balancing the losses and the gains and in deciding whether to have strict liability, we shall need principles of justice (e.g. the principle that everyone should count as one and no one to count as more than one) besides the principle 0 that we have suggested. But this is quite consistent with what we have said, for we have only suggested that principle 0 is one of the principles to be taken into account. We have stressed it because we think it has perhaps been neglected, not because we think the well-known rationale of excuses are not important.

It might be objected against our analysis that we have neglected important differences, such as the difference between the strict liability case and the railway track case 2 (p. 312). Now it is true that we have subsumed them both under a general theory, but this does not of course mean that we think that the two cases are not different in important respects.¹

1. The railway track case 2 on p. 312 above is a case where the State has not given an opportunity to those who could avoid a loss, whereas in the strict liability case the State is imposing losses on people, some of whom are incapable of avoiding them. Also it may be argued that in the railway track case 2, it is more likely that some of the losses involved are unnecessary - though it is conceivable that the State has to build a railway track immediately to cope with an emergency (that could not have been foreseen) and that all the losses (e.g. the sudden disruption in the lives of those who, without any notice, have to leave their houses) incurred are necessary.

But although there are differences, there are also similarities between the two cases. There is a sense of 'can' which implies both 'ability' and 'opportunity' and in this sense of 'can' both people in the railway track case 2 and those who cannot avoid losses under strict liability have this in common: they cannot avoid the losses that are being inflicted on them; though the reason why they cannot avoid the losses is different in the two cases.

Principle 0 does refer to the sense of 'can' which includes both ability and opportunity.¹ So it is not surprising that it should be relevant both for the strict liability case and the railway track case 2.

It might be objected that principle 0 does not really account for the odium of strict liability. But principle 0 is not meant to show that strict liability ought never to be imposed. If one wants to argue that strict liability ought never to be imposed, one will need to resort to some other principles. What principle 0 succeeds in showing is that there is an evil involved in having strict liability; but of course to say this is consistent with saying that strict liability may sometimes be necessary to prevent a still bigger evil. Sometimes the evil prevented by strict liability can have important similarities to the evil that is caused by strict liability, and principle 0 will not necessarily imply that we should not have strict

1. See p371.

liability. Thus suppose that if we do not have strict liability this leads to an increase in the crime rate, and suppose that the increase in the crime rate results in an overall increase in the losses that are inflicted on people which they could not avoid. It is possible that sometimes the unavoidable losses that people suffer as a result of the increase in the crime rate are greater than the unavoidable losses suffered by those who are punished under a system of strict liability.

It is true that there are some differences between the evils of punishment and the evils suffered by those who are adversely affected by the increase in the crime rate. Thus, if a man is punished, there is often a moral disgrace attached to it, whereas if a man suffers at the hands of a criminal he (i.e. the victim of the crime)¹ does not suffer from moral disgrace. But such differences, though they are real and important, should not make us ignore the important similarities between the two cases. In both cases he has suffered a loss. And in both cases we can discuss whether the loss was avoidable. So there do seem to be some common standards of comparison between the two cases.

Some people may take a sceptical line and say that we can never make inter-personal comparisons of losses. But if that is so, one will not be able to compare losses even within the field of punishment.

1. By 'victim of the crime' I do not mean the criminal but the person or persons whom the criminal harms.

But if we allow comparisons within the field of punishment,¹ it seems odd to deny that there are some similarities between the unavoidable losses that people who suffer from strict liability undergo and the unavoidable losses that people who are the victims of crime undergo.

Sometimes these similarities are neglected. It is sometimes argued that it is really a conflict of liberty versus utility, i.e. if we have strict liability this may result in an increase in utility (or prevent some disutility) but it will involve the sacrifice of the values of liberty (or freedom).² Now, if one defines the values of liberty in terms of the absence of State interference, then it is true that when we have strict liability, liberty is sacrificed for some other value. But just to say this, overlooks the fact that values that are sacrificed and the values for the sake of which the sacrifice is made have some important similarities. Hart talks of the values that are sacrificed as if they are quite different from the values for the sake of which the sacrifice is made. He overlooks that there is a similarity between the two. Thus he says that one of the advantages of a system where only voluntary offenders are punished is that such a system helps

1. By comparisons within the field of punishment I mean things like this: the loss undergone by Smith who is imprisoned for 15 years is, ceteris paribus, greater than the loss suffered by Brown who is imprisoned for 15 days.

2. See Hart, "Prolegomenon to the Principles of Punishment", in Philosophy, Politics and Society (ed. Laslett and Runciman), Second Series, pp. 172-179. See also Hart's article in Determinism and Freedom (ed. S. Hook).

individuals to feel secure, plan their lives and choose the future. But the same values can sometimes be promoted by strict liability. Thus, when strict liability results in the reduction of the crime rate this may mean that some individuals can now feel secure not only because they feel they are not likely to get punished, but also because they feel they are not likely to be victims of crime. And though the causes of feeling secure may be different in the two cases, the meaning of security is the same or, at least, has important similarities in the two cases.¹

To say that the values in the two cases have important similarities is not, of course, to say that we should only be concerned with maximizing these values. For, firstly, there may also be other values at stake - e.g., as we saw earlier, there is the moral disgrace attached to punishment. And, secondly, there are certain principles of distributive justice that we believe in so that we would not like just to maximize the relevant values but also to make sure that these values are not unfairly distributed throughout the population. Such factors can help to explain why even when there is likely to be an increase in total utility if we adopt strict liability, it does not always follow that we should adopt strict liability. Sometimes, of course, strict liability may also be objected to on the grounds that

1. And this argument applies, mutatis mutandis, to the values of planning their lives and of choosing their future.

it is creating unnecessary losses: for instance, as we said earlier, sometimes it may be possible that the advantages of strict liability could be obtained by abolishing strict liability and putting the burden of proof on the defence.

II

We have talked about those who could not conform to the law; but it is worth noticing that it is often thought that if people find it especially difficult to conform to the law this too in the present system tends to show that they should be excused, or if not excused at least not punished as severely as those who could have conformed to the law with much less difficulty.¹ So besides principle (2)² we seem to need another principle which is something like this: Ceteris paribus the more difficult it is to avoid committing the crime by using a good method,³ the greater the case for excusing the person from punishment (or at least from full punishment: i.e. the greater the case for making the punishment less severe). Let us call this

1. Cf. the sections of the Homicide Act relating to diminished responsibility and provocation.

2. See pp.219-220.

3. In order to apply this principle, it is of course essential to realise that certain methods of avoiding the committing of the crime are not approved of; so when the principle refers to the difficulty of avoiding the committing of the crime, it is not concerned with the possibility that certain objectionable methods of avoiding the crime may not be difficult to use.

principle (2a).

One possible objection that may be made against principle (2a) is this: If a crime is committed intentionally, the punishment is usually more severe than if it is committed negligently; yet it may be that sometimes a negligent crime is more easy to avoid than an intentional one; so according to principle (2a) it should be punished more severely than an intentional crime. Now there are two points that need to be made in reply to this objection. Firstly, when an intentional crime is considered impossible to avoid, this is often taken into account. Thus if a man is M'Naghten mad and yet acts intentionally he is not punished at all. (It is quite consistent to be M'Naghten mad and yet to act intentionally, for the madman may know the nature and quality of the act, but not know that what he is doing is wrong.) Also, when an intentional crime is difficult to avoid (e.g. provocation or diminished responsibility under the Homicide Act) this too is often taken into account.

However, it is true that there may be other intentional crimes that are punished more severely than negligent crimes, even though they may be more difficult to avoid. The justification for this could be some such principle as the following: Moral guilt is one of the determinants of punishment, and ceteris paribus, an intentional crime is morally worse than a negligent crime: the man who commits the crime intentionally is (when other things are the same) morally worse than the man who commits the crime negligently.

Now this principle is a distinct principle from principle (2a) of justice. It is also partly discrepant with it. But this is not a criticism of the claim that principle (2a) is one of the principles that help to explain and justify our system of excuses.

One could construct a principle at a more general level that corresponds to principle (2a) in the way that principle 0 corresponds at a more general level to principle (2). Thus we could suggest that at the more general level there is the principle: Ceteris paribus¹ the more difficult it is to avoid (by using a good method) a loss, the worse the inflicting of the loss, from the point of view of evaluating the actions of those who inflict the losses.² Let us call this principle 0a.

Now we have shown earlier that principle (2) can be seen as an instance of principle 0. For analogous reasons principle (2a) can be seen as an instance of principle 0a. Also the relationship between principle (2) and principle (2a) seems to be similar to the relationship between principle 0 and principle 0a, so that much of the discussion

1. The ceteris paribus clause is necessary, for without it the principle would not work. Thus it could be argued that it is worse to have a system of killing people (even though they could easily avoid being killed) than to have a system of inflicting small losses which are very difficult to avoid.
2. We saw earlier (pp. 313-314) that even though the total evil may be the same in two situations, it does not follow that the two situations are the same from the point of view of evaluating the actions of those who inflict the losses.

about the relationship between (2) and (2a) will apply, mutatis mutandis, to the relationship between 0 and 0a. The converse is also true.

If we accept principle 0a, principle 0 would seem to follow as a corollary. For a loss that cannot be avoided is impossible to avoid, and impossibility is the limiting case of difficulty. For similar reasons, if we accept (2a), (2) would follow as a corollary.

Let us now discuss whether, if we accept (2), (2a) follows from it. I shall argue that there is a connection, given certain conditions. But in order to discuss this it would be a help to distinguish different senses of 'difficult'.

A mountain may be very difficult to climb. This statement would be true, for instance, if many people found it impossible to climb, and a few found it possible to climb. It may be said to be less difficult to climb if, ceteris paribus,¹ the proportion of those who found it possible to climb to those who found it impossible to climb were to rise.

So in this sense, when we say that a thing is difficult, there may be some people who find it impossible to do it. And the more difficult it is, the more, ceteris paribus, is it likely that the number of people who find it impossible will increase.

1. The ceteris paribus clause is important. If, for instance, the proportion were to rise, we might not think the mountain became easier to climb if at the same time the proportion of those who found it very difficult, but possible, to climb the mountain rose sufficiently.

Sometimes we know how difficult an individual finds the thing in question; but sometimes we do not and we have to be content with knowing how difficult it will be for the average man or the reasonable man (these are not necessarily the same). But though the average or the reasonable man may be a fiction, it may be a useful fiction, and one reason why it may be a useful fiction is that it is sometimes easier to know about the capacities of the average man than about the capacities of the individual criminal in the dock. True, if we know an individual very well then we may know more about his capacities than about the capacities of the average man. But the defendant is not always so well known to those who have to decide what is to be done with him. When individual peculiarities are not well marked, they are not usually taken into account (for otherwise the legal system would become very difficult to operate). However it is quite possible that if the average man finds it difficult to avoid something, then there will be some people, below average, who will find it impossible to avoid it. And the more difficult the average man finds *x*, the more, ceteris paribus, the proportion of people who are likely to find it impossible, and so the more the chances that the particular offender finds it impossible to conform to the law. And if we agree that impossibility to conform to the law tends to excuse, then it seems to follow that, ceteris paribus, the more the likelihood that the individual offender found it impossible to conform to the law, the better the case for excusing him.

In those cases, however, where we do know how difficult the individual finds it to do the relevant thing, we cannot rely on this reasoning. So there is the problem: Why should we believe in principle (2a) when we know how difficult the particular individual finds it to conform to the law?

Sometimes when we say that an individual finds it difficult to do something, we do not refer just to a particular occasion or to a particular task, but to his general or average capacity over a period of time. Thus if a man sometimes finds it impossible to resist an impulse to steal, while at other times he finds it possible to resist it, we may say he finds it difficult to resist stealing. And, ceteris paribus,¹ the greater the proportion of cases where he finds it impossible to resist it to those cases where he finds it possible to do so, the more difficult (in general) he finds it to resist stealing.

So if a man finds it very difficult to resist stealing, and if it is not the case that it is known that he never finds it impossible to resist stealing, then the times when he will be unable to control his stealing impulse are likely to be more than if he found it less difficult to refrain from stealing. And so if he is on a stealing charge, the chances that he found it impossible on that particular

1. The ceteris paribus clause is important. Even if the proportion increases, if the proportion of cases where the individual finds it possible but difficult to resist it falls sufficiently, then the conclusion will not hold.

occasion to resist stealing are greater, the more difficult (in general) he finds it to resist stealing.

Thus, if we suppose that other things being equal, punishing people who could not have acted otherwise is worse than punishing people who could have avoided committing the crime, it seems to follow that a good case can be made for the following principle: Ceteris paribus, the more difficult it is to avoid the crime, the less the case for punishment.

There is another use of 'difficult', where the difficulty involved refers to the difficulty involved for the individual on the particular occasion. Thus there are at least three different senses (or uses) of 'difficult':-

(a) The sense which refers to more than one individual, e.g. "Mount Everest is very difficult to climb." Let us call this sense 'difficult_A'.

(b) The sense which refers to an individual's capacity, in general, over a period of time, e.g. "During the last ten years Mr. Smith has been finding it difficult to win matches in tennis." Let us call this sense 'difficult_B'.

(c) The sense which refers to an individual's capacity on a particular occasion (or rather to the individual's capacity to do the particular task in question), e.g. "Mr. Y. found it very difficult to climb the mountain on his seventieth birthday" - let us call this sense 'difficult_C'.

Corresponding to these three senses (or uses) of 'difficult', there are three senses (or uses)¹ of 'can'.

(a) Can_A refers to the capacities of people in general, e.g. "People (in general) can climb that mountain"; this does not imply that every individual can climb the mountain.

(b) Can_B refers to a particular individual's general capacity over a period of time, e.g. "Smith can climb the mountain in general" (i.e. usually or as a rule or on an average).

(c) Can_C refers to a particular individual's capacity on a particular occasion, or rather it refers to his capacity for a particular task,² e.g. "Smith can climb the mountain on his sixteenth birthday."

Similarly, we could have three different senses of 'possible':³ possible_A, possible_B, possible_C.

To come back to 'difficult': at least sometimes we do not have enough evidence about difficult_C or even about difficult_B, but have

1. Perhaps it will be more accurate to talk of the different uses of 'can' rather than of the different senses of 'can'. Similarly, it could be argued that, strictly speaking, we should speak of the different uses of 'difficult' rather than of the different senses of 'difficult'.

2. It is possible that the particular task (e.g. curing Mr. Brown of his illness) could extend over a period of time. We could still ask whether an individual has the capacity_C to do that particular task; what really distinguishes can_B from can_C is that can_C refers to the particular task and not to other similar tasks, whereas can_B refers to the individual's capacity (in general) to do that kind of task.

3. Similarly we could have three different senses of 'easy'.

more evidence about difficult_A; i.e. we have a rough idea about how difficult (in general) people find something, even though we do not know about the particular criminal. There is a good case in such circumstances for taking into account how difficult people in general find the thing in question. Thus we think it is more difficult for a man to restrain from killing someone who commits adultery with his wife than it is to refrain from killing someone who gives one a blow on the nose. This is true of people in general. Now it is possible that a particular individual may be idiosyncratic and may find it more difficult to resist killing someone who gives him a blow on the nose than someone who seduces his wife; but sometimes we do not have enough evidence to go into people's alleged idiosyncrasies, and we judge people's abilities by our view of general human nature (sometimes, of course, e.g. in some cases of insanity, infancy, etc., where people are different in marked ways, then their peculiarities are taken into account). When we are ignorant of difficult_C, we often fall back on what we know about difficult_A and difficult_B.¹ Now in those cases where we fall back on difficult_B or difficult_A, we have seen that if we believe that the claim 'he could not have avoided what he did' tends to excuse, then a corollary follows:

1. Not always. Sometimes we bypass talk of capacity as in strict liability. Though even strict liability in practice is not completely strict.

i.e. ceteris paribus, the more difficult it is to do what is required, the greater the case for excusing the person if he does not do it. (This corollary follows when 'difficult' is used in the sense difficult_A or difficult_B.) And for analogous reasons O_a would follow as a corollary from O.

However, there is at least one proviso that should be observed. These corollaries do not follow when we are certain that he could_C have done it on the particular occasion. When we have knowledge of how difficult_C a man finds it to do the relevant thing on a particular occasion then those corollaries do not follow. For our reasoning was that the more difficult_B a man finds doing something, the more the chances that on a particular occasion he finds it impossible_C to do it. But if we already know how difficult_C he finds it is on a particular occasion, then we shall not rely on this reasoning. Similarly, we shall not rely on difficult_A if we already know how difficult_C it was on the particular occasion. If a Japanese and an American are coming to a party and if one knows nothing else about them, it is probable that the American will be taller than the Japanese. But if one finds out, for instance from a reliable friend, that the Japanese is taller, it would be foolish to argue that he is likely to be shorter because Japanese are as a rule shorter than Americans.

There is another complication that should be noticed. In practice, at least sometimes when conforming to the law is a matter of

special difficulty, this does not excuse completely, but serves as a mitigating circumstance. And it may be asked, even if we have shown that under certain conditions it follows from principle (2) that the more difficult it was to avoid committing the crime (by using a good method) the greater the case for excusing, yet how does this explain the fact that when conforming to the law is a matter of special difficulty this does not excuse the criminal altogether, but only serves as a mitigating circumstance? Even if it is true that there is less of a case for punishing people who find it especially difficult to conform to the law, how does it explain the fact that we think there is a case for punishing such people less (i.e. mitigation)?

It seems that this fact could be explained (if not justified) as a result of a compromise between different principles. Thus there may be pragmatic factors that tend to make us punish under such circumstances. For instance, the practice of not excusing people altogether when it is especially difficult to avoid the crime, may encourage crime prevention. For at least some people will be able to overcome their difficulties, but if they are to be excused altogether in the event of committing a crime, then they will have less incentive to refrain from committing the crime. Also some criminals may commit crimes in the hope of bluffing the jury into believing that they found it difficult to avoid it. Such pragmatic considerations in favour of punishment would need to be balanced against the principle that the

more difficult it is to conform to the law the less the case for punishment. As a result there may be a compromise so that the criminal is not excused altogether, but only partially.¹ Nevertheless, at least sometimes such compromises are difficult to justify; they can be criticized not only on the grounds that it is unjust to punish at all if we are not sure that the criminal had the relevant capacity, but also such compromises can sometimes be quite foolish even from a utilitarian point of view. For punishment is an evil on a utilitarian theory and is justified when it prevents more evil than it causes. Now if the punishment is reduced to a level where it causes more evil than it avoids, then such punishment is, from a utilitarian point of view, worse than useless; i.e. worse than there being no punishment at all.

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1. Under the Homicide Act criminals whose responsibility is substantially impaired as a result of mental disorder are partially excused. Now we cannot really be certain beyond reasonable doubt that those who are sick enough to be partially excused had the capacity_C to conform to the law. Anyone who thinks he is sure beyond reasonable doubt that such people have the capacity_C to conform to the law should study the life history of the relevant criminals. Now it might be thought that ideally justice would demand that when we are not certain, beyond reasonable doubt, that the criminal had the capacity_C to conform to the law, we should excuse him altogether. Why then do we in fact excuse such criminals only partially? It would seem that this fact is explained partly by the dogmatic belief held in some quarters that such people do in fact have the capacity to conform to the law (it is perhaps easier to believe that they have the relevant capacity to conform to the law if one does not distinguish between can_B and can_C) and partly by the belief that the crime rate will go up if such people are not punished at all. There may of course also be other factors that help to explain why such people are not excused altogether.

We shall see later that other factors such as retributive considerations may also help to explain why we have the practice of mitigation.

tend to

So we see that 0a and (2a) follow as corollaries from 0 and (2) respectively when 'difficult' is used in sense_A or sense_B; though we noticed a proviso and a complication.

Let us now see whether (2a) can be defended when 'difficult' is used in sense_C. It may be argued that even when 'difficult' is used in sense_C, 0a and (2a) follow as corollaries from 0 and (2). For we can never know for certain that we were not wrong in our estimate, in thinking that something was possible_C. For instance, an impulse that we thought was difficult_C but possible to resist might in fact have been impossible to resist. And ceteris paribus, the more difficult it is to do something the more the chance that we may be mistaken in thinking that it was possible_C to do it.

However, some people may like to believe that even if we leave aside this possibility of being mistaken we would still like to adhere to the principle that, ceteris paribus, the more difficult it is to avoid committing the crime, the greater the case for excusing the crime. And they would like to believe in this principle, not only when 'difficulty' is used in sense_B or sense_A (for in these senses, when something is difficult, it leaves open the possibility that it was

impossible_C to do it) but also when it is used in sense_C. Thus they would argue that even if we know that on a particular occasion it is possible_C but difficult_C for a man to avoid committing the crime, the case for excusing this man is, other things being equal, stronger than the case for excusing someone who finds it possible and easy_C to avoid the crime. (The arguments we are now considering, unlike some of the arguments we considered earlier in favour of principle (2a), try to make a case in favour of (2a) without showing it as a corollary of (2).)

Take the case of duress. If (a) X is threatened with death unless he commits a minor crime, we shall excuse him. But if (b) he is only threatened with very minor inconvenience, then we shall not excuse him. In the second case he could easily have avoided the crime, but in the first case he could only have avoided it with great difficulty. So it may be argued that here is an example where we do (and we think we ought to) think the case for punishing someone who could have avoided the crime with great difficulty is less than the case for punishing someone who could easily have avoided committing it.

It may be pointed out, however, that the case of duress does not establish this principle; for it is true that while in the first case, unlike the second case, we do want to excuse, the reasons for excusing are not or should not be concerned with capacity, with how difficult it was for the criminal to conform to the law. Though it is true that it was probably more difficult for him to conform to the law in

the first case, this is not the justification of our excusing him: there are sufficient reasons for excusing him whether or not he found it difficult to resist the threat, for we think that even if he could have easily resisted the threat, he should not be punished if he commits the crime. Suppose there are two people, Mr. X and Mr. Y. Mr. X is threatened with death unless he commits a minor crime and Mr. Y too is threatened with death unless he commits a minor crime. Now suppose Mr. X has very great powers of self-control and self-sacrifice and can without much difficulty resist the threat, not commit the crime and die instead, but he chooses to commit the minor crime. Mr. Y has not got such powers; he finds it difficult (perhaps even impossible) to resist the threat and so commits the crime. Now in each of the cases, X and Y, we should want to excuse them (excuse them both from moral blame as well as from punishment). The fact that Mr. X could have faced death much more easily than Y is irrelevant. For in both cases we prefer that they commit the crime rather than sacrifice their lives. We excuse them because we think that, on the whole, the committing of the crime involves much less evil than refraining from committing the crime. If one chooses the lesser of two evils and breaks the law then it should be irrelevant (from the point of view of punishing or blaming the person) how difficult it was to refrain from committing the crime. Of course, if one of them had a good chance of escaping death without committing a crime, then that would be a

reason for not excusing him if he commits the crime. But assuming that there was no such way out, the extent to which they could avoid committing the crime would be irrelevant.

To come back to our problem of whether difficult_C is relevant for excuses, it must be agreed that often when someone finds it difficult_C to do something, we take this into account because of the things that are at stake (in the example that we discussed, it was the agent's life that was at stake). But it might be argued that the fact that an individual finds it difficult_C though possible_C to do something may be relevant for excuses, even if his overall interests would not suffer if he were to conform to the law. Thus, suppose a man, Mr. D., finds it difficult_C though possible_C to control an impulse to steal. And suppose that if he does control his impulse, his overall interests do not suffer. (Such a case is quite conceivable. Exercising self-control, though it may involve trouble while it lasts, may even help to improve one's position by improving the character. There are probably cases where such improvements are offset by the losses incurred, e.g. having to bear pain while exercising self-control, and the damage that the personality may have suffered by repressing one's desire. But it is not obvious that they must always be so offset.) In this case the net cost to him of controlling his instinct is not much. It may be that even in such a case there is something to be said for taking his difficulty_C into account when assessing

whether he should be punished or how much he should be punished. It could be argued that, ceteris paribus (i.e. if they have done similar crimes, and the cost to them of refraining from the crimes would have been roughly the same), if two people have done similar crimes, and one could have avoided committing the crime though with difficulty_C, and the other could have avoided committing the crime without any difficulty_C,¹ then principles of fairness require that the difference should be reflected, if not at the stage of conviction, at least at the level of sentencing. It acts as a mitigating circumstance, if not as a full excuse. Ceteris paribus, the man who found it difficult_C to conform to the law should not be punished or should be punished less than the man who found it easy to do so.

However, not everyone would agree with this. Let us take two cases, Mr. Brown and Mr. Smith, and suppose the cost to each of them if they conformed to a given law is the same. But Brown could not have avoided breaking the law, while Smith could, so the case for excusing Brown is greater. Thus if Brown could not have resisted a stealing impulse, but Smith could, the case for excusing Brown is greater, even though if Brown had succeeded in resisting his impulse the cost to him (e.g. the efforts, sacrifice, etc., involved) would have been just the same as the cost involved for Smith to conform if

1. Our discussion in the next paragraph about Mr. M and Mr. N will show that such a case is conceivable.

Smith were to conform to the law. And such a case is quite conceivable; for the extra effort involved for Brown could be offset by other advantages, e.g. the good effects on his character, so that the net cost to him would be no greater than the net cost involved for Brown if Brown were to conform to the law.

But now take another comparison. Suppose the cost to Mr. M if he conforms to a certain law is the same as the cost to Mr. N if Mr. N conforms to the same law, and suppose that both Mr. M and Mr. N could have (in sense_C) conformed to the law; but Mr. M could have done it with difficulty in the sense that he had to make a great effort of will, etc., while Mr. N could have done it easily, requiring very little effort. And suppose the cost to Mr. M, if he conformed to the law, is the same as the cost to Mr. N if Mr. N conformed to the law. And such a case is quite conceivable, for suppose the extra effort of will involved for M is offset by other advantages such as the good effects on his character. Now, is the case for excusing Mr. M greater than the case for excusing Mr. N? The answer is not as obvious as in the Smith and Brown case. It may be argued that the case for excusing Mr. M is greater because of the greater efforts, etc., involved. But this argument will not convince everyone, for we have already in our calculations taken into account the trouble involved, etc. For, ex hypothesi, the net cost to M and N if they conformed to the law would be the same. And the fact that M would have less trouble in

terms of efforts of will, etc., is something that is offset by other factors. So that the net cost is the same to M and N. Why, then, should the case for excusing M be greater than the case for excusing N?

Whether or not the case for excusing M is greater on grounds of fairness seems to me controversial. Different people may have different ideas of what is fair on this matter. (But the view that the case for excusing Brown is greater than the case for excusing Smith is much less controversial. It is true that the cost to Smith and Brown, if they conform to the law, is ex hypothesis the same, but we feel that the case for excusing Brown is greater since he could not conform to the law.) Whether the view that the case for excusing M is greater than the case for excusing N could be justified on utilitarian grounds is also not obvious. There may indeed be a utilitarian case for having greater punishment when an individual finds it difficult_C to conform to the law, for this may make it more likely that the man who can conform to the law, but finds it difficult, does in fact overcome his difficulty, whereas if a man finds it easy to conform to the law the amount of punishment needed to induce him to overcome the easy obstacles may be less.

To summarize our discussion of the relevance of difficulty to excuses, we have seen that when we are not certain that a man could_C have done the relevant action, principles 0a and (2a) tend to follow

as corollaries from principles 0 and (2) respectively.

When we do know 'difficult_C', it may be that principle (2a) can still be defended. But it will not be defended by showing it as a corollary of principle (2). One may however still try to defend it in some other way: for instance by claiming it to be an ultimate principle of fairness. Another method of defending it would be by suggesting that it is an instance of principle 0a. But of course there is a similar problem about the defence of 0a. For why should we accept 0a when we have knowledge of can_C? Some people may accept 0a as an ultimate principle of fairness. Anyway, if we do accept that the more difficult_C it is for the people who are threatened with the loss to avoid the loss (by using a good method), the worse the inflict~~ing~~ing of the loss from the point of view of evaluating the actions of those who inflict the loss, then principle (2a) can be accepted even when we have knowledge of can_C and difficult_C. We discussed earlier¹ the relationship between principle (2a) and the practice of mitigation.

Another possible way of trying to explain the practice of mitigation, when we have knowledge of can_C and difficult_C, may be by using a retributive argument. For it may be argued by some people that, ceteris paribus, his moral guilt is less if the criminal found

1. See pp. 339-341.

it especially difficult_C though possible_C to conform to the law than if he found it easy_C and possible_C to conform to the law. This may help to explain why, even if those who could_C have conformed to the law but found it especially difficult to do so, should be punished, they should be punished less severely. Though they are morally guilty, their moral guilt is less than the moral guilt of people who can easily conform to the law. On the retributive theory moral guilt is a necessary condition of the morality of punishment, so punishing people who could_C have conformed to the law with special difficulty_C does not violate this necessary condition. However, according to the retributive theory, the degree of moral guilt is also meant to determine the amount of punishment: i.e. ceteris paribus, the greater the moral guilt the greater the amount of punishment. And this can explain why, ceteris paribus,¹ those criminals who could_C have conformed to the law with special difficulty should be punished less severely than those who could_C easily have conformed to the law.²

Such arguments may not be acceptable to non-retributivists. And it should not be forgotten that even among the retributivists

1. The ceteris paribus clause is important, for the retributive theory does not entail that if a criminal could have avoided committing a murder with difficulty_C then he should be punished less severely than a person who could easily have avoided a minor crime.
2. An analogous retributive argument could try to derive principle (2) (or something like it) from retributivist premisses.

there is more than one school, so not every retributivist would agree with the version we have just presented.

However, whether or not one accepts the retributive theory, it does seem true that retributive considerations are at least sometimes used in order to determine what excuses should be allowed. Retributivists still exist in influential and important positions and it would be surprising if the system of excuses did not reflect this fact.

There is, then, more than one way in which we might try to defend the practice of mitigation. But of course whether one accepts such defences will depend not only upon how good the arguments are, but upon how good the premisses are from which one tries to derive the conclusion. Thus if one rejects retributivist principles then such principles cannot be used as premisses in an argument that tries to justify the practice of mitigation.

Also, it should be remembered that 'difficult' has more than one sense, and whether one finds (2a) a good principle may well vary with which sense of difficult we use. Even if people accept (2a) in some of its interpretations it does not follow that they must accept it in some other interpretation. Some people, for instance, may be reluctant to agree that the case for excusing M (or for partially excusing him) is any better than the case for excusing N (or for partially excusing him), even though in a sense M finds it more

difficult to conform to the law than N does. We saw that in another sense M does not find it more difficult; for both M and N can_C conform to the law, and for both the overall cost of conforming to the law is the same. However, others may think that the case for excusing M is greater.

If principle (2a), or any other principle that refers to 'difficulty', is to be workable it should be possible, at least sometimes, to make judgements about difficulty. Now sometimes people are sceptical about whether we can say that one thing is more difficult or harder than another. Whiteley,¹ for instance, had objected to a rationale that I had suggested on the grounds that he does not know how hard it is for a man to do an action. If he is right on this point, it is not just that the rationale I had suggested would not be workable, but also the present system of responsibility will not be workable, for in our present system we do assume or imply that it is possible to talk of how hard it is to do things (cf. the sections of the Homicide Act relating to provocation and diminished responsibility).

But I think Whiteley's scepticism is not wholly justified, for at least sometimes we can say that some things are easier to do than others. Even if we cannot compare the difficulty involved in doing

1. Proceedings of the Aristotelean Society, Supplementary Volume XL.

different kinds of things, we could still apply our rationale in areas where we can make such comparisons. Thus even if Whiteley is right that we cannot compare the difficulties of climbing a steep slope with the difficulties of congratulating a successful rival, we could still say for instance that some cases of provocation could have been avoided more easily than some other cases of provocation. Thus normally people find it more difficult to refrain from violence if they see their wives commit adultery, than if they are told that they are fools.

In fact I think a case could be made for saying that even with regard to different kinds of things that Whiteley mentions such as climbing a steep slope and congratulating a successful rival, and understanding Wittgenstein's Tractatus, it seems possible to make comparisons. It is perhaps true that if we do not know the details of the particular case, then it will be difficult or even impossible to make such comparisons. But certainly of some people it can truthfully be said that they find it much easier to congratulate a successful rival than they do to understand Tractatus Logico-Philosophicus. One could even give rough general criteria to be used in assessing difficulty. For instance, one criterion would be in terms of hypothetical probability statements, e.g. if one wanted to do x , then the less likely one is to do x the more difficult it is for one to do x . This would only be a rough general criterion of difficulty and would need to be qualified and supplemented by other criteria. There is also the complication that there are different senses of 'difficult' and what may be easy in one sense may be difficult in another. For instance there

is a sense in which political criminals like Russell could easily conform to the law, that is if they chose to conform to the law, they would succeed in so doing. But in another sense such people may find it very difficult to conform to our laws. But none of these complications justify Whiteley's extreme scepticism. Though there are different senses of difficult, it is not true that we cannot compare the difficulty involved in doing different actions. Once we specify which sense of difficulty we have in mind we can at least sometimes compare different actions in respect of difficulty.

Similarly with 'can', Whiteley exaggerates the extent to which it varies. Whiteley says that the prosecuting counsel who says, "This woman could have refrained from shoplifting; her husband gave her an adequate housekeeping allowance," and the defending counsel who says, "This woman could not have refrained from shoplifting; she suffers from a compulsive urge to steal," are not contradicting one another. It seems to me that given certain conditions it is quite possible that the two are contradicting one another. It is possible that the prosecution and the defence are using 'can' in different senses. But it is also possible that they may be using 'can' in the same sense and they may be disagreeing about the facts. Thus the prosecution may just deny that this woman's urge to steal is compulsive; he may maintain instead that she could have controlled the urge. And so the prosecution and the defence could be contradicting one another.

We have distinguished some of the different senses of 'can', and also some of the different senses of 'difficult'. And we have tried to see which of the senses are relevant. We think that can_C is the relevant one when we are concerned with whether an individual had a chance to avoid sanctions. Of course when we are ignorant of can_C , we may use can_B and difficult_B as evidence, and when we are ignorant of can_C and can_B , we may use can_A and difficult_A as evidence. But when we have knowledge of can_C and difficult_C , the other senses just discussed are not relevant. It is when we are ignorant of what a man could have done on the particular occasion that it becomes important to find out about his capacities (in general) to do that sort of thing; and when we are ignorant of his capacities, then it may be worth while to resort to our knowledge of the capacities of people in general - i.e. can_A .

Since can_C plays an important role in the system of punishment and moral blame, it might be worth while to say something more about can_C . That it refers to the particular occasion, and not to others, is a necessary but not a sufficient condition of can_C . Even when we are talking about a particular occasion (i.e. about a particular task)¹ we could have different senses of 'can', not all of which are equally important for excuses. So in order to identify the sense of 'can'

1. See p.337, footnote 2.

that is relevant for excuses, it is not enough to say that it applies to the particular occasion and not to others. There are other senses of 'can' that refer to the particular occasion and not to others. For instance, the sense of 'can' that refers to opportunity, as opposed to ability, can refer to a particular occasion. We not only say that some people (in general) have certain opportunities which others do not. We also say, referring to a particular occasion, that a person had a certain opportunity on that occasion, which he may or may not have had the ability to make use of. There is perhaps another, broader, sense of 'opportunity' such that, if a man did not have the ability to do it, it follows that he did not have an opportunity to do it, even if the external conditions were favourable to doing it. Yet there is a sense of 'opportunity' in which we could say of such a man that he had the opportunity but not the ability to make use of it - let us call this sense of 'opportunity' opportunity_E, and the sense of 'can' that corresponds to it, can_E. From the fact that a man could_E have done it on a particular occasion, it does not follow that he could have done it (in the sense relevant for excuses), for he may not have had the ability to do it.

Again there is a sense of 'ability' in which one may have the ability to do something on a particular occasion even though one does not have the opportunity of doing it - let us call this sense of 'ability' ability_F, and the sense of 'can' that corresponds to it, can_F.

It can be seen that can_F too refers to the particular occasion, yet from the fact that a man could_F have done it, it does not follow that he could have done it in the sense relevant for excuses.

It might be argued that can_E and can_F are necessary conditions of can_C . If a man did not have an opportunity to do the thing on the particular occasion, then he could_C not have done it on that occasion; similarly, if a man did not have the ability_F to do it, he could_C not have done it on the particular occasion.

Whether can_E and can_F are sufficient conditions of can_C is not obvious. Thus a dog may have the ability and an opportunity to do a thing, and, though it does follow from this that he can, in a sense, do it, yet it may be argued that there is a sense of 'can' in which grown-up men can do certain things but dogs cannot. If a dog has the ability to fetch the partridge that has been shot, and the opportunity, but does not fetch it, it may still be true that there is an important sense in which the dog could not have fetched it on that occasion.¹

Similarly with some men, they may, in a sense, have the ability and the opportunity to do a thing, but it is still possible that they could not have done it. Suppose Mr. X has the ability to read Great Expectations; suppose he knows English very well, while another man,

1. See Ch. IV, Section III.

Mr. Y, does not know how to read or write, then Mr. X, unlike Mr. Y, is in a sense able to read Great Expectations. And suppose also that there is a copy of Great Expectations lying in front of Mr. X, so that he has also, in a sense, the opportunity to read it. Yet though in a sense he has both the ability and the opportunity to read it, it is still possible that he could_C not read it. For it is possible that he may, for instance, be suffering from a strong pathological aversion to reading Dickens. If so, we can say, not just that he did not read it, but that perhaps he could_C not have read it.

So can_E and can_F may not be sufficient conditions of can_C. But of course much depends upon how we use terms like 'ability' and 'opportunity'. One may say, for instance, that if a man had a strong pathological aversion to reading a certain book, then it was not true that he was able to read it. And if we use 'ability' in this wider sense, it is more plausible to argue that if a man had ability and opportunity to do *x*, then he could_C have done it. Alternatively, one may use 'ability' in the narrower sense but use 'opportunity' in a wider sense. So that if a man is suffering from a pathological aversion to reading it, then he cannot be said to have a real opportunity of reading it, even though the book is lying in front of him. And if we use 'opportunity' in this wider sense, not just in the sense which refers to 'external' conditions, such as the book being there, then again it becomes plausible to argue that if a man had an ability

and an opportunity to do a thing, then he could_C have done it.

We have been talking about identifying the sense of 'can' that is relevant for excuses. But such talk can be a little misleading. It may suggest that only one sense of 'can' is relevant, and all the others are irrelevant. In fact the other senses are not always irrelevant. Thus what a man can_B do is often good evidence regarding whether he could_C do it; again can_E can be relevant. Thus if a man does not have a certain opportunity, if he could_E not have done it, this is a good reason for saying that he could not have done it in the sense relevant for excuses.

Since the other senses of 'can' that we have been discussing in this section¹ are not all irrelevant for excuses, in what way is can_C more important for excuses? I think one answer to this is that, ideally, when can_C is known to conflict with any of the other 'cans' that we have been discussing in this section, can_C should be the one that is relevant for excuses. Since this is so, there is a sense in which can_C is more important for excuses than can_A, can_B, can_E and can_F.

Thus, suppose a man could_E have done a thing, but could_C not have done it, we tend to excuse him, even though he could_E have done it. For instance, if a man has an excellent opportunity which he does not

1. I.e., can_A, can_B, can_E and can_F.

have the ability to make use of, we do not blame him, for he could_C not have done it.

Similarly if we know that a man can_B do it, but could_C not do it, then again we tend to excuse him. And again if we know that a man cannot_C do it, but people can_A do it, then again it is can_C that is relevant to whether than man should be excused. It might be objected, however, that if an individual was supposed to do the relevant action at time *t*, then, even if at time *t* he could_C not have done the relevant action, it does not necessarily follow (not even ideally) that he should be excused. For it may be that he could have done some relevant things in the past (i.e. before time *t*) as a result of which he would at time *t* have been able to do the relevant action. Suppose a person does not do a task *x*, because he is in bad form, so that, given that he is in bad form, it may be true that at that late stage he could_C not do task *x*. Yet it may be that his bad form at that time is attributable to his drinking too much earlier which he could_C have avoided.

It does not follow from the above considerations that can_B is more important for excuses than can_C. Rather, what follows is that we may have to take into account not only what the agent could_C have done at time *t*, but also we may have to take into account whether he could_C have done something relevant in the past (e.g. refrain

from getting drunk).¹

Although we have argued that ideally can_C is more relevant than can_B and can_A , one may, for pragmatic reasons, have a system of objective liability, or even if we do not have a complete system of objective liability, we could have elements of it. In our legal system we often (for pragmatic reasons) neglect individual idiosyncrasies. Thus suppose X killed his wife's lover twenty days after he discovered them in bed together, then this is no excuse. But if he had shot him immediately, his chances of being excused from murder would have been much better. This practice is based on the fact (or belief) that most people find it easier to control themselves the more the time that has elapsed since they were provoked. However, a particular man on a particular occasion may find that since the act that provoked him, the more the time that elapses the more worked up he gets; instead of his passions cooling down with time, he finds that the nature of the act takes some time to 'sink in'; the more the time that elapses the more worked up he gets, until he explodes and shoots his wife's lover. Yet the law will not take account of his idiosyncrasy (for pragmatic reasons). That the law does not always take into account individual idiosyncrasies can be seen, for instance, by studying Bedder v. D.P.P. (1954).²

1. See also p 369 and appendix A.

2. [1954] 38 Cr. App. R. 133.

III

One of the reasons why it is worth distinguishing different senses of 'can' is that it helps us to decide whether a particular sense of 'can' is relevant for excuses. This can be illustrated by an example that Austin gives:

discussing →

Consider the case where I miss a very short putt and kick myself because I could have holed it. It is not that I should have holed it if I had tried: I did try, and missed. It is not that I should have holed it if conditions had been different: that might of course be so, but I am talking about conditions as they precisely were, and asserting that I could have holed it. There is the rub. Nor does 'I can hole it this time' mean that I shall hole it this time if I try or if anything else: for I may try and miss, and yet not be convinced that I could not have done it; indeed, further experiments may confirm my belief that I could have done it that time although I did not.

But if I tried my hardest, say, and missed, surely there must be something that caused me to fail, that made me unable to succeed? So that I could not have holed it. Well, a modern belief in science, in there being an explanation of everything, may make us assent to this argument. But such a belief is not in line with the traditional beliefs enshrined in the word can: according to them, a human ability or power or capacity is inherently liable not to produce success, on occasion, and that for no reason (or are bad luck and bad form sometimes reasons?).¹

1. Philosophical Papers, p. 166, footnote 1.

Now here it seems that the sense of 'could' in which the golfer could have holed his putt is not the one that is relevant for blame and punishment. (I shall not here go into the question of whether Austin thought it was the relevant sense. But it is interesting to note that the golfer does kick himself.) If the golfer tried his hardest and missed, then there is a sense in which he could not have holed it.

Austin seems to think that the argument to show that the golfer could not have holed his putt would be as follows: (a) If he tried his hardest and failed, therefore (b) there must have been something that caused him to fail, therefore (c) he could not have holed it.

Now Austin points out that (b) does not automatically follow from (a). And he points out that (b) may follow from the truth of (a), if we also make certain assumptions which are incompatible with the "traditional beliefs enshrined in the word 'can'".

I think that Austin may be right that (b) does not automatically follow from (a). But it seems to me that he attaches too much importance to this point. He seems to think that one needs to establish (b) in order to derive (c). But this is not so. One could bypass (b) altogether. The argument could be: He tried his hardest and failed. Therefore, he could not have holed his putt. (This sense of 'could have' corresponds to can_C . Let us call it 'could have_C').

It refers to the particular situation.) It is true that in another sense he perhaps could have holed it, i.e. he usually succeeds in holing it on similar situations. (This sense of 'could have' corresponse to can_B . Let us call it 'could have_B'.)

The expression 'he tried his hardest' is ambiguous. In one sense of trying his hardest, if he tried his hardest and failed it does not follow that he could_C not have done it. For in this sense of trying one's hardest it is possible that he tried too hard; had he tried a little less hard, had been a little less excited, and more calm, etc., then he would have done it. And it is possible that it was in his power to have tried less hard, to have been more calm, etc.

If, however, by 'trying his hardest' we mean something like 'trying his best' then from the fact that he tried his hardest and failed, it does follow that he could_C not have done it. Or, if we may use some jargon, we could explain this sense of 'trying his hardest' in terms of his making the optimum effort that was in his power to make. If a man tried his hardest in the sense that he made the optimum effort that was in his power to make, and failed, then it follows that he could_C not have done it.¹

1. Though 'he tried in the sense that he made the optimum effort and failed' is a sufficient condition of 'he could_C not have acted otherwise', it is not a necessary condition of 'he could_C not have acted otherwise'. It is possible that a man never tried at all, and yet could_C not have done it.

Sometimes a man may not seriously desire to succeed, he may make the attempt and fail. It would be wrong to infer from the fact that he attempted or tried and failed, that therefore he could not have done it. For it may be that it was within his power to have a greater desire or will to succeed, and perhaps if he had a greater will to succeed he would have succeeded. So it is not obvious that he could not have done it. But this is not really an objection to saying that if a man tried his hardest and failed then he could not have done it. For if he did not seriously desire to succeed, and if it was within his power to seriously desire to succeed, then he did not try his hardest.

Some activities, of course, are so easy to carry out (e.g. raising one's arm, under normal circumstances) that it is odd to talk of trying to do them. This is consistent with the view that in those areas where we do talk of trying to do the thing in question, if a man tried his hardest and failed then he could not have done it.

Another objection against the view that if a man tries his hardest and fails then he could not have done it, is this. A man may not succeed in doing a thing even if he tries his hardest; yet he may be able to do it without any trying, by sheer luck. So it would be wrong to infer that he could not do it. The golfer who begins golf might try his hardest, and fail to get a hole in one; one cannot, however, infer that he could not get a hole in one. For it is possible

that, without any serious trying, if he had taken a wild swing (and there was nothing to prevent him from taking a wild swing) he might have been lucky and got the hole in one.

What are we to make of this argument? I think that we again need to distinguish different senses of 'can'. It is true that in some senses of 'can', even if a man has tried his hardest and failed, it does not follow that he could not have done it. But in another sense of 'can' it does follow and it is this latter sense of 'can' that is the relevant one for excuses. For suppose it is true that if the golfer had taken a wild swing, he could have holed it, and supposing there was nothing to prevent him from taking a wild swing. Then in a sense it is true that he could have holed his ball in one. But suppose he tries to hole it in one, takes a less wild swing, and does not hole it in one, we cannot blame him for he can truthfully say: 'I did not know how to hole it in one, so I could not have done it. Perhaps you are right that if I had taken the wild swing, I would have holed it and in a sense it is true that there was nothing to prevent me from taking a wild swing. But I did not have the slightest reason to think that I could have got a hole in one in that way. So I could not have done it, except by chance or luck. But since I was not lucky, I could not have done it. From the fact that if I was lucky, then I could have done it, it does not follow that I could have done it, whether or not I was lucky. For if luck was not on my side, then

I could not have done it" (in the sense that is relevant for excuses).

So if a man tries his hardest and fails, he could not have done it (in the sense of 'could have' that is relevant for excuses).

Austin thinks he could have done it. There may of course be other senses in which he could have done it. One of these other senses is the sense which refers to what he can do in general (i.e. normally); we have called this sense 'could_B'. Now we saw that what a man could_B do is often relevant to excuses; often we do not know whether he could_C have done it, and so we rely on our knowledge of could_B. But if and when we do know whether he could_C have done it then we do not need to appeal to could_B. Just as (as we saw earlier) if a Japanese and an American are coming to a party, and if you know that the Japanese is taller than the American, then it would be foolish to argue that the American is likely to be taller because Americans usually are taller than Japanese. So also if and when we know that a man could_C not have done the action (because we know he tried his hardest and failed), then it would be foolish to argue that: "It is likely that he could_C have done it, because he usually succeeds in doing it when he tries." This is not to deny that if the golfer does not try his hardest, but tries less than his hardest, and fails, then it may be plausible for him to argue, "Further experiments may confirm my belief that I could have done it that time although I did not." This is true when we are talking about could_C. When we talk about

could_B, further experiments may not just confirm but could prove that he had the capacity to do that sort of thing. Indeed, even if he tried his hardest and failed, further experiments could prove that he could_B do it.

To conclude this part: If he tried his hardest (in the sense of optimum) and failed, then he could not have acted otherwise (in sense_C). But at least often when a man fails to do something we do not know whether he tried his hardest, and so it may become relevant (from the point of view of excuses) to find out what he does in other similar situations.

Some people have said that 'he can' means the same as 'he will if he tries'. There are perhaps some good objections to this equation. But I am not defending this equation. I am defending a weaker thesis, viz., that if a man tries his hardest and fails, then he could not have done it. This weaker thesis does not entail the view that 'he can' means the same as 'he will if he tries' (though it is true that the view that 'he can' means the same as 'he will if he tries' does entail the weaker thesis that I am defending). There may be some objections to saying that 'he will if he tries' implies 'he can'.¹

1. Thus the statement 'he could not have tried to do it' (if we allow sense to such a statement) may be inconsistent with the statement that he could do it, but consistent with the statement that 'he would do it, if he tried'.

But these are not objections against the view that if a man tries his hardest and fails then he could not have done it.

There is the complication that it is possible that the golfer at the time he is playing could_C not have holed the ball, but it is possible that this was due to his own fault earlier on, e.g. if he was in bad form because he had drunk too much before the match. So, given his bad form, he could_C not have holed it; yet in an important sense he could have holed it if he could have done some relevant things earlier on, such as not drinking too much. However, such considerations do not show that can_C is not the relevant 'can', but just that we may have to take into account not only what our golfer could_C have done at the time when he was performing but also whether there was something relevant that he could_C have done earlier on.¹

We have discussed which of the senses of 'can' is relevant for excuses (from moral blame or punishment). Nowell-Smith rightly stresses that we should use the sense of 'can' that is relevant for excuses. But his sense of 'can' is not the relevant one either, for, as we saw earlier, he subscribes to the thesis that 'he could not have acted otherwise' is not a reason for excusing a person but that we say 'he could not have acted otherwise' because we want to excuse the person.

1. See pp. 360-361

One ought to distinguish being relevant from being derivative. Nowell-Smith is quite right that we should use the sense of 'can' that is relevant for excuses, but he is wrong in thinking that the sense of 'can' that is relevant for excuses is the sense that is derivative from excuses. For as we have seen, by making 'can' derivative from excuses, 'can' ceases to play the important role that it is meant to play in the present system.

In this chapter we have distinguished different senses of 'can' and what we have said here can be integrated with what was said in Chapter VII. There we argued that if a man could_Y not have avoided committing the crime then this tends to excuse: that a man could_Y not have avoided the committing of the crime meant that there was no method of avoiding the crime that the man could and should have used. We can now suggest that it should (ideally) be interpreted as meaning that there was no method of avoiding the committing of the crime that he could_C and should have used. Similarly, that a man could_Y have avoided committing a crime should mean that there was a method of avoiding the crime that he could_C and should have used.¹

A similar analysis of can_C can be given. For we saw that if a man could_C have done a thing it means that there was a good method

1. This suggestion would amount to interpreting can_X (see pp. 254-5) to refer to can_C.

of doing it that he could have used; and if a man could_G not have done a thing it means that there was no good method of doing it that he could have used. Now we can say that it is can_C that is (ideally) the relevant one, i.e. to say that a man could_C do a thing is equivalent to saying that there was a good method of doing it that he could_C have used. And principle 0 can be stated as follows: It is an evil if there was no good method of avoiding losses that people could_C have used. We have seen earlier that can_C refers to the capacity of the individual on the particular occasion and includes both ability (on the particular occasion) and opportunity (on the particular occasion).

Similarly to say that a man could_Z have done something can be understood to mean that there was a non-bad method of doing it that he could_C have used.

In fact, we could also have quite a few permutations and combinations with the different senses of 'can'. Thus can_{ZB} could refer to the capacity_B to do the relevant thing by using a non-bad method. Similarly we could have can_{GB} and can_{YB}.

Again we could have can_{ZA}, can_{YA}, and can_{GA}. Can_{ZA}, for instance, would refer to ^{people's} ~~the~~ capacity to do the relevant thing without using a bad method. It is possible that a mountain can_A be climbed, but it cannot_A be climbed without using a bad method (such as losing lives), i.e. it cannot_{ZA} be climbed. This is just an example to show the sort of way in which these terms may be applied.

APPENDICES
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APPENDIX A

In Chapter Three I used two tests in deciding whether a man could have helped his criminal actions. I appealed not just to how far a man could have acted otherwise at the time of committing the crime, but also to whether he could have done things in the past which would have prevented him from becoming a criminal later. Aristotle would have broadly agreed with this procedure. My main criticism of Aristotle was that he had wrongly applied these tests [e.g. he thought that all except the thoroughly senseless could have (in the past) helped acquiring wicked characters] not that he did not believe in these tests.

But Nowell-Smith has a more radical criticism against Aristotle's approach. He seems to think that Aristotle's appeal to what we could have done in the past is bound to lead us into inextricable difficulties. If Nowell-Smith is right, then I have been mistaken in appealing to how far we could have helped things in the past.

But I think Nowell-Smith's radical criticisms of the method of appealing to the past in order to decide issues of responsibility are not valid.

Nowell-Smith confuses the thesis of libertarians, that to be free an action must be uncaused, with the thesis that we can often hold people responsible for getting into a muddle, even when once they have got into the muddle, they could not do much about it. (Even if Aristotle did believe in both these theses and confuse them with each other, yet it is valuable to distinguish them.

Even if a search for uncaused actions does lead into inextricable difficulties, it is not obvious why we must cease to appeal to what we could have done in the past). Nowell-Smith then argues that a search for an uncaused action will lead us into inextricable difficulties. "You say that blaming me for doing x [now] is really blaming me for having done y and z [in the past]. Now apply the same argument to y and z and see where it leads you. Furthermore my ignorance at the time of doing y and z which, according to you, is the real source of the trouble, was not my fault either. My father did not have me properly educated. Blame him, if you must blame somebody; but he will offer the same reply as I have done, and so on ad infinitum ... if we proceed on the assumption that, to be moral, an action must be uncaused, either we shall find a genuinely uncaused action at the beginning or we shall not. If we do not, then, according to the libertarian, there can be no moral praise and blame at all (and it was to account for these that Libertarianism was invented); and if we do, we must suppose that, while almost all our actions are caused, and therefore amoral, there was in the distant past some one action that was not caused and for which we can be justly praised or blamed. This bizarre theory has in fact been held; but the objections to it are clear. We praise and blame people for what they do now, not for what they might have done as babies ..."¹

Now, of course, Nowell-Smith is quite right that we do not praise and blame men for what they might have done as babies; and if we were to adopt this strange practice, it would be most unjust.

¹ Mind. 1948. p. 51.

For people could not have helped what they might have done as babies. But why must an appeal to what we could have done in the past lead us into accepting this bizarre theory? To take into account how far one could have helped things in the past does not necessarily involve accepting the crude libertarianism that Nowell-Smith criticizes, any more than taking into account how far the criminal could have helped things at the time of committing the crime entails such libertarianism. If we allow that some actions can be helped at the time of committing the crime, then it seems odd to deny that some other actions, which could not be helped at the time of doing the act, could have been avoided in the past. What is absurd is the following thesis: ^{that} we can never help things in the present, that all our present actions are the inevitable consequences of and constrained by our past actions, and that we are only responsible for what we did in the past. This thesis is absurd because the 'past' too was at one time 'present', and if all present actions are the inevitable consequences of and constrained by earlier ones, then to be consistent we must agree that the past actions too were just as much constrained as the present ones are.

But our thesis was not that no one can help things in the present, but that some people cannot, and of these some may still be held responsible if they could have helped things in the past. Nor did Aristotle say that we can never help things in the present. It is true that he said about the unjust and the self-indulgent that once they have become so 'it is not possible for them not to be so.'

But there are, according to Aristotle, other wrongdoers who can help things in the present - some incontinent people would fall into this category. Aristotle is not saying that blaming me for doing x [now] is always really blaming me for having done y and z [in the past].

We have seen that to take into account how far things could have been helped in the past, does not involve the assertion that we can never help things in the present. We admit that sometimes people can help things at the time of committing the crime and this is relevant to issues of responsibility. The test that is concerned with how far we could have helped things in the past, does not replace the inquiry into how far we could help things in the present; it is an additional test that is to be used before we can say that a man could not have helped what he did. So by having this additional test, the result is that fewer people¹ would be excused than if we only inquired into how far the criminal could have helped things at the time of the crime. So Nowell-Smith is wrong in thinking that by appealing to how far people could have helped things in the past, we would be committed to excusing everyone. We certainly would not be committed to excusing more people than if we did not have this additional test.

¹ Though not as few as Aristotle thought. He wrongly thought that very few people (only the thoroughly senseless) would be excused.

APPENDIX B

We examined earlier¹ some cases that helped to show that 'can' plays a widespread and important role in our system of excuses. But we decided to relegate to an appendix some of the other cases (from some of the other parts of the law regarding excuses) that also help to reinforce our point that 'can' plays an important and widespread role in our system of excuses. We shall now give some more illustrations, though these illustrations, even when taken together with the ones we gave in the text, do not by any means give a completely exhaustive account of the role of 'can'.

We shall resume our illustrations with the law regarding inadvertence and negligence. In R. v. Dalloway, for instance, "The prisoner was indicted for the manslaughter of one Henry Clarke, by reason of his negligence as driver of a cart.

It appeared that the prisoner was standing up in a spring cart, and having the conduct of it along a public thoroughfare. The cart was drawn by one horse. The reins were not in the hands of the prisoner, but loose on the horse's back. While the cart was so proceeding down the slope of a hill, the horse trotting at the time, the deceased child, who was about three years of age, ran across the road before the horse, at the distance of a few yards; and one of the wheels of the cart, knocking it down and passing over

¹ See pp 224-233.

it, caused its death. It did not appear that the prisoner saw the child in the road before the accident.

Spooner, for the prosecution, submitted that the prisoner, in consequence of his negligence in not using reins, was responsible for the death of the child.

Erle, J., in summing up to the jury, directed them that a party neglecting ordinary caution, and, by reason of that neglect, causing the death of another, is guilty of manslaughter; that if the prisoner had reins, and by using the reins could have saved the child, he was guilty of manslaughter; but if they thought he could not have saved the child by pulling the reins, or otherwise by their assistance, they must acquit him. Verdict, not guilty."¹

This case was in 1847. Nowadays motor-cars tend to take the place of horse carts, but the role of 'can' remains important, as we saw earlier in discussing R. v. Spurge.²

That 'can' plays an important role in understanding 'negligence' can also be seen by studying R. v. Bourne: "... a person who holds such an opinion ought not to be an obstetrical surgeon, for if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of his

¹ Turner and Armitage, Cases on Criminal Law (Third Edition), pp. 216-217. Italics mine.

² See p. 231

religious opinions and the woman died, he would be in grave peril of being brought before this court on a charge of manslaughter by negligence. He would have no better defence than a person who, again for some religious reason, refused to call in a doctor to attend his sick child, where a doctor could have been called in and the life of the child could have been saved."¹

Another sphere where 'could have acted otherwise' plays an important role is the law regarding self-defence. For instance in R. v. Smith it was made clear by Bosanquet, J., that before a man can avail himself of self-defence "he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger."²

There are two points here. First, according to Bosanquet, J., the onus of proof is on the defence. Where the burden of proof is, is, as we have said earlier, a matter of legal policy. It seems that nowadays the legal policy is different from the policy of Bosanquet, J.

But the second point, which is the point that is relevant for our purposes, that emerges from this example, is that if the

¹ [1939] 1 K.B. 687. Italics mine.

² R. v. Smith (1837) 8 C & F 160.

accused could have saved his own life without killing his assailant, he is not to be acquitted on grounds of self-defence. Whether the onus is on him to show that he could not have saved his own life without killing his assailant or whether it is up to the prosecution to show that he could have avoided saving his own life without killing his assailant, is a separate matter. As we said, it is a matter of legal policy.

Again take the defence of duress. Here again it can be seen that a term like 'could' plays an important role. For a case of duress as we saw earlier is not supposed to excuse if the accused could have, for instance, fled from the wrong-doer. This can be seen, for instance, by studying what Chief Justice Lee directed the jury in the M'Growther case.¹ The important role of 'could' can again be seen by examining R. v. Gill (1963). In that case Edmund Davies, J., at the request of Lord Parker, C.J., read the following: ".... The account given by the appellant himself makes it very doubtful whether such a defence (i.e. Duress) was strictly open to him, inasmuch as there was a time after the alleged threats when, having been left outside his employer's yard and having then entered it, he could presumably have raised the alarm and so wrecked the whole criminal enterprise. In M'Growther's Case, Lee, L.C.J., directed the jury that to establish a plea of duress, the defendant must have resisted or fled from the wrongdoer if that were possible." ²

¹ Turner and Armitage, Cases on Criminal Law (3rd Edition) p.71-72.

² R. v. Gill [1963] 2 All E.R. 688. Italics mine.

So here it can be seen that to understand the term 'duress', we appeal to the term 'could'.

Again 'can' is needed to understand the defence of necessity. This can be seen, for instance, from the following example from Glanville Williams: "Suppose that a dog is discovered in pain, and nothing can be done to save it from extreme suffering except by killing it. The killing might well be justified by necessity, even though it takes place without the consent of the owner."¹

The role of 'can' can also be seen in discussions about whether economic necessity should be allowed as an excuse. Hobbes thought that under certain conditions, economic necessity should be allowed as an excuse: "When a man is destitute of food, or other things necessary for his life, and cannot preserve himself any other way, but by some fact against the Law; as if in a great famine he take the food by force, or stealth, which he cannot obtain for money nor charity he is totally excused"²

It seems that 'can' still plays an important role in the law about excusing on grounds of economic necessity (as it does with other kinds of necessity). "In another case a large number of unemployed persons demonstrated before a Red Cross Commissary for a greater allowance of flour than the relief committee was providing. This being refused, they went to the committee's

¹ The Criminal Law, p.729. Italics mine.

² Leviathan, Ch. 27. Italics mine.

storehouse and took some groceries. The court held that such 'economic necessity' was no defence. It was not clarified that the defendants were in any danger of starvation or even that they were hungry, nor did it appear that additional food could not be obtained elsewhere or by other means. The situation therefore lacked any of the requirements of a 'state of necessity ...'.¹

Similarly, with the defence of 'impossibility' (i.e. impossibility to conform to legal duty) it seems that a term like 'can' is required in order to understand that defence. Thus in Commonwealth v. Brooks, where the defendant was charged with illegally permitting the vehicle to remain in the street for more than twenty minutes, the defendant was acquitted; Judge Bray said, "the defendant ... was delayed by the crowding of other vehicles which he could not control."²

To understand the defence of impossibility, one also needs to understand 'fault'. For impossibility resulting from the accused's own fault (at an earlier stage), is no excuse.³ And so here is another way in which 'can' is an important determinant of the defence of impossibility. For 'can' is one of the determinants of fault, as we said earlier.⁴

¹ J. Hall, General Principles of Criminal Law, p.427. *Italics mine.*

² J. Hall, p.423. *Italics mine.*

³ Glanville Williams, p.747.

⁴ See pp. 230 - 232.

Again in order to understand the excuse of drunkenness, a term such as 'can' or 'voluntary' seems to be required. For not all cases of drunkenness excuse. Sometimes one of the things that determine whether or not drunkenness is to excuse, is whether the agent got drunk voluntarily. In Reniger v. Fegessa, which Hall describes as the first English report on drunken homicide, it was said that although the defendant "did it through ignorance ... that ignorance was occasioned by his own act and folly and he might have avoided it ..."¹. And such terms are used to evaluate and criticize the law about drunkenness. Thus Glanville Williams points out, "Still another situation for which a sound penal theory should provide is where the offender is an alcohol addict. He may have become predisposed to this through some injury that was not his own fault, such as a blow on the head; or he may be congenitally prone. In either event it is unrealistic to say that on the occasion in question the getting drunk was his voluntary act, in the sense that it was something he could have avoided."²

Of course, in order to understand how far drunkenness is a defence, we shall need to refer to other things besides 'can' and 'voluntary' (e.g. was he so drunk as to be incapable of forming the intent required for crimes such as larceny and murder?).

¹ J. Hall, p.538.

² Criminal Law, p.561. Italics mine.

But we are only saying that these terms are one of the determinants of the excuse of drunkenness.

Next let us see briefly the excuse of 'Infancy'. One reason why children below a certain age should not be punished is that they do not have the ability to distinguish between right and wrong. Another reason is that their capacity to resist temptations is not well-developed.¹ So here again it seems that terms like 'capacity' and 'ability' are required to understand the defence of 'Infancy'. Of course there may be other reasons why infants should not be punished. But to acknowledge the presence of these reasons would not contradict principle (2) (on pp. 219-220).

That the term 'capacity' plays an important role in understanding the defence of infancy can be seen, for instance, by examining R. v. Owen. In that case Littledale, J. (in summing up) said, ".... whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know that it is wrong ...".²

This presumption can, of course, be rebutted if certain evidence is forthcoming; but it does seem that 'capacity' ^{plays an important role} ~~is wearing the trousers~~. Capacity is also used to evaluate the law regarding

¹ See Fitzgerald, Criminal Law and Punishment, p.129

² [1830] 4 C. and P. 236.

infancy as an excuse, e.g. we sometimes criticize legal systems that punish children at an age when their capacity to conform to the law is not well developed.

Similarly, 'can' is sometimes used to evaluate the rule that ignorance of the law should not be allowed as an excuse. It is sometimes argued that ignorance of the law should sometimes be allowed as an excuse. For it is argued that sometimes people just could not have known the law. Justice Devlin says: "The annual output of statutes, statutory regulations, by-laws, could not be read, let alone understood, by any single individual if he did nothing else for the whole year."¹

There are some areas where the law is so uncertain or obscure that there is no way of clarifying it short of a court decision. And it is sometimes argued that in such cases ignorance of the law ought to be made an excuse. For if someone was ignorant of such a law, before it was clarified, it was not his fault, he could not have known of it until it was clarified. And, in fact, if and when people in such circumstances are punished, the penalty tends to be nominal.²

Even when the law is clear, there is at least in some cases good evidence to show not only that the accused did not know the law, but could not have known it (except perhaps by methods that

¹ The Times, 19th April, 1967. Italics mine.

² Fitzgerald, Criminal Law and Punishment, p.129.

he is not required to use). This can be seen by examining R. v. Bailey. In R. v. Bailey the judges actually recommended that the accused should apply for a pardon. "The prisoner was tried before Lord Eldon, at the admiralty sessions, on an indictment for wilfully and maliciously shooting at Henry Truscott. This was an offence under 9 Geo. I, c.22; but the Act enabling such an offence committed on the high seas to be tried in England was the Act of 39 Geo. III, c.37, passed when the prisoner was on the high seas, at a time when he could not have known that the Act existed. All the judges (except Mr. Justice Butler) were of opinion that it would be proper to apply for a pardon, on the ground that the fact having been committed so short a time after the Act, 39 Geo. III, c.37 was passed, the prisoner could not have known of it."¹ Here it is true that the prisoner could have known of the Act had he remained in Britain and not gone to the high seas. But this method of avoiding the crime is not relevant, since we are not prepared to say that people should use this method.

We have seen that ignorance of the law is normally no excuse, but if a man is ignorant of the law as a result of defect of reason due to disease of the mind, then under the M'Naghten Rules he will be excused.² It seems that one of the rationale of this is that

¹ R. v. Bailey. [1800] R. and R. I. Italics mine. See also Lim Chin Aik v. The Queen. [1963] A.C. 160.

² Unless, according to some authorities, he knew that the act was immoral.

when the man is suffering from a defect of reason due to disease of the mind, then there is more reason to think that the ignorance of the law could not have been avoided.¹ It is true that sometimes sane people, too, could not avoid being ignorant of the law, but other things being equal, if a sane man and an insane man are both ignorant of a particular law, the chances are more that the insane man could not have avoided his ignorance than that the sane man could not have avoided his ignorance.²

¹ See Ch. IV, p.105.

² In R. v. Windle [1952] 2 Q.B. 826, Devlin, J., said that 'wrong' in the M'Naghten Rules means 'contrary to law'.

APPENDIX C

I

Utilitarians sometimes argue that once we agree that utility is all we ultimately care for, we can by-pass all talk of terms like 'free-will' or 'he could have helped it'. Lady Wootton sometimes takes this position. So did Bentham. "The reason that is commonly assigned for establishing an exemption from punishment in favour of infants, insane persons, and persons under intoxication, is either false in fact, or confusedly expressed. The phrase is, that the will of these persons concurs not with the act; that they have no vicious will; or, that they have not the free use of their will. But suppose all this to be true. What is it to the purpose? Nothing: except in as far as it implies the reason given in the text."¹ (Or alternatively, some utilitarians, like Newell-Smith, seem to agree that terms like 'could have helped it' are relevant but they define such concepts in terms of utility, and these terms play a redundant role in their system.)

Critics of utilitarianism have pointed out that utilitarians are wrong in not bothering about whether a person could have helped what he did. Thus Hart² gives some good reasons why we should have

¹ Principles of Morals and Legislation, Ch. 13, para.9 footnote.

² See Prolegomenon to the Principles of Punishment.
Also see Legal Responsibility and Excuses.

a system of excuses where we do bother about whether a person could have helped what he did. But Hart seems to agree with the utilitarians such as Bentham and Lady Wootton that if utility is all we ultimately care for, then we should by-pass the problems about whether a person had free-will, or whether he could have helped what he did. That is perhaps one, though not the only, reason why Hart seems to think that since he has given reasons for not by-passing talk of 'capacity', therefore he has given reasons to show that the principle of utility needs to be qualified. This inference is invalid.¹ For it may be that terms like 'could have helped it' ought to be relevant to our system of excuses, that a system of excuses by retaining such terms promotes certain values, and that the promotion of these values is something that is quite consistent with the principle of utility. To say this is, of course, not to accept Newell-Smith's position according to which terms like 'he could have helped it' are defined in terms of utility. The principle of justice that contains 'can' may be justified in terms of utility. It does not follow that utility is the criterion of 'can'.

It is true that historically some utilitarians such as Bentham and Lady Wootton have thought that no utility is gained by bothering about whether a person had 'free-will' or 'could have helped what he did'. Some of these utilitarians have tended to treat law as

¹ To say this is not to deny that Hart may have some other good criticisms of the principle of utility.

a system of threats and stimuli. "The immediate principal end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it controls by its influence, either on his will, in which case it is said to operate by way of reformation; or on his physical power, in which case it is said to operate by disablement; that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of example ..."¹. But it is not obvious why utilitarians must treat the law purely as a system of stimuli and neglect the values that are promoted by not by-passing terms like 'he could have helped what he did.'

We are not saying that there are no good criticisms against the principle of utility, nor that the principle of utility is the only ultimate principle. But it seems to us that even if the principle of utility is accepted, it is not at all obvious that 'can' should always² be by-passed.

II

Professor Hart³ has suggested that the law is like a costing

¹ Op. cit., Ch.13, para. 2, footnote.

² The acceptance of the principle can of course sometimes lead to the by-passing of 'can', e.g. for utilitarian reasons we may sometimes require strict liability.

³ See S. Hook (ed.), Determinism and Freedom, pp. 81-104.

system. This theory of his is meant to explain why we should not 'pick up' people until they have done the actus reus. It is also meant to explain why we should not have a system of mass hypnosis, social conditioning, etc. And it is also meant to explain why we should have a system where it is relevant to inquire into whether the criminal could have helped what he did. "He can weigh the cost to him of obeying the law - and of sacrificing some satisfaction in order to obey - against obtaining that satisfaction at the cost of paying "the penalty". they [i.e. the excusing conditions] are regarded as of ^{moral} importance because they provide for all individuals alike the satisfactions of a costing system."¹ "Its primary operation consists simply in announcing certain standards of behaviour and attaching penalties for deviation and then leaving individuals free to choose."²

In order to assess the view of the law as a costing system, it is worth distinguishing two principles:

Principle A₁ - We should restrict punishment to those who have had a fair opportunity of obeying the law.

Principle B - We should restrict punishment to those who have had a fair opportunity of (i) obeying the law and of (ii) disobeying the law.

Sometimes Hart seems to advocate principle A₁; but sometimes, for instance when he talks of the law as a costing system, he seems

¹ Op. cit., pp. 99-100.

² Laslett (ed.), Philosophy, Politics and Society, Second Series, p.178.

to advocate principle B which is stronger than principle A_1 .

But are not A_1 and B the same in practice? For how can we give individuals the opportunity of obeying the law without also giving them the opportunity of disobeying it? The answer to this is that A_1 and B are not the same; that B entails A_1 , but not vice versa. Perhaps an example will make it clear that A_1 and B are not the same. If I deliberate between obeying the law and breaking it and come out in favour of breaking it, then if the State thwarts or forestalls my plan, it follows that I have not had a fair opportunity of breaking the law. But I cannot infer that I have not had a fair opportunity of obeying the law, unlike the case of my breaking the law by say, accident or mistake, where I did not have a fair opportunity of obeying the law.¹

Often to attempt a crime is itself a crime. Suppose I try to murder A, and fail (e.g. because the State thwarts my plans) I may be charged with attempted murder. Yet here I have not had a fair opportunity of disobeying the law² about not murdering A. Hence according to principle B I should not be punished. I have not been able to take advantage of the costing system. Admittedly, I did commit the crime of attempting murder, but that was not what I tried to commit; I tried to murder, not to attempt murder. When

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We have seen in Ch. VII that even the 'fair choice' principle can be improved upon. But principle A_1 (i.e. the fair choice principle) does seem to be superior to principle B.

²I did, it is true, have an opportunity of trying to disobey the law. But I was not given the advantages of the costing system.

I am punished for attempted murder the penalty may not correspond to any satisfaction that I get.

The practice of punishing attempts is incompatible with principle B, but it is compatible with principle A_1 . For from the fact that I was not allowed to complete the crime, it does not follow that I did not have a fair opportunity of obeying the law. The law then, at least with regard to serious crimes, seems more different from a costing system than Professor Hart suggests. And it is significant that in those cases where individuals are not given the advantages of a costing system (e.g. in attempts) we do not feel any particular qualms about it. No doubt, some of us may believe that punishment is never morally justified, and many of us may believe that punishment is at best a necessary evil; but none of us find the practice of punishing attempts (at any rate with regard to serious crimes) to be any more odious than the practice of punishing completed crimes.

Since we do not feel any particular qualms when individuals are not given the advantages of a costing system, it follows that we could not in such cases believe that the law ought to provide individuals with the advantages of a costing system.

Again sometimes when the State has some reason to suspect ^{that} X's life is in danger from Y, the State may take measures to protect X, and so prevent Y from carrying out his plan. When such protection is successful Y may not even be able to attempt the murder. So here clearly Y is not being given the advantages of a costing system.

And we do not feel we have sacrificed any principle by not giving Y such advantages. Hart is aware that the law does have a normative function. He thinks it guides us, but leaves us free to choose between obeying and disobeying it. In fact, however, the State does more than just guide us. It sometimes actually prevents us from committing the crime, and so deprives us of the advantages of the costing system.

Perhaps it is the failure to distinguish between principles A_1 and B that makes Hart's case for the law as a costing system look stronger than it is. For Hart rejects, rightly I think, the retributivist view that regards punishment as a justified return for moral evil. He also does not like to accept the Benthamite theory (which treats law as a system of threats and stimuli) in an unqualified form. So he believes that the solution to the problem lies in accepting the Benthamite theory in a qualified form, qualified by certain principles. But even if something like principle A_1 is one such principle, principle B (which is entailed by the view that law is a costing system) is not one of the principles that qualifies the Benthamite theory, at any rate with regard to serious crimes.

Another motive that Hart has for regarding the law as a costing system is this: Though this attitude that the law is a costing system may sound cold and immoral in good societies, it "seems repellent only if we assume that all criminal laws are ones whose operation we approve. To be realistic we must also

think of bad and repressive criminal law."¹ But from the fact that something is a good thing in a bad society, it does not follow that it is a good thing in our society. For instance, in societies with bad and repressive criminal laws, it might be a good thing if the State is not good at catching those who have committed crimes; a good thing, because it may help to destroy such a wicked State. But it does not follow that in our society it would be a good thing if the State were not good at catching criminals. Similarly, from the fact that it will be a good thing if in bad states, the law were treated like a costing system, it does not follow that we ought to treat the law as a costing system in our society.

It is of course true that very often we only catch the criminal after he has got what he set out to commit, i.e. after he has taken advantage of the costing system. Very often, but not always; but, at any rate with regard to serious crimes, the justification for catching him only after he has got what he set out to do, is not that we like to give an opportunity to the criminal to take the advantages of a costing system. In many cases we do not have any evidence that a crime will be committed; and in many other cases we do not have enough evidence that a crime will be committed. If in such circumstances we start locking people up, we shall lock up besides people who were going to commit crimes, (a) many people without criminal tendencies, and (b) many people, who though they have a tendency to commit a crime, might have the ability to control

¹ Determinism and Freedom, (ed. S. Hook), p.99.

the tendency. So we shall be locking up many people who are innocent, who would have conformed to the law even if we had not locked them up. We are not giving these people an opportunity of avoiding getting penalised.¹

Of course many criminals do take advantage of the law as a costing system, but this is, at any rate in serious crimes, an evil consequence of our not locking them up earlier. It is not the justification of our not locking them up earlier. That we treat their being able to take advantage of the law as a costing system, as an evil, can be seen from the fact that even in our system where we are sure that a serious crime² will be committed, we feel no reluctance in trying to prevent people even before they have taken advantage of the costing system. The justification for our not locking them up earlier is, as we saw, that often we do not have enough evidence that a crime will be committed, indeed sometimes we do not have any evidence at all. That is why in our system mere intention to commit a serious crime is not an offence - there must also be an 'external' act. But if we could be sure that a man was going to commit a serious crime, even though he has not committed an 'external' act, then why should we not lock him up? If we were sure that a man would

¹ See principle O, p. 307.

² With some less serious crimes such as soliciting, a case could I suppose be made for the view that even when we have good evidence that a crime will be committed, we should wait till it has been committed.

commit a murder, if left to himself, we should not mind depriving the potential murderer of the advantages of the costing system.

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