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RESPONSIBILITY AND EXCUSES

A Thesis submitted for the degree of

DOCTOR OF PHILOSOPHY

in the Department of Moral Philosophy

at The University of Glasgow

by

KEVIN McCORMICK

September, 1974

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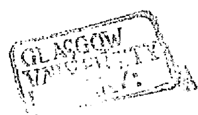

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TABLE OF CONTENTS

SUMMARY 3

INTRODUCTION 4

I. ARISTOTLE'S ARGUMENTS 7

1. Excuses 7
2. Choice 11
3. Responsibility for Virtue and Vice 15

II. LIBERTARIANISM 18

1. Moral Responsibility 21
2. Deliberation 32

III. THE PRINCIPLE OF RESPONSIBILITY BASED ON MORAL RESPONSIBILITY 41

1. The First Objection 41
2. The Second Objection 44
3. Is Punishment Necessarily Brutal or Savage? 47
4. Does Punishment Deter? 51
5. Does Punishment Prevent Recidivism? 53

IV. PRACTICAL TREATMENT 56

1. Macdonald's Arguments 59
2. Lady Wootton's Arguments 63
3. *Mens Rea* 68
4. Indefinite Sentences 70
5. Feinberg's Arguments 80

V. JUSTICE AND MORAL DESIRABILITY 95

1. Justice 95
2. Justice and Determinism 104
3. Gains and Losses to Human Life 109
4. The Law of Torts and Contract 115

VI. TWO DEFENCES OF PRACTICAL TREATMENT 118

1. Humane? 118

2. The Benefit to the Criminal 121

3. Crime Control 125

4. But Don't We Have The Right To Remould Criminals? 130

5. Quick and Easy Treatment 134

VII. _MENS REA_ 138

1. _Mens Rea_ and Aristotle 139

2. Strict Liability 142

3. Objective Liability 150

4. _Mens Rea_ and The Principle of Responsibility 171

CONCLUSION 173

BIBLIOGRAPHY 180

SUMMARY

This thesis deals primarily with criminal responsibility, although some of my arguments also apply to responsibility for non-criminal acts. It can roughly be divided into three parts: (1) a defense of the practice of holding people responsible for their actions based upon the fact that people are morally responsible for their actions; (2) a defense of the practice of holding people responsible for their acts based upon a series of arguments in which I try to show that a society which retains the practice of holding people responsible for their actions is better than one which replaces this practice with something else; and (3) a defense of the doctrine of *mens rea* against strict liability and objective liability.

In (1) I argue for a version of libertarianism and then I argue that moral responsibility is a sufficient reason for holding people responsible for their actions. This involves a discussion of punishment.

In (2) I first discuss the arguments of three people who believe that we should do away with the practice of holding people responsible for their actions and replace it with treatment designed to modify people's (especially criminals') behaviour. I argue that to abandon the practice of holding people responsible for their actions would be extremely unwise for a variety of reasons. Among these reasons are considerations of justice, human rights, dignity, humane treatment of criminals, and the control of crime.

In (3) I carefully compare a legal system which retains the doctrine of *mens rea* with legal systems which have adopted either strict or objective liability. I argue that considerations of justice and human rights make it imperative that we retain the doctrine of *mens rea*.

INTRODUCTION

In this thesis I will discuss two related questions. First, ought we to hold people responsible for their misdeeds? Second, if the answer to the first question is yes, under what circumstances ought people to be excused from responsibility for their misdeeds? My arguments mostly concern responsibility for criminal acts, but I also discuss responsibility for non-criminal misdeeds and responsibility for praiseworthy acts.

I begin with a discussion of Aristotle's answer to both questions and I argue that Aristotle's answer to the first question is not satisfactory. I then proceed to give two independent answers to the first question. I argue that we ought to hold people responsible for their misdeeds because they are morally responsible for them. That is, people make a free choice before they perform misdeeds and therefore must accept moral responsibility for their misdeeds. I then argue that people ought to be held responsible for their actions because a society which abandons the practice of holding people responsible for their actions and replaces this practice with something else will be very much worse off for the change. I conclude this thesis by defending a doctrine of excusing conditions which is very similar to Aristotle's.

My arguments employ a wide range of moral concepts such as justice, utility, freedom, human rights, dignity, etc. I make no attempt to show that several of these concepts can be reduced to a single, more fundamental concept. That is, I do not try to show that utility or justice is somehow a more important or fundamental concept than the others. Instead, my main method of argument is to show what gains and losses would result from taking a particular course of action, such as abandoning the practice of holding people responsible for their actions, and then comparing these gains and losses with those which would result from an alternative course of action.

This method of argument has the disadvantage of requiring that we make judgments by "weighing" gains expressed in terms of one moral concept

against losses expressed in terms of another moral concept, and this clearly can present problems. For example, if course of action A would aid us in controlling crime but would take away some human rights and alternative course B would not infringe human rights but also might not be as effective in controlling crime, then the choice between the two courses of action is clearly a difficult one. We are faced with a decision between two things we value very highly, and there seems to be no way to quantify the decision or to make it more clear-cut. That is, there seems to be no satisfactory way to give positive numerical scores for all the gains and negative numerical scores for all the losses because the concepts are so very different. For example, even if we knew precisely what effect courses A and B would have on the crime rate, we would still be faced with the necessarily imprecise choice between crime control and human rights.

The need to make decisions of this type would seem to be a good reason to try to reduce several moral concepts to one primary concept, but I have not chosen this course of action for several reasons. First of all, I simply have no idea how this could be done. I just do not see how such diverse moral considerations as utility, human rights, freedom, and justice can be covered under one heading. Second, I believe that any such attempt to reduce all moral concepts to one primary concept would simply mask moral problems rather than solve them. For example, there is a long tradition of people trying to show that if we maximize utility we will by some unknown process never run foul of other moral considerations. However, far from solving problems, this position seems to create them because people who share this view seem to be constantly engaged in explaining away apparent conflicts between the maximization of utility and other moral considerations, most commonly, justice. In view of this, it seems far more sensible to admit that there are a variety of moral considerations which may conflict with each other.

Finally, it must be remembered that moral judgments involving a variety

of moral considerations need not always be terribly difficult. This is because one course of action may be favoured by a majority of moral considerations. For example, if the only benefit of course A was that it would help to control crime and if it had many disadvantages such as loss of human rights, loss of freedom, and loss of human dignity, and course B would maintain rights, freedom and dignity, then the decision between the two courses of action becomes less difficult. Such a decision is still far from clear-cut because some people may be willing to give up a great deal in order to control crime, while other people may not be willing to do so. However, such differences between people are clearly unavoidable; also, a great deal is accomplished by making the benefits and disadvantages of alternative courses of action apparent because once we have done so, we are in a position to make a rational decision as to which course of action to take. Thus, all in all, I believe that it is best to accept that moral philosophy is a complex subject and not to try to make decisions appear more simple than they are.

I

ARISTOTLE'S ARGUMENTS

In the first five chapters of Book III in the Nicomachean Ethics, Aristotle discusses the two central questions of this thesis. However, he deals with them in reverse order. In his first set of arguments which are found in Chapter One, he assumes that people ought to be held responsible for their actions and he investigates the circumstances under which people ought to be excused from responsibility for their actions. In a second set of arguments in Chapters Two through Five, Aristotle defends what he assumes in the first set, that people ought to be held responsible for their actions.*

1. Excuses

According to Aristotle only voluntary acts may be praised or blamed, so it is obviously necessary to delineate the voluntary from the involuntary. Involuntary actions are of two kinds; (1) Actions done under compulsion, and (2) actions done by reason of ignorance.

Actions done under compulsion are those in which the moving principle is outside the actor and to which the actor contributes nothing. Aristotle's examples of this kind of action are being carried off by a wind or being bodily carried away against your will. In cases of this type there is no question that the action is involuntary because not only was a force external to the actor involved but the actor was totally passive during the action.

Far more difficult are actions in which external force is involved but in which the actor also contributes to the action. All actions done because of threats are of this type. For example, if I steal some valuable documents because someone has threatened that he will harm my wife if I don't, it is debatable whether or not my action was voluntary. On one hand it is clear that I would not have stolen the documents if my wife had not been

* I owe several of the points in this chapter to Mr. Alexander Broadie.

threatened, and therefore my action is clearly occasioned by compulsion. However, on the other hand it is clear that I contributed something to the act. I could have refused to steal the documents and accepted the consequences.

Aristotle tackles this problem by claiming that actions done because of threats are involuntary when considered abstractly, but in individual instances they are voluntary because the course of action taken by the actor is determined by his own deliberate choice. Here Aristotle is in very close agreement with the predominant modern view on this subject. It is generally accepted today that actions done because of threats are voluntary, but the threat is considered to be a mitigating circumstance when blame is affixed to the action. This is precisely Aristotle's view. He gives as an example a man who does an ignoble act in order to avoid unbearable torture and claims that in such a case the man should be pardoned. However, he does claim that some deeds are so terrible that all people should be willing to endure painful death rather than do them. Such a deed is matricide. This example isn't totally satisfactory because while it may be true that one ought to endure painful death rather than kill one's mother, it isn't clear whether one ought to allow ruffians to kill one's father, spouse, or several unrelated strangers rather than kill one's mother. Aristotle doesn't mention such cases, but it is clear that he was not unaware of them because he concludes his discussion of actions done because of threats by saying, "what sort of things are to be chosen, and in return for what, it is not easy to state; for there are many differences in the particular cases."

The only other ground on which people can be said to be not responsible for their actions, according to Aristotle, is ignorance. But before he discusses what sorts of ignorance excuse people from responsibility he makes a puzzling distinction between actions done by reason of ignorance which are involuntary, and actions done by reason of ignorance which are not voluntary. The former are those actions done by reason of ignorance which are followed

by repentance and the latter are those actions done by reason of ignorance which are not followed by repentance. Aristotle leaves this point dangling; in fact, all he says is that since the two cases are clearly different it is best to have different words for them.

One way of making sense out of this distinction is to note that repentance after an action done by reason of ignorance is a sign that had the actor known the true circumstances of his action he would not have performed it. Also lack of repentance is a sign that had the actor known the true circumstances of his action he would have performed it anyway. For example consider two cases of a hunting mishap: (1) A hunter mistakes his son for a deer and kills him, (2) a hunter mistakes his mortal enemy for a deer and kills him. In the first case the hunter would no doubt feel a great deal of repentance and clearly had he known that the "deer" was really his son he wouldn't have performed the action. In the second case the hunter would feel no remorse and had he known that the "deer" was his enemy he would have shot him anyway. This is an interesting point because there clearly is a moral difference between these two types of cases. In the first case the action is not typical of the actor's character while in the second case the action is typical of the actor's character. Later I will argue that this interpretation is consistent with Aristotle's other views on actions done by reason of ignorance.

Aristotle states that not all ignorance is a ground for excusing people from responsibility for their actions. Ignorance of what one ought to do and ought not to do and ignorance of what end one ought to pursue do not qualify as excuses. Only ignorance of the particular circumstances surrounding an action or ignorance of the object of an action count as grounds for excusing responsibility for the action. Aristotle gives several examples of this kind of ignorance such as ignorance of the true identity of your target when shooting, ignorance of the true nature of your instrument (e.g. taking a real spear from a rack when you only intended to take a practice spear), etc. The important point here is not so much what items Aristotle includes in his list of particular things about which we can be ignorant, but rather that he restricts ignorance as an excusing condition to

ignorance of particulars, that is, ignorance of the particular circumstances and objects of actions. His point here seems to be that the other types of ignorance which I mentioned are character traits, and no one ought to be excused from responsibility for an action simply because he has a bad character. This point, of course, is very controversial today. It isn't uncommon to hear arguments which maintain that either no one has any control over his character and therefore no one ought to be held responsible for his actions, or that some people who have been "socialized" in a certain way cannot help having bad characters and therefore ought not to be held responsible for their actions. Aristotle is explicitly opposed to these two views. He maintains that only actions which are "out of character" are to be excused; actions which are consistent with a person's character are not to be excused. This is consistent with what I said earlier about Aristotle's distinction between actions done by reason of ignorance which are followed by repentance and those which are not. The former actions are not typical of the actor's character while the latter actions are typical of the actor's character. Thus, in view of Aristotle's doctrine that a bad character is no excuse for a bad action it is quite natural for him to distinguish between these two types of actions.

Next, Aristotle discusses actions done by reason of anger or appetite and here his insistence that men are responsible for actions which are inconsistent with their characters is even more explicit. He points out that actions done by reason of appetite and anger are no less typical of the person who performs them than are reasoned actions. Thus, according to Aristotle, it is silly to say that a man is not responsible for actions done in anger or due to appetite, because these are no less typical of his character than a reasoned action is typical of the character of a sober, temperate man.

I think Aristotle's point is well taken in most cases. A great number of actions done in anger are done by people who have irascible characters, and it seems silly to say that such people aren't responsible for their actions, while at the same time we say that people of different characters who perform actions typical of their characters are responsible for their actions. However, it must be remembered that there is a class of actions done in anger which are not typical of the character of the actor. These are actions done under extreme provocation. Now, I may be

considered unwise to bring up this point because 'extreme provocation' is a term which is no doubt quite abused these days. It has become a common excuse for all sorts of actions both in legal and moral contexts. For instance, in 1968 the Chicago police tried to excuse their brutality toward the demonstrators at the Democratic Convention by arguing that they were extremely provoked. However, despite this common abuse of the term there still seem to be cases in which the term has an application. Cases in which it is unreasonable to expect even the most temperate and self-controlled person to control his anger. For example, it seems unreasonable to expect a parent to control his anger when he sees his young child being injured by a bully. Even a parent with saintly self-control might lose his temper in such a situation. Thus, while I agree with Aristotle that angry acts are often in character and therefore ought not to be treated any differently than other acts which are in character, I also think we must recognize as a distinct class of actions, actions done in anger due to extreme provocation. Such acts clearly are not in character and therefore deserve to be treated with acts done by reason of ignorance which are not typical of the agent's character.

Thus, Aristotle's doctrine of voluntary and involuntary actions consists of two parts. To be voluntary an action must have as its moving principle the actor himself and the action must be consistent with the actor's character or typical of the actor. This second part would be the subject of vigorous attack today on the grounds that a man hasn't the power to mould and change his character and therefore to say that men ought to be praised or blamed for actions typical of their characters is absurd, because one can't be praised or blamed for something that is not in his power. Aristotle seems to have been well aware of this argument because he spends the next four chapters arguing that we have our characters to some extent in our power.

2. <u>Choice</u>

Aristotle begins his argument that our characters are in our power by discussing choice. Choice is voluntary, but not the same thing as the voluntary since the voluntary is a broader concept as can be seen from Aristotle's treatment of the

voluntary in the first chapter. Aristotle considers several theories of the nature of choice. These are that choice is appetite, anger, opinion or wish. He dismisses all of these as completely wrong except wish which he claims is similar to choice, but not quite the same. It isn't the same because we can wish for impossible things, but we can't choose impossible things. Also Aristotle makes the controversial claim that wish relates to ends rather than means and choice relates to means rather than ends. His reasons for saying this are that choice seems to relate to things which are in our power and that ends are often not in our power. For instance, we can't choose to be healthy, we can only wish to be healthy and choose the means which will best promote our health. The same thing goes for happiness, we can't choose to be happy we can only choose those things which will make us happy. These uses have a certain amount of appeal but they don't fit every sort of situation. Suppose, for instance, a man wished to live a very fast life full of a great deal of drinking, late partying and generally carrying on. Suppose, further, that this same man wished to be healthy. When this man realized that his fast life was ruining his health, he might by great effort give up the fast life and start to cultivate those activities which lead to health. In such a case it seems to make perfectly good sense to say that the man chose between two ends both of which he wished. To deny this would seem to be to deny a very important moral phenomenon.

Aristotle finally selects "that which is decided upon by previous deliberation" as the most likely candidate for a definition of choice. However, before he can discuss this he must discuss deliberation. Deliberation he says is always about things in our power and we deliberate not about ends, but about means. He gives as examples that doctors do not deliberate about whether they shall heal; statesmen do not deliberate about whether they will promote law and order; and orators do not deliberate about whether they will persuade. Deliberation consists of setting an end before oneself and then considering the means by which it will best be achieved. If there are several such means, we select that which is simplest and most economical, or most suitable in some other sense. Also once the means has been decided upon, deliberation consists of going through the individual steps of the

means until we come to the "first cause" which must be performed before anything else. If this first cause is in our power we will proceed and if not we must look for another means to the end or abandon the end altogether.

A good example of this process occurred in Toronto this last summer. A doctor had a patient who required extremely complicated heart surgery. In fact the required surgery was so complicated and unusual that no "heart team" in Canada had ever performed it. Thus, the end was securing health for the patient and there were two means to this end; (1) the doctor could simply refer her to a Canadian "heart team" and hope for the best or (2) he could try to arrange for her to be sent to a Texas clinic which had pioneered this type of surgery. The doctor tentatively chose the latter means as best for the patient but then had to consider the individual steps involved. The first step became clear: the doctor had to convince the Ontario Health Insurance Board that it ought to provide money for an operation which would be performed in the United States. After considerable effort the doctor succeeded and the operation took place.

This example conforms well to Aristotle's doctrine of choice, because it is no doubt true that the doctor in this example considered it axiomatic that he ought to try his very best to secure the health of the patient. Thus, in this case it is true that the doctor didn't deliberate about the end, but only about the means. But in this example the patient was an otherwise healthy 28 year old woman. What if the patient had been much older with health problems other than the heart condition ? A few years ago medical opinion would have been unanimous that the operation should go ahead anyway. At that time there seemed to be an axiomatic belief among doctors that everything must be done to preserve life even if there was no hope that the patient would return to healthy active life. Today this axiomatic belief is being challenged by doctors as well as by people without medical training. Therefore, today it isn't at all uncommon to hear of a doctor faced with the very difficult decision of whether to prescribe a particular course of treatment in order to preserve the life of a terminally ill patient a little longer or whether to forbear the treatment and allow the patient to die. The doctor in such a situation must choose between quite distinct ends : the preservation of

life or the preservation of useful active life (this example is not intended to in any way minimize the moral problemswhich surround euthanasia). Now,clearly one could deliberate about which of these ends ought to be pursued. Thus, it is odd that Aristotle restricts deliberation and choice to means.

Another obstacle to understanding Aristotle's doctrine of choice is that Aristotle uses 'end' ambiguously. Up to chapter four he uses 'end' in the sense of particular end,that is, a determinate object of pursuit such as health,the winning over of a mob to a certain point of view,establishment of law and order, etc. However in chapter four Aristotle uses 'end' in the sense of the ultimate end for which men wish. Aristotle introduces his dicussion of this type of end by saying "That wish is for the end has already been stated; some think it is for the good,others for the apparent good". Aristotle then proceeds to find faults with both of these positions. The problem with maintaining that people always wish the good is that one is then forced to maintain that those people who seem to wish for something other than the good are not,in fact, wishing for these things at all, and such a doctrine of false wishes is at best difficult to defend. On the other hand the problem with maintaining that the object of wish is the apparent good is that it follows from this that there is no natural object of wish. Aristotle achieves a tenuous compromise between these two alternatives by saying that absolutely and in truth the good is the object of wish,but for each person it is the apparent good. Clearly, the end in the sense of the good or the apparent good which I will call the ultimate end, is quite a bit different than the ends such as health,pursuation and law and order which I will call particular ends. In fact, it seems reasonable to say that people wish the good or the apparent good as an ultimate end,but they can choose among several particular ends. Also it could be argued that one ground for choosing a particular end is whether or not it is consistent with my ultimate end. For example, if I were an orator who wished happiness in the sense of <u>eudaimonia</u>, I might very well deliberate about whether or not I will persuade a crowd of people, because the particular end of persuading the crowd may be inconsistent with my ultimate end which is the good.

3. Responsibility for Virtue and Vice.

In chapter five Aristotle gives an argument designed to show that it is within our power to be virtuous or vicious. He argues that we wish for the end and deliberate and choose the means to the end, thus, actions concerning means must be according to choice and voluntary. But since the exercise of virtue is concerned with means it follows that virtue and vice are according to choice and voluntary.

I don't believe that this argument is adequate. Aristotle's doctrine is that the means are dictated to some extent by the end. That is, he believed that we wish for the end and then investigate possible means to the end, and that we finally choose the most suitable means from the set of means which are within our power. Thus, it would seem that this argument rests on the understood premise that to every end there are both virtuous and vicious means. If this were not the case then it would follow that in some cases the end wished for might be such that no virtuous means could possibly bring it about, and in such a case Aristotle couldn't say that virtue was in the actor's power.

I will now argue that Aristotle cannot supply this understood premise. I will argue this point with respect to both particular and ultimate ends. In the case of the particular ends it is clear that there are some ends which cannot be achieved by both virtuous and vicious means. For instance, consider the following two particular ends. Suppose A wishes to be a statesman. There are at least two means to this end : (1) A could strive to make himself morally and physically worthy of an appointment to a high government post, or (2) A could bribe officials in the hope of achieving a high government post. Here there is a clear choice between virtuous and vicious means to a particular end. But what if the particular end is becoming the dictator of a popularly governed state. In such a case there are simply no virtuous means by which the end can be achieved. To achieve such an end one would simply have to lie, cheat, bribe, falsely accuse, murder, etc. and these are all obviously vicious things to do.

The same holds true if we consider ultimate ends such as the good or the apparent good. Now, clearly anyone who wished <u>eudaimonia</u> would only choose virtuous means to this end, but suppose A wished for an apparent good. To take

an explicit example, suppose A wished a life of pleasure and suppose further that A was so debauched that only the most extravagant pleasures satisfied him. In this case it is clear that in order to attain the life of pleasure A will require a substantial income. It is true, of course, that there are both virtuous and vicious means of obtaining a substantial income but invariably the virtuous means allow very little time for leading a life of extravagant pleasure. Thus, unless A is blessed with an independent income he must resort to vicious means to achieve his particular end of a substantial income.

Thus, Aristotle's doctrine of choice is not sufficient to show that it is in our power to be virtuous or vicious, because it simply is a fact that some ends can only be achieved by vicious means. What Aristotle must do then is show that people have some power over the ends for which they wish. Aristotle seems to have been aware of this necessity because in the second half of chapter five he tries to show that people do have somepower over the appearance of the ultimate good. Here he says that it might be objected that all men desire the apparent good, but have no control over the appearance, to this he replies that if each man is somehow responsible for his state of mind then he will be somehow responsible for the appearance of the end, but if not no one will be responsible for his own evil doing. Unfortunately, rather than tackle this problem by showing that men can control the appearance of the good, Aristotle tackles it by way of a reductio. And, of course, the problem with a reductio is that the absurd conclusion upon which it rests may turn out to be not so absurd after all. This is the fate of Aristotle's reductio in this age of modern social science. Aristotle argued that to say that men have no control over the appearance of the good implies that both virtue and vice are involuntary, and he found this conclusion to be clearly absurd. Virtue, he held, was clearly voluntary, therefore any argument that vice is involuntary which entails that virtue is involuntary must be unsound. This, of course, just doesn't stand up today. Those who argue that vice is involuntary are perfectly willing to accept as a consequence that virtue is involuntary.

Having proved to his satisfaction that vice and virtue are voluntary, Aristotle

claims that this could be true for two reasons; (1) men have some control over how the end appears to them or (2) men have no control over how the end appears to them but they choose the means and therefore virtue and vice are voluntary. Aristotle can't maintain the second alternative for reasons I have given earlier in this paper so it must be lamented that he failed to defend the first alternative directly.

II

LIBERTARIANISM

In the preceding chapter I argued that Aristotle's reasons for believing that men are generally responsible for their actions were inadequate. But, having said this, I cannot simply drop the subject; this is a problem which simply must be faced before any rational system of excuses can be constructed. The reason for this is that a system of excuses is completely otiose if no one is responsible for their actions.

In order to attack this problem, I must make a distinction between someone's _being_ responsible for his actions in a moral sense and the _practice_ of _holding_ someone responsible for his actions. For someone to be morally responsible for an action, he must deserve reward, praise, blame or punishment for it (providing, of course, the action is not trivial or morally indifferent). The practice of holding someone responsible for his actions is the actual rewarding, praising, blaming or punishing of people who may or may not deserve what they get.

In order for someone to be morally responsible for an action, it is generally assumed that he must satisfy the following three conditions: (1) He must have performed the action in question. (2) He must not have an excuse for performing it, such as mistake. (3) He must have been able to have acted otherwise than he in fact did. That is, he must have what is commonly called free will. It is also generally assumed that in order to be justified in holding someone responsible for an action he must in fact be morally responsible for the action. This assumption raises no problems when we consider people who are not morally responsible for an action because they fail to meet the first two conditions, but serious problems arise when we come to people who are not morally responsible for their actions because they fail to meet the third condition. For example, it is obviously wrong to hold a man responsible for an action which he did not perform. If we

were to do so, we would be punishing and blaming the innocent or rewarding and praising the undeserving, and both practices are clearly unacceptable. Also, to hold someone responsible for an action performed due to ignorance or by mistake is unacceptable because, in the case of bad actions, the actor possesses none of the bad characteristics by virtue of which he deserves blame or punishment and, in the case of good actions, he possesses none of the good characteristics by virtue of which he deserves praise or reward. For instance, if a person accidentally injures someone else, he is not wicked as is a person who intentionally injures someone else and, therefore, he does not deserve to be blamed or punished for his action.*

However, things are very different when we come to people who are not morally responsible for their actions because, while they meet the first two conditions, they fail to meet the third condition. The problem is that such people can intentionally perform very good or very wicked actions and yet not be morally responsible for them. This presents us with the following dilemma. On the one hand, we are presumably not justified in holding such people responsible for their actions because they are not morally responsible for them. But on the other hand, it seems very important that we praise or reward such people if their actions are good and blame and punish them if their actions are bad. Holding people responsible for actions which they perform intentionally is a central feature of our society, and if we abandon it, things would certainly change - quite possibly for the worst. For example, if we fail to praise or reward good actions, we can hardly be surprised if the number of good actions decreases, and if we fail to punish or blame bad actions, we must expect the number of bad actions to increase. This dilemma becomes especially disturbing when we are faced with the prospect that no one in fact ever meets the third condition. It was this prospect which troubled Aristotle, and it still troubles people today

*However, if his action was due to carelessness, he may deserve blame and possibly punishment because of his carelessness.

because of the fairly widely held belief that the thesis of determinism is true and, therefore, that all people lack free will.

There are three possible ways of resolving this dilemma. First, we could simply abandon praise, reward, blame and punishment in favour of some alternative such as manipulation or treatment. The second solution is the one Aristotle chose which is to argue that people actually possess free will and therefor meet the third condition. The third possible solution is to argue that we are justified in holding people responsible for their actions if they meet the first two conditions but fail to meet the third.

For a variety of reasons which I will discuss in some detail later, I find the first solution totally unacceptable. However, I believe that both the second and third solutions are worth pursuing and in the next several chapters I will pursue both of them. In this and the next chapter, I will argue that some people meet the third condition and that those who do not have the potential of becoming people who do meet it. I will then spend several chapters arguing that even if the thesis of determinism is true and no one meets the third condition, we still ought to hold people responsible for their actions (providing, of course, that they meet the first two conditions). My arguments for this will be fairly varied, but my central point will be that the practice of holding people responsible for their actions is vitally important both for individuals and for society and that the alternatives to holding people responsible for their actions are morally undesirable.

Thus, I will be presenting two separate and fairly long arguments for the principle that we ought to hold people responsible for their actions if they meet the first two conditions. Stating this principle in this way is quite awkward and, therefore, I will refer to it from now on as the 'principle of responsibility'.

Finally, it might legitimately be asked why I am offering two independent defenses of the principle of responsibility. The answer to this question is that

I want to make my case for the principle as strong as possible and I also want the case to be "metaphysically satisfying". That is, I would prefer to base my case for the principle on actual moral responsibility because I find a world in which people are morally responsible for their actions more pleasing in a metaphysical sense than a world in which they are not. However, I am fully aware that my case for moral responsibility will be extremely controversial, so in order to make the case for the principle of responsibility as strong as possible, I will also argue that we are justified in retaining the principle of responsibility even if the thesis of determinism is true.

(1). Moral Responsibility

To be morally responsible for an action, the actor must have been able to have performed an alternative action to the one he actually performed. Thus it makes no sense to blame a man for failing to lift 2000 pounds or for sneezing and thereby giving away your position to the enemy. In either case, the man could not have done otherwise. As we saw in the last chapter, even in Aristotle's time, people used this point to argue that no one is morally responsible for any of his actions because it is never the case that an actor could have performed an alternative action to the one he actually performed. This same argument, in a considerably more sophisticated form, is put forward today by people who accept a position which is generally called determinism.

The determinists' position is that for every event there are conditions which are causally sufficient for the occurrence of that event. They further maintain that human actions are events, and therefore, that there must be sufficient causal conditions for the performance of every human action. The conclusion which is drawn from this is that in any given action situation, an actor can perform only one action. It is argued that this is true no matter how many alternatives appear to be open to the actor. The particulars of the action situation and the physical and mental make-up of the actor are sufficient conditions

which make one and only one action casually necessary.

The doctrine of determinism is in a very interesting position because the denial of determinism, or indeterminism, is an even more disturbing doctrine. It seems to entail that human actions are uncaused and therefore due to chance and hence, capricious, and clearly no one can be held morally responsible for an actior due to chance. In fact, it could be argued that it is incorrect to call any event due to chance an action.

This leaves two possible ways of saving moral responsibility: the first is to deny that in order to be morally responsible an actor must have been able to perform an alternative action to the one he actually performed. In other words, the strategy here is to argue that moral responsibility is compatible with determinism, and as a result of this, philosophers who take this line are called "reconciliationists" or "soft determinists". The second way is to argue that human actions are not events which are made necessary by causally sufficient conditions, but are actions which are performed by an agent. Philosophers who take this line are called "libertarians" or "agency theorists".

There have been a large number of soft determinist theories, o I can only discuss the bare bones of the position here. They claim that in order for an actor to be morally responsible for an action, it is not necessary for the action to be uncaused but for it to exhibit the actor's character -- that is, his desires, moral outlook, degree of rationality, etc. These actions are opposed to actions which do not exhibit the actor's character, such as those done under duress, when suffering from a high fever, done under hypnosis, etc. The point is that moral responsibility for an action does not depend on the action's being uncaused , but on the action's being caused in a certain way - that is, by the agent's character.

This theory did not satisfy everyone because it completely ignores the fact that in order to be morally responsible for an act an actor must have been

able to perform an alternative action to the one he actually did perform.

The soft determinists replied to this objection by pointing out that according to their theory an actor could have performed analternative action to the one he actually did perform had he chosen to do so. This, they maintained, was sufficient to show that an actor is morally responsible for his actions even though they admitted that according to their theory (which, of course, is deterministic) the actor could not have chosen to perform an alternative action to the one he actually did perform. The argument generally used to support this point is based on an analysis of the meaning of the phrase, "He could have performed an alternative action to the one he actually did perform." The soft determinists maintain that what we actually mean when we say this is that he could have performed an alternative action to the one he actually did perform had he chosen to do so.

This point is attacked in great detail by the late Professor C.A. Campbell in his article, "Is 'Free will' a pseudo-problem ? * This is a long article which considers several versions of soft determinism and it would be silly to repeat all of Professor Campbell's arguments, but I will repeat one which is directed against the particular version of soft determinism that I am dealing with here. In this argument, Professor Campbell simply points out that in virtually all cases in which an actor's moral responsibility is in question it is obviously true that the actor could have performed an alternative action had he chosen to do so. However, this trivial truth has no bearing upon the moral responsibility of the actor because it still makes sense to ask whether the actor could have performed an alternative action. It would seem, therefore, that the soft determinists are wrong when they say that the real meaning of "he could have performed an alternative action" is that he could have performed an alternative action had he chosen to do so. However, this trivial truth has no bearing upon the moral

* C.A. Campbell, "Is 'Free Will' a Pseudo-Problem ?", _Mind_, LX(1951), pp. 686 - 706.

responsibility of theactor because it still makes sense to ask whether the actor could have performed an alternative action. It would seem,therefore, that the soft determinists are wrong when they say that the real meaning of "he could have performed an alternative action" is that he could have performed an alternative action had he chosen to do so.

It would appear then that only a version of the theory of agency will be adequate to save moral responsibility, and this is just what Professor Campbell goes on to defend. He argues that most actions are merely the product of the individual's character and for these actions sufficient causal conditions exist. However, he argues that in cases which involve moral conflict, the "self" which is distinct from the character and is a causal agent can rise to duty or allow the character to do what it is most inclined to do. In such cases, he argues, it makes sense to say that the actor could have performed an alternative action and therefore, that people are morally responsible for their acts.

A more precise statement of agency theory can be found in "Determinism and the Theory of Agency" by Richard Taylor.* Taylor points out that two conditions must be met before we can say that people are in general morally responsible. These are: "(a) there is a reason for everything that happens, but (b) some such happenings - viz. some human acts are contingent." If these two conditions are met,then clearly people are in general morally responsible because (a) assures that human actions are not capricious and (b) assures that, in some cases, an actor could have performed an alternative action.

This,then, is a concise statement of the theory of agency. Unlike soft determinism, the theory of agency, if true, would clearly render people morally responsible for their actions. However, there are three reasons for not accepting the theory of agency. The first is due to a misunderstanding, so I will dispense

* Richard Taylor, "Determinism and the Theory of Agency", in Determinism and Freedom, Sidney Hook (ed.), New York University Press, New York, 1958.

with it right here. It is that if there are no sufficient conditions for some human actions, then these actions are inexplicable. This simply isn't true, unless someone means by 'explicable' only able to be explained in terms of causally sufficient conditions. Now clearly this is one perfectly proper sense of 'explicable', because once we have discovered causally sufficient conditions for a particular event then we have explained it in the scientific sense of explanation. However, this is clearly not the only sense of explicable. A human action can also be explained in terms of the actor's reasons for performing it, and indeed, this is certainly the most common type of explanation with regard to human actions. Thus, if the theory of agency is true and there are no causally sufficient conditions for human actions, it does not follow that human actions are inexplicable. It only follows that human actions are not inexplicable in terms of causally sufficient conditions. So long as there are reasons for such actions, they would still be explicable in terms of the reasons the actor had to perform them, and this is certainly a respectable type of explanation *.

The second and third reasons for not accepting the theory of agency are more substantial. The second is that the theory of agency as described by Professor Campbell is a very strange theory. The theory states that whenever there is a moral decision to be made, the self can somehow opt out of the ordinary causal world and rise to duty. Professor Campbell gives us no reason why the self should behave this way only when there are moral decisions to be made, and a determinist could not be blamed if he thought this a bit odd. The third reason is that the determinist can point to a large number of people who cannot in any sense be described as agents, but who are also in no sense mentally disordered or insane. Together, the second and third reasons seem to make a strong case. A determinist is quite justified in asking whether it makes sense to adhere to a strange theory when it is clear that some people are not agents.

* I owe this argument to Richard Taylor's book, Action and Purpose, Prentice-Hall, Inc., New Jersey, 1966, pp. 140,141.

These points are well-taken - as long as the agency theorist cannot provide a more substantial account of what the self or the agent is then his case will remain very weak.

I will now argue that agency is the ability to deliberate. In other words, I will argue that the actions which proceed from deliberations satisfy Taylor's two conditions for moral responsibility. That is, they are performed for a reason and therefore, they are not capricious. Also, they are contingent and therefore, the actor could have performed an alternative action. Also, since I will argue that not all people have the ability to deliberate in the way required for agency, it will follow that it is not anomalous that some people are agents while others are not.

My arguments centre around three young executives who each comes upon an opportunity to steal a substantial amount of money from his employer. The executives are alike in that they each have a similar opportunity to steal the money and in that all three do, in fact, steal the money. However, their characters are radically different. I will argue that the first executive is not an agent and, therefore, that he is not morally responsible, while the second and third are agents and are morally responsible.

The situation in which each young executive finds himself is this: while performing his daily duties, he comes across a computer error which lists the total price of new heating equipment for one of firm's factories as £400,000 when the actual cost of the equipment is only £315,000. The young executive is in charge of paying for the equipment and he realizes immediately that if he draws £400,000 from company funds, pays the heating supplier £315,000 and keeps £85,000 for himself, the company's computerized accounting system will not show any discrepancy. In fact, the young executive realizes that the theft will only be discovered if an auditor happens to compare the amount of the heating supplier's bid with the amount the computer shows has been paid out.

Now, since we are talking about whether the executives are agents and therefore morally responsible, it is best to keep our examples free of any

excusing conditions which might render our executives not morally responsible on other grounds. Thus, I will leave out any hint of coercion such as a usurious debt to pay off, or a greedy husband or wife who brings pressure to bear upon the young executive. In short, I am assuming that the young executive alone knows of the opportunity and that no pressing commitment of any kind makes stealing the money in any sense imperative. Now let us consider how the three very different young executives react to this situation.

The first executive

The first executive has a very strong desire to live well. He wants a truly glamorous and exciting existence, and such an existence ,of course, requires money. He also has boundless self-confidence as a result of an extremely successful time at school. He did well academically and was superb at sports. He had never failed at anything in his life and,for this reason, he does not even consider the possibility of getting caught if he steals the money. Finally, the first executive has virtually no "moral sense" due to to the fact that his father was thoroughly unscrupulous and proud of it. For example,his father cheated on his income tax and proclaimed to his young son that anyone who did not cheat on his income tax was a fool.

In view of the above description of the first executive, it is not surprising that as soon as he discovered the opportunity to steal the money, he went ahead and stole it.

The second executive

The second executive is similar to the first one in that he desires to live a very comfortable life, but beyond this there is no similarity. The second executive is a very prudent man. His parents always taught him to weigh possible gains against possible losses. He also has had a fairly strict moral education; unlike the first executive, he is well aware that stealing the money would be wrong. Due to his cautious nature, he makes no hasty decisions. He ponders the possibility of gaining £85,000 against the possibility

of getting caught and losing not only the money but his present situation and his freedom as well. However, he decides that the price is so grand that it is worth the risk. Then he ponders whether the possibility of gaining the money is worth doing something which is very wrong. After a great deal of deliberation, he finally decides that the possibility of being rich is worth running the grave risk of being caught and doing something which is very wrong. Upon deciding this, he steals the money.

The third executive

The third executive differs from the second in that he has spent a great deal of time deciding what type of life he ought to live. The first and second executives merely desire a comfortable life; they have never given any thought to any other type of life. The third executive has chosen to live a comfortable life after considering several others, such as a life service to others. He has also considered how central the pursuit of a comfortable life ought to be. That is, he also considered just how far he ought to go in order to procure a comfortable life. For example, ought he to try to secure a comfortable life only within the bounds of the existing legal system ? Or ought he to adopt restraints upon his search for a comfortable life that are more or less strict than those prescribed by the present legal system ? I will discuss his reasoning in more detail later; for the present just let me say that he rejected part of the restrictions of the present legal system and then considered the gain as opposed to the risk. He judged that the prize was worth the risk and stole the money.

Now, as I said before, I am conceding to the determinist that the first executive could not have performed an alternative action and that he is, therefore, not morally responsible for his action. This, of course, is generally considered to be a fatal move. It is often assumed that if you admit that some people could not have performed an alternative action, you must also admit that all people in all action situations could not have performed alternative actions. It is this assumption which has forced libertarians into the very difficult to defend position that people such as the first

executive could have performed alternative actions. In such a case, the sufficient conditions simply stare one in the face: the combination of the first executive's desire for the good life, lack of prudence, and lack of moral sense make it ridiculous to argue that he could have risen to duty and not stolen the money or that he could have considered the consequences and not stolen the money. The example explicitly excludes these possibilities because he has no sense of duty nor any sense of prudence.

It is far better to concede such cases to the determinists and then argue that people such as the second and third executive could have performed alternative actions, and this is just what I will do. However, I must first dispose of two arguments which try to show that from the fact that the first executive could not have performed an alternative action, it follows that the second and third executives could not have performed alternative actions. These arguments are attempts to prove that there must be sufficient conditions for all human actions even though it is impossible to list the sufficient conditions for complex actions such as the actions of the second and third executives.

The first argument merely insists that the reason that it is impossible to list sufficient conditions for the second and third executives' actions is not that no sufficient conditions exist, but rather that the second and third executives have more complex characters than the first executive. The sufficient conditions are therefore too complex to list, but they must exist. The basis for this argument seems to be a feeling that with regard to moral responsibility all men must be essentially alike, and therefore, if the first executive could not have performed an alternative action, we must admit that the same goes for the other two executives. This argument is unacceptable because to assume from the beginning that either all men must be morally responsible or not morally responsible is to rule out of court one perfectly sensible solution to the morally responsible versus determinism debate - that is, that some people may be morally responsible while others are determined.

The second argument tries to show that there must be sufficient conditions for the actions of the second and third executives by drawing an analogy between the human brain and electronic computers. A rough outline of the analogy goes as follows :

1. The brain, like a computer, is made up of a huge number of switching devices. The materials are different and the complexity of the connections is far greater in the brain than even in the best computers, but basically the brain is a very complex computer.

2. The brain controls several mechanical mechanisms, i.e. the muscle and the bone combinations throughout the body. Present-day computers can control very sophisticated high speed printing devices, and there is every reason to believe that some day an advanced computer will be able to operate an aftificial arm and hand.

3. It is with its electronic machinery that a computer computes, and in a similar way, it is with the brain that people think. This, of course, is very controversial. It is argued, for example, that it is a category mistake to equate the mind with the brain, but these arguments need not deter the determinist. All he has to do is to show that human thought is in some sense dependent upon the brain, and this is not difficult to do because the evidence for dependence is amazing: if you damage the brain, you damage the mind. If you drug the brain you drug the mind. If you electronically stimulate the brain, you mysteriously get through to the mind. Thus no matter what the precise ontological status of the mind turns out to be, there is little doubt that the mind and brain are inextricably linked; therefore we must grant the computer/brain analogy.

Once we have granted him the computer/brain analogy, he might proceed with his argument as follows : for every action of a computer, there are sufficient conditions which include the state of the computer (i.e. its physical plan, the state of its memory, etc.), its programme, and external stimuli in the form of instructions given by operators. In a similar sense,

can there be any doubt that for every human action there is a set of sufficient conditions which consist of the state of the human brain (i.e. its complexity and its memory), its programme (e.g., feelings, preferences, moral beliefs, and skills such as reading, math skills, etc.), and external stimuli such as the discovery of an opportunity to steal money ?

The evidence that there are sufficient conditions for all human actions is overwhelming. We know that the brain is like a computer. We know that thinking depends on the brain. We know that the state of a person's brain affects his actions. We know that external stimuli affect a person's actions. You have even admitted that in the case of the first executive there are sufficient conditions for his action. Surely, then, the only sensible conclusion from all this is that there are sufficient conditions for all human actions.

This, then, is the determinists' argument. It can be written in step form as follows :

1. The human brain is a very complex computer.
2. There are sufficient conditions for every "action" a computer performs.
3. Therefore, there are sufficient conditions for every action a person performs.

This argument is not completly sound because the second premise is not known to be true. What we do know is that there are sufficient conditions for every action performed by every modern computer, but these computers are much simpler than the human brain. Would the same hold true for much more complex computers ? Since no such computers exist, we just do not know for sure. However, the determinist would no doubt insist that it is reasonable to assume that a complex computer would not be so fundamentally different from a simple one that there would be no sufficient conditions for some of its actions. But here we must be very careful. For example, consider the following argument which is similar to the one above:

1. An amoeba is just a complex chunk of matter.

2. Matter does not have the power of locomotion.

3. Therefore, an amoeba does not have the power of locomotion.

The conclusion to this argument is, of course, absurd. We know from direct observation that an amoeba does have the power of locomotion, so that we must reject at least one of the premises. The most likely candidate is premise 2. In view of the fact that there is no reason to believe that an amoeba is anything other than complexly organized matter, we must accept the fact that a certain level of complexity matter displays emergent properties such as locomotion.

Now, in the case of the brain/computer argument, we do not know the conclusion to be false, and therefore, we are not forced to reject one of the two premises, but the possibility that one of them is false plainly exists. For instance, it is perfectly possible that at a certain level of complexity computers will display the emergent property of no longer having sufficient conditions for all of their "actions". Thus, the determinists' second argument is also inconclusive. It is still possible that for some human actions there are no sufficient conditions. I will now argue that this is the case.

2. Deliberation

In order to show that some people are morally responsible for some of their actions, we must show that some human actions satisfy Professor Taylor's two conditions. That is, that there is a reason for the action in question, but that the action was not made necessary by causally sufficient conditions. In this section, I will argue that we have good reason to believe that deliberate actions meet these two conditions.

By 'deliberate actions' I mean actions which follow from deliberation and for 'deliberation' I will use Professor Taylor's definition :*

* Richard Taylor, Action and Purpose, op. cit.

> Deliberation as I am conceiving it, is a process of active, purposeful thought, having as its aim or goal a decision to act, under circumstances in which more than one action is, or at least is believed to be, possible for him who deliberates.
> (p. 168)

The actions of the second and third executives are by this definition deliberate, while the action of the first executive is not.** Both the second and third executives deliberated about whether they should steal the money and, in addition, the third executive had earlier deliberated about the type of life he should lead. The first executive, on the other hand, simply grasped the opportunity to steal the money as soon as it presented itself; he did not deliberate about what to do at all.

It is easy to show that deliberate action satisfies the first condition, because deliberations can have several rational conclusions. For example, the second executive might decide to steal the money or he might decide not to steal it. His reason for stealing it might be the reason given in the example -- that the possibility of gaining the money (even given the risk) is worth doing something very wrong. If he decided not to steal the money, his reason might be that no amount of money was worth the risk or that the possibility of getting the money was not worth doing such a great wrong. Thus, either outcome can be rational -- there are perfectly sound reasons for each alternative.

The difficult question is to show that there are no sufficient conditions for deliberate action.

** It must be pointed out that I am not saying that the first executive's action is not intentional, while the actions of the second and third executives are intentional. The actions of all three executives are intentional; that is, they all intended to steal the money. Also, I do not mean to say that the first executive's action is involuntary, while the second and third executives' actions are voluntary. All three actions are voluntary because no person or circumstances forced any of the executives to steal the money. But an action need not be deliberate to be voluntary, nor is it impossible for an action to be involuntary but also deliberate. For example, if I am forced by someone to choose between two alternative actions (which I would have never dreamed of performing had I not been coerced), I might well deliberate about which action to perform. If I did deliberate, then my decision would be deliberate but involuntary.

The doctrine that there are sufficient conditions for all human actions is simply that all human actions are essentially like the first executive's action, although they may be more complicated. For example, the second executive's action involved consideration about the amount to be gained, the risk involved and the morality of stealing the money; and therefore, it is much more complicated than the first executive's action which only involved consideration of the amount to be gained. The doctrine admits that in cases such as those of the second and third executives, it is difficult to give a precise statement of the sufficient conditions which made their actions causally necessary, but that such conditions exist none-the-less. The reason it is difficult is that these actions involve conflicting motivating factors. For example, in the case of the first executive, the two motivating factors of his desire for a comfortable life and his extreme self-confidence do not conflict and together they make the first executive's motivation to steal the money overwhelmingly strong. Thus, in the case of the first executive, it makes sense to say that his psychological state and the discovery of the opportunity to steal the money are two conditions which were causally sufficient for his going ahead and stealing the money. Now, the question we must answer is whether it is reasonable to believe that such sufficient conditions exist for the actions of the second and third executives. I have purposely couched this question in terms of what it is reasonable to believe because this is one of those problems which quite possibly will never be solved conclusively. On the one hand, the deliberations preceding the actions of the second and third executives are so complex that it is quite possible that even if sufficient conditions do exist for their actions, they could never be identified, even in the fairly crude way I identified sufficient conditions for the action of the first executive. On the other hand, it is probably impossibleto show conclusively that no such sufficient conditions exist because a determinist can always argue that simply because deliberation is such a complicated process does not mean that there are no sufficient

conditions for the decisions which follow from deliberation. However I do believe that careful inspection will show that it is more reasonable to believe that there are no sufficient conditions for the decisions which follow from deliberation. To see this we must look more closely at the case for saying that there are sufficient conditions for the decisions of the second and third executives.

The determinist's case is basically that the only difference between the case of the first executive and the cases of the second and third executives is one of complexity. In support of this claim, he can point to the fact that the motivating factors in the cases of the second and third executives were not fundamentally different from the factors in the case of the first executive, but were simply more numerous. Also, he could point out that the second executive is clearly a product of his upbringing in the same way that the first executive is a product of his. The first executive is over-confident and lacking in moral sense because of his early background, and the second executive is prudent and has a strong moral sense because his parents instilled both qualities in him. In view of these similarities, the determinist feels justified in arguing that there are sufficient conditions for the second executive's decision, even though the second executive's way of coming to the decision to steal the money is very different from the way the first executive came to his decision. The fact that the second executive deliberated about whether or not to steal the money while the first executive did not is not seen as a significant difference by the determinist, but rather as simply the result of the fact that the second executive had something to deliberate about (i.e. conflicting motivating factors). Here deliberation is viewed as a completely deterministic process in which conflicting motivating factors interact in various ways until a decision is finally reached.

The third executive offers a bit of a problem to the determinist because the factors which motivate him are largely self-chosen. But

here the determinist would simply argue that the third executive is simply more complex than the second executive. He would argue that the third executive's early background caused him to be the type of person who deliberates deeply about everything, and through years of deliberation, the third executive chose to seek a very comfortable life and to live with certain moral principles. When the third executive discovered the opportunity to steal the money, he deliberated yet again to see whether stealing the money was consistent with the goals and rules he had chosen through earlier deliberation. Thus, the determinist would argue that there are sufficient conditions for the third executive's decision to steal the money, but that they are shrouded in several tiers of deliberation and, therefore, they are so complex that we could never hope to identify them. There is clearly nothing absurd about this view. It certainly is possible that deliberation is just a very complex deterministic process. However, I will now argue that a careful look at deliberation will tend to show that it is not.*

The reason I find it difficult to believe that deliberation is a deterministic process is because I find it difficult to believe that deliberation is a process at all; instead, I believe that it is best described as an activity. To see my point here, consider the case of the second executive. The determinist's position is that the second executive's deliberation consists first in his desire for the money, interacting with fear of getting caught and once his desire for the money has supplanted his fear, his deliberation then consists of his desire for the money interacting with his moral principles, which are in turn supplanted by his all-powerful desire to steal the money. If we view deliberation in this way, then it makes very good sense to say that there are sufficient conditions for the second executive's decision because one could argue that, given the strength of his desire for the money combined with the strength

* My argument owes a great deal to Taylor, Action and Purpose, op.cit, Part 2.

of his fear of getting caught and the strength of his moral principles, it was causally necessary that he would eventually decide to steal the money. But I see no reason why we should accept this view of deliberation because it completely ignores the fact that deliberation is an activity which human beings engage in, rather than a process which simply takes place. The second executive actively considers whether stealing the money is worth the risk of going to prison and he then considers whether he ought to do something which is very wrong. In both cases, the second executive made a conscious choice and he clearly believed that he could have made the opposite choice because if he did not believe this, there simply would be no point in deliberating about which choice to make. Now, in view of the fact that deliberation is an <u>activity</u> in which people engage and also in view of the fact that people who deliberate believe that they can choose more than one alternative, that is, that one alternative is not causally necessary, why should we accept the determinist's account of deliberation as a deterministic process ? Indeed, why should anyone have ever believed that deliberation was a deterministic process ? There seems to have been two reasons for this. The first is that many people have accepted general arguments which try to show that there must be sufficient conditions for all human behaviour regardless of whether it follows deliberations or simply springs from spur of the moment impulses. Examples of such general arguments are the argument based on the computer/brain analogy and the argument that if there are no sufficient conditions for human action, then that action is inexplicable. The second reason is that it is possible to point to human thought processes which resemble deliberation, but which are also clearly deterministic. One such process is vacillation, which Taylor describes in the following passage:*

* Taylor, <u>Action and Purpose</u>, op.cit., p.170.

Now while both of these continuing states of mind can in some sense be described as processes of thought, only the first is deliberative. The second is, simply, vacillation between competing inclinations. Both are, moreover, processes of *my* thinking. But in the first my thought is an activity, for I am intentionally calling it forth. In the second I do not call forth any thoughts or considerations; they simply occur to me, willy-nilly, with whatever force they may or may not have for deciding the matter for me. In the first my thinking is purposive, for thoughts are pursued with a view to making a decision, but in the second my thoughts have no purpose. They are only thoughts, impulses, or inclinations that occur in succession. The second situation can therefore be described without introducing the idea of my doing anything at all, except just deciding, whereas the first cannot, and there are accordingly all sort of locutions, mostly metaphorical, which are used to convey the element of activity involved in deliberation -- such as "weighing" pros and cons, "turning" the thing over in my mind, and so on.

(p.170)

Another thought process which is similar to deliberation but is clearly deterministic is rationalization , in which someone has an overwhelming desire to do something (or refrain from doing something) but also has some minor qualms about going ahead with it. For example, if the first executive had had some semblance of moral sense, he might have rationalized his decision to steal the money by quickly dismissing moral considerations from his mind. It makes sense to say that both vacillation and rationalization are deterministic processes because they truly fit the determinist's model of motivitating factors interacting with each other, but this in no way shows that deliberation is a deterministic process. In fact, when we look closely, we see that genuine deliberation is very different from vacillation and rationalization, and clearly, one way of accounting for this difference is to say that deliberation is a non-deterministic activity which human beings engage in rather than a deterministic process over which human beings have little or no control.

Of course, this does not settle the issue of whether deliberate actions are free since it is still quite possible that deliberation is an extremely complex deterministic process. However, in view of the fact that deliberation certainly seems to be an activity which can have more than one outcome

(otherwise there would be no point in deliberating) and also in view of the fact that deliberation is easily distinguishable from mental processes which are deterministic, I think it is more reasonable to believe that deliberate actions are free than to believe that they are determined. This is especially true when we realize that there is nothing absurd about saying that some human actions are free, while other human actions are determined. In short, until someone unravels the mysteries of deliberation and shows that there are sufficient conditions for deliberate actions or until someone presents a sound argument which demonstrates that all human actions must be determined, I will continue to find it more reasonable to believe that deliberate actions are indeed free actions.

Many libertarians, no doubt, will be quite displeased with my arguments because if my view is correct, we are forced to say that many people who cannot be called insane or abnormal are not morally responsible for their actions. They might argue that I have created more problems than I have solved because the courts will now be faced with the problem of distinguishing between those criminals who deliberated before they committed their crime and those criminals who did not. But, as I said in the introduction to this chapter, I do not believe that moral responsibility is the only reason for holding people responsible and therefore, this is not necessarily a problem for me, and I will say more about this in the next several chapters.

Also, I believe that my views on moral responsibility have two distinct advantages over standard libertarian views. The first is that the libertarian view that all human beings are agents forces them to treat all human beings as being essentially equal with regard to moral responsibility even though people obviously differ in this respect. For example, they must say that someone like the first executive who quite literally "did not know any better" is every bit as responsible for his actions as the third executive who is sober and knowledgeable, and who deliberates about everything he does. In short, the libertarian's dream of a world in which everyone is morally responsible simply is not a realistic dream, and my view recognizes this fact.

The second advantage is that my view involves no mysterious conception of the self. This is very important in the debate between libertarians and determinists because as long as libertarians insist that human beings are in some mysterious way agents, determinists can quite rightly ask what possible reason there is for believing that what the libertarians say is true.

III

THE PRINCIPLE OF RESPONSIBILITY

based on

MORAL RESPONSIBILITY

In the last chapter, I argued for what might be called a limited version of libertarianism in which some people have the ability to deliberate and are, therefore, morally responsible for their actions, while others lack this ability and, therefore, are not morally responsible for their actions. There are two possible objections to this as a justification of the principle of responsibility. First, it could be argued that since I have been forced to admit that only some people are morally responsible for their actions, my attempt to base the general principle of responsibility upon moral responsibility must be considered a failure. The second objection is that moral responsibility is not a sufficient condition for holding people responsible for their actions, or this objection may take the less radical form that moral responsibility is a sufficient condition for reward, praise or blame, but not for punishment.

1. The First Objection

The first objection, at first glance, appears very serious, especially when we consider that the number of people like the first executive who are not morally responsible for their actions may prove to be quite large. Thus my argument for the principle of responsibility based upon moral responsibility may appear so weak as to be uninteresting.

However, this objection ignores the fact that if my arguments for libertarianism are sound, then it follows that all human beings (with the exception of the insane or the mentally defective) have the potential to

gain the ability of free deliberation and thus to become morally responsible for their actions. It is very important to avoid a "black and white" picture in which there is one section of the population which will always have the ability to deliberate, while the rest will always lack this ability. Such a view is unrealistic because people can both gain and lose the ability to deliberate and they can also have it with regard to some circumstances and lack it with regard to others. For example, many parents have breathed a sigh of relief when their arrogant, rude, head-strong teenager has finally grown up and started to act sensibly. Also, a really doctrinaire right or left wing radical is a good example of someone who is incapable of deliberation in some areas.* He is totally bound by his doctrines and he simply will not hear of anything else. But such people can change into people who are able to deliberate and who are open to the ideas of others. Similarly, people can lose the ability to deliberate. We all probably know someone who has "become a bigot", or become so consumed by hate, jealousy, awe, or love that he has lost a great deal of his ability to deliberate. Finally, some people can deliberate in some areas but not in others. We all have met people who are perfectly reasonable until someone mentions a "forbidden subject", such as religion, certain government policies, or women's liberation.

Thus, even people who are not morally responsible for their actions can become so if they attain the ability to deliberate. This suggests the possibility of encouraging people to deliberate about their actions and thus to become morally responsible for them, and in order to do this it seems clear that we must retain the principle of responsibility. My reason

* I am talking about the true zealot, not someone who has come to hold radical views after long periods of study or deliberation.

for saying this is that to excuse someone from responsibility for an action because he failed to deliberate before he performed it cannot possibly encourage him to deliberate in the future. For example, if the parents of the arrogant teenager I just mentioned write off his behaviour as "going through a difficult stage" rather than blame him for it, they certainly are not encouraging him to become a sensible adult.*

Thus, if we assume that it is good for people to be morally responsible for their actions, we can base a fairly strong case for the principle of responsibility upon my limited libertarianism. This is so because by holding people responsible for their actions, we will ensure that those who are morally responsible for their actions will get what they deserve and we will encourage those who are not morally responsible for their actions to become so. There is, of course, one obvious objection to this, which is that to hold someone responsible for his actions if he is not morally responsible for them is unjust. Again, I must postpone discussing this point in order to avoid duplication. In later chapters I will argue, at some length, that while it is true that to hold someone responsible for an action for which he is not morally responsible is unjust, the

*To show conclusively that holding people responsible for their actions will encourage them to deliberate and thus to become morally responsible would take several more pages and would nearly duplicate an argument which I will present later in this thesis. There I will argue that even if the thesis of determinism is true, we ought to hold people responsible for their actions because this will encourage them to develop their rational wills (the rational will is basically the human ability to deliberate and make decisions without undue dependence upon others). In fact, the only difference between my argument here and my argument later in the thesis is metaphysical. If my arguments for libertarianism are correct, then holding people responsible for their actions would encourage them to actually become morally responsible for their actions. On the other hand, if the thesis of determinism is true, then by holding people responsible for their actions we would encourage them to develop their rational wills (and I will argue that a well-developed rational rill is morally valuable), but we could not encourage them to attain the metaphysically satisfying status of moral responsibility.

alternatives to holding someone morally responsible for his actions are even more unjust or are morally undesirable on other grounds. Also, I must again stress that I am only talking about people who are not morally responsible for their actions because while meeting the first two conditions of moral responsibility, they fail to meet the third condition. I am not advocating punishing the i nocent or strict liability.

2. The Second Objection

We must now turn to the second objection mentioned at the beginning of this chapter - that moral responsibility is not a sufficient condition for holding people responsible for their actions. It may seem that this objection is so extreme that it is unlikely that anyone would ever put it forward. But this is not the case, because a strict adherent of either act or rule utilitarianism would be forced to hold this line. Also, even if no one would ever put forward this objection in this form, a more limited version of this objection is fairly common. This version allows that moral responsibility is a sufficient reason for rewarding, praising, or blaming someone, but not for punishing someone because punishment is evil and can only be justified if it produces some further good. I will attack only the second version of this objection, but my arguments can be generalized to cover the first as well.

In attacking this objection, I will become involved in the long-standing dispute between retributivists, who believe that punishment ought to be meted out according to dictates of justice and utilitarians, who argue that punishment is only justified if it produces some further good, such as a reduction in crime. I believe that a good deal of this debate is misguided because the participants tend to try to establish a case for one point of view to the exclusion of all others. I think that this is a great mistake because, as I stated in the introduction, I believe that moral problems

are usually very complex and that a satisfactory solution must balance many conflicting moral considerations. The justification of punishment is an extremely good example of a complex moral problem. Punishment is usually discussed in the context of how the officials of the government ought to deal with criminals. In this context, the moral complexity is obvious because in order to be legitimate, a government must administer justice, consider the utility of its actions (e.g. promote public welfare), and act in a morally acceptable manner (e.g. a legitimate government is morally bound not to be brutal or cruel). From this it follows that a legitimate government's policy on punishment must strike a satisfactory balance between these three moral considerations. Thus, in order to show that moral guilt is a sufficient condition for punishment, I must show that justice requires that we punish the morally guilty and then that punishing the morally guilty does not seriously conflict with the other two moral considerations.

That justice requires that we punish the morally guilty has often been taken to be self-evident, but it has been challenged on the basis that justice is an intangible or even an unintelligible concept. There is some basis for these views since some aspects of justice are intellectually very "slippery", but the case of punishment is not one of these slippery aspects. Stated in its simplest terms, the principle of distributive justice is that people ought to get what they deserve, not more than they deserve and not less than they deserve. Thus, people ought not to receive undeserved rewards nor escape deserved burdens. It is quite true that ascertaining just what people deserve can be very difficult in some cases. Notorious examples of this are the problems of just income distribution and just distribution of educational opportunities. However, ascertaining what people deserve with regard to specific actions poses no

insurmountable problems. The following examples will hopefully make this clear: A clear case with regard to reward would be one wherein a manager gives a promotion to his lazy brother-in-law instead of to another much more hard-working candidate. Here the other candidate would be denied a reward he deserved and the brother-in-law would enjoy an undeserved reward. Also, a person who consistently fails to praise particularly courteous actions on the part of his or her spouse would be acting unjustly because people who perform courteous, virtuous, or in other ways outstanding actions deserve praise. The same holds true for blame and punishment. If someone neglects his duties, he clearly deserves to be blamed, and if someone is morally responsible for a serious wrong, it seems to make perfect sense to say that he deserves to bear a burden - that is, he deserves to be punished.

To deny this would be a very radical move indeed because it would amount to denying that what a person does can influence what he deserves. To take this line would restrict the concept of desert to the point of absurdity. To say that a man's actions can never affect what he deserves would leave room only for humanistic theories of desert such as the theory that all people deserve to have their basic needs satisfied, or old-fashioned "birth right" theories in which some people are said to deserve certain benefits by virtue of being born princes and others to deserve to bear burdens by virtue of their being born into some lower station. This is not in any way to denigrate humanistic theories, but even if we adopted such a humanistic theory, we would certainly still want to say that a person's actions can affect what he deserves. For example, even in the totally egalitarian world envisioned by those who put forward such humanistic theories, Smith could still cheat Jones, and surely Smith would deserve to be blamed or punished for doing so. Thus, there certainly would

seem to be a *prima facie* case for the view that moral guilt is a sufficient condition for punishment. However, I still must discuss whether punishment for moral guilt conflicts with the other moral considerations I mentioned above.

3. Is Punishment Necessarily Brutal or Savage?

It is often argued that punishment is necessarily brutal or savage and therefore is unjustified. This argument can take three forms, the first of which applies to punishment for any reason, while the second and third apply only to punishment for moral guilt.

The first argument is that punishment is by definition the infliction of pain upon people who do wrong and the infliction of pain is clearly evil or brutal. However, this argument is unacceptable because there is no reason to accept the view that punishment is by definition the infliction of pain to wrong-doers. Punishment clearly must be in some sense burdensome and, of course, it can be painful, but there are any number of cases of punishment, which could not be described as painful if we take 'pain' in its normal, everyday sense of substantial physical or mental suffering. For example, if a child misbehaves and is confined to his room for two hours, it makes perfectly good sense to say that the child was punished, but he certainly could not be said to have suffered any pain. Also, a stay in a well-managed prison which provided privacy, opportunities for education, and recreational facilities could not be described as painful in the ordinary sense of 'pain' but it certainly would seem to be an example of punishment.

It can be argued that punishment is by definition the infliction of pain upon wrong-doers if we adopt the classic utilitarian definition of 'pain', where 'pain' means any type of unhappiness, displeasure or disutility*. If we adopt this definition, it makes perfectly good sense

* See Jeremy Benthan, *Principles of Morals and Legislation*, Chapter 5, sections 17-31.

to say that when we send a child to his room or a man to a well-managed prison, we are inflicting pain, but this certainly does not prove that punishment must be evil or brutal. In short, the infliction of pain in the sense of substantial suffering may be brutal or evil, but the punishment need not be painful in this sense. Also, while it is true that punishment is necessarily painful in the utilitarian sense of 'pain', this sense is so wide that it is insufficient to show that punishment must be evil or brutal.

The second argument is that punishment for moral guilt necessarily involves some brutality because justice requires that the punishment must fit the crime, and brutal crimes would require brutal punishments. However, the phrase, 'the punishment must fit the crime', can mean two different things. It can mean that the punishment must be as nearly identical to the crime as possible or it can mean that the punishment must be proportional to the seriousness of the crime. The former is the lex talionis (an eye for an eye etc.) and it clearly would involve brutality, but there seems to be no reason why we should adopt it instead of the second interpretation which would not require brutality. In fact, it can be argued that the lex talionis is absurd because, in many cases, the punishment cannot be even remotely similar to the crime. Clear examples of this occur when a poor person steals from a rich person or when a man betrays his country.

The third argument is that punishment for moral guilt amounts to little more than institutionalized vengeance, and vengeance is a savage remnant of our uncivilized past which must be firmly resisted. Here, the opponent of punishment for moral guilt is using the word 'vengeance' which has an extremely pejorative connotation, and this really is not fair. The evils of vengeance have been catalogued by Shakespeare and

many other writers, and it is associated with feuds, vendettas, and very harsh codes of law such as Hamurabi's. Thus, to call punishment for moral guilt 'institutionalized vengeance' is to lower the whole debate to the level of sophisticated rhetoric and in no way shows that punishment for moral guilt is evil or brutal.

Thus, punishment for moral guilt certainly need not be evil or brutal, but many people would still want to argue that it is wrong. Their argument is that even though punishment need not be evil or brutal, it still is painful in the utilitarian sense of 'pain'. That is, it creates disutility and we are justified in creating disutility only if by doing so we promote sufficient good to counterbalance the disutility. From this it follows that moral guilt cannot be a sufficient reason for punishing someone because it is quite possible that when we punish some people who are morally guilty of crimes, we will produce insufficient greater good to counterbalance the disutility produced by the punishment.

The "greater good" mentioned in the above argument is usually a reduction in the rate of crime, and thus this argument is often put forward by those who advocate what is often called a totally preventative view of punishment, which is that punishment can only be justified if it tends to control crime. This view is expressed in unequivocal terms by Herbert L. Packer in The Limits of the Criminal Sanction when he says : "The case for an essentially preventative view of the function of criminal law is unanswerable: anything else is the merest savagery."*

The problem with this argument is that it completely ignores the value of justice and the disvalue of injustice. It is , of course, true that when we punish someone we inflict pain in the utilitarian sense of

*Herbert L. Packer, The Limits of the Criminal Sanction, Oxford, 1969 p. 66.

'pain' and this does raise the amount of disutility in the world. However, if someone is morally guilty of a crime, justice requires that he be punished and to fail to punish him would be unjust and this itself would be evil.* Also, it seems to make perfectly good sense to say that the evil of failing to punish someone who is morally guilty of a crime would greatly outweigh the evil of punishing him, providing the punishment took place in a well-managed prison and the criminal was not subjected to cruel practices such as flogging. In short, this argument is only telling against punishment for moral guilt if we adopt a totally utilitarian view of good and evil and ignore other forms of good and evil such as justice and injustice.

So far punishment for moral guilt has fared very well against its opponents, but there is one serious challenge left. This is that the practice of punishment seriously conflicts with the utilitarian goal of controlling crime and therefore must be replaced by something more effective. Thus, it may turn out that the pursuit of justice conflicts so radically with the pursuit of public welfare (inthis case, through the control of crime) that we must limit our pursuit of justice in order to insure the physical well-being of society.

There are two aspects of crime control. The first is preventing people from becoming criminals in the first place; this aspect is usually referred to as deterrence. The second is preventing criminals from committing further crimes which is usually referred to as the problem of recidivism. It may seem odd that anyone would ever question punishment's effectiveness in controlling crime since punishment certainly seems to be an effective deterrent, and it would seem that once a criminal had been

* I owe this point to "Punishment and Desert" by C.W.K. Mundle, _The Philosophical Quarterly_, Volume LV, No. 16, (July 1954).

punished he would be too intimidated to commit further crimes. However, today it is fairly easy to find people who would argue that punishing criminals does not deter other people from becoming criminals and that punishment is very ineffective in preventing recidivism. From here, they go on to argue that punishment ought to be replaced by something else, such as compulsory psychological treatment for criminals. I will now consider their arguments.

4. Does Punishment Deter?*

It is argued by Bentham and others that by punishing criminals we deter other people from becoming criminals because they see that the advantages that crime can bring are not worth the unpleasant consequences of punishment.

This may seem like common sense, but this argument has come under very strong criticism recently by psychologists who argue that psychological studies of criminals have shown that a high percentage of them were not deterred by the threat of punishment, but rather that they acted upon impulses which they could not control. The conclusion drawn from these studies is that the threat of punishment does not deter people from committing crimes.

This argument fails quite dismally because it is based on an obviously unrepresentative sample of the population - i.e., convicted criminals. It is no doubt true that convicted criminals were not deterred by the threat of punishment; clearly, had they been deterred they would not be criminals. Also, it may be true that a large number of convicted criminals never gave punishment a thought but rather acted from impulses they could not control; however, from this it does not follow that deterrence is ineffective. Proponents of deterrence have never claimed that it will

*My discussion of deterrence is based on H.L. Packer's discussion of this topic in The Limits of the Criminal Sanction, pp. 39-45.

prevent _all_ crime or that _all_ people will react to the threat of punishment in a rational manner. Thus, to claim that deterrence is ineffective simply because some people are not deterred is just plain illogical.

In order to show that the threat of punishment does not deter, it would be necessary to show that if there were no institution of punishment, there would be approximately the same amount of crime as there is at present with the institution of punishment. To show this would require a study of law-abiding people, not of criminals, and if such a study were carried out, there is every reason to believe that it would show that the institution of punishment plays a significant part in keeping law-abiding people law-abiding.

To see this we must consider punishment and the entire mechanism of the criminal law in their role of moulding public opinion and behaviour. From childhood, people are confronted with the influence of the criminal law. They know that suspected criminals must go through the unpleasant process of arrest, the tense waiting period before trial and, if convicted, the unpleasantness of going to prison or paying a fine. On top of this, there is the moral condemnation of one's neighbours and the loss of one's good name, and these take place even if one is given a suspended sentence by the court. Not only are people confronted with the unpleasantness awaiting those who commit a crime, but they are also confronted with the moral justification behind this unpleasantness. Thus, the institution of the criminal law and punishment influences people in two ways: (1) It encourages people to obey the law by showing them the unpleasant consequences of not doing so; (2) It encourages people to obey the law by inculcating the belief that it is right and just for criminals to be punished.

To deny that these influences exist would be, I think, to deny the obvious ; but that is just what the critics of deterrence must do. No mere study of those who were not deterred will ever be adequate to show that punishment and the criminal law do not deter.

5. Does Punishment Prevent Recidivism?

Once a criminal has been convicted he usually is sent to prison, and while he is in prison, his opportunities for committing other crimes are clearly drastically reduced. However, it would be horribly unjust, as well as practically impossible, to keep all criminals in prison for the rest of their lives, so that locking criminals up is only a temporary solution to the problem of recidivism. Thus, in order to prevent recidivism, it is necessary to change the criminal's attitudes so that he will consider crime wrong or at least unprofitable. If, during his prison stay, a prisoner becomes convinced that what he has done is wrong, then he probably would be referred to as reformed or rehabilitated; while if he does not believe that his crime was wrong but has come to see that crime is unprofitable, then he probably would be referred to as being merely intimidated but not reformed.

At first glance, one would think that almost all criminals who have been convicted and have spent some time in prison would never even dream of committing further crimes when they are released. The reasoning behind this is that spending time in prison is such an unpleasant experience that they would carefully avoid any activity that could possibly send them back. Unfortunately, this is not the case. In fact, a large number of convicted criminals commit further crimes, and the evidence available suggests that those who have served long sentences are more likely to commit further crimes than those who have served light sentences or than those who have been given suspended sentences and placed on probation.

The reason for the seeming anomaly of those who have been punished more severely having a greater rate of recidivism is generally considered to be the "hardening" effect of long prison sentences. That is, long prison sentences tend to make criminals bitter and vengeful and also give them ample opportunity to learn new criminal techniques from their fellow inmates. On top of this, a long prison sentence often produces unpleasant personality traits which make the notorious problem of finding ex-convicts jobs even worse. Thus, it is not surprising that those who have served long prisong terms have a greater tendency to commit further crimes; in many cases, it is the only road open to them.

This hardening effect of punishment, combined with the belief that punishment does not deter people from becoming criminals, has led many people to argue that punishment is not only useless in controlling crime, but also that it makes the problem worse. For this reason, they argue that punishment must be discarded in favour of some other way of dealing with criminals*. I have already discounted the argument that punishment does not deter and I will now argue that although punishment can harden criminals, it need not do so.

To deny that punishment can harden criminals would be silly. Punishment often takes place in overcrowded prisons, many of which are very old and were built without adequate recreational, educational, and sanitation facilities. A stay in this type of prison can be a very hardening experience because prisoners are often subjected to very long periods of inactivity in which there is little else to do but plan new crimes and exchange information about criminal techniques. This mind-numbing inactivity

* The most commonly mentioned alternative to punishment is some system of compulsory treatment designed to change the criminal's behaviour and attitudes. I will discuss the merits and demerits of such a system in later chapters.

combined with the poor conditions is very bad for a prisoner's morale, and it is little wonder that many criminals become "hardened".

But clearly an advocate of punishment for moral guilt need not advocate such poor conditions for prisoners because, as I argued earlier, justice does not require that we be brutal to prisoners or make their lives miserable. An advocate of punishment for moral guilt is perfectly free to advocate proper prisons which provide privacy and opportunities for recreation and education. Thus, while punishment can, and indeed does, harden criminals, it need not do so; and, therefore, the argument that punishment necessarily conflicts with crime control breaks down.*

*It is true that governments are notoriously loath to pay for proper penal facilities, but as I will point out later, this problem is equally serious for the proposed alternatives to punishment.

IV

PRACTICAL TREATMENT

I must now turn to the more complex task of arguing that we ought to retain the principle of responsibility even if the thesis of determinism is true. This argument will involve carefully weighing the advantages and disadvantages of retaining the principle of responsibility compared to the advantages and disadvantages of adopting the main alternative to the principle of responsibility.

The main alternative to the principle of responsibility is what I will call 'practical treatment'. It is basically the view that, rather than blaming and punishing criminals, we should treat them any way that is necessary to prevent them from committing crimes in the future. The reason that I call it 'practical treatment' rather than just 'treatment' is to emphasize that those who advocate it, advocate any type of treatment which will change a criminal's behaviour. They are not advocating only medical or psychological treatment as the use of just the word, 'treatment', might suggest.

A practical treatment legal system differs from a legal system based on the principle of responsibility in the following ways : (1) The duration of practical treatment is generally indefinite because it is argued that we can never be sure how long it will take to change a criminal's behaviour. On the other hand, the duration of punishment is generally based on the seriousness of the crime in question and almost always has an upper limit. (2) In order to obtain one's release from detention in a practical treatment legal system, one must show that he will no longer commit other crimes, that is, one must show that he is no longer dangerous. In a system based

on the principle of responsibility, a person is released when his sentence has been served or before that time if he is let out on parole. (3) Treatment in a practical treatment legal system is compulsory, while any treatment offered in a legal system based on the principle of responsibility is voluntary. In short, in a practical treatment legal system the state assumes the right to alter a criminal's behaviour by an appropriate means and also assumes the right to detain a criminal for as long as it takes to alter his behaviour - it assumes the right to remould the criminal. In a legal system based on the principle of responsibility, the state has no such right. It may detain a criminal for a fixed period of time, and when that period of time has passed, the criminal must be released. It is, of course, hoped that the burdens of punishment along with the moral condemnation which punishment necessarily involves will convince the criminal that he ought not to commit further crimes. Also, a proper penal system would provide opportunities for education, recreation, treatment, and counselling in order to help the prisoner to become better adjusted to society. But beyond this, the state has no right to alter a criminal's behaviour.

Before I can discuss the advantages and disadvantages of a legal system based on practical treatment as opposed to one based upon the principle of responsibility, I must flesh out the bare outline above by discussing the arguments of some people who advocate a practical treatment legal system. In this chapter, I will discuss three different arguments for practical treatment and in the following two chapters, I will have a good deal to say about several general issues raised by these arguments.

The three advocates of practical treatment which I will discuss are J.E. Macdonald, Lady Wootton, and Joel Feinberg. My reasons for choosing

these three are varied, but the main reason is that all three offer clear arguments for their positions. Also, they offer a good representation of the different fields and professions which are concerned with practical treatment. Macdonald is a clinical psychologist; Lady Wootton has been a magistrate and she is a very well known social commentator as well as a very active member of the House of Lords; and Feinberg is a very well-known philosopher. Finally, their arguments vary in emphasis. Macdonald's arguments are firmly based on the assumption that the thesis of determinism is true, while the arguments of Lady Wootton and Feinberg stress the practical and moral advantages of a system of practical treatment.

It may seem odd that I have chosen two people who do not make explicit use of the thesis of determinism in their arguments. My reason for doing this is that the truth of the thesis of determinism is basically a background condition which is necessary before we can even consider doing away with the principle of responsibility. In other words, if the thesis of determinism is false, then people are actually morally responsible for their actions, and to argue that we ought to throw out the principle of responsibility even though people are actually morally responsible is very difficult, if not patently absurd. Thus, even though Feinberg and Lady Wootton do not make use of the thesis of determinism in their arguments, their arguments would be extremely weak if it turned out that the thesis of determinism was not true.

1. Macdonald's Arguments

J.E. Macdonald presented a vigorous attack on our present system of punishment in the Journal of Mental Science in 1955*. In his article two separate arguments can be discerned. The first is on pages 710 and 711 where Macdonald is trying to show that it is mistaken to divide criminals into two groups - those who are pyschologically normal and therefore responsible for their crimes and those who are psychologically abnormal and therefore not responsible for their crimes. His reason for believing that this is mistaken is simply that he believes all criminals are psychologically abnormal and therefore not responsible for their crimes. In his words :

> East (1949) also writes : "The State acts, and must act, upon the assumption that men and women are mentally normal until the contrary is proved." But normality is not to be assumed, analoguous to innocence; if the accused is proved guilty,i.e. physically responsible for the offence, then it follows that his behaviour has been deviant or abnormal, and to talk of "psychologically normal criminals" is a contradiction in terms, equivalent to saying "persons who behave normally who behave abnormally".

The second argument is on pages 711-715 and is basically a somewhat wordy version of the standard line that universal determinism is true and therefore no one is morally responsible for any of his acts.

The conclusion Macdonald draws from these two arguments is that the concept of responsibility is a "metaphysical anachronism" and that once responsibility is thrown out we are left with the practical problem if disposing of the convicted. He says:

> Relegating questions of responsibility and with them those of punishment, to the amusement of the religious and others of that kidney, we are left with the important and practical question of the disposal of the convicted.

*J.E. Macdonald, "The Concept of Responsibility", Journal of Mental Science, Vol. 101, 1955.

However, from the fact that a man is not morally responsible for a crime he committed, it does not follow that we are justified in disposing of him in a practical manner. What follows is only that he does not deserve retributive punishment: the question of how we should deal with such a person is a separate and quite complex matter which involves practical as well as moral considerations.

But, we still must deal with Macdonald's first argument in which he tries to show that all criminals are psychologically abnormal. Couldn't it be said that having shown that all criminals are psychologically abnormal Macdonald is justified in claiming that we ought to dispose of all criminals in a practical manner? After all, it might be added, we already treat insane criminals in a practical manner so surely it only makes sense to treat all criminals that way now that we know that they are all pyschologically abnormal. Macdonald seems to hold this line because when he finally sums up he alludes to his first argument in the following passage :

> We are confronted with a person who has committed some action that is abnormal, by its infrequency of occurrence, and that has brought its doer into conflict with his fellows: we have to decide how to obviate or minimize repetition of such conflict, for the good of all concerned.

But this argument also doesn't establish Macdonald's case for practical treatment because it equivocates on the concept of psychological abnormality.

In step form his arguments can be written as follows :

Step 1. Every criminal who is psychologically abnormal is at present subject to practical treatment.

Step 2. All criminal behaviour is abnormal so it follows that all criminals are psychologically abnormal.

Step 3. Therefore, all criminals ought to be subject to practical treatment.

Premise one is at present included in the legal systems of many countries, and although it is fairly controversial let us accept it for the

sake of argument. The important point to notice is that in premise one 'psychologically abnormal' is defined by some test. This test has traditionally been the M'Naughten rule which states that a man is responsible for his actions unless he is "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong"*. In recent years several other tests have been proposed but I won't go into these here because for the purposes of my argument a number of tests will do. To show that Macdonald's argument is fallacious all that is necessary is that the test used be one which precisely picks out those who are psychologically abnormal in the sense that they have a mental incapacity which prevents them from governing their own affairs. It may be the case that only the M'Naughten rule meets this requirement (Lady Wootton thinks so; see next section) but I am perfectly willing to admit the possibility that other and even better tests could be devised.

Now, for Macdonald's argument to be sound it is necessary that the concept of psychological abnormality in premise one be the same as the concept of psychological abnormality in premise two, but quite clearly this is not the case. In the second premise we are told that since criminal behaviour is abnormal all criminals are psychologically abnormal, and Macdonald has told us that criminal behaviour is abnormal because of its infrequency of occurrence. Thus, the test for psychological abnormality in the second premise is whether the person engages in behaviour which occurs infrequently. This is an equivocation on the concept of psychological abnormality because a test of incapacity such as the M'Naughten rule picks out a completely different group of people than the infrequency of occurrence test in greater detail.

Our first task will be to make the test precise by specifying a threshold frequency which divides normal from abnormal behaviour. This may seem to be

*Lady Wootton, Social Science and Social Pathology, London (1959), pages 228-229.

a very simple task because at first glance it would seem that normal behaviour is behaviour in which the vast majority (say 90%) of the people engage. A good example of this would be heterosexual behaviour; one might want to argue that since the vast majority of people are heterosexual it follows that homosexual behaviour is abnormal. But it will soon become obvious that the vast majority rule is entirely too restrictive. For example, less than half of the population are devoutly religious but do we really want to call such behaviour abnormal? Also even if we adopted a very low threshold such as 15% we would still be forced into some rather strange corners. For instance, less than 15% of the population pursue a post secondary education and a very small percentage obtain an advanced degree, but are we to call attending university abnormal behaviour?

However, the most absurd aspect of Macdonald's infrequency of occurrence test is that, contrary to what he claims, some crimes would not constitute abnormal behaviour according to his test. Exceeding 25 miles per hour in an urban area, experimenting with canabis, or shoplifting are all crimes which occur entirely too frequently to be called abnormal. Also if we accept Macdonald's infrequency of occurrence test we will have to accept that as soon as a crime becomes sufficiently widespread it also passes from the realm of the abnormal to the normal.

Thus, there is a great deal wrong with Macdonald's infrequency of occurrence test but for the sake of argument let's accept it. The question we now must ask is whether those people who, according to his test, behave abnormally are in fact psychologically abnormal in the same sense as those who are psychologically abnormal by some test of incapacity such as the M'Naughten rule? The answer to this question has to be 'no' because Macdonald's test only tells us that the person does in fact behave abnormally. Now, from this we can no doubt infer psychological abnormality in a trivial sense. For

example a postgraduate student is no doubt psychologically abnormal in that he is much more interested in an academic subject than the rest of the population but this in no way tells us about a person's ability to manage his own affairs.

Thus, even if we accept Macdonald's test as a coherent one it picks out people who are psychologically abnormal in a totally different sense from a test of mental incapacity. We can therefore conclude that Macdonald's argument is fallacious because he equivocates on the concept of psychological abnormality.

2. Lady Wootton's Argument

In chapter eight of her book Social Science and Social Pathology Lady Wootton argues that it would be far better to do away with the concept of responsibility altogether and thus relieve the courts of the impossible task of wrestling with logically inadequate criteria of responsibility.

Her argument in outline form goes as follows :

Step 1. The M'Naughten rule is a good rule in that it is precise and fairly easy to apply. Non-capricious decisions about a person's responsibility are possible with the M'Naughten rule.

Step 2. Despite the M'Naughten rule's virtue of precision, almost all psychiatrists and psychologists believe that it is too exclusive because it only deals with the defendant's intellectual capacity to appreciate what he is doing, and thus neglects other aspects of his psychological make-up such as his emotional state.

Step 3. Professional opinion may be in agreement that the M'Naughten rule is too exclusive but it certainly is not in agreement about what ought to put in its place. Lady Wootton reviews new criteria based on motiveless behaviour, unconscious motivations, the presence of standard symptoms of

psychological abnormality, etc. and rejects them all as logically unsound.

Step 4. This is an intolerable state of affairs because it prevents the courts from functioning properly.

Step 5. One solution to this state of affairs would be to do away with the concept of responsibility altogether.

She sums up her argument as follows :*

> Admittedly the idea of ignoring all questions of responsibility in the treatment of anti-social persons involves so radical a departure from basic presumptions of ancient and honoured legal systems that any prospect of its practical acceptance may seem utopian. Nevertheless the logical drive towards that conclusion is very powerful. For, once we allow any movement away from a rigid intellectual test of responsibility on M'Naughten 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. All the intermediate positions, described in the foregoing pages, have shown themselves to be logically quite insecure. Already in many countries, amongst which England must now be included, the first steps down this slope have been taken: and the possibility cannot be dismissed that the relaxation of definitions of responsibility which is already in progress is the beginning of a process which, in the remoter future, is destined to result in the total destruction of the concept itself . (page 249)

She goes on to say that this would involve :

> A shift of emphasis in the treatment of offenders away from considerations of guilt and towards choice of whatever course of action appeared most likely to be effective as a cure in any particular case. The legal process for determining who has in fact committed certain actions would continue as at present : but once the facts had been established, the only question to be asked about delinquent persons would be: what is the most hopeful way of preventing such behaviour in future. (page 251)

It must be pointed out that Lady Wootton doesn't see this practical treatment of criminals wholly in medical or psychiatric terms. In fact, she envisions a sort of "play off" between medical (and psychiatric) methods of dealing with criminals and more traditional methods. The arbitor in this play-off would be the statistician.

* The spelling of M'Naughten isn't standard. I use M'Naughten because it seems to be the most common, but Lady Wootton uses McNaughten in Social Science and Social Pathology.

She also gives two cautionary notes. The first is that in our hurry to prevent offenders from committing future crimes we should not neglect deterrence to others who are not criminals but might become criminals if the sanctions against criminals become too "soft".

The second warning is that our treatment methods must be morally acceptable. She particularly mentions capital punishment and brain surgery in relation to this consideration.

This argument is unacceptable for two reasons. First, Lady Wootton only refers to the cases in which the question of someone's responsibility depends upon whether or not he is mentally ill. From the fact that there are problems with deciding cases of mental illness, she concludes that we ought to give up the principle of responsibility. But what about the vast majority of cases in which there is no question of the accused being mentally ill? What reason do we have for rejecting the principle of responsibility in these cases? Lady Wootton simply does not provide an answer to this question*. The second problem with Lady Wootton's argument is that it could equally well be used to defend the M'Naughten rules as to support the conclusion that we ought to do away with the principle of responsibility. Given that all the proposed replacements of the M'Naughten rules are logically unsound, then it would seem to make just as much sense to retain the M'Naughten rules as to do away with the principle of responsibility.

In fact, Lady Wootton's argument is an almost transparent failure because it does not in any way show that we ought to give up the principle of responsibility. Yet judging from the tone of Lady Wootton's argument, she clearly thought that she had made a very strong case for the abandonment of responsibility. This anomaly is explained once we realize that Lady Wootton makes several assumptions which she never explicitly defends.

* I will have a good deal more to say about this in my section on strict liability below.

These are : (1) that our present penal system which is based on the principle of responsibility is ineffective in controlling crime; (2) that the control of crime could be greatly improved by adopting practical treatment; and (3) that the principle of responsibility is only valuable in that it is part of our present legal system, and if this is ineffective in controlling crime, then the principle of responsibility has no value at all. All three of these assumptions are clearly implicit in the last paragraph of Lady Wootton's discussion of responsibility and mental illness.

> Be this as it may, with the elimination of the concept of responsibility the moral problems that arise in the treatment of offenders are brought into line with those inherent in the use of almost any scientific instrument. So long as the presumption of responsibility survives, a unique complication is introduced into the treatment of the anti-social: for methods of high effectiveness may be ruled out, not because they are in themselves immoral, but because of the risk of conflict with the requirements of this presumption. Only when this presumption is removed can science pursue unhindered its morally neutral task of designing, in this as in other cases, the method of achieving a prescribed aim that is most likely to be effective; but whether that instrument be hydrogen bomb, hangman's noose or analyst's couch, the demonstration of effectiveness is not, and cannot be, by itself a command to use. (p. 254)

Here the principle of responsibility is depicted as an outdated and unnecessary constraint upon the scientific task of designing effective methods of practical treatment. Such treatment must, according to Lady Wootton, be morally acceptable, but she clearly believes the concept of responsibility has nothing whatsoever to do with the morality of practical treatment.

Lady Wootton's implicit views on responsibility and practical treatment help explain why she believes that a patently invalid argument provides a strong case for the abandonment of the concept of responsibility. She obviously regards the problem of deciding whether people are responsible as yet another black mark against the very dubious concept of responsibility.

But to take Lady Wootton's assumption out in the open in no way strengthens her arguments because the cavalier way in which she treats the concept of responsibility shows that she is insensitive to a large number of moral considerations which are involved in the replacement of our present legal system, which is based on the principle of responsibility, with a practical treatment legal system.

Macdonald is equally insensitive to these considerations. Both he and Lady Wootton do not seem to realize that they are advocating drastic changes in everyone's legal rights as well as drastic changes in how we think about and act towards our fellow human beings. The three most important of these changes are :

1. The abandonment of standard excuses which are contained in the requirement that mens rea must be proved.

2. The abandonment of fixed terms of punishment in favour of indefinite terms of treatment which end when the criminal no longer has a tendency toward committing further crimes.

3. A change in our attitude toward criminals - from considering them to be moral agents to considering them to be people who have somehow malfunctioned and who must be set right. This change could possibly entirely erode the concepts of a 'moral agent' and 'responsibility', and these are very important concepts in everyday life as well as in the law of torts and contract .

In the remainder of this chapter, I will discuss the first two of these points and I will then present Feinberg's arguments which offer some solutions to the problems these points raise. The third point is much more complex, and I will discuss it at some length in the following two chapters.

3. Mens Rea

Proving mens rea or "guilty mind" consists in showing that a person definitely intended to commit the crime in question. For example if the crime was committed by mistake or accidentally then mens rea would not exist and in general the accused would be acquitted. But notice that in the practical treatment legal system advocated by Lady Wootton and Macdonald there would be no room for mens rea because they both advocate a legal system which is only interested in whether or not the defendant actually committed the crime and not in whether he intended to commit the crime. Thus, without argument or discussion both Lady Wootton and Macdonald have thrown out one of the most important principles of our present legal system: the principle that the defendant is guilty only if mens rea can be proved.

Now, it could be argued that I am just being silly and that mens rea would still be taken into account in the new system, but it would be taken into account by the practical treatment experts and not the courts. Thus, the practical treatment experts would treat someone who committed a crime by accident or mistake differently from someone who intentionally committed a crime.

But a tremendous change would still have taken place. In our present legal system lack of mens rea is an excuse in the full sense of the word. That is, if mens rea can't be proven then the defendant is released - he is judged not guilty of the crime in question. However, in the new system we are asked to embrace he would be sent to a practical treatment centre where his negligence, inadvertence, "head in the sky attitude", etc. would be treated. For example, suppose I held the job I talked about in my second chapter which involved paying the heating company £315,000 for the new heating equipment, and suppose I took the computer's erroneous figure of £400,000 as the correct sum to be paid and thus overpaid the heating

company by £85,000. I would clearly have misappropriated company funds but I would have done so by mistake. If my employers decided to charge me with fraud I would be acquitted because I didn't intend to misappropriate the money. However, under the new practical treatment legal system I would be sent to a practical treatment centre where psychologists would presumably try to find out what made me make my mistake and then try to prevent me from making more mistakes in the future. Thus, there is no question that if we were to adopt this new practical treatment legal system, we would considerably extend the reach of criminal sanctions, and such a move surely requires a justification.

The justification which I believe they had in mind (if they gave this matter any thought at all) is simply that once we have done away with responsibility it doesn't matter whether a person is not responsible for a crime because he committed it by mistake or whether he is not responsible because although he intended to commit the crime he couldn't have acted otherwise. In either case the defendant has committed a crime and we must prevent him from doing so in the future.

But here is a perfect example of putting the goal of crime prevention above all other considerations. It may be the case that by treating all criminals who committed their crimes inadvertently we would reduce crime, although this is by no means certain. However, do we have a right to significantly alter someone's life simply because he has made a serious mistake or accidentally committed a crime? Would we want to live in a society which treated inadvertent criminals? Such a place would, in my opinion, be quite intolerable because one's freedom would constantly be in jeopardy. In such a country one could do one's level best to obey all the laws and yet still find oneself in a practical treatment center being treated for carelessness, absentmindedness, or some such problem.

4. Indefinite Sentences

'Indefinite sentence' can mean several things. It can mean a sentence with a fixed minimum and maximum such as one to three years; it can mean a sentence with no minimum but a maximum such as not more than ten years; or it can mean a sentence with no minimum and no maximum. The first type of indefinite sentence is common today, especially in America. What this type of sentence does is to make explicit what has almost always been the case, that a prisoner can be released on parole before he has served the maximum sentence prescribed by law for his crime. The second and third types of indefinite sentences are the ones which are applicable to a practical treatment legal system.

The reasoning behind indefinite sentences is fairly simple. It begins with the following two premises: (1) We must protect society by preventing criminals from committing further crimes. (2) We also should detain a criminal no longer than is necessary to achieve (1). From here, it is argued that since no one can be sure just how long it will take to modify a criminal's behaviour, rather than giving a criminal a definite sentence, we ought to send him to a practical treatment centre where he will be detained until the practical treatment experts are convinced that he shows no tendency to commit further crimes. The advantage of this system is that criminals who are quickly reformed will be quickly released, and criminals who persist in their tendencies toward crime will be detained until they no longer show any tendencies toward crime; in this way, the public will be protected, and, in theory, no one will be detained longer than necessary.

There are two problems with this suggestion. First, it would allow many criminals to go free after extremely short periods of detention, and this could seriously erode the concepts of responsibility and moral agency.

I will discuss this problem in the next two chapters. The second problem is that with this system many people would be detained much longer than they would have been detained under our present penal system, perhaps even for the rest of their lives. This problem is clearly less serious if we adopt the second type of indefinite sentence which provides a maximum period of detention for practical treatment. If this maximum period were set at the maximum sentence presently set by the criminal law for the crime in question then practical treatment would be no different, at least in this respect, than our present penal system. However, if the maximum were set at a relatively high figure - say, ten years - for all crimes, then we still would have a problem because it would be possible to lose one's freedom for ten years for committing a minor crime. Also, it is not at all uncommon for an advocate of practical treatment to advocate indefinite sentences with no maximum length. For instance, Lady Wootton and Macdonald do not even discuss the problems involved with indefinite sentences, but simply advocate that our present system of committing mentally ill criminals for practical treatment ought to be extended to all criminals. Therefore, since criminals who are treated in our present system receive indefinite sentences with no maximum length, it seems clear that Lady Wootton and Macdonald just took it for granted that a practical treatment legal system should involve indefinite sentences without a maximum length.

However, to be fair, Lady Wootton takes greater notice of the problems involved in indefinite sentences in her later book, Crime and the Criminal Law*. Here she says :

* Lady Wootton, Crime and the Criminal Law, Stevens and Sons, London, 1963.

> If the primary object of a sentence is to discourage further offences at the cost of minimal interference with liberty, then the moment at which this discouragement is effective enough to justify the offender's release can hardly be forecast in advance: it must depend upon his progress. Logically, therefore, the conception of criminal procedure as preventative rather than punitive involves acceptance of indeterminate sentences. (pp. 112-113)
>
> All the same indeterminacy does, I think, demand safeguards; and I would whole-heartedly support both Mr. Walker and Mr. Rupert Cross in proposing to leave with the courts, at any rate for the time being, the power to fix a maximum period of detention.
>
> (Emphasis mine)(pp.113-114)

This clearly shows some appreciation of the problem, but I am not at all pleased at the underlined section of the above quote. Also, other writers quite clearly state their advocacy of indefinite sentences without maximum lengths*. Thus, even though indefinite sentences with no maximum length or a very long maximum length are not a necessary feature of practical treatment, enough people favour them to make it worth-while to look at them rather closely.

Let's assume for the sake of argument that we do have a right to detain a criminal until he shows no tendency to commit further crimes. It does not follow from this that it is right to allow the practical treatment experts to decide who will be released and who will not. To do so would clearly violate the criminal's right to due process of law since the length of his detention would be decided by the practical treatment experts and not by the courts. This is a very important point because it is surely wrong to allow one man to be detained at the word of another no matter how expert that other person is. To do so would be opening the door to any number of abuses such as the indefinite detention of dissenters which is now widespread in the Soviet Union**.

* See the statement by B.L. Diamond on pages 217-218 in The Mentally Abnormal Offender, A.U.S. de Reuck and Ruth Porter, eds., J. & A. Churchill Ltd., London, 1968. For a general background of this problem, see pages 188-218 in this same book.

**See I.F. Stone: "Betrayal by Psychiatry", in The New York Review of Books Vol. XVIII, No. 2 (Feb. 10 1972).

To correct this defect in a practical treatment legal system it would be necessary to replace indefinite sentences with short sentences (say one to two years) which are renewable upon demonstration in court that the criminal is still dangerous. But this method is frought with difficulties because there is reason to believe that such judicial hearings have a tendency to simply "rubber stamp" the decisions of the experts who are treating the criminal in question. The reason for this is that 'dangerousness' or 'tendency to commit crimes' are not precisely defined terms such as 'capital murder' or 'grand theft' and therefore the court has little choice but to rely heavily upon expert testimony.

Take for instance what might happen at present in a case where someone has been committed to mental hospital and is now trying to secure his release through the courts. In such a hearing the psychiatrist in charge of the patient is generally questioned about the patient's case history and then is generally asked "In your opinion is the patient likely to injure himself or others if he is given his liberty?" If the psychiatrist's answer to this question is 'yes' then it is most unlikely that the patient will be given his freedom because - short of proving that the psychiatrist is corrupt or incompetent - it is virtually impossible for laymen to challenge a psychiatrist's opinion.

No doubt many people would say that this is just the way things should be. They might add that psychiatrists are trained to tell whether or not a person is dangerous and they also have a vast amount of experience in such matters. Therefore, surely it is better to continue our present system of judicial review which depends heavily on expert opinion.

However, I think we should be very skeptical of this argument because such a system of judicial review encourages the experts who are treating the patient to be very conservative. The expert is in effect being asked

to guarantee that the patient will not injure himself or others if he is released, because if the expert says that it is safe to release the patient and the patient then injures somebody the expert will be in a great deal of trouble. It is, of course, true that the expert will not have to pay a legal penalty for his mistake, but the damage to his professional standing could be disastrous especially if the released patient committed a well publicised crime. A.S. Goldstein discusses this problem* and he even goes so far as to say that "The little information we do have suggests that the contemporary movement towards liberal release procedures (from mental hospitals) is given short shrift when the patient has been committed after (or in lieu of) a charge of serious crime".

A concrete example of this problem can be found in the case of Bong Yol Yang** which was heard before the United States District Court in Washington D.C. on November, 18, 1964. It is impossible to quote this case at length, but briefly Mr. Yang appeared at the White House on October 5, 1964 asking to see the President or a representative of the President. He was questioned by a senior Secret Service officer and he told the officer that he was a painter who was out of work and that people were always following him around and revealing his subconscious thoughts. He also said that these people were going to kill him and that he could not go on living with this problem. The Secret Service Officer thought that Mr. Yang was mentally ill and had him committed to a mental hospital. At the hearing on November 14, Mr. Yang was trying to obtain his release from that hospital.

* See A.S. Goldstein, "The Mentally Disordered Offender and the Criminal Law", in <u>The Mentally Abnormal Offender</u>, London, 1968.

**Katz <u>et al</u>, <u>Psychoanalysis Psychiatry and Law</u>, New York, 1967.

At the hearing testimony was taken from Dr. Dan F. Keeney who is a Psychiatrist and who had examined Mr. Yang on four separate occasions. Dr. Keeney testified that Mr. Yang believed that for the last 42 months people have been following him and revealing his subconscious thoughts in a way which keeps him from getting a job. Dr. Keeney also said that Mr. Yang had written a large number of letters to government officials trying to get them to do something about his problem and that on October 5 Mr. Yang was trying to ask the President himself to do something about it.

Dr. Keeney testified that he believed that Mr. Yang was suffering from schizophrenia of a paranoid type. He was then asked to define these words in everyday terms and he explained that a person suffering from schizophrenia has lost his ability to differentiate between what is real and what is not real, and that such a person often has hallucinations, illusions, and false beliefs. A paranoid type of schizophrenia is diagnosed when these delusions are of persecution.

Under cross-examination Dr. Keency said that Mr. Yang had been treated at D.C. General Hospital with a tranquilizing drug "but at times there when people would question his delusions he would become agitated and disturbed to such an extent that it was necessaryto increase this drug considerably." The doctor then said, "It is my feeling that his control of his aggressive and hostile impulses in situations where the questioning of these delusions comes up is very thin, and that it might break through at any time and he might attack someone: Although I must admit I do not have any direct knowledge of his ever having attacked anyone so far." Dr. Keeney was then asked whether this was a possible danger or a real certainty? He replied "It is a potential danger, yes." The defence attorney then asked "Potential or possible?" Dr. Keeney answered, "I think it is a probable danger."

A few more questions follow concerning the possibility of Mr. Yang obtaining tranquilizing drugs if he was released from the hospital and about Mr. Yang's talent as an artist. At the end of these questions the defence attorney moved for a directed verdict in favour of Mr. Yang based on the fact that the government had failed to show that Mr. Yang was likely to injure himself or others. He gave as reasons for his motion the fact that Mr. Yang was not armed when he visited the White House and that Dr. Keeney's testimony was quite vague. He concluded that considering the fact that Mr. Yang had never struck anyone the Government had failed to make a prime facie case for Mr. Yang's continued detention. To this the judge said, "I will deny your motion."

The hearing then proceeded with testimony from Mr. Yang and then went to the jury. The jury decided that Mr. Yang was both mentally ill and likely to injure himself and others. Therefore, Mr. Yang was not released from detention.

The case clearly illustrates the power of the psychiatrist in a hearing of this kind. Despite the fact that Mr. Yang had never injured anyone in his life the psychiatrist's opinion that he was dangerous was sufficient to convince the jury that he ought not to be released.

But even more disturbing than the psychiatrist's power is the incredible vagueness of the phrase "likely to injure himself or others". This problem is clearly illustrated by the exchange between Dr. Keeney and the defence counsel quoted above. Here Dr. Keeney begins with "potential danger" and after being pressed by the defence counsel changes to "probable danger". Now, presumably if someone is a probable danger he is more likely to cause harm than if he is merely a potential danger, but even this

tightening up of language does not get us very far. "Probable danger" is still a very vague term because there are no precise criteria for its use. For example, are we to say that everyone who has eccentric beliefs and who gets agitated when these beliefs are questioned is a potential danger? Surely not, because this would include a vast number of people many of whom are not dangerous at all. For example, virtually all political dissenters hold beliefs which many people would call eccentric and they more often than not get very agitated when their views are questioned, but surely we can't say that they are all probable dangers. I am not saying that such people never cause harm but a mere propensity to become agitated coupled with eccentric beliefs surely is not sufficient to show that someone is a probable danger because there are any number of such people who never become violent in any way.

The reason I am stressing this point is that there is a legal principle in both the British and American legal systems that laws must be precise with as little definitional leeway as possible*. This principle is very important because if it did not exist it would be possible to pass laws which virtually invite government officials to abuse their power. For example, there is a law in the Soviet Union a law against anti-Soviet activities** which is so vague that the government can suppress virtually any activity it dislikes simply by labelling it as anti-Soviet. Also lest we sink into a "it can't happen here" attitude it must be remembered that the United States flirted with the type of legislation in the hay-day of the House of representatives Un-American Activities Committee. Thus, in order to preserve this principle we must figure out some way to define 'dangerouness' so that

* See Packer, Op. Cit. Chapt. 5.

**See I.F. Stone, Op. Cit.

the periodic hearing will release all those criminals who are no longer dangerous and return to the practical treatment centers only those criminals who actually are still dangerous. If this isn't done, not only will we have the problem of the practical treatment experts "playing it safe" and releasing only those criminals about whose conduct they can be absolutely sure, but we will also have greatly increased the potential for official abuse of our legal system. In the absence of a precise definition of 'dangerousness' the government could for example hold political dissidents indefinitely on minor charges (such as disturbing the peace) simply by ensuring that the practical treatment experts labelled them as dangerous. In short, a free society must exclude from its legal system all charges which are so vague that is impossible to defend oneself against them, and dangerousness which is not precisely defined but merely proclaimed by experts is just such a charge.

But how are we to define dangerousness? Are we to say that anyone who is prone to agitation is dangerous? Are we to say that anyone who feels that people are against them is dangerous? Are we to say that cocky unco-operative prisoners are dangerous? Or should we consider these and other factors as indications of dangerousness and then devise some statistical formula which will tell us how likely it is for a person to go back to a life of crime upon his release? There is a good reason to believe that all such attempts at a definition of 'dangerousness' are doomed to failure because a person could exhibit all of the above indications and still not be dangerous and he could exhibit none of the above indications and be extremely dangerous.

Thus, the quest for a precise definition of 'dangerousness' is to say the least frought with difficulties. However, this is only to be expected because by allowing continued detention for dangerousness we

would be throwing out yet another important legal principle: the principle that criminal sanctions may be invoked only for conduct.* This principle has always been of prime importance to a free society because it prevents the all too widespread practice of locking up people because they have disfavoured beliefs whether they be political, religious, or in some cases scientific. This principle is equally important with regard to dangerousness. I have just argued that a proper definition of 'dangerousness' is impossible to devise. However, there is always the possibility that a government will devise a precise but arbitrary definition of 'dangerousness'. Such a definition could be the doorway to very severe repression if for example the government labelled all people who favoured certain reforms as dangerous. Something very similar to this has in fact happened in the Soviet Union where intellectuals have been detained in mental hospitals because of "excessive reformist delusions".** If however, we stick to our principle that people can only be subjected to criminal sanctions for conduct then such repressive practices could not be carried out under the guise of legality.

Thus, the practical treatment legal system advocated by Macdonald and Lady Wootton runs counter to no less than three fundamental legal principles. Principles which to a large extent distinguish the legal system of a free society from the repressive legal systems found in many parts of the world today. I am not suggesting that Lady Wootton or Macdonald had anything but the best intentions when they advocated a practical treatment legal system. My point is simply that they do not seem to have relized what changes would be required for the implementation of such a system. This is turn prevented them from considering whether the benefit in the area of crime control provided by a practical treatment system is sufficient to offset the very real dangers inherent in such a system.

* See Packer, Op. Cit., Chapter 5.

* See I. F. Stone, Op. Cit.

5. Feinberg's Arguments

In his article, "Crime, Clutchability, and Individuated Treatment",* Joel Feinberg argues that we ought to adopt a system of practical treatment, but that we must adopt an elaborate system of safeguards in order to avoid the problems I mentioned in the last two sections. His argument is the best defense of practical treatment I have seen, so I will discuss it at some length.

In outline, his argument consists of four parts: (1) he requires that we treat "similar cases in similar ways and dissimilar cases in dissimilar ways; (2) he then classifies criminals into six different categories; (3) he describes the appropriate type of treatment for each; and (4) he describes the procedures which will guarantee individuated practical treatment for the different types of criminal and still protect the individual criminal's rights.

The first step is the principle of formal justice, and Feinberg puts it forward without argument; I have no objection to this.

The second step is much longer: it consists of a long discussion of the first category, which is mentally ill criminals, and somewhat shorter discussions of the other five categories.

Feinberg begins his treatment of mental illness and crime by saying, "Central to the concept of disease in general is the idea of the impairment of a vital function, that is, a function of some organ or faculty upon which the important or proper functioning of the whole system depends." Examples of such impairment would be a heart which is too weak to allow for any exertion or a limb which is paralyzed.

Feinberg then turns to the question of whether this model of disease applies to mental illness. In his words, "If mental illness shares the generic character of sickness, it must then consist in the disabling impairment of

* Joel Feinberg, "Crime, Clutchability and Individuated Treatment", in _Doing and Deserving_, Princeton University Press, Princeton, New Jersey, 1970.

some vital mental function, such as reasoning, remembering, feeling or imagining." He points out that there is little controversy that someone with an impaired cognitive function is mentally ill. He argues that few people would argue that someone whose memory had failed, who simply could not draw any inferences, or who could not distinguish between fact and fantasy was sick.

He then goes on to tackle the much more controversial issue of whether someone is mentally ill if his emotional or volitional faculties are impaired. He argues that a satisfactory explication of this type of mental illness is possible if we carefully distinguish between various senses of symptom. Feinberg asks us to consider the following example:

> Let us imagine that there is a small gland whose secretions into the bloodstream help regulate emotional states. When various cells in this gland become cancerous, the character of its secretions is subtly altered, so that a person falls out of emotional equilibrium easily and tends to overreact emotionally to commonplace stimuli. At a certain stage the person is subject to powerful moods of melancholy alternating with consuming inner rages. Soon his consciousness is pervaded by these feelings, and his experience chronically colored by them. Anything done or said to him and anything he can turn his attention to in reverie make him angry. He finds himself, to his own dismay, rehearsing assaults and murders in his imagination. He is subject to paroxysms of resentment and hate. (p. 257)

Feinberg argues that such a person would clearly be sick because "one of his component parts is not performing its regulative function". Feinberg then changes the example to one in which the symptoms are the same but cannot be accounted for by any physical malfunction. He also stresses that the person suffers no cognitive impairment - "The victim may still be capable of consecutive reasoning and valid inferences; he may suffer no perceptual aberrations; and although he may enjoy paranoid fantasies, he does not really believe them."

Feinberg then presents us with the following description of a crime committed by this man:

> Suppose instead that he broods for days over an affront, considers measures of vengeance, and entertains fantasies in which he inflicts the sharpest agonies on his enemy, Gradually fantasy merges into plan and plan into action. Still he does not *want* to take action; he knows it is wrong and knows it would endanger himself. For many days he constrains himself; but then his angry mood flares up again, and his hateful desire regains its frightening strength. On the day of his crime he could have stopped himself yet again. There was not irresistible compulsion to commit the crime then and there; and if there had been a "policeman at his elbow", he surely would not have done it then and there. But the crime was "in the cards," and it almost certainly would have happened sooner or later. (p. 258)

Now, the crucial question which Feinberg must answer is whether this man's desires are a product of an illness or a natural expression of his character. Feinberg answers this question by drawing an analogy between a person with a fever and the person in our example:

> Fever is a symptom of underlying subfunctional impairment (such as infection) in a stronger sense of "symptom" than that in which a desire for water is a symptom of fever. In the stronger sense, a symptom is an *infallible indication* (a sufficient condition) of the presence of something else; in the weak sense, a symptom is a mere sign or clue, or *ground for suspicion*. The mentally ill man's morbid desire to kill is a symptom of his illness in roughly the way the physically ill man's craving for water is a symptom of his fever. One can lust to kill without being ill, just as one can be thirsty without having a fever. On the other hand, the chronically gloomy moods and inner rages are, like the fever, in themselves sickness, that is, states of being in which a person cannot function properly; and, further, they are symptoms (in the strong sense) of some underlying part-functional impairment. (p. 259)

He then distinguishes a third sense of symptoms :

> If our suspicions of underlying illness, based on the occurrence of the hateful (or thirsty) desire are confirmed, then what we took to be a sign of possible illness is now seen to be an actual symptom in still a third sense. The desire is a *necessary consequence* of the pathological condition: given fever, it is necessary that there by dryness, and, given morbid inner rages of the appropriate type, it is necessary that there be murderous desires. (pp.259-260)

He concludes that if the murderous desires are symptoms in this strong third sense, then they are a product of an illness and not a natural expression of his character.

Having shown to his satisfaction that his first category of sick criminals is logically sound, Feinberg goes on to categorize other criminals who are not mentally ill. These are :

2. The self-interested risk-taker who commits a crime in order to achieve gain. He has weighed the risks of being caught against the benefit to be obtained from committing the crime and he decides to commit the crime. Feinberg's example is a respectable bank teller who embezzles money.

3. The fallen sinner who is a good man who succumbs to temptation.

4. People who commit crimes to advance a cause other than their own and often at great personal cost. Such crimes can be intended to "advance or retard a cause, to help a loved one, or to hurt an enemy".

5. Criminals who are completely alienated from the ideals of the society at large. Feinberg's examples of this type are young provincial hooligans, people at war with society, and committed professional criminals.

6. Psychopaths of whom Feinberg says : "(they) commit one petty crime after another, are convicted, imprisoned, reassigned to hospitals, released, only to begin the familiar pattern of pointless self-damaging crime again."

The appropriate treatment for the first category of criminal is presumably some sort of psychiatric or psychological treatment, although Feinberg is not in any way specific about this.

He argues that criminals of the second and third type ought to be punished. Of the second type of criminal he says, "His is the type we have in mind when we speak of 'gain' as a motive and talk of punishment as a 'pricing system' and the criminal as 'paying his debt' and "wiping his moral slate clean." Punishment is also appropriate for the fallen sinner because it may lead to repentance. He sums up by saying that punishment

provides rationally self-interested men self-interested motives to obey the law and, once they have disobeyed the law, the necessary means of repentance. He then argues that these points apply to the third category of criminal to a lesser degree because, since such criminals are not completely self-interested, they are less likely to be deterred by the threat of punishment and because they are advancing a cause other than their own, they are less likely to repent. Feinberg concludes by saying, "The dedicated zealot, the revolutionary, the Robin Hood bandit, the man overcome by love or pity (or hate for that matter) are not as likely to repent for their crimes as the ambitious bourgeois embezzler."

Feinberg declares that punishment has no application at all to the fourth category of criminal because, since they have not sinned against their own ideals, they are very unlikely to repent. Also he argues that punishment is unlikely to deter them from committing crimes because, while they may weigh risks with regard to the decision to commit a particular crime, they usually do not weigh the risks of the criminal or noncriminal lives generally. Feinberg sums up here by saying :

> Thus methods and tools other than the price tag and the penitentiary seem called for as a response to those in this category: persuasion, re-education, integration into thelarger community, provision of a stake in it and a new source of pride. Intimidation "reforms" only the cowardly and dispirited from this group. (pp. 261-262)

Of psychopaths Feinberg simply states the usual problems that this type of criminal presents because they completely lack prudence, conscience, the ability to think about the future, and the ability to care about other people's feelings. Because this condition is incurable in adults (or at least widely thought to be incurable), Feinberg advocates that they "be consigned permanently to 'places of safety' that are neither hospitals nor prisons but are pleasant and only minimally restrictive."

Having made this classification, Feinberg sets about making suggestions about how we ought to reform our penal system. He begins by saying precisely what he means by punishment:

> What distinguishes punishment from alternative modes of response is that it is a form of deliberately hard treatment that expresses blame and condemnation. It is a forceful and emphatic way of impressing upon the wrong-doer the public judgement that he has done wrong and that society resents him for it. Punishment is a hard fate for the criminal and also a symbolic way of telling him that he has deserved his hard fate, that he has it coming, that it serves him right. When we punish, as Samuel Butler's visitor to Erewhon put it, "we add contumely to our self-protection," and we rub it in. It is true, of course, that punishment may have extra-punitive effects; by punishing we may sometimes reform, deter, cure, intimidate, instruct, or detain. But in punishing we (necessarily) condemn and inflict pain that is meant to be ignominious and shameful. (pp. 263-264)

And again he stresses that he does not believe that it is appropriate for any but the second, third, and possibly fourth categories of criminal. He therefore suggests that we become much more flexible in dealing with criminals.

> Sound policy would therefore seem to require a wide variety of types of institutions for treating criminals and great administrative flexibility in procedures for selecting among them. But here is the catch. Flexibility presupposes discretion and liberty to experiment. These in turn presuppose freedom from rigid statutory impediments. But such freedom is a form of power over human beings, and relatively unanswerable power at that. Whatever the defects of the traditional system that preserved the linkage between crime and punishment, it at least offered the protections of due process to the criminal from first arrest to final release. If we break that link, do we not also sever the connection between crime and responsible legal procedures? (p.264)

Feinberg proposes to deal with this problem by introducing the concept of a "clutch line". In his words :

> ...the criminal trial becomes a mere preliminary hearing to establish whether the state has the right to get a defendant in its clutches. If convicted, the accused is properly under the state's control. He can no longer decide his own fate, and it is up to the authorities to decide what kind of treatment, if any, to impose upon him. (p. 265)

Feinberg then tries to outline procedures which would guarantee an individual's freedom both before and after the clutch line has been passed. He argues that before the clutch line is crossed someone must have committed an act proscribed by law or omitted to perform an act required by law. He

rejects out of hand the suggestions that anyone ought to get into the law's clutches simply because he has a character flaw or neurotic symptom that makes him a dangerous person. He rightly points out that being a dangerous person has only been a crime in the most oppressive of societies. He also rejects Lady Wootton's position that once it has been shown that someone has committed a crime, then he ought to be in the state's clutches regardless of whether he has committed the crime intentionally or by mistake, by accident, or under duress. He concludes that before the state has a right to get a defendant into its clutches, it must prove that he actually committed the crime in question and that he did it intentionally (or, in some cases, negligently or recklessly). In short, the state must prove both that the defendant performed the act in question and mens rea.

But now what happens after the criminal has passed the clutch line and is in the state's power? Feinberg argues that

> Procedures must be devised to make possible the assignment of clutchables to appropriately individualized modes of treatment and also the effective protection at every stage of their right not to be mistreated. Clutchability must involve at least temporary forfeiture of not only the right to liberty of movement but also the right to privacy. If the system is to have any chance of working, the clutchable will be subjected to tests, interviews and measurements. Many of the inquiries that were banned at the first trial now become centrally important: inquiries into his motives in committing the crime, his ulterior objectives, and his emotional states, his cognitive capacities, his affective dispositions; his praise- or blameworthy traits of character, his attitudes and beliefs. (pp. 268-269)
>
> I should think that such inquiries, if unimpeded, could yield evidence of high reliability, even in our present backward state of social scientific knowledge, that the convicted clutchable is either a clear case of one or another of the main categories of criminal - gambling consumer, fallen sinner, class enemy, mentally disturbed or whatever - or else a marginal case, or otherwise one not easily classifiable. This evidence then would be presented at another hearing to a committee of post-clutch-line judges, perhaps composed of jurists, sociologists, psychologists and lay jurymen in equal numbers, with the prisoner's lawyer present to challenge parts of it if he wishes, but not necessarily in accordance with the strict assignments of presumptions and burdens and other procedures characteristic of the adversary system. The prisoner himself would be interrogated by the committee; and, finally, a decision would be reached either to release him outright as no longer dangerous or to condemn him to penal servitude for a time-period with a fixed upper limit , or fine him, or parole him under supervision, or assign him to a mental hospital, or rehabilitory work camp, or some comfortable but permanent "place of safety". (pp. 269-270)

Finally, Feinberg tackles the problem of a prisoner's falling under the arbitrary power of some doctor or administrator "who regards him as too dangerous ever to be released." Feinberg proposes three separate safeguards against such a problem and argues that we ought to adopt all three. First, there must be someone to look after the prisoner's interests. If friends are not available to do this, Feinberg argues that the state must appoint officials to do so. Second, he argues that there must be an elaborate system of appeals, not only for the original court decision, but also for the decisions of the assignment committees and of the penal and therapeutic authorities. Third, there must be periodic reviews at regular intervals.

Feinberg deserves credit for making a genuine effort to solve the problems I mentioned in the last two sections. His retention of the doctrine of _mens rea_ and his provision of an elaborate appeals procedure make his suggestions vastly superior to the systems proposed by Macdonald or Lady Wootton. However, I will now argue that Feinberg's proposals are unacceptable for two reasons: (1) He still advocates detaining people indefinitely because they are dangerous. I will argue that this is unacceptable because dangerousness is such an ill-defined concept that even with elaborate procedures for appeals and review, the accused is basically in the intolerable position of not knowing what charges are pending against him. (2) Feinberg advocates abandoning the principle of responsibility (at least with regard to blame and punishment) and the adoption of practical treatment on the basis that it is just that we treat the different categories of criminals in different ways and that by doing so we will reduce crime. I will argue that he is wrong on both counts.

In the last section, I argued that 'dangerousness' must be precisely defined if the accused is to have any chance of defending himself against expert opinion. Feinberg in no way solves this problem: in fact, _his_

proposals seem to highlight it. He proposes that the criminals be categorized as "gambling consumer, fallen sinner, class enemy, mentally disturbed, or whatever." Of these, only the first two would go to penal institutions for a period of time with a fixed upper limit; the others would go to "a mental hospital, or rehabilitatory work camp, or some comfortable but permanent 'place of safety'." It is this latter group which will most need the protection of Feinberg's system of appeals and reviews. But just what would these appeal and review hearings have to decide? Among other things, they would have to decide whether a criminal has an impaired emotional or volitional part-function or whether he is a class enemy. I will now argue that neither of of these concepts is precise enough to properly be part of the criminal law.

Feinberg argues that if we agree that there can be impairments of cognitive part-functions, then there is no reason to believe that there cannot be impairments of emotional or volitional part-functions and, therefore, that criminals can be sick even if they do not come under the M'Naughten rules which only refer to cognitive impairments. On a purely theoretical level this may indeed be true, but this does not show that mental illness due to some impairment of a volitional or emotional part-function is as precisely definable as mental illness due to the impairment of cognitive part-functions, and unless something can be precisely defined, I respectfully submit that we ought to be very loath to make it part of the criminal law.

This problem is well illustrated by Feinberg's example of a man who has constant inner rages. This is due to an impairment of a part-function, but of what part-function? Feinberg does not tell us, and this is a very serious defect in his argument, because unless we have a precise description of the part-function and how it operates in a normal person we know very little. Feinberg tells us that the murderous desires of the man in his example are a symptom of his morbid inner rages, and the morbid inner rages are a symptom

of the impairment of a part-function. The question is, how do we tell morbid inner rages which are the result of an impaired part-function from just plain ordinary inner rages which are not the result of an impaired part-function? For Feinberg's account of mental illness to be sound, we must be able to do this and, before we can do this, we must have a precise description of the normal part-function.

Feinberg would no doubt reply that surely you cannot say that someone who constantly rages at practically everything is normal. The man simply cannot cope with everyday life. He rages at things such as his neighbour typing in the adjoining flat or someone failing to say hello to him on the street.

But is this true? What distinguishes the man in Feinberg's example from an extremely nasty person who rages at everyday occurrences? I do not know the answer to this and I do not know how we can ever get an answer to this without first precisely defining the part-function which is supposed to be impaired in Feinberg's example.

However, even if we grant that the man in Feinberg's example has an impaired part-function, we must remember that Feinberg has, understandably enough, chosen an extreme example in order to illustrate his point. But, for his explication of mental illness based upon the impairment of a part-function to be of any use in the criminal law, he must tell us how to tell a sick rage from a normal one in cases which are much less clear-cut. One possible way of going about this would be to refer to "reasonable rages". That is, someone would not be considered to be mentally ill if there were reasons for his rages. For example, it would not be considered sick to lose one's temper if someone deliberately annoyed you day after day by dumping leaves and trash in your garden, blocking your driveway, or playing music very loud late at night.

But even here we are on shaky ground because what counts as a proper reason for going into a rage is difficult to pin down and may even be ideal-ogically coloured. Take, for instance, someone who believes very strongly some left or right wing ideology. If he is a right-winger, he might rage at all things in the news which in any way smack of socialism, such as nationalization of industry, welfare projects, trade union activities, etc. If he is a left-winger, he might rage at tax relief for big business, high salaries for people in management positions, arguments that workers' wage demands are unreasonable, etc. Given the present state of the world, either man will no doubt have something new to rage about practically every day, although when Labour is in power the right-winger will do a bit more raging than the left-winger and vice versa. Anyone who has known such radicals can testify that they can get absolutely livid simply by reading newspapers or watching television. Are such rages normal or are they due to the impairment of an emotional part-function? Well, in either case, the person would have a reason for his rages, but he would also be flying into a rage in situations in which most people would not bat an eye. It very much boils down to what you call a proper reason for flying into a rage, and this can be an issue with strong ideological overtones. For example, in the Soviet Union, the right-winger might be considered to have an impaired emotional part-function, while the left-winger might be considered perfectly normal, and the situation might be reversed in Spain or even in some partd of the United States.

My point here is not that there is no such thing as an impaired emotional or volitional part-function. Clearly people vary tremendously in their emotional stability and their ability to control themselves. My point is only that considerations of emotional and volitional part-functions have no place in the criminal law because they are such vague concepts that, in many cases,

* This is a very important question since radicals commit their share of crimes and these crimes are often violent.

it is impossible to come to precise, impartial decisions about them. In short, if someone is charged with murder, he knows what the charge against him means and he can defend himself against it, but if he is charged with having an impaired emotional part-function, he simply would not know what the charge meant and would be at a real disadvantage in conducting his defense.

Here it might be objected that since I do not object to the M'Naughten rules I cannot object to including considerations of emotional and volitional part-functions in the criminal law. However, I do not object categorically to considerations of emotional or volitional part-functions. I only object to them if they are poorly defined as they are at present. In my section on Macdonald's arguments, I stated that I was perfectly willing to admit that the M'Naughten rules could be improved upon or possibly added to. Here it is worth noting that one of the reasons that the M'Naughten rules are precise is that they deal only with extreme impairments of cognitive part-functions. Someone has to be so far gone that he does not know what he is doing or that he does not know that it is wrong.* Also, since the M'Naughten rules deal only with extreme cases, we avoid the ridiculous situation in which a very large number of criminals are classified as mentally ill. Thus, if we are to successfully expand the M'Naughten rules to cover impairments of emotional and volitional part-functions, we should only allow extreme impairments of these part-functions to count as part of the legal definition of mental illness. For example, if a precisely worded rule could be devised under which only extreme cases such as Feinberg's constantly raging man would count as mentally ill because of an impaired emotional part-function, I would have no objection

* It must be remembered that this second condition refers to clear cases of wrong such as murder, not to ignorance of new tax laws or the like.

to including this rule in the criminal law. Such a rule would be precise enough to allow someone to defend himself against a charge of having an impaired part-function and it would avoid the ridiculous and dangerous situation in which anyone who gets extremely emotional or excited (such as people with radical political views) would be considered to be mentally ill because of an impaired emotional or volitional part-function.

Possibly even more disturbing is Feinberg's notion of a "class enemy". He never says exactly what he means by this, but I assume he is referring to many of the criminals who fit into his fourth and fifth categories such as dedicated zealots, revolutionaries, Robin Hood bandits, young provincial hooligans, or committed professionals. But again, how does one go about proving that he is not a revolutionary or a committed professional criminal? These may seem to be better defined charges than the charge of having an impaired emotional part-function and indeed, in one sense, they are because we certainly do know what it means to be a revolutionary or a professional criminal. But the question is how one goes about proving that one is no longer a revolutionary or professional criminal and this is by no means clear. In effect, Feinberg is advocating that in order to secure his release the criminal must show that he is no longer dangerous, and as I argued in the last section, a system of criminal law which requires this is unacceptable.

Here it most likely would be objected that I am ignoring the many advantages of a system of practical treatment and over-emphasizing the disadvantages and that indefinite sentences are a small price to pay for the more just and less crime-ridden society practical treatment would provide. I will discuss these and other defenses of practical treatment in the remainder of this chapter and in the next two chapters.

It is clear from the quoted passages above that Feinberg believes that his system of practical treatment is in line with the principle of formal justice, that is, that we should treat similar cases in similar ways and

dissimilar cases in dissimilar ways. His reasoning is that the people who fall into his six categories of criminals differ widely enough to merit being dealt with in different ways. However, the principle of formal justice can be satisfied by a radically immoral legal system. For example, a legal system which punished all thieves who stole less than £100 by death and all thieves who stole more than £100 by torture followed by death would satisfy the principle of formal justice because we would be treating similar cases in similar ways and dissimilar cases in dissimilar ways. In other words, while Feinberg is absolutely right to say that we should abide by the principle of formal justice, he also must provide a morally acceptable way of distinguishing among different types of cases.

Feinberg's method of distinguishing among cases is simply that we should deal with each type of criminal in such a way as to maximize the control of crime. This is why Feinberg classified criminals according to their motivation rather than, say, according to the seriousness of their crimes. He therefore advocates punishment for those whom he believes will be prevented from committing crimes by punishment and treatment of various kinds for the rest (excepting psychopaths who will be detained permanently). But clearly there are many considerations other than the control of crime which must be taken into account when we formulate a policy for dealing with criminals. For example, in the name of crime control, Feinberg advocates sentences of a fixed length for criminals of the second and third categories and sentences of indefinite length for all other categories except psychopaths. These indefinite sentences can vary from immediate release after being thoroughly interviewed to detention for a very long period of time if someone is considered dangerous.

These suggestions bring up some very serious moral problems. First, it seems that the criminals from the second and third categories who will receive definite sentences get by far the better deal. It is true that some criminals from the other categories will be released outright once the interviews and

tests show that they are no longer dangerous, but others might be detained for the rest of their lives or for very long periods of time. Also, those who receive definite sentences at least know when they will regain their freedom; those who receive indefinite sentences do not have the comfort of such knowledge.

This point seems to be completely lost on Feinberg, quite possibly because he has fallen into the trap of believing that punishment is burdensome while treatment is not. This is shown by what he says in the quoted passage where he distinguishes punishment from other responses to criminals. Feinberg is quite right to point out that punishment must express blame and condemnation, but to call it "deliberately hard treatment" is quite misleading because to be detained in a properly run penal institution of the type I have already described is no more "hard" than to be detained for practical treatment. In both cases, the inmate must bear the very heavy burden of losing his freedom. However, in the case of practical treatment, the loss of freedom is indefinite.

Thus, in his hurry to control crime Feinberg certainly seems to have ignored many other moral considerations. In the next two chapters, I will argue that these other moral considerations make a very strong case for the retention of the principle of responsibility rather than the adoption of a system of practical treatment.

V

JUSTICE AND MORAL DESIRABILITY

In this and the next chapter, I will discuss the actual advantages and disadvantages of a practical treatment legal system as opposed to a legal system based upon the principle of responsibility. In this chapter, I will argue that justice and what might be called the moral quality of our everyday lives will be served best by a legal system based upon the principle of responsibility. In the next chapter, I will discuss the two major arguments in favour of a practical treatment legal system, which are that practical treatment is more humane and more effective in controlling crime than a legal system based on the principle of responsibility.

1. Justice

In the last section, I argued that Feinberg was not justified in assuming that the interests of justice would be served by providing individuated treatment for his six categories of criminal. However, the issue of justice plays an important role in the defense of a practical treatment legal system, and therefore, I must consider it in greater detail.

Stated in simple terms, the basic issue is that if the thesis of determinism is true, then it follows that people never <u>deserve</u> blame or punishment for any of their actions. From this it follows that a legal system based upon the principle of responsibility necessarily involves injustice because to administer undeserved blame and punishment is clearly unjust. I will discuss this problem in two stages. First, I will consider a famous attempt by Professor P.F. Strawson to show that this problem is misconceived because we cannot, in fact, avoid holding people responsible for their actions. After I have discussed the strengths and weaknesses of Strawson's argument, I will proceed to what I believe to be a more satisfactory solution to this problem.

In his lecture entitled "Freedom and Resentment" before the British Academy in 1962 Professor P.F. Strawson addressed himself directly to the above objection

by identifying "optimists" who deny that the above objection has any force and "pessimists" who believe that this objection is valid:

> Some optimists about determinism point to the efficacy of the practices of punishment, and of moral condemnation and approval, in regulating behaviour in socially desirable ways. In the fact of their efficacy, they suggest, is an adequate basis for these practices; and this fact certainly does not show determinism to be false. To this the pessimists reply, all in a rush, that _just_ punishment and _moral_ condemnation imply moral guilt and guilt implies moral responsibility and moral responsibility implies freedom and freedom implies the falsity of determinism. (page 188)

Strawson then reviews the two standard moves which optimists have made in order to convince pessimists that determinism is compatible with punishment and moral blame. The first move is to argue that the freedom required for moral blame and punishment is simply the absence of certain conditions which if present would make it improper to punish or blame. These are conditions such as compulsion, feeble mindedness, insanity, etc. The optimist maintains that in the absence of conditions such as these we are justified in holding someone morally responsible for their actions. The second move is to point out that even if determinism is true people still intend to do things and then act on these intentions, and therefore do in fact act for reasons which are in a very real sense their own. However, Strawson's pessimist rejects both of these moves in the following words :

> But _why_ does freedom in this sense justify blame, etc.? You turn towards me first the negative, and then the positive, faces of a freedom which nobody challenges. But the only reason you have given for the practices of moral condemnation and punishment in cases where this freedom is present is the efficacy of these practices in regulating behaviour in socially desirable ways. But this is not a sufficient basis, it is not even the right _sort_ of basis, for these practices as we understand them.

Now Strawson makes an interesting attempt to bring the pessimist and the optimist together. He argues that the practices of moral blame and punishment are, so to speak, "built into" every human being and therefore could never be eschewed completely.

Strawson begins by considering ordinary human interactions and the attitudes these engender. He points out that when someone displays an

attitude of goodwill, affection, or esteem to someone else, the second person usually reacts by displaying what Strawson calls a "reactive attitude" which in these circumstances would be gratitude. Similarly when faced with someone displaying "contempt, indifference, or malevolence" people tend to display the reactive attitude of resentment.

However, Strawson points out that people need not display a reactive attitude toward the actions of other people. In some cases Strawson argues that we ought to and generally will adopt what he calls an objective attitude which he describes as follows:

> To adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained;

Also Strawson argues that objective attitudes can be either toward particular actions of people who in general would be subject to reactive attitudes or to all the actions of a person. An example of the first would be when someone injures me by mistake. Here I would suspend my normal reactive attitude of resentment* but I would still assume that the person who injured me would under other circumstances still be a suitable candidate for a reactive attitude.

However, if someone is insane, feeble minded, delirious etc. we would suspend our reactive attitudes toward all of his actions and adopt a uniform objective attitude toward him.

Having given us this framework Strawson asks the following question on Page 195:

> What effect would, or should, the acceptance of the truth of a general thesis of determinism have upon these reactive attitudes? More specifically, would, or should, the acceptance of the truth of the thesis lead to the decay or repudiation of all such attitudes? Would, or should, it mean the end of gratitude, resentment, and forgiveness; of all reciprocated adult loves; of all the essentially personal antagonisms?

* Provided, of course, that the mistake was a reasonable one, something which genuinely could not be helped. I might still resent someone if he injured me by mistake but the mistake was due to carelessness.

Strawson answers these questions by first saying on page 197 that, "A sustained objectivity of inter-personal attitude, and the human isolation which that would entail, does not seem to be something of which human beings would be capable, even if some general truth were a theoretical ground for it". Strawson then goes on to point out that the reason we adopt the objective attitude toward a particular person is that he is deranged, immature or for some other reason outside the reach of normal human relationships, or we may adopt an objective attitude to normal people for reasons of self-protection or policy. His point here is that in neither case do we adopt the objective attitude because we believe that determinism is true. He sums up his answers by saying:

> So my answer has two parts. The first is that we cannot, as we are, seriously envisage ourselves adopting a thorough going objectivity of attitude to others as a result of theoretical conviction of the truth of determinism; and the second is that when we do in fact adopt such an attitude in a particular case, our doing so is not the consequence of a theoretical conviction which might be expressed as 'Determinism in this case' , but is a consequence of our abandoning, for different reasons in different cases, the ordinary inter-personal attitudes.

Strawson then goes on to mention the objection which must be forming in every reader's mind by saying :

> It might be said that all this leaves the real question unanswered, and that we cannot hope to answer it without knowing exactly what the thesis of determinism is. For the real question is not a question about what we actually do, or why we do it. It is not even a question about what we would in fact do if a certain theoretical conviction gained general acceptance. It is a question about what it would be rational to do if determinism were true, a question about the rational justification of ordinary inter-personal attitudes in general. To this I shall reply, first, that such a question could seem real only to one who had utterly failed to grasp the purport of the preceding answer, the fact of our natural human commitment to ordinary inter-personal attitudes. This commitment is part of the general framework of human life, not something that can come up for review as particular cases can come up for review within this general framework. And I shall reply, second, that if we could imagine what we cannot have, viz, a choice in this matter, then we could choose rationally only in the light of an assessment of the gains and losses to human life, its enrichment or impoverishment; and the truth or falsity of a general thesis of determinism would not bear on the rationality of this choice.

Here I must make two points. First, the fact that we could not sustain a totally objective attitude toward our fellow human beings does not mean that we could not be induced to adopt an objective attitude in many more

situations than we do in fact now adopt that attitude. Second, from the fact that we presently adopt the objective attitude for reasons other than a belief that the thesis of determinism is true, it doesn't follow that a belief that the thesis of determinism is true would not induce us to adopt objective attitudes in areas we do not normally adopt them today.

If these two points are well-founded, and I will soon argue that they are, then the question Strawson dismisses as unreal is not so silly after all. If the belief that the thesis of determinism is true can alter our pattern of adopting the objective attitude toward people then "the natural human commitment to ordinary inter-personal attitudes" is more subject to review than Strawson seems to think.

In what cases would a belief that the thesis of determinism is true cause us to change from reactive attitudes to objective attitudes? I do not believe that many cases involving what Strawson calls personal reactive attitudes (e.g. gratitude, resentment, etc.) would be very much affected by such a belief. But Strawson also identifies vicarious analogues of personal reactive attitudes. I will argue that a belief in the truth of the thesis of determinism has caused people to give up vicarious reactive attitudes in favor of objective attitudes.

Strawson described these vicarious analogues in the following words :

> They are reactions to the qualities of others' wills, not toward ourselves, but toward others. Because of this impersonal or vicarious character, we give them different names. Thus one who experiences the vicarious analogue of resentment is said to be indignant or disapproving, or morally indignant or disapproving.

The various analogues of reactive attitudes and the objective attitudes to which they are opposed are of special interest because these are the types of attitudes which officials of all kinds must adopt, and whether they adopt a vicarious reactive attitude or an objective attitude is a very important issue. For example, a personnel manager who is inclined to adopt vicarious

reactive attitudes would consider an employee who was constantly tardy to be at fault and therefore a proper object of disapproval and disciplinary action. However, a personnel manager who is inclined toward objective attitudes might consider the employee to be in need of some type of treatment to enable him to face his job better.

Now, we must answer two questions : (1) Is it possible to replace to a significant extent vicarious reactive attitudes with objective attitudes? (2) Can a belief in the truth of the thesis of determinism lead us to such an replacement? I will argue that the answer to both questions is, 'yes'.

The most clear-cut cases of the belief that the thesis of determinism is true influencing people to adopt objective attitudes rather than vicarious reactive attitudes are cases which have to do with law and the courts. For example, there are any number of psychiatrists who believe that because determinism is true we ought to treat all criminals in an objective manner. J.E. Macdonald, discussed above, is a good example.

But the shift to objective attitudes is also in evidence in university administrations and in personnel management in a wide variety of industries and government departments. An interesting example is the subtle but noticeable shift in the attitudes of university administrators especially in America. The shift is from considering those students who do not work hard as lazy, to viewing them as suffering from a lack of motivation. At first glance it may seem that they have merely substituted a fancy synonym for 'lazy' but this is not the case. The two expressions and the attitudes which go with them are very different. Notice that a student is said to suffer from a lack of motivation while a student is said to be lazy. The former expression implies that the student cannot help but not work hard because he is suffering from that dread malady, lack of motivation, but if we say that a student is lazy we imply that he is to blame. This is a clear switch from a reactive attitude to an objective

attitude; a switch from disapproving of substandard performance which is considered to be within the control of the student to viewing such substandard performance as a symptom of a malady which is beyond the student's control.*

This shift from reactive to objective attitudes is very much in evidence in the field of personnel management. Some managers have only flirted with objective attitudes by requiring or urging their employees to take "sensitivity training" or attend "group encounter sessions" in the hope that these will help the employees get rid of their inhibitions, or emotional problems or, more colloquially, their "hang-ups" and thus help them to do better work. This again is a subtle shift from reactive attitudes to objective attitudes, but an important one none the less because it is a shift from the view that a normal human being can run his own affairs toward the view that all human beings have problems which can only be remedied by undergoing some form of treatment.

However, some managers have taken the objective view completely to heart and view their employees' performance not in terms of what they could do if they tried or what they ought to do, but rather in terms of what they can be induced to do by various means. Now, I must make it clear that I am not talking about inducements such as fair pay and good working conditions. The belief that good work will only be forthcoming if workers are fairly paid and provided with proper working conditions, could hardly be considered an objective attitude. My argument concerns the way managers view substandard work given a background of fair pay and good working conditions. In fact my example is a Canadian service organization which employs people in a

* I have only mentioned higher education here because the students in institutions of higher education are adults, and the issues raised by objective and reactive attitudes are most clear-cut when dealing with adults. When dealing with children (especially young children), we are sometimes justified in adopting objective attitudes rather than reactive attitudes, but my points in favour of reactive attitudes hold for children in a large majority of cases. Professor R.S. Downie, Miss Elizabeth Telfer, and Miss Eileen Loudfoot make this point very well in Education and Personal Relationships, Methuen and Company, London, 1974, pp. 139-142.

capacity which might be called "lay social workers". These people had no professional qualifications and, in view of this, their pay of £2800 must be considered excellent. Also they worked in a building which was not only brand-new, but truly first-class.

Although several of these lay social workers were excellent, there were several others who consistently avoided their fair share of the work. The manager's way of dealing with this displayed a total objectivity of attitude. Never did he blame them for their poor work or say that they ought to do more. Instead, a large number of meetings were held at which he tried to find out the causes of their lack of motivation and how their jobs might be made more interesting. The methods all failed, but he shied away from the obvious solution of dismissing the poor workers and hiring new ones. Finally he dismissed the poorest worker, but he felt very guilty about doing so because he felt quite strongly that the poor performance was not the employee's fault.

Thus we can conclude that some people have definitely shifted from vicarious reactive attitudes to objective attitudes. This shift is far from universal, but I believe that practically anyone could think of an instance of this shift.

But we still must answer my second question as to whether this switch is due to the belief that determinism is true. In the case of those people who advocate that we adopt a totally objective attitude toward criminals there is no question that the belief that determinism is true has induced them to change their attitudes. As I mentioned earlier, J.E. Macdonald uses the truth of determinism as a major premise in his argument for objective attitudes toward criminals. In the cases of university administrators and the personnel managers, it is most probably not a belief in the thesis of determinism, but rather a belief in what might be called a "derivative thesis" which causes these people to adopt objective attitudes.

Most influential of such derivative theses is probably the belief that all human beings are to a large extent the products of "socialization" and therefore simply cannot help it if they have been socialized not to work hard. Another factor which is no doubt involved in the switch to objective attitudes is the belief in one or more of the many popular psychological theories. A belief in a theory which depicts unhappiness, poor work, feelings of insecurity, etc. as "conditions" from which people suffer cannot help but push someone toward objective attitudes.

Thus I believe that it is fairly evident that there has been a switch from vicarious reactive attitudes to objective attitudes, and it also seems evident that a belief that the thesis of determinism is true or the belief that a derivative of the thesis of determinism is true has had a great deal to do with this switch. Strawson has therefore failed on both counts. He has failed to show that vicarious reactive attitudes cannot come up for review and he has failed to show that the belief that the thesis of determinism is true could not induce people to change from vicarious reactive attitudes to objective attitudes. So we must deal with the question which Strawson believes to be unreal, the question of whether it is <u>rational</u> to switch from vicarious reactive attitudes to objective attitudes, and we must consider Strawson's reply to this question. That is, that

> We could choose rationally between objective and reactive attitudes only in the light of an assessment of the gains and losses to human life, its enrichment and impoverishment; and the truth or falsity of a general thesis of determinism would not bear on the rationality of <u>this</u> choice.

I am very much in agreement with Strawson as to the importance of considering gains and losses to human life when deciding whether it is rational to hold an objective or a reactive attitude, but I see no justification for Strawson's claim that the truth or falsity of a general thesis of determinism would not bear on this issue. Strawson is here rejecting the objection with

which I began this section and this is extremely odd since his pessimist voices essentially the same objection. This objection is that if determinism is true it is unjust to punish or blame people for their actions because they could not have acted otherwise. This issue of justice cannot be easily dismissed. It may be the case that considerations of the gains and losses to human life completely outweigh any considerations of justice, but Strawson certainly hasn't shown this.

Thus we are still left with the question of whether determinism is compatible with the principle of responsibility and we still must take seriously those who argue that it is not. In what follows, I will deal with this question in two stages. First I will argue that the issue of justice is far more complex than the standard objection would lead us to believe, and that when all the issues are examined it turns out that it is a greater injustice to adopt an objective attitude toward normal people rather than to consider them to be morally and legally responsible for their actions. I will then follow Strawson's suggestion and investigate the gains and losses to human life if we were to give up vicarious reactive attitudes for objective attitudes.

2. Justice and Determinism

Is it the case that all punishment is unjust if determinism is true? The correct answer to this question is, I believe, yes. But I will argue that it doesn't follow from this that we are justified in doing away with punishment and adopting a totally objective attitude to all criminals.

The argument that determinism is incompatible with just punishment is simply the objection I mentioned at the beginning of this paper or the points made by Strawson's pessimist. It is that if determinism is true then it is never the case that anyone could have acted otherwise than he in fact did. From this it follows that no one is morally responsible for their action, and if people are not morally responsible for their actions then they do not deserve

to bear burdens as retribution for misdeeds. Thus, if determinism is true, punishment consists of inflicting undeserved burdens and surely this is unjust.

This argument is, I think, quite sound, but we must be very careful about the conclusions we draw from it. This argument only shows that if determinism is true no one deserves to be punished and from this we can conclude that punishment would be to a certain extent unjust. This argument does not show that we are justified in taking an objective attitude toward criminals and adopting a practical treatment legal system. Nor does it even show that punishment is unjustified. The fact that punishment is to some extent unjust clearly has a bearing upon whether we ought to retain punishment or reject it and adopt a practical treatment legal system, but this fact is not sufficient to decide this question one way or the other.

This will no doubt seem quite odd because at first glance it does seem that the issue of justice does decide this question. After all, one might argue, if punishment is unjust surely we must do away with it and adopt some other means of social control such as a practical treatment legal system. Thus, the fact that to adopt a reactive attitude is unjust is for many people sufficient reason for adopting an objective attitude.

However, to be justified in adopting an objective attitude in these cases we must be able to show that adopting an objective attitude involes no injustice or is less unjust than adopting a reactive attitude. This point is generally totally overlooked or assumed without argument, but I will now argue that to assume that reactive attitudes are unjust while objective attitudes are not is a very great mistake.

To see this, consider the case of punishment and practical treatment. Now, if determinism is true then it is clear that no one deserves to bear a burden for his misdeeds and clearly this means it is unjust to punish people.

But it should also be clear that it is unjust to subject anyone to practical treatment because practical treatment also involves inflicting burdens. Thus, it certainly is false that practical treatment involves no injustice. However, it still might be the case that practical treatment involves less injustice than punishment and no doubt many people would consider this to be obviously the case, but again the case for practical treatment and objective attitudes in general is not quite so easily established. The standard argument in favor of practical treatment is that when we punish someone we inflict a burden which is only loosely related to altering his behaviour and thus making it safe for him to be released. On the other hand when we subject someone to practical treatment we inflict only such a burden as is necessary to control his undesirable behaviour. Therefore, it is argued that punishment often involves inflicting burdens gratuitously and thus practical treatment involves less injustice than punishment because, in general, practical treatment subjects people to fewer burdens. But there is a good reason to discount this argument. It is that we have no guarantee that practical treatment will be effective. This point is crucial to the argument that a practical treatment legal system inflicts fewer burdens than punishment because if effective treatment doesn't exist, then the so-called practical treatment will be every bit as loosely connected with altering a criminal's behaviour as punishment is.

Both Macdonald and Lady Wooton admit that no effective practical treatment exists but they would argue that I have missed the whole point. It is not the case today that we know how to treat criminals in order to alter their behaviour: the point is rather that we must make a commitment toward that end. Only by doing this will we come to a point where we can quickly and efficiently control a criminal's behaviour. I must leave my objections to such a commitment until the next chapter when I discuss rehabilition. Suffice it to say that at present we have no guarantee that effective practical treatment

exists and therefore we have no reason to believe, at present, that practical treatment inflicts fewer burdens than punishment.

However, it is important not only to consider burdens such as length of detention. There are other burdens which are just as important. One such burden is to be deprived of one's dignity, and I will argue that by adopting a practical treatment legal system, we will be depriving many criminals of their dignity by considering them to be merely things to be controlled rather than beings capable of rational thought and action.

But before I discuss this point, I must dispose of a very common argument which is used against this point.* The argument runs something like this: How can you talk about practical treatment robbing people of their dignity when you advocate punishing people? When we consider all the indignities one will face in prison, such as sadistic bullies, overcrowding, poor sanitation, etc., it is hardly appropriate for you to criticize practical treatment. This argument is completely bogus for two reasons. First, it depicts punishment as only taking place within disgusting prisons, and of course, there is no law that says prisons have to be evil or disgusting, except the "law of nature" which states that new prisons do not appear by magic, but must be built and paid for. The second reason this argument is bogus is that it gives the impression that there is an easy choice between disgusting prisons and excellent facilities where practical treatment will be carried out. This, of course, is a complete fiction. Such facilities do not exist and they will only come into being when governments decide to pay for them. Thus, it is completely wrong to contrast excellent practical treatment centers with very poor prisons because the enormous amount of money necessary to build and staff such practical treatment centers could just as easily be used to build excellent prisons such as I described in my chapter on punishment. In fact, the cost of the prisons would probably

*See B.L. Diamond in The Mentally Abnormal Offender, op. cit., pp. 217-218.

be less because while a good prison should certainly have psychiatric care available it would not be charged with the <u>specific duty</u> of <u>altering</u> a prisoner's behaviour. Therefore, a modern prison's requirements for psychologically and psychiatrically trained staff would be considerably less than the requirements of a practical treatment center. In short, then, we are perfectly justified in holding up an idealized prison system as an alternative to a practical treatment system because neither will come into existence without huge government outlay.

How will practical treatment rob a criminal of his dignity while modern, uncrowded, and well-run prisons will not? In fact, how will the two types of institutions be essentially different? The answer is that a practical treatment center would have the specific duty to alter a criminal's behaviour while a prison would not have such a duty. It would, of course, be hoped that a criminal would mend his ways in prison, but this would be up to him - it would not be incumbent upon the prison authorities to see that he changed his ways.

This difference is extremely important. It is the difference between adopting a vicarious reactive attitude toward the criminal and thus considering him to be capable of reasoned choices and actions and adopting an objective attitude toward him and considering him as merely something to be controlled and managed. It is also the difference between treating him as a normal human being and treating him in the way we treat insane and subnormal human beings. To treat a criminal in the latter way is surely to subject him to a very great indignity for the same reason it is an indignity to keep prisoners in overcrowded cells with poor sanitation. Human beings of all descriptions deserve conditions suitable for human beings and normal human beings deserve to be dealt with as normal human beings not as insane human beings or subnormal human beings* Anything less is to subject the criminal to indignities.

* Professor R.S. Downie makes this point in "Objective and Reactive Attitudes", <u>Analysis</u> 27.2, (December 1966).

Thus at the present state of the "practical treatment art" it would appear that practical treatment would subject criminals to greater burdens than punishment, and therefore considerations of justice would favor punishment over practical treatment. However, there is the very real possibility of a technological "breakthrough" in practical treatment methods which would allow a considerable reduction in the length of a criminal's detention. This would clearly reduce the burdens a practical treatment system would impose upon a criminal and therefore would greatly reduce the injustice involved in practical treatment. In the next chapter I will argue that such methods would be morally unacceptable.

3. Gains and Losses to Human Life

We can now follow Strawson's suggestion and discuss the gains and losses to human life we can expect if we reject reactive attitudes for objective attitudes and especially if we reject punishment for practical treatment.

Before I go into this I must briefly introduce the concept of a rational will which Professor R.S. Downie and Miss Elizabeth Telfer discuss on page 20 of Respect for Persons:*

> .... to have a rational will is to be capable not simply of thinking rationally but also of acting rationally; to accept the concept of 'rational will' is to commit oneself to the view that reason can be practical as well as theoretical. What is involved in the practical exercise of reason?
> It involves, in the first place, the ability to choose for oneself, and more extensively, to formulate purposes, plans and policies of one's own. A second and closely connected element is the ability to carry out decisions, plans or policies without undue reliance on the help of others.

This concept can be illustrated by referring to my three executives whose rational wills clearly vary in degrees of development. The first executive has the least developed will since his purposes and plans are basically those of his father. The second executive is a step up from this

* Respect for Persons, By R.S. Downie and Elizabeth Telfer, George Allen & Unwin Ltd., London, 1969.

because he clearly has a "mind of his own", but he cannot match the third executive who has given all aspects of his life a great deal of thought.

In what follows I will argue that by rejecting reactive attitudes in favor of objective attitudes we will be actively discouraging people from developing their rational wills. This, I think, is very clear in the case of punishment and practical treatment. When someone is punished he is made to bear a burden because he has performed an action which society has proscribed. Now, among the aims of a policy of punishment is clearly the aim of changing the behaviour of criminals after they have been released from prison; however, this is done simply by demonstrating to the prisoner what burdens he will have to bear if he is caught committing a crime again. Beyond this it is up to the criminal to decide what he will do in the future. He can decide to avoid criminal behaviour in the future. He can decide to commit other crimes but also to take greater precautions in order to avoid detection. He can decide to make no alterations in his behaviour. And finally he can decide that the behaviour for which he was sent to prison ought not be forbidden and he can decide to fight the law under which he was convicted either by lobbying or by the more drastic means of breaking the law again in order to become a test case. In any case, however, the decision is his. He must decide to do something even if it is only to continue as before.

This is not to say that people will not try to convince a prisoner that he ought to decide to obey the law in the future. In a well-run prison, career counselors would try to show him how he could get along better without breaking the law. Guidance and marriage counselors would help him with his marital and other personal problems, and psychologists could help

him with emotional problems. Most important of all he would know that by indicating through good behaviour that he would in the future obey the law he could reduce the length of his detention through a parole scheme. However, despite these inducements the decision is very much up to the prisoner. If he wishes he can choose not to visit the various counselors in the prison. Also he can choose to spurn the advantages of parole and still be released when his sentence is up. He must decide what to do with his life; it is not incumbent on the prison authorities to ensure that he will obey the law in the future.

With practical treatment the situation is completely different. Here it is the prison authorities' duty to alter the prisoner's behaviour. Thus the prisoner only has one choice: to abide by the law. Also if certain methods such as brain surgery and drugs are used in order to achieve this alteration in the prisoner's behaviour, it is very questionable whether we are ever justified in saying that the prisoner chose to alter his behaviour. However, even if no such methods are used, but rather the prisoner is simply required to attend regular sessions with a psychiatrist and other counselors, the pressures upon him to conform are quite overwhelming because in order to secure his release he must alter his behaviour*.

Thus, punishment provides an opportunity for the prisoner to exercise his rational will while practical treatment either provides no such opportunity or an opportunity which is greatly restricted.

The same is true when we reject reactive attitudes in favour of objective attitudes in education and management. By assuming that students and employees who shirk their work are suffering from a lack of motivation we discourage them from exercising their rational wills. We, in effect, "kill

* This point is subject to the comments I made about the different types of indefinite sentences in my section on indefinite sentences in the last chapter.

them with kindness" by bending over backward to motivate them to do better work rather than leaving it up to them to decide what they will do. A person who is never faced with a clear-cut decision, but is always led to believe that his problems will be handled by others, cannot help but become dependent on other people; and this of course erodes his rational will. Thus, the loss to human life if we reject reactive attitudes in favour of objective attitudes is quite considerable. It is the erosion of the rational will which is a very serious matter since a rational will is surely one of the fundamental constituents of personhood*.

But what of the gains to human life? Well, in the case of punishment vs. practical treatment, those who favour practical treatment claim that it will drastically reduce the number of recidivists and therefore greatly reduce crime. This, if true, is an important gain which must be carefully considered. However, in the next chapter I will argue that practical treatment methods which would be more effective than punishment are morally unacceptable.

As for the gains derived from shifting to objective attitudes in education and management, these are usually considered to be a general relaxing and "humanizing" of the manager/employee and lecturer/student relationships. For example, it might be argued that an "old-fashioned" lecturer or manager would imperiously take the drastic action of withdrawing a student's place or dismissing an employee, while a "modern" lecturer or manager would take an objective attitude and try to motivate the poor student or employee.

However, these gains only appear to be worthwhile when compared to imperious lecturers and managers who dismiss people at the "drop of a hat". To compare objective attitudes with extreme reactive attitudes such as these is to unfairly weight the case in favour of objective attitudes. Holding a vicarious reactive attitude need not involve being imperious. All

* See Downie and Telfer, op. cit., pp.20-23.

that is essential to a vicarious reactive attitude is that the person to whom it is directed be considered responsible for his behaviour. That is, that he be considered capable of doing something about his behaviour. Such an attitude is perfectly compatible with giving an employee or student a second chance. The essential point is the clear implication that the student or employee must help himself; that this will not be done for him. Thus, vicarious reactive attitudes are certainly compatible with "humanized" manager/employee and lecturer/student relationships.

However, the champion of objective attitudes might wish to argue that a truly humanized manager/employee relationship requires security of tenure and that true security of tenure is only possible if management adopt objective attitudes. The reason for this would be that as long as management clung to reactive attitudes they would still claim the right to dismiss poor workers who failed to show improvement and clearly such a practice is incompatible with a policy of complete security of tenure.

It must be pointed out that while objective attitudes on the part of management are compatible with a policy of complete security of tenure they do not guarantee such security. A manager could hold an objective attitude toward a poor employee and still dismiss him simply because his poor work is damaging the company. Thus complete security of tenure must be written directly into an employee's contract: it will not follow automatically from objective attitudes on the part of management.

However, it could be argued that objective attitudes on the part of management are more conducive to security of tenure than vicarious reactive attitudes. There may very well be something to this argument. For example, had the director of the Canadian service organization which I mentioned earlier held vicarious reactive attitudes toward the performance of his staff instead of objective attitudes he would no doubt have dismissed all three

poor workers rather than dismissing only the worst one. However, there is always the possibility that had the vicarious reactive attitude of disapproval been displayed toward these employees at the first sign of poor work they would have improved and no one would have needed to be dismissed. One cannot help but think that by not telling the employee in clear terms that his work needed improvement the manager encouraged him to drift along on his undistinguished path until the well-being of the service organization required that he be dismissed.

A similar point can be made about objective attitudes in higher education. There is no question that universities which have adopted objective attitudes toward their students allow poor students to retain their places much longer than universities which still have a policy that poor work is the student's fault and it is up to the student to show improvement. However, it is difficult to see what is gained by allowing poor students to retain their places even though they show no sign of improving. This is especially true when one considers that such lenient policies of student probation cannot be matched by equally lenient standards for granting degrees. Clearly very little is gained by allowing a student to attend a university for four years only to find that he is not eligible for a degree. On top of this, there is always the very real possibility that the lenient policies of student probation offer very little incentive for a student to improve when compared to a strict policy in which a student is given two terms to show improvement and if no improvement is forthcoming the student's place is withdrawn.

It would therefore appear that the case for objective attitudes in everyday life and practical treatment when dealing with criminals isn't very strong. Not only do considerations of justice favour reactive attitudes over objective attitudes, but in terms of gains and losses to human life,

objective attitudes provide very questionable gains in return for the very great loss of depriving people of opportunities to exercise their rational wills.

4. The Law of Torts and Contract

However, there is yet another drawback to objective attitudes. This is that to switch from vicarious reactive attitudes to objective attitudes in the law of torts and contract would be in effect to destroy these two branches of the law. Therefore if we were to adopt a practical treatment system of criminal law we would either have to radically change the law of torts and contract or be faced with a very troublesome gap between the criminal law on one hand and the law of torts and contract on the other. The reason that there would be a gap is that the concept of responsibility is central to the law of torts and contract while it is not central to the criminal law.

A practical treatment system of criminal law eschews any talk of responsibility or of a criminal deserving to bear a burden; instead it is based on the belief that we ought to control a criminal's behaviour as efficiently as possible. I have steadfastly argued that this type of criminal legal system is very undesirable but there is nothing unworkable about it, although as I mentioned earlier we probably don't know as much about behaviour control as we like to think we know. However, the situation is very different with the law of torts. The reason for this is that the law of torts is above all a system intended to compensate victims for injuries done to them rather than to regulate the behaviour of the offender or deter potential offenders. This is not to say that the law of torts does not deter potential offenders. Clearly the threat of a lawsuit is a very potent deterrent. Also I don't want to give the impression that the

law of torts is a reasonably simple body of law which is concerned solely with seeing that the victim gets fair compensation. The law of torts is an incredibly complex body of law which contains some elements which definitely favour the party which causes the injury.*

But all in all the law of torts is a system of compensation and this fact requires that tortfeasors be held responsible for their actions, because if they were not held responsible for their actions and made to pay compensation to their victims the law of torts would be quite worthless. Thus, the law of torts is logically linked with responsibility while the criminal law is not. Therefore if we reject the concept of responsibility in the criminal law, we would of necessity create a tremendous gap between the criminal law and the law of torts.

Just what harm this gap would do is hard to assess; however, it does seem that the fact that some torts are also crimes could lead to a clash between the two branches of the law.** For example if X intentionally strikes and injures Y then X has committed a felony as well as a tort and X can in the end suffer criminal penalties as well as be required to pay Y compensation. Now a clash might well come about in the following way. Suppose Britain has adopted a practical treatment system of criminal law and X is tried and found guilty of striking and injuring Y. Suppose further that X is sent to a practical treatment center and so quickly responds to treatment that he is released after only six weeks of treatment. I don't see how this could help but come up in the subsequent hearing of Y's action in tort against X.

* See George P. Fletcher " Fairness and Utility in Tort Theory", Harvard Law Review, Vol. 85, No. 3 (January 1972)

**See Philip S. James, General Principles of the Law of Torts, Second Edition, Butterworths, London, 1964, page 12.

For example X's lawyer could argue that it is absurd for the law to consider him as not responsible for the crime of striking Y and then turn around and make him pay compensation for the damages caused by his crime. The lawyer might add that if X is not responsible for the crime then clearly he is not responsible for the tort and if he is responsible for the tort then he ought to be held responsible for the crime and punished.

It might be argued that this anomaly in the law is not really an anomaly at all because the aims of the two branches of law are differnt and therefore there is nothing unusual about holding someone responsible for a tort arising out of a crime but not for the crime itself. The criminal law is designed to protect the public and the law of torts is designed to compensate individuals for losses they have suffered. Thus, in the criminal law we protect society best by sending criminals to practical treatment centers and in the law of torts we must hold people responsible for their actions in order to insure that victims are properly compensated. But this argument only provides one practical reason why we should tolerate this anomaly - it does not in any way diminish it. This anomaly could still cause havoc in the court room as well as raise serious questions of justice. It could also precipitate legal precedents which could greatly weaken the law of torts.

A similar anomaly would also exist between the criminal law and the law of contract because again not to hold people responsible for the completion of their contract would destroy the law of contract.

Both of these anomalies could of course be removed by replacing the law of torts with a system of government paid compensation for victims of torts and modifying the law of contract so every contract carried a government guarantee. But these two suggestions illustrate in the strongest possible way the loss human life would suffer if objective attitudes replaced vicarious reactive attitudes. In a society in which no one was held responsible for crimes, torts, or breaches of contract (assuming that such a society could function) the opportunities for a human being to exercise his rational will would be very few indeed.

VI.

TWO DEFENCES OF PRACTICAL TREATMENT

We must now examine two major claims that are made in favour of practical treatment. The first is that practical treatment is in the best interest of the criminal because (1) it is humane and (2) it makes the criminal a better and happier person. The second claim is that practical treatment will reduce crime by reducing the number of criminals who are recidivate.

The first claim is in fact two distinct claims which are almost always run together. The two are related in that the goal of making criminals better and happier persons is presumably a humane and morally commendable goal, and therefore, to act toward that goal is to act in a certain sense humanely. However, the two are distinct in that to achieve the goal of making criminals better and happier people might require inhumane or morally objectionable methods.

1. Humane?

That practical treatment is humane is often taken for granted, or, if any argument is deemed necessary, the arguments provided are often entirely too simple. For example, it might be said that practical treatment is therapeutic while punishment is brutal or vengeful. This argument is often combined with the view, which I attacked in the last section, that punishment always takes place in disgusting overcrowded prisons, while practical treatment would take place in modern, pleasant practical treatment centres. But both of these arguments are mistaken. The surroundings in which punishment or practical treatment takes place can be good or bad depending upon the amount of money a government is willing to spend on such facilities. Thus, since it seems reasonable to assume that to keep people in squalid conditions is inhumane and to keep them in good conditions is humane, it follows that as far as conditions go, both punishment and practical treatment can be either humane or inhumane. Also, the fact that practical treatment is therapeutic does not guarantee

that it will be humane because it is possible that effective methods of practical treatment may turn out to be quite inhumane. To take an obvious example, aversion therapy which involves a good deal of pain could prove to be a very effective method of practical treatment, but it certainly could not be described as humane.

To be fair, I must point out that some advocates of practical treatment (e.g. Lady Wootton- see above) have admitted this and have argued that such methods must not be used. However, I will now argue that practical treatment can be humane but that this does not guarantee that it is morally acceptable. This may sound like a clear contradiction in terms because 'humane' is often used to mean 'morally proper'. For example, many people would consider 'humane treatment of criminals' to be synonomous with 'morally proper treatment of criminals', but there are reasons to doubt this assumption. 'Humane' is a word which the Concise Oxford Dictionary defines as "benevolent or compassionate", and therefore, practical treatment can be called humane because it aims toward the benevolent end of helping criminals.* But in our hurry to be benevolent and compassionate, it is important not to overlook other moral requirements for dealing with our fellow human beings. My point here is that although practical treatment's aim of helping criminals is humane, in a practical treatment legal system a criminal would be required to accept such help whether he wanted it or not and I will argue that this is morally objectionable. My reason for saying this is that a practical treatment system requires that a prisoner must change his behaviour as a condition of his release, and I have already argued that this very fact actively discourages the criminal from developing his rational will. However, a practical treatment system goes even further than this: it also actively tries to change the prisoner's ways - to remould or rehabilitate him by subjecting him to one type of treatment or another. This active attempt

*Provided that the practical treatment took place in proper surroundings and did not involve any cruel or brutal methods.

to remould a prisoner already involves an element of coercion in that the prisoner is coerced into submitting to such treatment by the knowledge that only by allowing himself to be remoulded will he ever secure his release. However, those prisoners who refuse to submit to such treatment must either be manipulated into submitting or coerced into submitting, and either procedure would be immoral.

This point is made in an article by Arnold S. Kaufman.* Kaufman argues as follows:

> Either the person to be reformed knows that the reformer aims to reform him, or he does not. If he does not then he is being manipulated...If the criminal does know the identity and aims of the reformer, then he will be made to submit to the reform regimen either coercively or of his own free will. If he is made to submit against his will, efforts to reform him are not likely to succeed. Also, the morality of such coercion is as dubious as is the case of manipulative efforts...

Kaufman defines manipulation as follows:

> A manipulates B when A gets B to behave in a certain fashion without B discovering A's real purpose in trying to affect B's behaviour.

He then argues that:

> Manipulation, so conceived, is a *prima facie* wrong for a number of reasons. First, it involves deliberate concealment, a form of deception or lying. Second, it involves one person treating another as a tool of the former's aims or desires. Third, even in cases where the manipulator's aim is entirely benevolent it presupposes a moral inequality. It presupposes that the person manipulated is incapable of assessing reasonably the manipulator's ends and of making a deliberative decision. It also presupposes that the manipulator knows what the one he manipulates would want if the latter had deliberated fully.

Kaufman also argues that all of these objections apply to coercion, except that coercion involves no deception.

There are two possible replies to the points Kaufman makes against practical treatment. First, one could admit that *prima facie* wrongs are necessarily involved in practical treatment but argue that these wrongs are outweighed by the benefit practical treatment provides to the criminal and society. The second is to deny that these are in fact *prima facie*

*A.S. Kaufman, "The Reform Theory of Punishment", *Ethics*, Vol. LXXI, 1960-1961, pp. 49-53.

wrong. The first reply would no doubt be the most common and I will deal with it directly below. The second reply is a possibility, but I doubt if anyone would want to argue that deception and treating other people as tools are not at least *prima facie* wrong. However, someone might wish to deny that it is *prima facie* wrong to consider criminals to be morally unequal to us and that it is perfectly correct to assume that we know what criminals would want if they had deliberated fully. I will discuss this argument in a later section.

2. The Benefit To The Criminal

Does practical treatment benefit criminals? One obvious answer to this is that practical treatment will result in shorter periods of incarceration than will punishment and that this is clearly in the criminal's best interest. However, this benefit is by no means guaranteed, as I tried to show in my section on indefinite sentences. Also, I will argue later that practical treatment methods which guarantee short detention periods may be undesirable for other reasons.

Another common answer is that all criminal behaviour is senseless and self-destructive, and therefore, practical treatment is clearly in the criminal's best interests. For example, J.E. Macdonald, in the quoted passages above, argues that to control anti-social behaviour is in the "interest of all concerned". This belief that criminal behaviour is always senseless and self-destructive is one of the mainstays of the belief that all criminals are in some sense mentally ill. Here it is argued that criminals must be mentally ill because no sane person would ever do anything so clearly against his interest as committing a crime.*

But is this belief in the self-destructive nature of criminal activity justified? It is fairly common to see the criminal's lot as an extremely unpleasant one which involves constant fear of detection, victimization by one's friends, squalid living conditions, etc. And clearly if such a

*Antony Flew has a good discussion of these arguments in his book, Crime or Disease, London, Macmillan, 1973, Chapter One, Section Four.

situation is the rule, then those who argue that practical treatment is always or almost always in the criminal's interest might have a strong case. But is this an accurate picture of criminal life? Well, there is no doubt that some criminals lead very seedy lives indeed, but clearly not all criminals. For example, in A Thief's Primer*, the life of a real life "safe cracker" and cheque forger turns out to be astonishingly rich and varied. In fact, the criminal interviewed in that book claims that the very fineness of a life of crime prevents him from going "straight". His attitude could be expressed as "Why live on £60 a week with a mortgage when you can live on £200-300 a week in a fine hotel?" Now it is, of course, difficult to tell just how many criminals live well off crime, but it is clear that one cannot say categorically that criminal activity is always against the criminal's best interest. Also, it is very important to realize that to people who are in lower paid jobs or who are unemployed even a fairly seedy life of crime is attractive. It is no doubt true that many criminals would be better off with a steady job at £35 a week, but this fact is of little comfort to the unemployed and especially to those whose employment prospects are very poor. Thus, the old saw that crime does not pay certainly is not universally true.

However, those who wish to argue that practical treatment is in the criminal's best interest do not have to claim that the criminal's interest can be measured by the quality of his standard of living. In fact, many would no doubt wish to argue that the criminal's standard of living is a secondary consideration or is totally irrelevant to the claim that practical treatment is in the criminal's best interest. For example, it might be argued that a successfully treated criminal is morally better off because he is no longer wallowing in sin. But even here problems arise because practical treatment is merely treatment designed to prevent criminals from committing further crimes, and clearly, this does not

*Bruce Jackson, A Thief's Primer, The Macmillan Company, London, 1969.

guarantee that a successfully treated criminal will be a morally better person after his treatment. To take an example, let's consider an extremely evil criminal such as a professional murderer employed by organized crime who after treatment will no longer commit crimes. Is he then a morally better person? The answer to this question depends on the reason why he will no longer commit crimes. If the ex-murderer has decided that he has performed horrible deeds and is truly sorry, then clearly the practical treatment has made him a morally better person. However, if the practical treatment has only convinced him that it is unwise to commit other murders, then it is difficult to see how he has become a morally better person. After all, he still believes that it is all right to take lives for profit; he has only changed his estimate of the profit to be had from murder.

Here it is useful to invoke the old distinction between intimidation and reform. Traditionally, a criminal was considered to be intimidated if he considered it to be unwise to commit further crimes because the possible benefits could not outweigh the consequences (i.e. prison) if he were caught. However, a criminal was considered to be reformed if he would not commit crimes in the future because he genuinely considered it to be wrong to do so. Today we might wish to modify the concept of intimidation to cover all those people who will no longer commit crimes but who are not actually reformed. Thus, criminals who have undergone aversion therapy and who will, therefore, not commit further crimes because the very idea of doing so makes them ill, are not intimidated in the classical sense, but their moral status is closer to those who are intimidated than to those who are reformed.

Now, clearly, practical treatment could result in the genuine reform of some criminals, but none of the advocates of practical treatment whom I have discussed claims that genuine reform ought to be a requirement of release, although Feinberg clearly sees his system of individuated treat-

ment as being oriented toward reform. Thus, it is questionable whether we can even say that practical treatment makes criminals morally better; clearly it can, but there is no guarantee that it will.

Thus, the argument that practical treatment is best for the criminal is by no means very strong. It is based on the quite false beliefs that all criminals could do better in legitimate employment and that once a criminal has quit committing crimes he is a morally better person. There are cases in which a criminal will be both materially and morally better off once he has undergone practical treatment, but we have no right to assume this as a general rule.

However, so far I have only spoken of criminals who are successfully treated and released. What about criminals who never respond to treatment or who respond very slowly? Such criminals would either be detained for life or for a very long period. Here the argument that they are morally better off simply does not apply because if they were, they would not need to be detained. Also, to say that a life of incarceration is better for the criminal than a life of crime is a very difficult position to defend. To be deprived of your freedom even in the best of surroundings is a very heavy burden to bear for even a short period of time, much less for life or a very long period. A criminal would have to face an extremely bad life outside of prison before we could ever say that a life of incarceration was better than a life of crime. Thus, the view that practical treatment is beneficial to all criminals just does not hold up. The criminals who respond to such treatment may or may not become better off. However, most of those who do not respond to such treatment will be positively worse off.

This is a very serious blow to the case for practical treatment because it can no longer be claimed that practical treatment is always in the interest of the criminals themselves. It simply is not clear that the benefits to criminals of practical treatment are sufficient to outweigh

the *prima facie* wrongs involved in practical treatment. Therefore, we are left with the claim that practical treatment will significantly reduce crime by preventing recidivism, and we must ask whether this benefit is sufficient to outweigh the undesirable aspects of practical treatment I have discussed in the previous sections.

3. Crime Control

That practical treatment will help control crime by reducing recidivism is almost a tautology because practical treatment is by definition treatment designed to alter criminal behaviour. However, I explicitly said that it was *almost* a tautology because we have no guarantee that the treatment methods which will be employed to alter criminal behaviour will in fact help to reduce recidivism. Therefore, we are faced with two problems. First, we must decide whether the reduction in crime which a practical treatment legal system might provide is worth the very real drawbacks of such a system which I have described in previous sections. We must then look into the likelihood that a practical treatment system will ever achieve such a reduction and whether it is worth putting up with the drawbacks of a practical treatment legal system when we have no guarantee that it will in fact reduce crime.

It is very difficult to get a clear-cut answer to the first question because so many conflicting values are involved. I, personally, am very much inclined to say that a practical treatment legal system is a very bad bargain because I feel that the loss of legal safeguards, *mens rea*, and, to a certain extent, human dignity which a practical treatment legal system would entail is entirely too high a price to pay for any increase in crime control. Also in connection with this question, it is important to notice that there is a very real possibility that we could achieve every bit as effective crime control without resorting to the coercion, manipulation, indefinite sentences, etc. which are characteristics of a practical treatment legal system. A greatly improved conventional penal

system which provided prisoners with real opportunities for recreation, education, reading, etc. and which made counselling available on a voluntary basis might prove every bit as effective in reducing recidivism as a practical treatment legal system.

However, as I mentioned earlier, the methods used in practical treatment legal systems may prove to be ineffective, and we may find ourselves with all the disadvantages of a practical treatment legal system without any reduction in recidivism. This point is totally overlooked by the advocates of practical treatment, but it is a very real possibility because as it stands now we simply do not know how to successfully treat criminals. Both Macdonald and Lady Wootton admit this, but only Macdonald expresses any pessimism as to our making progress towards this goal. Lady Wootton argues in Crime and the Criminal Law that a great deal more research is needed into this problem, and Feinberg presents us with a list of criminal types and a few vague suggestions about treatment, but beyond this they offer no concrete suggestions. Thus, since no proven methods of practical treatment presently exist, we must accept that it is at least possible that practical treatment will never prove successful in preventing recidivism or that it will only prove a modest success.

It could be argued that even if practical treatment is only modestly successful it will still greatly reduce recidivism because those criminals who do not change their ways will be detained for life or for long periods of time. This is, of course, true, but if such a system could only reduce recidivism by keeping a large number of criminals behind bars for life then it could hardly lay claim to the name of practical treatment. Also, its moral justification would be even more suspect than that of a practical treatment legal system.

It would seem that practical treatment's most highly touted benefit - the prevention of recidivism - is extremely speculative. We just do not know whether it will reduce recidivism, but it must be remembered that

there is nothing speculative about practical treatment's disadvantages.

However, even if we grant that practical treatment will prevent recidivism (or that it can eventually be developed to the stage that it will prevent recidivism), there still remain some problems which pertain to practical treatment's very high cost. From what Lady Wootton and Feinberg say we can assume that practical treatment will be extremely expensive because not only would it require many new facilities, but it would also require funds for research into treatment methods and a greatly increased number of highly trained staff. Now, the expense of such a system is not a mark against it. I am adovacting a greatly improved prison system which would also be very expensive, but here there is a crucial difference: were we to embark on a program to totally overhaul our prison system, the fate of the prisoners would not worsen if a cut-back in spending were to bring the project to a halt. Such a cut-back would, of course, be unfortunate because we very much need to improve the conditions in our prisons. But the cut-back in money would not make things worse. Also, no doubt some new facilities would have been completed before the cut-back, and therefore, at least some prisoners would have a better time of it. However, if we were to embark upon a practical treatment legal system, a cut-back in government spending could cause very serious problems for prisoners.

The reason for this is that a practical treatment legal system involves some very fundamental changes in the law which, so to speak, go hand in hand with the existence of new facilities and with greatly increased staff. The most fundamental change would be the introduction of indefinite sentences, and for this we would need adequate treatment facilities and, one would hope, periodic review courts. Also, we would need a very large number of treatment staff. Now, one would hope that no government would ever alter the law to include indefinite sentences without first providing the necessary facilities and staff. However, we

cannot assume this (for example, the government did not ensure an adequate number of teachers before raising the school leaving age). But even if we assume that indefinite sentences would not be introduced before adequate facilities and staff existed, there would still be the possibility that a future cut-back in spending would greatly reduce the number of treatment staff; and this could be extremely serious, because to sentence people to indefinite spells of practical treatment without providing such treatment would be absolutely monstrous.

It could be argued that I am being extremely pessimistic about the fate of a practical treatment legal system. For example, it might be said that no government would ever cut back the funds for so valuable a project as a practical treatment legal system once it had become clear that the practical treatment legal system had done so much to reduce crime. This is a very good point. Nothing succeeds like success, and if those who are running a practical treatment legal system are successful in preventing recidivism, then it is very doubtful that a government would cut off their funds. But is this assumption of success justified? As I said earlier, Macdonald, Lady Wootton, and Feinberg agree that we presently do not know very much about behaviour control. But only Macdonald shows any pessimism about the likelihood of making advances along this line. Lady Wootton and Feinberg seem to assume that research into behaviour control will yield satisfactory methods of practical treatment and they therefore advocate what might be described as a "learn as you do" approach. But what guarantees do we have that such an approach will be successful? This point is crucial because governments can be expected to take a fairly dim view of such approaches if they do not yield a significant amount of knowledge in a reasonable amount of time, say four to five years. If no measurable successes were forthcoming after such a period, then it would seem quite possible that funds would be cut off, and one can only hope that the governments involved will have the

foresight to repeal the legislation authorizing indefinite sentences when they cut off the funds.

It could be argued that I am being very unfair to a practical treatment legal system by saying that we ought not embark upon such a system because it is so vulnerable to government cut-backs. In fact, my argument here might be classed with the argument in a recent letter in the press which said that we ought not build the channel tunnel because it would be extremely vulnerable to sabotage by extreme political groups. It could be argued that any project looks bad if we assume the worst will happen, and therefore, we ought not to listen to such arguments. Such a strong stand against "defeatism" is commendable in certain circumstances, such as when one is making decisions which are easily reversible or which do not involve extremely large investments. However, both the channel tunnel and a practical treatment legal system involve very large investments, and, even more important, a practical treatment legal system involves some very important changes in individual rights. In cases like these a "let's give it a go" attitude is quite reckless. Thus, before we build the channel tunnel we have a duty to make sure that it will not end up as a flooded thirty-two mile long tube with a hole in the middle because if that happened the waste of public resources would be incredible. Similarly, before we bring in a practical treatment legal system, we have a duty to make sure that a practical treatment legal system will not be crippled by government cut-backs to the detriment of the inmates.

Thus, the question still remains whether a practical treatment legal system will be successful and therefore find favour with those who control the government's purse strings. At present this question is unanswerable because so little is known about how to go about altering human behaviour. In effect, those who advocate practical treatment are asking us to buy an extremely expensive "pig in a poke". Practical treatment might prove successful and it might not, within a period acceptable to the government;

we simply do not know.

4. But Don't We Have The Right To Remould Criminals?

I am sure what I have just said will be extremely controversial because I have attacked a view which has become so common that it is practically a cliché: i.e., it is almost impossible to read any liberal tract on prisons without running into something like "prisons should reform not punish" or "treatment not punishment". First, I want to stress that I am fully in favour of reforming prisoners. I am simply against coercion and manipulation in order to achieve reform. But this is not likely to appease my critics because many people will feel that by disallowing coercion and manipulation, I have taken away any chance of effectively reforming criminals. Thus, it is safe to assume that many people would want to argue that manipulation and coercion are justified, given certain safeguards. One such set of safeguards is provided by Kaufman in the article quoted above. He argues:

> Theoretically, the general conditions which would justify manipulation are clear. First they must be conditions in which the manipulator does know what the criminal would want to do after deliberation if he were rational and good. Second, the person manipulated is incapable of deliberatively deciding on this best course, and the manipulator is a man of good will. Finally, if the manipulated person were permitted to make his own decisions without manipulation and without coercion, his moral education would not be advanced in a way which would yield greater benefit in the long run (even if he errs) than the benefits which would, in balance, flow from insuring that he embarks upon the best course through manipulation.

Here we have a very precise version of the argument, which I briefly mentioned above, that it is not prima facie wrong to consider criminals to be morally unequal to us. This point seems almost trivially true because clearly some criminals are morally unequal to us. However, in the following discussion of Kaufman's first condition, I will argue that we ought not assume this as a general rule.

At first glance, the first condition seems perfectly straightforward. It seems correct to say that we know what other people would choose if they were rational and good. For example, all of us judge decisions made

by government officials. Thus, I might judge a particular governmental decision to be irrational because I believe it will lead to financial disaster. Also, I might want to argue that had a particular government minister been a truly good man, he would not have chosen to help one economic group while neglecting the needs of another group.

Similarly, it seems to make perfectly good sense to say of a criminal that had he been good and rational he would not have chosen to commit a crime. For example, let us consider the case of a young drug pusher. Now clearly, if someone is good he would never choose to push drugs because a good person would realize that people are far better off without drugs. But does it follow that if he were rational he would never choose to push drugs? Well, it could be argued that if he were rational, he would see that by selling drugs he was actually hurting himself by damaging the very fabric of our society as well as running the risk of severe consequences if he is caught. But this argument only holds for people who are well enough off to have something to lose. For instance, a seventeen year old boy from an upper middle class family who sells drugs in an American high school is irrational (I am assuming that he himself is not addicted and is not selling drugs to "feed his habit"). By selling drugs he gains money which he does not need and which he will have trouble spending. For example, the dream of all seventeen year old boys, a powerful car, could only be purchased by lying about his age and this might involve the complication of forged documents. On the other hand, he would be seriously damaging a society which has treated him very well and which offers him great opportunities in the future. Also, he would be running the risk of getting into the clutches of organized crime. However, a seventeen year old slum dweller who pushed drugs could not be described as irrational because the money he made could be put to immediate use (e.g. clothes, food, trips away from the slum, even a university education). Also the slum dweller would have far less to lose. His social position is of

virtually no value so if he gets caught, he is not much worse off; and even the rough and ready employment offered by organized crime might be better than what he could expect from the society as a whole. Therefore, the judgement of what is rational is by no means simple. Yet such a judgement could, and probably would, appear simple to the correction officer who was in charge of manipulating the criminals.

A similar argument applies to the decision of what a criminal would choose to do if he were good. The case of the drug pusher is a particularly clear case where practically everyone would agree that such activities are wrong, although even here there could be some controversy. We all remember the sixties when drugs (with the exception of strong opiates and barbituates) were being touted as our "sick" society's only salvation. But if there is a clear case, I would say that this was it, along with the cases of murder, rape, and other crimes of violence. However, what about crimes such as some cases of trespass (e.g. non-violent sit-ins), right and left wing demonstrations, anti-Soviet activities (or, for that matter, anti-American activities in the days of the House Un-American Activities Committee), printing pornographic literature, violations of the Official Secrets Act, etc.? All of these offences are quite controversial, so do we have the right to assume that if a person were good, he would choose not to commit offences such as these? To do so would be to equate what is the law with what is good, and this is clearly unwise since there can be, and are, bad laws.

Therefore, the assumption that someone would choose to obey the law if he were rational and good simply is not correct, and it is also dangerous if it is used to justify practical treatment. The reason for this is that this assumption provides the law with a sanctity it does not deserve and an efficacy which would be unprecedented. At present, if a person breaks a law, he must pay a penalty or go to prison. He is not obliged to agree with the law and upon release from prison he can, and

sometimes will, break the law again. This is, of course, a serious problem, but we must be very careful how we handle it because recidivism is in some cases a very important form of social feedback which alerts society that something is wrong with its legal system or its social organization. The clearest example of this type of social feedback is the constantly recurring crimes among the very poor. These point to very bad living conditions which will not be helped by simply preventing poor criminals from recidivating. Equally important are those cases in which people repeatedly break a law in order to call attention to its inequity.

This objection would especially apply to practical treatment systems which require that the criminal be reformed before he is released rather than merely intimidated. In this case, a prisoner would have to be made to believe that what he did was wrong before he could be released, and this would give the authorities the power to silence dissent with utter finality. This last point is somewhat theoretical because there is no quick and easy method of altering a person's thoughts. Thus, at present, if a practical treatment legal system were used to silence dissent, people would take notice and disapprove. For example, in the Soviet Union, dissenters are often declared insane by the Serbsky Institute of Forensic Psychiatry and are treated with depression and pain-inducing drugs in order to make them change their opinions.* This practice is clearly brutal and has raised a storm of protest. But what if there were a quick, easy, and painless way to remould human beliefs, attitudes, and behaviour patterns? If such a method existed, a practical treatment system could probably be used to silence dissent without many people taking notice and this could prove to be very bad indeed. On the other hand, such a method would meet many of the standard objections to practical treatment such as the problem of prolonged detention. In the remainder of this chapter I will argue that we ought not adopt a "quick and easy" method of practical

*See Amnesty International Report on Torture, Duckworth in association with Amnesty International Publications, London, 1973, pp. 174-178.

treatment should one become available.

5. Quick And Easy Treatment

What for example should be our attitude toward a drug which made people extremely susceptible to suggestion and which had no harmful side effects such as pain, loss of memory, nerve damage, etc.? Such a drug (I will call it mentezin) would be extremely useful for changing criminals' thoughts, attitudes, and behaviour, and it would meet several important objections which are leveled at practical treatment.

Mentezin treatment would be almost 100% effective in preventing recidivism. A therapist could interview criminals in depth, gain a great deal of knowledge about criminals' motives, and provide suggestions to counteract these motives. If a criminal refused to co-operate, the first dose of mentezin could be administered by force, and once it had taken effect, all the therapist would have to do is to suggest that the criminal be co-operative. This fine performance in preventing recidivism would be tempered by the fact that mentezin treatment would no doubt not have the same deterrence value that punishment has. However, just as long as crime did not show a drastic increase, many governments would probably still consider mentezin treatment to be worthwhile, and there is always the real possibility that the drop in the number of recidivists which mentezin treatment would provide would more than make up for any increase in "first time" criminals.

Also, because mentezin treatment would be so effective, there would be no need to detain anyone for prolonged periods of time. In fact, it is doubtful whether any criminal would have to be detained for more than about four weeks. In four weeks, a criminal could be interviewed about twenty times, and that certainly would be a sufficient number to ferret out many deep-rooted problems and motives. This is especially true when we consider that mentezin would guarantee complete co-operation on the part of the criminal.

Finally, far from costing more than our present penal system, mentezin treatment would allow governments to drastically reduce their expenditures on penal institutions. It is, of course, true that mentezin treatment would require a very large number of trained therapists, but this expense would be offset many times over by huge savings in the maintenance of prisoners. Mentezin treatment would limit the maximum detention of any new offender to about four weeks and, in addition, would allow a government over about two or three years to rehabilitate almost its entire prison population. This would enable a government to close down whole prisons and greatly reduce the size of those prisons where mentezin treatment took place. Clearly then, the savings provided by mentezin treatment would be so enormous that it would be extremely attractive to many governments.

However, despite these clear advantages, I believe that mentezin treatment would be extremely undesirable for several reasons. First, mentezin treatment would go beyond manipulation and coercion to out and out thought control, and surely thought control is subject to the same _prima facie_ objections which Kaufman makes against manipulation and coercion. Also, because mentezin would be "quick and easy", it could be used to quietly stamp out dissent by remoulding dissenters to the official government line. Finally, and possibly most important of all, it would greatly encourage people to hold objective attitudes rather than reactive attitudes and the result of this could be extremely profound.

Take, for example, the clash between the criminal law and the law of torts which I mentioned in the previous section. The advent of mentezin treatment would intensify this clash because the period of detention while a criminal underwent mentezin treatment would always be very short and, therefore, it would make the practice of treating criminals, but still holding them responsible for their torts, even more anomalous. In fact, an imaginative lawyer might even argue that once a

criminal has undergone mentezin treatment he ought not be held responsible for any torts arising from his crime because the treatment has changed him into a "new man", and to hold him responsible for the tort would be unfair to his new personality.

Also, if a government used mentezin officially, it would have a difficult time keeping it from the general public. Even if mentezin were very carefully controlled (e.g. administered only by professionals such as psychiatrists and family doctors), it could not help but deal reactive attitudes a very serious blow. Mentezin would encourage us to adopt objective attitudes: that is, to see people as things "to be managed or handled or cured or trained", simply because it would provide us with a quick and effective way to manage, train, or cure people. For example, the head of the Canadian service organization which I mentioned in the previous section would not have to hunt futilely for methods to motivate those among his employees who were not working hard. Instead, he would simply recommend that they see a mentezin therapist. Similarly, people would be encouraged to see themselves in objective terms; for instance, students could have their lack of motivation cured so easily that there would be no reason for them to consider it as anything other than a condition which is beyond their control. Also, since mentezin would make psychological therapy much faster and cheaper, the proportion of the population which make use of such services would increase dramatically. Again, this would encourage people to view their problems as things to be cured rather than things to be faced.

Just what a society in which objective attitudes prevailed would be like is hard to say, but one thing at least is clear: the number of people with strong, well-developed rational wills would decline or, to put it another way, the number of people who require strong, precise guidance through life would increase. This increase would require a greatly increased government influence in our lives. For example, if

tortfeasors were no longer required to pay compensation for their torts, the government would have to take on this responsibility. Even if we assume that such influence would always be benign and reasonably efficient, there is something very undignified about people who are not responsible for the consequences of their actions. Such a situation would foster an extreme dependence upon authority which might in the long run become a burden which no government could carry. And, of course, there is always the possibility that this greatly increased government influence could become malignant.

My points about mentezin are quite speculative, and certainly, it is quite possible that a drug such as mentezin will never be developed. But this speculation is necessary, because a drug such as mentezin is clearly the goal of those who advocate practical treatment: that is, a quick, easy way to change a criminal's behaviour.

VII.

MENS REA

In the last several chapters I have argued that we must retain the principle of responsibility. That is, I have argued that we are justified in rewarding, praising, blaming, or punishing people for their actions. In this chapter, I will discuss the question of under what circumstances we ought to excuse people from responsibility for their actions.

In this chapter I will defend the doctrine of mens rea against its two chief rivals, strict liability and objective liability. The doctrine of mens rea or guilty mind is basically that before someone can be convicted of a crime it must be proven that he intended to commit the crime or that he did so recklessly. I must stress the word 'basically' in the previous sentence because the criminal law is far from simple and there are crimes in which it is not necessary to show that the accused actually intended to commit a particular crime, but simply that a reasonable man would have foreseen that his action would cause the crime. As we shall see, such cases amount to a partial abandonment of the doctrine of mens rea in favour of objective liability.

In general, the existence of mens rea in a particular case can be challenged in three different ways: by pleading ignorance of fact, mistake or accident. Ignorance of the law is in general no excuse. The precise difference between these pleas is not absolutely clear. For example, many cases in which someone was ignorant of fact A could also be described as mistakenly believing fact B which entails the negation of fact A, or mistakenly believing the negation of fact A. For example, in Sherras versus DeRutzen,* a publican was charged with serving liquor to a constable who was on duty. The publican was held to be not guilty because he believed that the constable was off duty. In such a case it does not seem to matter whether one chooses to call this a case of ignorance of the fact that the constable was on duty or a case of mistakenly believing

*R. Cross and P.L. Jones, Introduction to Criminal Law, sixth edition, Butterworths, London, 1968, p. 50. From now on simply Cross & Jones.

that the constable was off duty. 'Accident' is also a somewhat loose term. Cross & Jones define accident in the following words:

> The defense of accident is based on the fact that the accused did not foresee that his conduct would have the consequences prohibited by the definition of the crime charged. It may be contrasted with the defense of mistake of fact because that defense goes to the accused state of mind concerning the circumstances surrounding his conduct rather than its consequences.*

However, they argue that the two can be mixed, as in a case where someone mistakenly believes a gun to be unloaded and accidentally kills someone with it. Here we have an accident because the outcome was not foreseen, but it was due to a mistake. I do not mean to denigrate these categories but to point out that what is important is whether the accused has shown that he did not intend to commit the crime in question. Categories should be the servant and not the master and what is important is the accused's moral state of mind, not the category of that state of mind.

1. Mens Rea And Aristotle

The doctrine of *mens rea* is very similar to the doctrine Aristotle expounds in the first five chapters of Book III of the *Nicomachean Ethics* which I discussed in my first chapter. Aristotle claims that people ought not to be held responsible for actions done under compulsion or actions done in ignorance. By compulsion, Aristotle means cases in which the accused was totally passive. Thus, if A is accused of knocking B down and of injuring him, A will not be convicted if he can show that he was blown into B by a strong gust of wind. Here there is no question of A's having intended to injure B and therefore *mens rea* would not exist.

Aristotle is considerably more cautious about actions done under duress. He argues that duress can be a complete excuse, a mitigating factor, or possibly even no excuse depending upon the nature of the duress and the nature of the act done under duress. For example, a man who commits a crime in order to avoid unbearable torture ought, according to

*Cross & Jones, *op. cit.*, p. 54.

Aristotle, to be pardoned or treated leniently as long as his crime was not an exceptionally bad one such as matricide. Aristotle's doctrine is very similar to the doctrine of *mens rea* which treats duress as an excuse or mitigating circumstance except in cases of treason, murder, and other very serious felonies.*

Cases of duress are interesting because they lie on the very border of *mens rea*. They clearly involve a "guilty mind" in that the person who commits a crime under duress clearly intends to commit a crime. However, this intention is not solely the actor's but is induced by threats and violence from other sources. Thus, the solution of treating duress as a mitigating circumstance is a natural one in that it seems to be the perfect compromise between considering the actor to be a blameless tool of those who have him under duress and considering him to be totally responsible for his crime because he intended to commit it.

Aristotle's category of ignorance also agrees with the doctrine of *mens rea* in most respects. As I mentioned earlier, ignorance of fact or mistake are standard pleas for the negation of *mens rea* and Aristotle's examples are very similar to those heard in court today. His example of taking a naked spear rather than one with a button over the point is a classic case where ignorance of fact or mistake show that there was no intent to do harm. Also interesting is Aristotle's distinction between actions done in ignorance which are involuntary and those which are not voluntary, which I discussed in my first chapter. The former are those which are followed by repentance and the latter are those which are not. I gave as an example a hunter who mistakes his son for a deer and kills him and another hunter who mistakes his worst enemy for a deer and kills him. Aristotle merely says that there is a moral difference between the two, and therefore, it is not clear whether or not he would wish to treat the second hunter more harshly than the first. This points to a concern

*See Cross & Jones, *op. cit.*, pp. 89 and 90.

for the moral state of the agent which goes even beyond that which is required by the doctrine of mens rea. In a modern court, if someone can prove that he did not intend to kill his enemy, then he would not be convicted of murder. However, Aristotle only briefly mentions this point, so it is impossible to tell whether he would disapprove of our acquitting such a man. Since Aristotle does not discuss it in detail, it might be the case that he was troubled by this case or at least was not quite sure what to do with it. This case points to one of the major problems which I will have to deal with in this chapter. That is, how far can we make moral blameworthiness the basis of liability to punishment? The second man in my example is clearly blameworthy since by hypothesis he would have killed his enemy if he had seen him clearly and not mistaken him for a deer. But is his blameworthiness equivalent to that of someone who knowingly kills his worst enemy?

Finally we have Aristotle's treatment of actions done by reason of anger or appetite. As I pointed out in my first chapter, Aristotle does not believe that people should be excused from liability for actions done in anger or from appetite because these actions are every bit as typical of their character as reasoned actions are of the characters of reasonable men. I objected that this point is too broad because it makes no mention of actions done because of provocation. However, this point meshes with the doctrine of mens rea very well. Mens rea allows a narrow scope to provocation, considering it as a mitigating circumstance rather than an excuse.

Thus, Aristotle's views on excuses agree quite well with the doctrine of mens rea. It is a staunchly moral doctrine of responsibility which bases responsibility and liability to punishment upon the personal blameworthiness of the actor. The predominance of the doctrine of mens rea shows that his views are still widespread, but they are being challenged by the doctrines of strict liability and objective liability to which I

will now turn.

2. Strict Liability

The first rival of the doctrine of mens rea which I will discuss is strict liability. Simply stated, strict liability is the doctrine that people ought to be held liable for all of their actions which are proscribed by law regardless of the circumstances under which they are performed. That is, the doctrine of strict liability denies that we should make any distinction among crimes committed intentionally, by mistake, under duress, in self-defense, etc. Strict liability has always been very unpopular for the obvious reason that it seems clearly very harsh to punish someone who did not intend to commit a crime or, at least, not to make allowances for someone who commits a crime under duress.

However, to those advocating practical treatment, strict liability has seemed much more attractive. Lady Wootton seems to embrace strict liability in the second quoted passage on page 64 above, and, indeed, Joel Feinberg and H.L.A. Hart assume that she does in fact embrace strict liability.* Strict liability when coupled with practical treatment is in theory less harsh than strict liability coupled with punishment because someone who accidentally killed someone else would not be subjected to severe punishment, but rather would be treated in some way which would be less burdensome than punishment. My objection to this proposal is twofold. First, of course, I am totally against practical treatment, and if my arguments against practical treatment are sound, then strict liability is morally questionable since it only obtains a semblance of respectability when it is coupled with practical treatment.

However, even if we were to assume that practical treatment was morally acceptable, it does not follow immediately that we ought to adopt a system of strict liability. There is nothing absurd about adopting a practical treatment legal system and continuing to recognize the traditional

*See Joel Feinberg, Doing & Deserving, op. cit., Chapter 10 and H.L.A. Hart, Punishment and Responsibility, Oxford University Press, Oxford, 1968, Chapter 10.

excuses of the doctrine of <u>mens rea</u>. Thus, a further argument is required to support a case for strict liability. I will now discuss two such arguments.

The first argument is that it is impossible to distinguish those criminals who lack <u>mens rea</u> from those who possess it, and therefore, we are better off adopting strict liability. This argument is commonly attributed to Lady Wootton and, clearly, in the above quoted passage she appears to hold this view. However, her arguments are not sufficient to establish a case for strict liability. Lady Wootton's argument is based on the need for the courts to function properly. She argues that the M'Naughten Rules are precise and workable but unacceptable to the professionals in the behavioural sciences. But these same professionals have failed to replace the M'Naughten Rules with workable alternatives, and therefore, chaos reigns in the courts when decisions must be made about the mental state of a defendant. Her solution to this problem is to give up the notion of responsibility altogether and to adopt strict liability coupled with practical treatment.

But clearly this argument does not show that everyone who commits an action proscribed by law ought to be liable to practical treatment regardless of the existence of excusing conditions. Lady Wootton is quite right to point out that all the replacements for the M'Naughten Rules are defective, but this in no way shows that we cannot come to conclusions about the state of a defendant's knowledge, his intentions, whether or not he was subject to coercion, etc. The fact that inquiries into a criminal's mental health are impossible because of confused categories and logically unsound criteria has no bearing upon inquiries into intentions, knowledge, etc, which are relatively simple and unconfused concepts. Dr. Francis Jacobs expresses this point particularly well:

> To say that juries cannot answer questions of this kind is readily controverted by the everyday experience of the criminal courts. Questions of <u>mens rea</u> are generally the most important which the jury

must answer: did he intend to keep the property for himself? Did he know that the cheque was forged? Did he believe that the statement in the prospectus was correct?

These questions are not only answerable by a jury in ordinary experience: their answers are susceptible to reasoned appraisal, and can be set aside on appeal if unreasonable on the evidence.*

The second argument for strict liability requires the assumption that the thesis of determinism is true. It is that if deteminism is true, then all people who commit crimes are morally indistinguishable one from another. That is, someone who intentionally kills someone is morally no different from someone who kills someone else by accident because they both could not have acted otherwise than they did. Thus, it is argued that it is unjust, immoral, or just plain silly to excuse people who commit crimes unintentionally, under duress, in self-defense, etc. I will reply to this argument in two stages. First I will assume a system of punishment and argue that this argument does not establish a case for strict liability coupled with punishment. I will then argue that it does not establish a case for strict liability coupled with practical treatment.

Now, there will undoubtedly be objections to my even considering whether this argument establishes a case for strict liability to punishment because it is commonly believed that if the thesis of determinism is true, then we ought not to punish people for their crimes. I have already discussed this point at length and I have argued that even if determinism is true, it is morally desirable to hold people responsible for their actions and, therefore, liable to punishment. I must now discuss whether we ought to hold people strictly liable to punishment.

Apart from the obvious reason of crime control, my reasons for holding people responsible for their crimes were that it would encourage people to develop and exercise their rational wills and that to punish someone was to respect his dignity (provided, of course, that the punishment was not degrading), while to subject a man to practical treatment was to subject him to indignities. None of these reasons require us to

*Jacobs, op. cit., pp. 163, 164.

hold people strictly liable to punishment. It is difficult to see how the control of crime would be aided by holding people strictly liable for their crimes. Someone who commits a crime unintentionally surely cannot as a general rule be considered dangerous, and neither can someone who commits a crime under duress or in self-defense. In fact, in the latter two cases, the "criminal" is clearly a victim of circumstances since had there been no duress or no threat to his life, no crime would have been committed.

Also, to hold people strictly liable for their crimes would do nothing to encourage people to exercise their rational wills. Indeed, it might foster a feeling of helplessness because if we adopt strict liability, people would no longer be punished only for their intentional actions, but also for mistakes and actions dictated by circumstances beyond their control.

Here the advocate of strict liability could object that I have not answered his argument because I am still advocating that we deal in different ways with people who are morally indistinguishable and, therefore, I am advocating injustice. Here we must remember that if determinism is true, then all people are morally indistinguishable in that they do not deserve to be punished for their crimes. From this it follows that we must have good reasons for punishing people because all punishment involves injustice. In the case of people who have no excuses for their crimes we have such good reasons, but in the case of people who have excuses for their crimes we have no such good reasons. Thus, punishing such people would involve gratuitous injustice. It is, of course, true that making this distinction between those who have excuses and those who do not would involve us in a formal injustice, but this is a small price to pay in order to avoid the injustices (in the distributive sense) strict liability would involve.

At first glance it may be thought that strict liability is compatible with a practical treatment legal system. The reason for this is that

practical treatment is often thought of as not being burdensome because it is therapeutic. Thus, since it is often argued that if determinism is true no one deserves to bear burdens for their crimes, punishment is ruled out while practical treatment is acceptable. This argument is unacceptable because, as I argued earlier, practical treatment is indeed burdensome. Thus, the objections which apply to strict liability coupled with punishment also apply to strict liability coupled with practical treatment. In order to be justified in subjecting a criminal to practical treatment, we must have a good reason for doing so. In the case of criminals without excuses we have such good reasons in the fact that such people must be controlled.* However, what reasons do we have for subjecting people who have excuses for their crimes to practical treatment? Will treating such people reduce crime? Here a strong advocate of strict liability might be tempted to say, "Yes, treating such people will reduce crime. What you have failed to see is that if determinism is true, then all crimes are essentially the same regardless of the existence of excusing conditions in particular cases. Crimes are merely events which must be prevented from recurring. Subjecting all criminals to practical treatment would help to prevent crimes from recurring."

This argument is completely unacceptable on two grounds. The first is that even if determinism is true, all crimes are not essentially the same. For example, intentional crimes can be controlled both through deterrence and by preventing recidivism. However, if we exclude cases of negligence, unintentional crimes cannot be controlled through deterrence for the simple reason that they are unintended.** Also, it is doubtful whether crimes done under duress or in self-defense can be controlled by either method. Crimes of these two types arise out of circumstances which are often unexpected and usually beyond the criminal's control. It is

*I am speaking hypothetically here. I still disagree with practical treatment.

**I will say a good deal more on unintentional crimes and negligence in the next section on objective liability.

difficult to see how a man can be deterred from giving into threats or how treatment would prevent him from giving in again if he were threatened again.

Thus, it is not at all clear how treating criminals who have excuses for their crimes would help to control crime. There are, of course, cases of the so-called "accident prone" and possibly treatment could prevent them from having more accidents. But there are also any number of other cases in which treatment would have no effect. What of the pub-keeper mentioned earlier who served the constable whom he had good reason to believe to be off duty? How could treatment prevent him from committing a similar crime in the future?

Here we would no doubt be faced with the soothing reply that all strict liability coupled with practical treatment would do was to insure that those who needed treatment would get it. Once all criminals were bound over to practical treatment they would be examined, and some would be released upon the completion of the examination. For example, the publican who sold liquor to the constable on duty would be released once the examiners were satisfied that it was a genuine mistake.

However, despite the soothing tone of this point, strict liability coupled with practical treatment would still be objectionable for several reasons. First, by adopting strict liability we would be shifting the responsibility for decisions about excuses from the courts to practical treatment experts. This is a major change which removes legal safeguards provided by a public trial in which the accused is allowed defense counsel. In a court of law the publican could present arguments through his lawyer as to why he believed that the constable was off duty, and these arguments could then be assessed by the judge when he instructs the jury and finally by the jury themselves. Strict liability coupled with practical treatment would replace this public hearing of excuses with private tests and interviews, the nature of which are seldom specified. Now, this problem can

be remedied. Special public treatment hearings could be held which were similar to court hearings, and special rules of testing and interviewing could be set out; but even if this were done, strict liability coupled with practical treatment would be subject to another very serious objection.

This is that strict liability coupled with practical treatment would subject people to the burdens of incarceration and examination who are today acquitted as blameless. Further, the very fact that it is deemed necessary to detain and examine people who have excuses for their crimes would indicate that they would not be released as a matter of course after such examinations, but could be required to undergo practical treatment if the practical treatment experts who examined them found something which would indicate that they might commit crimes in the future. Thus, strict liability coupled with practical treatment would involve inflicting considerable burdens upon categories of people who are today released as blameless.

Here it would probably be argued that I have completely missed the point. I have failed to grasp the fact that because determinism is true blameworthiness no longer exists and all people who commit crimes are morally indistinguishable. This leaves us free to dispense with the distinction between the blameworthy and the blameless and simply to get on with controlling crime, and we can do this best by examining and possibly treating all criminals, not just those who have no excuse.

For this argument to be sound it must be the case that the only reason we have for dealing with criminals who have excuses differently from those who have no excuses is that we assume the former are blameless and that the latter are blameworthy. But surely this is not the case. For example, we may wish to exempt criminals with excuses from being examined and interviewed by the practical treatment experts because such examinations and interviews would only reduce crime marginally and at a cost of great disruptions in many people's lives. It would help if those who advocate

strict liability coupled with practical treatment would remember that, even if the thesis of determinism is true, people are still people. That they are still thinking creatures, who have feelings, make decisions, and, above all, have rights.* Also, we must remember that even if the thesis of determinism is true, a system of criminal law is designed not only to control crime, but also to foster an atmosphere in which our society can flourish and in which people can enjoy a goodly amount of freedom. These points should make it clear that the truth of the thesis of determinism is not a sufficient basis for strict liability coupled with practical treatment. It does not allow us to abandon all distinctions among criminals and allow us just to get on with the business of controlling crime. Crime control must be balanced against the people's right not to have excessive interference into their affairs. Professor H.L.A. Hart expresses this point quite well in the following passage:**

> By attaching excusing conditions to criminal responsibility, we provide each individual with benefits he would not have if we made the system of criminal law operate on a basis of total 'strict liability'. First, we maximize the individual's power at any time to predict the likelihood that the sanctions of the criminal law will be applied to him. Secondly, we introduce the individual's choice as one of the operative factors determining whether or not these sanctions shall be applied to him.

Professor Hart then invites us to do the following thought experiment in which we imagine the criminal law operating without excusing conditions:

> First, our power of predicting what will happen to us will be immeasurably diminished: the likelihood that I shall choose to do the forbidden act (e.g. strike someone) and so incur the sanctions of the criminal law may not be very easy to calculate even under our system: as a basis for this prediction we have indeed only the knowledge of our own character and some estimate of the temptations life is likely to offer us. But if we are also to be liable if we strike someone by accident, by mistake, under coercion, etc., the chances that we shall incur the sanctions are immeasurably increased. From our knowledge of the past career of our body considered as a <u>thing</u>, we cannot infer much as to the chances of its being brought into violent contact with another, and under a system that dispensed with the excusing condition of, say, accident (implying lack of intention) a collision alone would land us in jail. Secondly, our choice would condition what befalls us to a lesser extent.

*See A.J.M. Milne, <u>Freedom and Rights</u>, George Allen and Unwin, London, 1968, Chapter 10, especially p. 341.

** H.L.A. Hart, <u>op. cit</u>., Chapter 2, pp. 47 and 48.

3. Objective Liability

The other rival of the doctrine of *mens rea* is objective liability. Dr. Francis Jacobs provides the following succinct expression of this doctrine:*

> If a person is neither an infant nor insane...he is deemed to be a 'reasonable man': he is allowed to make mistakes but only reasonable ones; to respond to threats to his person or property, but only reasonably; and to retaliate if provoked, but only if the reasonable man would have been provoked, and then only within limits that the reasonable man would not have exceeded.

This doctrine is extremely interesting because at first glance it appears to be the type of liability which is often used in everyday life. For example, suppose a manager in business gets overly enthusiastic about a particular project and neglects his other duties. As a result of this neglect the company loses an important business contract. The manager cannot clear himself by saying that he did not intend to lose the contract or that he did not foresee that the contract would be lost. Or suppose a very religious lecturer is offended by an essay on the philosophy of religion which makes several allusions to sociological theories which try to explain man's need for religion and unfairly gives the student a gamma along with some very rude comments. When the student rightly complains to the professor and the lecturer is disciplined, he would not get very far by saying that the student's "denigration" of religion provoked his rude response. Both the manager and the lecturer acted unreasonably in situations in which they were expected to be reasonable. In view of this, it may appear obvious that we ought to require that everyone live up to a standard of the reasonable man. Do we not have a right to punish people who unintentionally commit crimes, but who have unreasonable excuses?

Examples of such unreasonable excuses might be the following: a painter paints my kitchen and cleans his brushes inside the kitchen with petrol instead of white spirit or turpentine; the pilot light in my gas cooker

*Jacobs, *op. cit.*, p. 121.

ignites the petrol fumes and my house burns down. Ought we to hold the painter guilty of arson? Ought we to accept the painter's plea that it was an accident?

Another case is Regina versus Ward* in which a man of subnormal intelligence who suffered from gastric ulcers killed the eighteen month old child of the woman with whom he was living. One evening after work, Ward was so irritated by the child's crying that he shook her and this caused her death. He claimed that his only intention was to quiet the girl, but he was convicted of murder in a decision which specifically made use of the reasonable man test.

In the above two cases there is no question that the accused did not intend to commit his crime. In such cases, objective liability would make the accused liable to punishment while the doctrine of <u>mens rea</u> would not. However, there are cases in which it is quite likely that the accused did intend to commit his crime, but in which intent would be quite difficult to prove. In such cases, objective liability would make it easier for the prosecution to get a conviction. Take, for instance, the case of a young woman who is married to an old wealthy man. The man is subject to severe depression and is being treated with an anti-depressant drug which will react with certain foods (e.g. cheese, eggs, milk, etc.) and cause a drastic increase in his blood pressure and, therefore, the danger of a stroke. The wife has charge of the drug and has been told by the family doctor that fairly high dosages are permissible if the husband says he is very depressed, but she has been warned that the husband's diet must be watched very closely. One day the husband takes a large dose of the drug and eats some cheese. The increase in blood pressure causes him to have a stroke and he dies. Did the wife kill him intentionally? She claims that she simply forgot about the danger of cheese when she bought it and that she had no intention of killing her husband. The prosecutor claims that

*Regina v. Ward, Queen's Bench Division, 1956, p. 351.

she gave him the cheese with the intention of causing his death. Obviously, in a case such as this, objective liability would make the prosecutor's job a great deal easier.*

Before I can discuss these examples, I must go deeper into just what is meant by the 'reasonable man test'. The classic exposition of this is The Common Law by O.W. Holmes.** On page 51 he says:

> The reconciliation of the doctrine that liability is founded on blameworthiness with the existence of liability where the party is not to blame, will be worked out more fully in the next Lecture. It is found in the conception of the average man, the man of ordinary intelligence and reasonable prudence. Liability is said to arise out of such conduct as would be blameworthy in him. But he is an ideal being, represented by the jury when they are appealed to, and his conduct is an external or objective standard when applied to any given individual. That individual may be morally without stain, because he has less than ordinary intelligence or prudence. But he he is required to have those qualities at his peril. If he has them, he will not, as a general rule, incur liability without blameworthiness.

Thus, someone is liable for the consequences of his actions if a reasonable man would have known that such consequences would follow or would have foreseen that such consequences were likely to follow. Holmes states, "The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen."(p. 54)

However, Holmes does not apply the reasonable man test to the actual state of the criminal's knowledge. Immediately following the preceeding quote he says, "On the other hand, there must be actual present knowledge of the present facts which make an act dangerous."(p. 54) Holmes defends this distinction between knowledge of consequences (or foresight of consequences) and the knowledge of circumstances in the following words:

> A fear of punishment for causing harm cannot work as a motive, unless the possibility of harm may be foreseen. So far, then, as criminal liability is founded upon wrong-doing in any sense, and so far as the threats and punishments of the law are intended to deter men from bringing about various harmful results, they must be confined to cases where circumstances making the conduct dangerous were known.
> (p. 55)

*I obtained this example from the episode of the television series Justice which was broadcast on May 17, 1974.

**O.W. Holmes, The Common Law, Little, Brown, Boston, 1881.

I find this argument unacceptable because, if objective liability is acceptable at all, it surely makes sense to extend it to cases where a reasonable man would have known the circumstances which made his action dangerous or would have made an effort to find out such circumstances. For example, consider a young man who comes into some money and decides to buy a very powerful speedboat. He settles on a fabulous stern drive model and, of course, wants to take his friends out in it. They set out for a picnic spot four miles along the coast but never arrive because he smashes the boat into a large rock which is submerged only a foot below the surface of the water while going about forty miles per hour. Two of his friends are seriously injured and drown before help can arrive. Here, the young man is ignorant of what made his action dangerous, but clearly it is arguable that a reasonable man would not have been ignorant in such a situation. The rock would have been clearly marked on an admiralty chart* and quite possibly mentioned in a cruising guide to that part of the coast. Also, Holmes himself vacillates on this point. For example, also on page 55, he says, "An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known."(emphasis mine) Thus, when discussing the doctrine of objective liability, I will assume that the reasonable man test can be applied to a person's knowledge of circumstances as well as to his knowledge and foresight of consequences.**

We must now discuss the arguments for and against objective liability. One argument has already been mentioned, which is that objective liability is already the standard of liability in business, government, employment, etc., and therefore, why not extend it to the criminal law? This argument is unsatisfactory, but it is worth considering because it points to several

*Many of the world's waters were charted years ago with sounding lines and therefore are not very accurately charted. However, British coastal waters have been recharted with modern equipment, so that the rock would have been on a chart.

**A long discussion of this distinction can be found in Jacobs, <u>op.cit.</u>, ch.5.

faults of objective liability. First, there is the obvious point that people are appointed to various positions in order to perform a specific function (e.g. lecture, manage, weld, etc.) and they take on these positions of their own free will and are paid to perform their function. If they cannot perform to a reasonable standard, then they are free to go to a job which is less demanding. However, people are not appointed to life of their own free will, and to set a standard of behaviour which is beyond some people's capacity is unfair to these people. They cannot seek a life in another less demanding universe.

Also, it is very misleading to say that objective liability exists in many types of employment. Objective liability disregards the distinction between intentional behaviour and behaviour which is unintentional, but for which there is no reasonable excuse. However, this is not quite what takes place in many types of employment. Here unintentional actions which are not reasonably excused are considered proper grounds for discipline, but they are still clearly distinguished from intentional actions. For example, the manager who unintentionally lost the important contract would probably be demoted or perhaps discharged, but if it were discovered that he had intentionally lost the account either because he was angry with the company or because he was bribed by another company to do so, he would be sure to lose his job and, quite possibly, would be sued. The same goes for the lecturer. His excuse is unreasonable and he will receive a warning, and, possibly, his promotion chances will be hurt, but if it were discovered that he had intentionally tried to "get" the student, he would be in a great deal of trouble indeed.

However, neither of these two points would impress Holmes; as we shall see, he is perfectly aware that objective liability is unfair to some people. Also, he would probably argue that it is silly for employers to make any distinction between intentional acts and unintentional acts which a reasonable man would have avoided because both acts cause the same amount

of harm. Holmes is very concerned with the fact that all criminal behaviour, regardless of the existence of excusing conditions, is harmful, and therefore, we ought to do our utmost to prevent it. In fact, in some places, he even seems to be advocating strict liability. For example, on page 49 he argues:

> For the most part, the purpose of the criminal law is only to induce external conformity to rule.
> In directing itself against robbery or murder, for instance, its purpose is to put a stop to the actual physical taking and keeping of other men's goods, or the actual poisoning, shooting, stabbing, and otherwise putting to death of other men. If those things are not done, the law forbidding them is equally satisfied, whatever the motive.

However, on page 50, he stops short of strict liability because

> ...a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.

Thus, Holmes has weighed the value of crime control against the necessity of preventing the rule of law from becoming oppressive, and he has concluded that the proper balance can be struck by adopting objective liability. He has come to this conclusion even though he is fully aware that objective liability will involve injustice to the less able members of society. On pages 50 and 51, he states:

> They [the standards of objective liability] take no account of incapacities, unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness. They assume that every man is as able as every other to behave as they command. If they fall on any one class harder than on another, it is on the weakest. For it is precisely to those who are most likely to err by termperament, ignorance, or folly, that the threats of the law are the most dangerous.

Holmes seems to see this injustice as an unpleasant, but necessary, fact of life if the criminal law is to be effective in controlling crime. But justice is not something to be given up lightly. In order for Holmes' view to be well-founded, there must be very good evidence that adopting objective liability will increase the effectiveness of the criminal law in controlling crime. We must now see whether such evidence exists.

There are two possible ways in which the adoption of objective

liability might reduce crime. First, it might encourage people to be much more careful and thus prevent "crimes" such as the painter's cleaning his brushes with petrol or the young man's hitting the submerged rock in his speedboat. Second, it might make it much easier to get convictions because the prosecutor would no longer have to prove intent, but rather that a reasonable man would have foreseen that his actions would have caused the crime in question.

The first way is difficult to discuss because it is impossible to tell for certain whether the adoption of objective liability would cause us to take greater care. However, there are two reasons to doubt whether it would. First, I find it hard to believe that many people are conscious of the fact that they are careless and, therefore, I doubt that many people would become more careful if they were told that carelessness could land them in prison. This is especially true when we consider that the wages of carelessness are already very high. If a painter is not going to be deterred from cleaning his brushes with petrol by the possibility of burning down his employer's house, and possibly seriously injuring himself and others, then it is doubtful that he will be deterred by the possibility of being charged with arson or homicide. Also, we must remember that some people cannot become reasonable men because they lack the requisite intelligence. Therefore, in so far as their unreasonable behaviour is due to low intelligence, the threat of punishment will not make them act reasonably. For example, Ward of Regina v. Ward, which I described above just was not intelligent enough to realize that shaking the child could harm her.

Here someone might wish to reply that objective liability might not deter people from being careless, but it certainly would prevent people who have committed a crime because of carelessness from committing another such crime. But again, if the actual consequences of his crime do not prevent a person from being careless in the future, then it is doubtful whether a prison term will be much additional help. For example, if,

after ramming one speedboat onto a submerged rock, the young man buys another and does the same thing, it is doubtful whether a prison term would have any deterrent effect. The man is just too thick to be reached. In short, I find it hard to believe that recidivism is a major problem among people who commit crimes because of carelessness and I doubt whether punishment will prevent what recidivism there is.

The second point is far better founded. There is no question that objective liability would help in getting convictions. It is sometimes very difficult to prove that someone committed a crime intentionally, rather than by mistake or accident. Objective liability would ease this burden because the prosecution would only have to prove that a reasonable man would have foreseen the outcome. Thus, in the case of the man who died when the anti-depressant drug reacted with the cheese, his wife would undoubtedly be convicted because she had been clearly warned that the drug would react with cheese. And clearly a reasonable man, having been warned that the drug would react in this way, would have foreseen that letting the man have cheese would endanger his health. Now, let us assume that the wife in this example had really intended to kill her husband and had not just forgotten the doctor's warning about the cheese. In such a case, objective liability would ensure that she would not be able to get away with her crime by pleading that she gave him the cheese by mistake or that the doctor's warning momentarily slipped her mind. In cases like this one, objective liability would ensure that people who had committed crimes intentionally would not be able to plead spurious mistake or accident, and this would help reduce crime because, presumably, many intentional criminals are likely to commit further crimes if they are allowed to go free. Therefore, in order to evaluate the effect of objective liability on the level of crime, we must have good reason to believe that a large number of such people are being acquitted. Obviously, statistics on this topic would be practically impossible to obtain because there is no way of telling whether

a person who is acquitted is actually innocent. However, I find it hard to believe that an alarming number of people are being acquitted who are actually guilty. Clearly, it is natural for a criminal to plead accident or mistake when he is accused of a crime, but _mens rea_ is not that difficult to prove. Also, as Dr. Jacobs pointed out in the passage quoted in the last section, _mens rea_ is proved in courts all over the world everyday.

Also, it might be worth mentioning that objective liability may not guarantee convictions in all cases where the accused has falsely pleaded accident or mistake. It would still be open to the defence to argue that the crime could not have been foreseen by a reasonable man. This may prove to be almost as valuable to criminals as false excuses because the reasonable man test is very imprecise.

The fact that the reasonable man test is imprecise is also disturbing because, as I pointed out in my section on indefinite sentences, it is a well-established legal principle that the law ought to be precise. For example, it is against the law to intentionally burn down someone else's house. Intent may be difficult to prove, but we know what it means for someone to intentionally burn down a house. However, if we were to adopt objective liability, it would be against the law to perform any action which causes someone's house to burn down if that action was such that a reasonable man would have foreseen that it might have caused the house to burn down. Now, do we really know what we mean when we say a reasonable man would have foreseen that an action would, or might, have certain consequences? In some cases, of course, we do know what this statement means. For instance, it makes perfectly good sense to say that a reasonable man would have foreseen that pointing a loaded gun at another man and pulling the trigger would result in a serious injury to that man. But what about the case which I mentioned above of the painter who cleans his brushes

with petrol?* Should he, as a reasonable man, have foreseen that cleaning brushes with petrol in a kitchen could result in a serious fire? It is interesting to compare the type of arguments the prosecution and defence could use in this case.

The prosecution would clearly stress the extreme dangerousness of petrol - i.e. that it is extremely volatile and flammable and that it can explode. He would then add that every reasonable man must be aware of this danger because of the elaborate care which is taken in handling petrol. He would probably point to the rules that petrol pump attendants must not smoke and that a car must not be refueled while its engine is running. He could also point out that the widespread use of petrol bombs clearly shows the danger inherent in this substance. He might wish to stress this last point because the use of petrol bombs has received a great deal of publicity over the last several years.

The defence would probably reply by stressing that petrol is a very common substance which is often handled casually, and because it is such a common part of our everyday lives, few people give it a second thought or consider it to be very dangerous. He would no doubt point out that petrol pump attendants who smoke are not unknown and that petrol is often pumped in a very casual manner. For example, every driver has had a pump attendant slop petrol down the side of his car and onto the pavement. Also, we have all seen cars without filler caps. He might then argue that all substances for cleaning paintbrushes are flammable and volatile (barring, of course, water for water soluble paints) and that the painter had no reason to believe that petrol was more flammable than these other substances.

This last point might prove very important because it is quite possible that most people of average intelligence do not know that petrol is more

*To add some factual bite to this example, I should point out that this example is based on an actual incident which took place in the United States where petrol is not highly taxed and is therefore widely used as a cheap paintbrush cleaner. The house was completely gutted, but no one was hurt.

dangerous than other flammble liquids such as paraffin, white spirit, or turpentine. But here the prosecution could counter with the claim that a reasonable man would have foreseen that using any flammable liquid near a gas cooker was dangerous. Finally, the defence could come back by claiming that paintbrushes are commonly cleaned in kitchens with no harmful result, and therefore, the fire must be seen as an unforeseeable accident.

Needless to say, such an argument could go on and on, but the few hypothetical arguments I have presented here show that the reasonable man test is far from satisfactory. For instance, what knowledge should a reasonable man be expected to possess? Should he be expected to know that petrol is more volatile than many other flammable liquids? Clearly, such knowledge is freely available - anyone who has read a basic science book which includes a chapter on the fraction distillation of crude petroleum would know this, but can we expect that a reasonable man would have read such a book? The difficulty of questions such as these is, no doubt, why some people would like to eliminate the question of what a reasonable man would have known and concentrate on the question of whether his actions were reasonable given the state of his knowledge.* However, this latter question does not fare much better. Even if the painter knew that petrol was more flammable and more volatile than white spirit or turpentine, does it follow that he acted unreasonably by using it to clean brushes in a kitchen? Would a reasonable man have foreseen that fumes from the petrol could be ignited by the pilot light in the cooker which was several feet from the petrol? Would a man of reasonable prudence have foreseen such a mishap or would it require a higher standard of prudence? How do we ascertain what is a reasonable standard of prudence?

Holmes is not very helpful here because he defines a reasonable man in terms of ordinary intelligence and <u>reasonable</u> prudence. Are we justified in saying that reasonable prudence is the prudence that an

*Jacobs, <u>op</u>. <u>cit</u>., argues that it may be difficult to distinguish these two questions in some cases. See Chapter 5.

ordinary person would exercise in everyday life? If so, then the test of the reasonable man becomes a bit more precise because it is, presumably, easier to tell what the ordinary prudence of everyday life is, as opposed to reasonable prudence. This is especially true when there is a general procedure or common practice associated with the action in question. Common practice plays a big role in the law of torts where the reasonable man test is used extensively.* However, a law which states that you are liable to punishment if you cause certain types of harm by deviating from common practice is still much less precise than one which states that you should not intentionally cause these same types of harm. This is especially true when we consider that for some activities there will not be a well-established common practice. This lack of precision is very disturbing because if the criminal law does not clearly define a standard of behaviour, then people do not have a proper opportunity to obey the law. Also, as I argued in my section on indefinite sentences, imprecise law invites abuse.

Another point which should be briefly mentioned is that while common practice is clearly one way of elucidating 'reasonable prudence', it may prove to be a very low standard. If this is the case, then the argument that adopting objective liability will reduce crime becomes even weaker. For example, if we adopt common practice as the standard of reasonable prudence, it is quite possible that the painter would be acquitted, and it is even more likely that the young man with the speedboat would be acquitted. Cleaning brushes in the kitchen is a common practice because it is a convenient place to wash the last bit of solvent out of the brushes. Also, it is convenient to pour the paint and solvent mixture down the drain (another common but very dangerous pracitce). Thus, if the painter could prove that he had no reason to believe that petrol was any more dangerous than other paint solvents, he would probably be acquitted. The speedboat owner would probably be acquitted because speedboat owners commonly bat

*See Harry M. Street, The Law of Torts, Butterworths, London, 1972, pp. 127 and 128.

around all over the place at tremendous speeds, counting on their shallow draughts to keep them out of trouble. Of course, there are speedboat owners who are fine, careful seamen, but speedboat advertisements stress speed, not seamanship, and it is quite probable that the common practice is a very low grade of seamanship.

The final, and to my mind the most important, objection to objective liability is that it blurs the distinction between intentional criminals and people who commit crimes negligently.* The former are morally more reprehensible than the latter, so if the latter deserve to be punished at all, they certainly do not deserve to be punished as harshly as the former. This point holds regardless of whether or not the thesis of determinism is true. If, as I argued in my second chapter, many people are in fact responsible for their actions, then it follows that most of those who intentionally commit crimes deserve to bear a greater burden than those who commit crimes negligently. However, even if determinism is true, I have argued that it is morally desirable to hold people responsible for their actions, both because it encourages them to develop their rational wills and because a society in which reactive attitudes predominate is far better than one in which objective attitudes predominate.

Here it might be objected that far from discouraging reactive attitudes, objective liability actually encourages them by expressing official condemnation of negligence which surely will encourage people to hold reactive attitudes toward everyday examples of negligence. There is a kernel of truth in this objection because negligence is certainly a suitable object of reactive attitudes. However, this objection takes no notice of the fact that reactive attitudes can and ought to be extremely diverse, ranging from very strong condemnation through mild rebuke all the way to extreme praise. Objective liability would encourage people to have reactive

*From this point on, it will be convenient to have a word for the failure to live up to the standard set by the reasonable man. The standard for this is 'negligence' and that is the one I will use.

attitudes toward negligence, but the wrong sort of reactive attitudes. If the law deals with our unfortunate painter in the same manner that it deals with someone who burns down a house intentionally, then it is ignoring a vitally important moral distinction between the two people: the former intended no harm; he was not wicked, while the latter was wicked because he intended to cause harm. This is not to say that the former is not morally blameworthy. It is proper to blame negligent people, but they are not as blameworthy as wicked people, and the reactive attitudes which are appropriate for negligent people are not the same as those which are appropriate for wicked people.

Again, the standard argument that if the thesis of determinism is true then there is no moral distinction between the wicked and the negligent does not show that we ought to display the same type of reactive attitudes toward both of them. Once we have accepted that a society in which reactive attitudes predominate is morally more desirable than one in which objective attitudes predominate, it makes no sense to adopt objective liability and thus express the same reactive attitudes to radically different types of people. It is vitally important that reactive attitudes be appropriate to the conduct at which they are expressed. This is so because to react too harshly to other people's behaviour is to encourage resentment or even hatred, while to react too kindly is to subject oneself to ridicule as a fool or a "patsy". Examples of the dangers of adopting the wrong reactive attitudes are easy to find practically everywhere. Almost everyone can recall from his school days an example of a teacher who was hated because he was unfairly harsh when he disciplined his students, one who was looked down to as being a "soft touch" and, hopefully, at least one teacher who had earned a reputation of being firm but fair. Also, in America, many young people hate the law because they or their friends have been given very harsh prison sentences for the possession of marijuana in quantities which were too small to be a dealer's supply. Also in America, the law

has been subject to ridicule when slum landlords are subject to tiny fines for quite disgusting practices such as providing no heat in the winter and renting dangerous premises.

A good example of how objective liability expresses inappropriate reactive attitudes is the case of Regina v. Ward, which I mentioned earlier, in which a man of subnormal intelligence and suffering chronic pain from gastric ulcers lost his temper when the eighteen month old child would not stop crying and shook her with "full force", but with only the intention of making her quiet. Pilcher J. directed the jury as follows:*

> If, when he did the act which he did do, he must as a reasonable man have contemplated that death or grievous bodily harm was likely to result to the child as a result of what he did, then...he is guilty of murder. If, on the other hand, he could not, as a reasonable man, have contemplated that death would result in consequence of what he did, then he is guilty of manslaughter.

Here is a perfect example of how objective liability ignores the distinction between a wicked person and a negligent or unthinking person. Ward was not wicked; he bore the child no malice; he simply intended to quiet her. Yet, because of the reasonable man test, he was ranked with wicked criminals who actually intended to kill or seriously injure their victims. The inappropriateness of this decision is clear - the law certainly cannot gain respect by ignoring such an obvious distinction and convicting a most unfortunate man of murder rather than manslaughter.**

Here I am open to the following objection: You admit that it is appropriate to hold reactive attitudes toward negligent people, yet you advocate the doctrine of <u>mens rea</u> which traditionally requires actual intent except in cases of recklessness.*** Surely this leaves a large number of

*Regina v. Ward, <u>op. cit.</u>, p. 351.

**It should be noted that the Criminal Justice Act of 1967 has explicitly ruled out the reasonable man test. See Cross & Jones, <u>op. cit.</u>, p. 136.

***Professor H.L.A. Hart defines 'recklessness' as "wittingly flying in the face of a substantial, unjustified risk, or the conscious creation of such a risk." Thus, for a person to have been reckless, he must have foreseen that harm would follow from his action. It is, therefore, very similar to intent, except that harmful consequence is not desired. See Hart, <u>op. cit.</u>, chapter 6, Cross & Jones, <u>op. cit.</u>, p. 44.

crimes which were committed due to negligence, but not recklessness, which the law is powerless to deal with unless objective liability is adopted.

This objection points to a very real problem of how to deal with crimes committed negligently, but it fails to recognize (1) that there may be other solutions to this problem than the adoption of objective liability and (2) that there may be reasons why some types of negligence should not be dealt with by the criminal law.

At present, only a few crimes are punishable if performed negligently. The most important is manslaughter, but even here the negligence must be gross; that is, the accused behaviour must have deviated very far from what a reasonable man would have done. Thus, the criminal law clearly does pass over a large number of acts which would become punishable if we were to adopt objective liability. For example, our unfortunate painter certainly could not be described as reckless since he did not foresee the possibility of the petrol exploding. Also, it is doubtful whether he could be described as grossly negligent because, as I argued earlier, it is very much up in the air as to whether he was negligent at all. Thus, if he were to be ruled negligent, the negligence almost certainly could not be described as gross.

Therefore, we must now investigate whether it would be possible to extend the reach of the criminal law beyond recklessness and gross negligence to ordinary negligence, but at the same time avoid the objections to objective liability that I have mentioned in the last several sections.

Professor Hart suggests that some of the above difficulties could be overcome if, before negligence could be punished, the following two questions had to be answered affirmatively:

(1) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?

(2) Could the accused, given his mental and physical capacities, have taken

those precautions?*

This suggestion is interesting because it would meet the very first objection I made to objective liability - that it set a standard that was too high for some members of the community to attain. Professor Hart also argues that if this suggestion were adopted, it would ensure that no one would be punished who had not had a fair opportunity to obey the law. Thus, for example, Ward of Regina v. Ward would have been excused from punishment because he had subnormal intelligence and a short temper due to the pain from his gastric ulcers and, therefore, did not have a fair opportunity to live up to the standard set by a reasonable man.

However, this suggestion would still punish negligent people with the same severity as wicked people. But this could easily be overcome by passing a law which stated that all crimes which were committed due to negligence are punishable by some fraction (say, one third) of the usual sentence for that crime. Thus, if the statute covering a particular crime stated that it was punishable by three to nine years if committed intentionally or reckelessly, it would now also be punishable by one to three years if committed negligently.

Professor Hart's suggestion, coupled with my suggestion about reduced sentences for crimes committed negligently, would certainly be an improvement over objective liability, but I am still sceptical of the advisability of punishing negligence for three reasons: (1) While it is, no doubt, true that crimes committed negligently merit reactive attitudes, I am not at all convinced that many of them merit the very strong reactive attitudes we express (and encourage others to express) when we punish someone. (2) I am still concerned that the reasonable man test is very vague. (3) There is reason to believe that some of the work of the reasonable man test could be done much better by precisely worded statutes such as the Road Traffic Act of 1960.

*Hart, op. cit., chapter 6, p. 154.

To discuss my first point, we will need a few clear-cut cases of crimes committed due to negligence. The first case is that of a university student who collects knives and who lives in a hall of residence. One day he buys a machete with a blade two feet long and, upon taking it back to his residence, he proceeds to polish and hone its blade as he is very particular that all his knives should be in perfect condition. When he has honed the blade to a very fine edge, he steps from his room into the narrow hall with the intention of going to the commonroom, but he sees a friend about thirty feet away along the hall and calls to him and says, "Stay right there. I want to show you something." He darts back into his room and re-emerges waving the machete over his head, screaming "AAAAAAAAGGGGGGG", and running full tilt, like an ancient warrior, toward his friend. The hall is lined with several doorways, each opening into other students' rooms. At the moment he starts running, another student steps into the hall from one of these rooms. The two collide and the machete strikes the other student, and he is seriously injured.*

The second example takes place at the main door to the residence mentioned in the previous example. The door is situated on the top of four stone steps, and the steps have cast iron picket fences where most steps would have railings. The door opens out. One student had just climbed the steps and is about to open the door when another student on his way outside and in a very boisterous mood kicks the door open with great force. The flying door knocks the student on the steps into the cast iron pickets and he is seriously injured.**

Now, unlike the cases of the painter and speedboat operator, these are, hopefully, clear-cut examples of the type of behaviour a reasonable man would avoid. No defence attorney could ever argue that a reasonable

*As fantastic as this may sound, it is based on an actual incident. I was the friend thirty feet along the hall, and, fortunately, no one stepped from the six doors between me and my knife-wielding friend.

**Again, this is based on an actual incident, although the outside student was able to prevent himself from falling on the pickets by pushing away with his hand.

man would have no reason to believe that such behaviour was dangerous. Also, since it certainly is not common practice to go about waving machetes or kicking doors open, no one could plead common practice in defence.

Also, hopefully, almost everyone will agree that the incident with the machete is an example of gross negligence, while the incident with the door is an example of negligence, but not gross negligence. The reason for this is that even a fairly thick-headed person who would not qualify as a reasonable man would realize that knives, and especially large knives, are very dangerous. On the other hand, a fairly thick person probably would not realize that kicking doors open was dangerous, as opposed to just naughty. Thus, the knife-wielding student deviated farther from the standard of a reasonable man than did the door-kicking student.

Both students are bright and perfectly normal, so if we were to adopt Hart's suggestion, we would clearly have to punish both students because not only is their behaviour negligent, but they both are capable of living up to the standards of a reasonable man as well.

I find this quite unacceptable because even if we were to adopt my suggestion that crimes committed negligently ought to carry reduced sentences, I do not believe that punishment is appropriate in the case of the door-kicking student. Also, while punishment may be appropriate in the case of the knife-wielding student, I will argue that Hart's suggestion is not the proper way to administer such punishment.

The student who kicked the door open was engaged in boisterous horse-play and that was clearly foolish under the circumstances, but horseplay is not a crime and, had the other student not been about to open the door, no harm would have resulted from the horseplay. Thus, we have the anomalous situation in which horseplay, which under normal circumstances would merit the mild reproach we give foolish people, all of a sudden becomes the object of the very stern reproach we express by putting someone in prison. This is clearly unjust because the student who kicked the door and caused the

injury is morally the same as all other people who kicked the door open (and others did), yet he would be sent to prison while the others would simply get a stern lecture from the Dean of Men (providing, of course, they were caught).

But, not only would punishing such people be unjust, it would also quite possibly cause people to lose respect for the law because putting someone in prison who is only guilty of horseplay is clearly an inappropriate way to react to his actions.

The case of the student waving the machete is quite a bit different. Here we have someone engaging in an activity which is extremely dangerous. In fact, the activity is so dangerous that a government might wish to make it punishable regardless of whether any harm ensued. For this reason, I would agree that there is a stronger case for punishing gross negligence than there is for punishing negligence in general. This student's activities clearly deserve a much stronger reproach than do the activities of the student who kicked the door. Such behaviour can hardly be described as mere horseplay.

However, even if punishment were restricted to cases of gross negligence, such punishment would be objectionable for two reasons. First, good law ought to be precise, and a law which states that crimes committed due to gross negligence are punishable is anything but precise. Of course, my example with the machete is clear-cut because it involves a dangerous weapon, but beyond such cases there is no reason to believe that the line between negligence and gross negligence is any clearer than the line between negligence and non-negligence which I discussed earlier.

My second objection to punishing crimes committed due to gross negligence is that it would involve an injustice in that, of all the grossly negligent people, only those whose negligence resulted in a crime would be punished. This is, in effect, the reverse of the situation of the student who kicked open the door. In that case, a person who was only guilty of

negligent horseplay would receive a prison sentence, which is a reproach far in excess of what he deserves and far in excess of what most people guilty of horseplay would receive. However, in the case of the knife-wielding student, he would get a prison term which he deserves because he was grossly negligent, but many other grossly negligent people would not get what they deserve simply because they were lucky in that their gross negligence did not lead to a crime. Now, it is true that no system of law can be perfectly just if for no other reason than that some criminals get caught while others do not. However, to pass a law which provided that all crimes committed due to gross negligence will carry one third of the normal prison sentence would be writing injustice into the law because the reason grossly negligent people deserve punishment is because they are grossly negligent, not because their negligence caused a particular crime.

Thus, I must conclude that even if punishment for negligence is restricted to cases of gross negligence, it would be a very bad policy to adopt. This is especially true when we consider that relatively clear-cut cases of gross negligence can be covered by statutes. This makes all cases of a particular type of gross negligence punishable, rather than only those cases which result in harm. The Road Traffic Act of 1960 is a good example. This act makes it an offence to drive dangerously regardless of whether you do it intentionally or inadvertently, and such an act is justified because inadvertent dangerous driving has the potential to cause enormous harm and therefore qualifies as gross negligence. In other words, the danger of poor driving is so great that even a very thick-headed person would see its potential harm. Another advantage of such laws is that they are precise; there is no arguing about whether or not an action was grossly negligent.

Thus, those people who would like to punish negligence might seriously consider passing some new laws instead. For example, it might be made law that it is a criminal offence to point a firearm of any type at another person. This law, if carefully worded, would exclude genuine accidents,

while covering those horrible cases where a foolish person thinks a gun is unloaded, points it at someone else and pulls the trigger "just for fun".

4. Mens Rea And The Principle Of Responsibility

In the last two sections I have defended the doctrine of mens rea by arguing that the two main alternatives to it are very undesirable. In those sections, I referred several times to my arguments for the principle of responsibility and I will now briefly make the connection between the justification of the doctrine of mens rea and the justification of the principle of responsibility more explicit.

The connection between the principle of responsibility and the doctrine of mens rea is most clear-cut if my arguments for libertarianism are correct. If they are, then our justification for holding people responsible is that they are actually morally responsible for their actions or are capable of becoming morally responsible for their actions. In order to be morally responsible for an action, someone must meet the three conditions I laid down in the second chapter; that is, he must have performed the act in question; he must have not have had an excuse for performing it; and he must have been able to have acted otherwise than he did. This being the case, if we are to base the principle of responsibility on moral responsibility, then it clearly makes no sense to adopt anything but the doctrine of mens rea. This is because someone who lacks mens rea for a particular crime does not meet the second condition of moral responsibility because, as I have shown in this chapter, if you lack mens rea for a particular crime, then you have an excuse for performing it.

If the thesis of determinism is true, then our reason for retaining the principle of responsibility is, among other things, that it will encourage people to develop their rational wills and that it will encourage people to adopt reactive attitudes. Neither end will be served if we deviate from the doctrine of mens rea. As I pointed out in the section on strict liability, to hold someone strictly liable for his actions could

quite possibly cause him to feel helpless or resentful. It is of course true that strict liability and objective liability are not incompatible with reactive attitudes, but they both would encourage totally inappropriate reactive attitudes. I pointed this out with regard to objective liability in the last section, but the point also holds for strict liability. If we were to adopt strict liability, we would have occasion to hold people liable for accidents and mistakes which were not in any way due to negligence, and to hold someone responsible for an action which he simply could not help is clearly to adopt an inappropriate reactive attitude toward him, and this would surely encourage other people to hold similar inappropriate reactive attitudes.

In short, to retain the principle of responsibility and, at the same time, to adopt objective or strict liability is to act at cross-purposes. All the benefits to be gained by retaining the principle of responsibility are to some extent at least negated by adopting strict liability or objective liability.

CONCLUSION

In this thesis, I have tried to show three things: (1) that Aristotle was essentially correct when he argued that acts which follow from deliberation are free, and therefore, the principle of responsibility is firmly based on actual moral responsibility; (2) that even if the thesis of determinism is true, and therefore no one is ever morally responsible for their actions, we are still justified in retaining the principle of responsibility because, for a large number of reasons, a society which retains the principle of responsibility is far better than one which has rejected it in favour of practical treatment; (3) that it is far better to retain the doctrine of *mens rea*, which is similar to Aristotle's doctrine of excuses, than to adopt either strict liability or objective liability.

I have argued for all of these points in some detail in the body of this thesis and it would be fairly tedious to summarize those arguments here. However, there are some very general criticisms which might be urged against my arguments and which I have not mentioned so far. In conclusion, I would like to discuss four of these general points.

The first general criticism of my arguments is that they are irrationally opposed to science. That is, I am afraid of changes that scientific discoveries could cause in society and, therefore, I have opposed them right down the line.

Such a criticism must be taken seriously because there is a very real split in the academic community between what might be called scientific and humanistic camps. In the scientific camp are many natural scientists, as well as those social scientists who adhere to the discipline of the scientific method. Also in this camp are those historians, philosophers, and students of politics who share the scientific outlook. In the humanistic camp are those academics who study arts, humanities, classics, and those historians, philosophers, and students of politics

who share their outlook. There is a tendency for members of opposing camps to dismiss each other's views simply because they emanate from the opposite camp. Thus, a scientifically minded philosopher might object to my arguments by claiming that I am only a humanistic thinker who does not have the intellectual toughness to accept the fact that the thesis of determinism is true and that this entails substantial changes in how societies must be organized.

There are several things which must be said here. First, it should be clear that branding someone a humanistic philosopher does not mean that his views are wrong or misconceived, any more than branding someone as a "heartless scientist" shows that his arguments are misconceived. Second, I believe that this kind of type-casting is very unfortunate because it tends to make people feel that they have grounds for dismissing a group of arguments _en bloc_ when, if they were examined separately, one might find that he agrees with some of them.

It is true that every now and then this type of criticism has some basis because sometimes people harden into dogmatic apologists for one position or another. For example, if someone categorically refused to accept any of the findings of science, we would be justified in saying that he is irrationally opposed to science. However, I plead not guilty to the charge of dogmatically refusing to accept the findings of science. It is not the case that I steadfastly refuse to believe that the thesis of determinism is true in the face of overwhelming evidence that it is true. I offered arguments in which I tried to show that it was most reasonable to believe that, with regard to some actions, that actor could actually have acted otherwise than he did. I also admitted that this point was controversial and, therefore, I also argued my case assuming that the thesis of determinism was true. Finally, I freely admitted that science could come up with some extremely effective methods of behaviour control such as my hypothetical drug, mentezin.

It is true that I argued that such a drug could be extremely dangerous and that it ought not to be used to treat criminals, but these arguments are not anti-scientific in the sense that I am refusing to acknowledge scientific findings. These arguments express concern over what ought to be done with such scientific knowledge, and surely such arguments are legitimate, if not absolutely essential to a free society. Thus, while my arguments may be wrong, they must be shown to be wrong individually; they cannot be dismissed all at once by branding them as anti-scientific.

The second general criticism is that my views are reactionary. That is, by opposing the change to practical treatment, I am standing in the way of progress. This criticism can take two forms. In its first form, it is a moral criticism which claims that it is wrong to stand in the way of progress. In its second form, it is a practical criticism. Here my arguments against practical treatment are viewed as necessarily futile because practical treatment is an idea for which the time is right and all my arguments can do is stave off its ultimate arrival. I will discuss these two points in turn.

For the moral claim to have any force, we must be careful to use the word 'progress' in a strong moral sense. There are at least two possible moral senses of 'progress'. It could mean any 'change for the better' or any 'change toward some good or morally desirable goal'. The two are obviously very similar, but the second is a bit wider because it covers changes which are not themselves good, but which move us closer to some good goal. The reason 'progress' must be used in a moral sense is that if it were used in the sense of "progressing toward a goal" where the goal need not be a good one, then there would clearly be cases in which to be a reactionary would not be wrong at all. For example, if 'progress' is used in a non-moral sense, it makes perfectly good sense to say that Hitler spent several years making progress toward his goal of becoming ruler of Germany. [illegible]

ruler of Germany. In that case, it clearly would not have been wrong to oppose Hitler's progress, yet Hitler's supporters would clearly have thought such people to be reactionaries. In short, we either have to admit that reaction is not always bad or we have to be very careful about how we use the term. We must be sure that those we accuse of being reactionary are reacting against progress in the true moral sense of the word. Thus, in order to show that I am a reactionary, someone would have to show that the goal of establishing a practical treatment system of criminal law is a morally desirable goal. This would require an examination of my arguments, not just a statement that I am a reactionary.

One could modify the moral claim to say that to be a reactionary one need not impede progress in the strong moral sense. Instead, it could be argued that it is reactionary to stand in the way of sincere efforts to make progress. According to this view of reaction, my arguments are reactionary because they support the status quo against those who are sincerely trying to improve the way we deal with crime by changing to a practical treatment legal system. This new version of the moral claim may appear to be more damaging to me because there are people who are reactionary in this sense and it is clearly wrong for them to be so. There are people who oppose any change in the status quo, no matter how pressing the need for change.

However, I certainly cannot be grouped with such people because I have advocated sweeping changes in our prison systems. I am not in favour of the status quo. I am in favour of different changes than those who advocate practical treatment. Thus, to charge me with being reactionary in no way disproves my arguments or shows that I am evil because, in order to show that I am reactionary in a morally significant sense, one must demonstrate that my arguments are opposed to progress in a genuine moral sense.

I will now turn to the second part of this criticism, which is that

my arguments are just a futile reaction to an idea for which the time is right. The point here is that the principle of responsibility is a relic of the past and must eventually be replaced by practical treatment. I simply see no reason to accept this, but I cannot go too deeply into it because that would involve going into the Philosophy of History. However, I would like to point out that whether or not an idea's "time has come" very much depends upon how people think and feel about it, and to present reasoned arguments against such an idea might very well influence how people think and feel about such an idea and, therefore, might not be futile.

The third criticism is that I have shown myself to be insensitive to the very real problems of the mentally ill criminal by advocating very restrictive rules (i.e. the M'Naughten rules) for distinguishing between mentally normal and mentally abnormal offenders and by insisting that we retain the principle of responsibility rather than adopt practical treatment. This point is, I think, simply due to the misconception that the only way to deal with the mentally ill is with compulsory treatment. This simply is not true. As long as psychiatric or psychological help is made available to criminals on a voluntary basis, one can hardly be accused of being insensitive to the problems of mentally ill criminals. It may be the case that by subjecting all criminals to compulsory treatment we would ensure that some mentally ill criminals would get treatment who would otherwise be loath to accept it. However, this small gain would be bought at a high price because, as I argued in the main part of this thesis, practical treatment is very undesirable.

The fourth criticism is that I have consistently placed criminals' rights over the rights of society in general. In particular, it could be said that I have argued that we should not adopt practical treatment because it would violate the rights of criminals, and this clearly runs counter to the public interest because I am saying that we ought not

adopt an important weapon in the control of crime.

There are two things I must say about this. First, I did consider the contribution practical treatment might make toward the control of crime and I argued that, at present, it did not seem that there was much probability of a significant increase in crime control if we were to adopt practical treatment. However, I did argue that even if there were very effective treatment methods available (such as my hypothetical drug, mentezin), we still ought not adopt practical treatment. This, on the face of it, clearly appears to be putting the rights of criminals over the public interest, so I must say some more about this.

It is important not to see this problem only in terms of criminals' interests versus the public's interest in being protected from crime, because the issue is much more complicated than that. To be sure, it is in the public's interest to be protected from crime, and if practical treatment can provide such protection, then that is a clear mark in favour of practical treatment. Unfortunately, practical treatment violates several rights which criminals presently enjoy, but if this were all there was to the issue, many people would argue that society's interests must take precedence. They would have a very strong case because, within certain humanitarian limits, the rights of criminals must take second place to the interests of society as a whole. However, there is a great deal more to it than this because the changes in the rights of criminals which practical treatment would bring directly affect the interests of society as a whole in at least three ways. First, practical treatment would most probably involve detention for dangerousness. That is, before a criminal could be released, it would have to be demonstrated that he is no longer dangerous. I argued that 'dangerousness' was very difficult to define and, therefore, that criminals would be held on a very vague charge. I argued that this could lead to widespread abuses of the law, and this clearly is not in the public interest. Second, to adopt

practical treatment in the criminal law would open a large gap between the criminal law on the one hand and the law of torts and the law of contract on the other. I argued that this gap could lead to significant changes in the latter two branches of the law which could lead to greatly increased government influence over our everyday lives and I do not believe that this would be in the public interest. Third, adopting practical treatment would discourage people from developing their rational wills and would also encourage people to hold objective rather than reactive attitudes, and I argued that these two changes could have a very marked effect on society and I certainly do not believe that this would be in the public interest.

Thus, while many people would no doubt disagree with the way I have weighed the public's interest in being protected from criminals against the other aspects of the public interest, I do not think they are justified in claiming that I have placed the interests of criminals above those of the public.

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