H. L. A. HART

THE MORALITY OF THE CRIMINAL LAW

TWO LECTURES

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CHANGING CONCEPTIONS OF RESPONSIBILITY

I

THIS LECTURE is concerned wholly with criminal responsibility and I have chosen to lecture on this subject here because both English and Israeli law have inherited from the past virtually the same doctrine concerning the criminal responsibility of the mentally abnormal and both have found this inheritance embarrassing. I refer of course to the McNaughten rules of 1843. In Israel the Supreme Court has found it possible to supplement these exceedingly narrow rules by use of the doctrine incorporated in s. 11 of the Criminal Code Ordinance of 1936 that an "exercise of the will" is necessary for responsibility. This is the effect of the famous case of *Mandelbrot* v. *Attorney General* [1] and the subsequent cases which have embedded Agranat J's construction of s. 11 in Israeli law. English lawyers though they may admire this bold step cannot use as an escape route from the confines of the McNaughten rules the similar doctrine that for any criminal liability there must be a "voluntary act" which many authorities have said is a fundamental requirement of English criminal law. For this doctrine has always been understood merely to exclude cases where the muscular movements are involuntary as in sleep-walking or "automatism" or reflex action. [2] Nonetheless there have been changes in England; after a period of frozen immobility the hardened mass of our substantive criminal law is at points softening and yielding to its critics. But both the recent changes and the current criticisms of the law in this matter of criminal responsibility have taken a different direction from development in Israel and for this reason may be of some interest to Israeli lawyers.

1 (1956) 10 P.D. 281.

2 See Edwards, "Automatism and Responsibility" (1958) 21 *M.L.R.* 375 and Hart, "Acts of Will and Responsibility" in *The Jubilee Lectures of the Faculty of Law, Sheffield University* (London, 1960). The doctrine as now formulated descends from Austin, *Lectures in Jurisprudence*, Lecture XVIII.

Let me first say something quite general and very elementary about the historical background to these recent changes. In all advanced legal systems liability to conviction for serious crimes is made dependent, not only on the offender having done those outward acts which the law forbids, but on his having done them in a certain frame of mind or with a certain will. These are the mental conditions or "mental elements" in criminal responsibility and, in spite of much variation of detail and terminology, they are broadly similar in most legal systems. Even if you kill a man, this is not punishable as murder in most civilised jurisdictions if you do it unintentionally, accidentally or by mistake, or while suffering from certain forms of mental abnormality. Lawyers of the Anglo-American tradition use the Latin phrase *mens rea* (a guilty mind) as a comprehensive name for these necessary mental elements; and according to conventional ideas *mens rea* is a necessary element in liability to be established *before* a verdict. It is not something which is merely to be taken into consideration in determining the sentence or disposal of the convicted person, though it may also be considered for that purpose as well.

I have said that my topic in this lecture is the recent changes in England on this matter, but I shall be concerned less with changes in the law itself than with changes among critics of the law towards the whole doctrine of the mental element in responsibility. This change in critical attitude is, I believe, more important than any particular change in the detail of the doctrine of *mens rea*. I say this because for a century at least most liberal minded people have agreed in treating respect for the doctrine of *mens rea* as a hall-mark of a civilised legal system. Until recently the great aim of most critics of the criminal law has been to secure that the law should take this doctrine very seriously and whole-heartedly. Critics have sought its expansion, and urged that the Courts should be required always to make genuine efforts, when a person is accused of crime, to determine before convicting him whether that person actually did have the knowledge or intention or the sanity or any other mental element which the law, in its definition of crimes, makes a necessary condition

of criminal liability. It is true that English law has often wavered on this matter and has even quite recently flirted with the idea that it cannot really afford to inquire into an individual's actual mental state before punishing him. There have always been English judges in whom a remark made in 1477 by Chief Justice Brian of the Common Pleas strikes a sympathetic cord. He said "The thought of man is not triable; the devil alone knoweth the thought of man". [1] So there are in English law many compromises on this matter of the relevance of a man's mind to the criminality of his deeds. Not only are there certain crimes of "strict" liability where neither knowledge, nor negligence is required for conviction, but there are also certain doctrines of "objective" liability such as was endorsed by the House of Lords in the much criticised case of *The Director of Public Prosecutions* v. *Smith* [2] on which Lord Denning lectured to you three years ago.[3] This doctrine enables a court to impute to an accused person knowledge or an intention which he may not really have had, but which an average man would have had. Theories have been developed in support of this doctrine of "objective liability" of which the most famous is that expounded by the great American judge, Oliver Wendell Holmes in his book *The Common Law.* Nonetheless generations of progressive minded lawyers and liberal critics of the law have thought of the doctrine of *mens rea* as something to be cherished and extended, and against the scepticism of Chief Justice Brian they could quote the robust assertion of the nineteenth century Lord Justice Bowen that "the state of a man's mind is as much a fact as the state of his digestion".[4] And they would have added that for the criminal law the former was a good deal more important than the latter.

But recently in England progressive and liberal criticism of the law has changed its direction. Though I think this change must in

1 *Year Books* Pasch Ed. IV. fi pl. 2.
2 [1961] A.C. 290.
3 Denning, *Responsibility before the Law*, Jerusalem, 1961.
4 *Edgington* v. *Fitzmaurice* (1889) 29 Ch. D. 459.

the end involve the whole doctrine of *mens rea* it at present mainly concerns the criminal responsibility of mentally abnormal persons, and I can best convey its character by sketching the course taken in the criticism of the law in this matter. The main doctrine of English law until recently was of course the famous McNaughten Rules formulated by the Judges of the House of Lords in 1843. As everybody knows, according to this doctrine, mental abnormality sufficient to constitute a defence to a criminal charge must consist of three elements: first, the accused, at the time of his act, must have suffered from a defect of reason; secondly, this must have arisen from disease of the mind; thirdly, the result of it must have been that the accused did not know the nature of his act or that it was illegal. From the start English critics denounced these rules because their effect is to excuse from criminal responsibility only those whose mental abnormality resulted in lack of knowledge; in the eyes of these critics this amounted to a dogmatic refusal to acknowledge the fact that a man might know what he was doing and that it was wrong or illegal and yet because of his normal mental state might lack the capacity to control his action. This lack of capacity, the critics urged, must be the fundamental point in any intelligible doctrine of responsibility. The point just is that in a civilised system only those who *could have* kept the law should be punished. Why else should we bother about a man's knowledge or intention or other mental element except as throwing light on this ?

Angrily and enviously, many of the critics pointed to foreign legal systems which were free of the English obsession with this single element of knowledge as the sole constituent of responsibility. As far back as 1810 the French Code simply excused those suffering from madness (démence) without specifying any particular connection between this and the particular act done. The German Code of 1871 spoke of inability or impaired ability to recognise the wrongness of conduct or to act in accordance with this recognition, and it thus, correctly, according to the critics, treated as crucial to the issue of responsibility not knowledge but the capacity

to conform to law. The Belgian Loi de Défence Sociale of 1930 makes no reference to knowledge or intelligence but speaks simply of a person's lack of ability as a consequence of mental abnormality to control his action. So till recently the great aim of the critics inspired by these foreign models was essentially to secure an amendment of the English doctrine of *mens rea* on this point: to supplement its purely cognitive test by a volitional one, admitting that a man might, while knowing that he was breaking the law, be unable to conform to it.

This dispute raged through the nineteenth century and was certainly marked by some curious features. In James Fitzjames Stephens' great *History of the Criminal Law* [1] the dispute is vividly presented as one between doctors and lawyers. The doctors are pictured as accusing the lawyers of claiming to decide a medical or scientific issue about responsibility by out of date criteria when they limited legal inquiry to the question of knowledge. The lawyers replied that the doctors, in seeking to give evidence about other matters, were attempting illicitly to thrust upon juries their views on what should excuse a man when charged with a crime: illicitly, because responsibility is a question not of science but of law. Plainly, the argument was here entrapped in the ambiguities of the word "responsibility" about which more should have been said. But it is also remarkable that in the course of this long dispute no clear statements were made of the reason why the law should recognise any form of insanity as an excuse. The basic question as to what was at stake in the doctrine of *mens rea* was hardly faced. Is it necessary because punishment is conceived of as paying back moral evil done with some essentially retributive "fitting" equivalent in pain ? If so, what state of mind does a theory of retribution require a person punished to have had ? Or is a doctrine of *mens rea* necessary because punishment is conceived as primarily a deterrent and this purpose would be frustrated or useless if persons were punished who at the time of their crime

1 Chap. XIX, On the Relation of Madness to Crime.

lacked certain knowledge or ability ? Or is the doctrine to give effect not to a retributive theory but to principles of fairness or justice which require that a man should not be punished and so be used for the ends of others unless he had the capacity and a fair opportunity to avoid doing the thing for which he is punished ? Certainly Bentham and Blackstone had something to say on these matters of fundamental principle, but they do not figure much in the century-long war which was waged by English reformers, sometimes in a fog, against the McNaughten Rules. But what was clear in the fog was that neither party thought of calling the whole doctrine of *mens rea* in question. What was sought was merely amendments or additions to it.

Assault after assault on the McNaughten Rules were beaten off until 1957. It cannot be said that the defenders of the doctrine used any very sharp rapiers in their defence. The good old English bludgeon which has beaten off so many reforms of English criminal law was enough. When Lord Atkins Committee recommended in 1923 an addition to the McNaughten Rules to cater for what it termed "irresistible impulse", it was enough in the debate in the House of Lords [1] for judicial members to prophesy the harm to society which would inevitably flow from the amendment. Not a word was said to meet the point that the laws of many other countries already conformed to the proposal: nothing was said about the United States where a similar modification of the McNaughten Rules providing for inability to conform to the law's requirement as well as defects in knowledge had been long accepted in several States without disastrous results. But in 1957, largely as a result of the immensely valuable examination of the whole topic by the Royal Commission on Capital Punishment,[2] the law was amended, not as

1 Hansard 5th series Vol. 57 Lords (1-24), pp. 443-476 "if this Bill were passed very grave results would follow" (Lord Sumner p. 459). "What a door is being opened !" (Lord Hewart p. 467). "This would be a very dangerous change to make" (Lord Cave p. 475).

2 Cmd. 8932 of 1953.

recommended by the Commission, but in the form of a curious compromise. This was the introduction of the idea borrowed from Scots law of a plea of diminished responsibility. S. 2 of the Homicide Act of 1957 provides that, on a murder charge, if what it most curiously calls the accused's "mental responsibility" was "substantially" impaired by mental abnormality, he could be convicted, not of murder, but only of manslaughter, carrying a maximum sentence of imprisonment for life. This change in the law was indeed meagre since it concerned only murder; and even here it was but a half way house, since the accused was not excused from punishment but was to be punished less than the maximum. The change does not excuse from responsibility but mitigates the penalty.

A word or two about the operation of the new plea of diminished responsibility during the last six years is necessary. The judges at first tended to treat it merely as catering for certain cases on the borderlines of the McNaughten Rules, not as making a major change. Thus Lord Goddard refused to direct the jury that under the new plea the question of capacity to conform to law and not merely the accused's knowledge was relevant.[1] But the present Lord Chief Justice in a remarkable judgment expressly stated that this was so, and a generous interpretation was given to the section so as to include in the phrase "abnormality of mind" the condition of the psychopath. He said that it was important to consider not only the accused's knowledge but also his "ability to exercise will power to control physical acts in accordance with rational judgment".[2] However, the most remarkable feature of six years' experience of this plea is made evident by the statistics: apprehensions that it might lead to large-scale evasions of punishment have been shown to be quite baseless. For since the Homicide Act almost precisely the same percentage — about 47% — of persons charged with murder escaped conviction on the ground of mental abnormality as before. What has happened is that the plea of insanity under the old McNaughten

1 *R.* v. *Spriggs* [1958] 1 Q.B. 270.
2 *R.* v. *Byrne* (1960) 44 Cr.App. 246.

Rules has virtually been displaced in murder cases by the new plea.[1] Though satisfactory in that the old fears of reform have not been realised the plea certainly has its critics and in part the general change in attitude of which I shall speak has been accelerated by it.

II

I have said that the change made by the introduction of diminished responsibility was both meagre and half-hearted. Nonetheless it marked the end of an era in the criticism of the law concerning the criminal responsibility of the mentally abnormal. From this point on criticism has largely changed its character. Instead of demanding that the court should take more seriously the task of dividing law breakers into two classes—those fully responsible and justly punishable because they had an unimpaired capacity to conform to the law, and those who were to be excused for lack of this — critics have come to think this a mistaken approach. Instead of seeking an expansion of the doctrine of *mens rea* they have argued that it should be eliminated and have welcomed the proliferation of offences of strict liability as a step in the right direction and a model for the future. The bolder of them have talked of the need to "by-pass" or "dispense with" questions of responsibility and have condemned the old efforts to widen the scope of the McNaughten Rules as waste of time or worse. Indeed, their attitude to such reforms is like that of the Communist who condemns private charity in a capitalist system because it tends to hide the radical errors of the system and thus preserve it. By far the best informed, most trenchant and influential advocate of these new ideas is Lady Wootton whose powerful work on the subject of criminal responsibility has done much to change and, in my opinion, to raise the whole level of discussion.[2]

1 For the statistics see Murder: Home Office Research Unit Report, H.M.S.O. 1961, Table 7, p. 10.

2 See her *Social Science and Social Pathology* (London, 1959) esp. Chapter VIII on Mental Disorder and the Problem of Moral and Criminal Responsibility; "Diminished Responsibility: A Layman's View" (1960) 76 *L.Q.R.* 224; *Crime and the Criminal Law*, London, 1963.

Hence, since 1957 a new scepticism going far beyond the old criticisms has developed. It is indeed a scepticism of the whole institution of criminal punishment so far as it contains elements which differentiate it from a system of purely forward looking social hygiene in which our only concern when we have an offender to deal with, is with the future and the rational aims of the prevention of further crime, the protection of society and the care and if possible the cure of the offender. For criminal punishment, as even the most progressive older critics of the McNaughten Rules conceived of it, is *not* mere social hygiene. It differs from such a purely forward looking system in the stress that it places on something in the past: the state of mind of the accused at the time, not of his trial, but when he broke the law.

To many modern critics this backward looking reference to the accused's past state of mind as a condition of his liability to compulsory measures seems a useless deflection from the proper forward looking aims of a rational system of social control. The past they urge is over and done with and the offender's past state of mind is only important as a diagnosis of the causes of his offence and a prognosis of what can be done now to counter these causes. Nothing in the past, according to this newer outlook, can in itself justify or be required to license what we do to the offender now; that is something to be determined exclusively by reference to the consequences to society and to him. Lady Wootton argues that if the aim of the criminal law is to be "the prevention of socially damaging actions" not retribution for past wickedness the conventional doctrine puts *mens rea* "into the wrong place".[1] *Mens rea* is on her view relevant only *after* conviction as a guide to what measures should be taken to prevent a recurrence of the forbidden act. She considers it "illogical" if the aim of the criminal law is prevention to make *mens rea* part of

1 See *Crime and the Criminal Law*, p. 52. But she does not consider explicitly whether even if the aim of the criminal law is to prevent crime there are not moral objections to applying its sanctions even as preventives to those who lacked the capacity to conform to the Law. See *infra*, pp. 23-24.

the definition of a crime and a necessary condition of the offender's liability to compulsory measures.[1]

This way of thinking leads to a radical revision of the penal system which in crude outline and in its most extreme form is as follows: Once it has been proved in a court that a person's outward conduct fits the legal definition of some crime, this without proof of any *mens rea,* is sufficient to bring him within the scope of compulsory measures. These may be either of a penal or therapeutic kind or both; or it may be found that no measures are necessary in a particular case and the offender may be discharged. But the choice between these alternatives is not to be made by reference to the offender's past mental state — his culpability — but by consideration of what steps, in view of his present mental state and his general situation, are likely to have the best consequences for him and for society.

I have called this the extreme form of the new approach because as I have formulated it it is generally applicable to all offenders alike. It is not a system reserved solely for those who could be classed as mentally abnormal. The whole doctrine of *mens rea* would on this extreme version of the theory be dropped from the law; so that the distinctions which at present we draw and think vital to draw before convicting an offender, between for example intentional and unintentional wrongdoing, would no longer be relevant at this stage. To show that you have struck or wounded another unintentionally or without negligence would not save you from conviction and liability to such treatment, penal or therapeutic, as the court might deem advisable on evidence of your mental state and character.

This is, as I say, the extreme form of the theory, and it is the form that Lady Wootton now advances.[2] But certainly a less extreme though more complex form is conceivable which would replace, not the whole doctrine of *mens rea,* but only that part of it which con-

1 *Op. cit.,* p. 51.

2 In the *Crime and the Criminal Law* she makes it clear that the elimination or "withering away" of *mens rea* as a condition of liability is to apply to all its elements not merely to its provision for mental abnormality. Hence strict liability is welcomed as the model for the future (*op. cit.,* pp. 46-57).

cerns the legal responsibility of the mentally abnormal. In this more moderate form of the theory a mentally normal person would still escape conviction if he acted unintentionally or without some other requisite mental element forming part of the definition of the crime charged. The innovation would be that no form of insanity or mental abnormality would bar a conviction, and this would no longer be investigated before conviction.[1] It would be something to be investigated only after conviction to determine what measures of punishment or treatment would be most efficacious in the particular case. It is important to observe that most advocates of the elimination of responsibility have been mainly concerned with the inadequacies or absurdities of the existing law in relation to mentally abnormal offenders, and some of these advocates may have intended only the more moderate form of the theory which is limited to such offenders. But I doubt if this is at all representative, for many, including Lady Wootton, have said that no satisfactory line can be drawn between the mentally normal and abnormal offenders: there simply are no clear or reliable criteria. They insist that general definitions of mental health are too vague and too conflicting: we should be free from all such illusory classifications to treat, in the most appropriate way from the point of view of society, all persons who have actually manifested the behaviour which is the *actus reus* of a crime. The fact that harm was done unintentionally should not preclude an investigation of what steps if any are desirable to prevent a repetition.[2] This scepticism of the possibility of drawing lines between the normal and abnormal offenders commits advocates of the elimination of responsibility to the extreme form of the theory.

Such then are the essentials of the new idea. Of course the phrase "eliminating responsibility" does sound very alarming and when Lady Wootton's work first made it a centre of discussion the columns of *The Times* newspaper showed how fluttered legal and other dovecotes were. But part at least of the alarm was unnecessary because

1 Save as indicated *infra* p. 25 n. 1.
2 See Wootton, *op. cit.*, p. 51.

it arose from the ambiguities of the word "responsibility"; and it is, I think, still important to distinguish two of the very different things this difficult word may mean. To say that someone is legally responsible for something often means only that under legal rules he is liable to be made either to suffer or to pay compensation in certain eventualities. The expression "he'll pay for it" covers both these things. In this the primary sense of the word, though a man is normally only responsible for his own actions or the harm he has done, he may be also responsible for the actions of other persons if legal rules so provide. Indeed in this sense a baby in arms or a totally insane person might be legally responsible — again, if the rules so provide; for the word simply means liable to be made to account or pay and we might call this sense of the word "legal accountability". But the new idea — the programme of eliminating responsibility — is not, as some have feared, meant to eliminate legal accountability: persons who break the law are not just to be left free. What is to be eliminated are enquiries as to whether a person who has done what the law forbids was responsible at the time he did it and responsible in this sense does not mean the legal status of accountability. It means the capacity, so far as this is a matter of a man's mind or will, which normal people have to control their actions and conform to law. In this sense of responsibility a man's responsibility can be said to be "impaired." That is indeed the language of s. 2 of the Homicide Act 1957 which introduced into English law the idea of diminished responsibilty: it speaks of a person's *"mental"* responsibility and in the rubric to s. 2 even of persons "suffering from" diminished responsibility. It is of course easy to see why this second sense of responsibility (which might be called "personal responsibility") has grown up alongside the primary idea of legal accountability. It is no doubt because the law normally, though not always, confines legal accountability to persons who are believed to have normal capacities of control.

So perhaps the new ideas are less alarming than they seem at first. They are also less new, and those who advocate them have always

been able to point to earlier developments within English law which seem to foreshadow these apparently revolutionary ideas. Lady Wootton herself makes much of the fact that the doctrine of *mens rea* in the case of normal offenders has been watered down by the introduction of strict liability and she deprecates the alarm this has raised. But apart from this the Courts have often been able to deal with mentally abnormal persons accused of crime without confronting the issue of their personal responsibility at the time of their offence. There are in fact several different ways in which this question may be avoided. A man might be held on account of his mental state to be unfit to plead when brought to trial; or he may be certified insane before trial; or, except on a charge of murder, an accused person might enter a plea of guilty with the suggestion that he should be put on probation with a condition of mental treatment.[1] In fact, only a very small percentage of the mentally abnormal have been dealt with under the McNaughten Rules, a fact which is understandable since a successful plea under those Rules means detention in Broadmoor for an indefinite period and many would rather face conviction and imprisonment and so may not raise the question of mental abnormality at all. So the old idea of treating mental abnormality as bearing on the question of the accused's responsibility to be settled before conviction has with few exceptions only been a reality in murder cases to which alone is the plea of diminished responsibility applicable.

But the most important departure from received ideas incorporated in the doctrine of *mens rea* is the Mental Health Act, 1959, which expands certain principles of older legislation. S. 60 of this Act provides that in any case, except where the crime is not punishable by imprisonment or the sentence is fixed by the law, (and this latter exception virtually excludes only murder) the courts may after conviction of the offender if two doctors agree that the accused falls into

1 In 1962 the number of persons over 17 treated in these ways were respectively 36 (unfit to plead) 5 (insane before trial) and 836 (probation with mental treatment). See *Criminal Statistics* 1962, p. 44.

any of four specified categories of mental disorder, order his detention for medical treatment instead of passing a penal sentence, though it requires evidence that such detention is warranted. The four categories of mental disorder are very wide and include even psychopathic disorder in spite of the general lack of clear or agreed criteria of this condition. The courts are told by the Statute that in exercising their choice between penal or medical measures to have regard to the nature of the offence and the character and antecedents of the offender. These powers have come to be widely used [1] and are available even in cases where a murder charge has been reduced to manslaughter on a plea of provocation or diminished responsibility.

Advocates of the programme of eliminating responsibility welcome the powers given by the Mental Health Act to substitute compulsory treatment for punishment, but necessarily they view it as a compromise falling short of what is required, and we shall understand their own views better if we see why they think so. It falls short in four respects. First the power given to courts to order compulsory treatment instead of punishment is discretionary and even if the appropriate medical evidence is forthcoming the courts may still administer conventional punishment if they choose. The judges *may* still think in terms of responsibility and it is plain that they occasionally do so in these cases. Thus in the majority of cases of conviction for manslaughter following on a successful plea of diminished responsibility the Courts have imposed sentences of imprisonment notwithstanding their powers under s. 60 of the Mental Health Act and the Lord Chief Justice has said that in such cases the prisoner may on the facts be shewn to have *some* responsibility for which he must be punished. [2] Secondly, the law itself still preserves a conception of penal methods such as imprisonment coloured by the idea that it is a payment for past wickedness and not just an alternative to medical treatment, for though the courts may order medical treatment or

1 In 1962 Hospital orders under this section were made in respect of 1187 convicted persons (*Criminal Statistics* 1962, p. 94).

2 *R.* v. *Morris* (1961) 45 Cr. App. Rep. 185.

punish, they cannot combine these. This of course is a refusal to think as the new critics demand we should think [1] of punitive and medical measures as merely different forms of social hygiene to be used according to a prognosis of their effects on the convicted person. Thirdly, as it stands at present, the scheme presupposes that a satisfactory distinction can be drawn on the basis of its four categories of mental disorder between those who are mentally abnormal and those who are not. But the more radical reformers are not merely sceptical about the adequacy of the criteria which distinguishes, for example, the psychopath from the normal offender: they would contend that there may exist propensities to certain types of socially harmful behaviour in people who are in other ways not abnormal and that a rational system should attend to these cases.

But fourthly, and this is most important, the scheme is vitiated for these critics because the courts' powers are only exercisable after the conviction of an offender and, for this conviction, proof of *mens rea* at the time of his offence is still required: the question of the accused's mental abnormality may still be raised before conviction as a defence if the accused so wishes. So the Mental Health Act does not "by-pass" the whole question of responsibility: it does not eliminate the doctrine of *mens rea.* It expands the courts' discretion in dealing with a convicted person, enabling it to choose between penal and therapeutic measures and making this choice in practice largely independent of the offender's state of mind at the time of his offence. Its great merit is that the mentally abnormal offender who would before have submitted to a sentence of imprisonment rather than raise a plea of insanity under the McNaughten Rules (because success would mean indeterminate detention in Broadmoor) may now be encouraged to bring forward his mental condition after conviction in the hope of obtaining a hospital order rather than a sentence of imprisonment.

The question which now awaits our consideration is the merits of

1 See Wootton, *op. cit.*, pp. 79-80.

the claim that we should proceed from such a system as we now have under the Mental Health Act to one in which the criminal courts were freed altogether from the doctrine of *mens rea* and could proceed to the use of either penal or medical measures at its discretion simply on proof that the accused had done the outward acts of a crime. Prisons and Hospitals under such a scheme will alike "be simply places of safety" in which offenders "receive the treatment which experience suggests is most likely to evoke the desired response".[1]

The case for adopting these new ideas in their entirety has been supported by arguments of varying kinds and quality and it is very necessary to sift the wheat from the chaff. The weakest of the arguments is perhaps the one most frequently heard, namely, that our concern with personal responsibility incorporated in the doctrine of *mens rea* only makes sense if we subscribe to a retributive theory of punishment according to which punishment is used and justified as an "appropriate" or "fitting" return for past wickedness and not merely as a prevention of anti-social conduct. This, as I have argued elsewhere,[2] is a philosophical confusion and Lady Wootton falls a victim to it because she makes too crude a dichotomy between "punishment" and "prevention". She does not even mention a moral outlook on punishment which is surely very common, very simple and except perhaps for the determinist perfectly defensible. This is the view that out of considerations of fairness or justice to individuals we should restrict even punishment designed as a "preventive" to those who had a normal capacity and a fair opportunity to obey. This is still an intelligible ideal of justice to the individuals whom we punish even if we punish them to protect society from the harm that crime does and not to pay back the harm that they have done. And it remains intelligible even if in securing this form of fairness to those whom we punish we secure a lesser measure of conformity to law than a system of total direct liability which repudiated the doctrine of *mens rea*.

1 Wootton, *op. cit.*, pp. 79-80.

2 Hart, *Punishment and the Elimination of Responsibility*, London, 1962, pp. 27-30.

But of course it is certainly arguable that at present in certain cases we recognise in the application of the doctrine of *mens rea* this principle of justice in a way which pays too high a price in terms of social security. For there are indeed cases where the application of *mens rea* operates in surprising and possibly dangerous ways. A man may cause very great harm, may even kill another person, and under the present law neither be punished for it nor subjected to any compulsory medical treatment or supervision. This happened, for example, three years ago when a United States Air Force sergeant,[1] after a drunken party, killed a girl, according to his own story, in his sleep. He was tried for murder but the jury were not persuaded by the prosecution on whom the legal burden of proof rests that the sergeant's story was false and he was accordingly acquitted and discharged altogether. It is worth observing that in recent years in cases of dangerous driving where the accused claims that he suffered from "automatism" or a sudden lapse of consciousness, the courts have striven very hard to narrow the scope of this defence because of the obvious social dangers of an acquittal of such persons unaccompanied by any order of compulsory treatment. They have produced a most complex body of law distinguishing between "sane" and "insane" automatism each with their special burdens of proof.[2] No doubt such dangerous cases are not very numerous and the risk of their occurrence is one which many people might prefer to run rather than introduce a new system dispensing altogether with proof of *mens rea.* In any case something less extreme than the new system might deal with such cases; for the courts could be given powers in the case of such physically harmful offences to order notwithstanding an acquittal any kind of medical treatment of supervision that seemed appropriate.

But the most important arguments in favour of the more radical system in which proof of the outward act alone is enough to make

1 *The Times,* 18 February 1961 (Staff Sergeant Boshears).

2 See *Bratty* v. *Att Gen. for Northern Ireland* [1961] 3 All E.R., 523 and Cross, "Reflections on Bratty's Case" (1962) 78 *L.Q.R.* 236.

the accused liable to compulsory measures of treatment or punishment comes from those who like Lady Wootton have closely scrutinised the actual working of the old plea of insanity and the plea of diminished responsibility introduced in 1957 by the Homicide Act into cases of homicide. The latter treats mental abnormality as an aspect of *mens rea* and forces the Courts before the verdict to decide the question whether the accused's "mental responsibility", that is, his capacity to control his actions was "substantially impaired" at the time of his offence when he killed another person. The conclusion drawn by Lady Wootton from her impressive and detailed study of all the cases (199 in number) in which this plea was raised down to mid-September of 1962, is that this question which is thus forced upon the Courts should be discarded as unanswerable. Here indeed she echoes the cry often in earlier years thundered from the Bench that it is impossible to distinguish between an irresistible impulse and an impulse which was merely not resisted by the accused.

But here too if we are to form a balanced view we must distinguish between dubious philosophical contentions and some very good sense. The philosophical arguments (which I will not discuss here in detail) pitch the case altogether too high: they are supposed to show that the question whether a man could have acted differently is *in principle unanswerable* and not merely that in Law Courts we do not usually have clear enough evidence to answer it. Lady Wootton says that a man's responsibility or capacity to resist temptation is something "buried in his consciousness into which no human being can enter", [1] known if at all only to him and to God: it is not something which other men may ever know ; and since "it is not possible to get inside another man's skin" [2] it is not something of which they can ever form even a reasonable estimate as a matter of probability. Yet strangely enough she does not take the same view of the question which arises under the McNaughten Rules whether a man knew what he was

1 See "Diminished Responsibility: A Layman's view" (1960) 76 *L.Q.R.* 232.
2 See *Crime and the Criminal Law*, p. 74.

doing or that it was illegal although a man's knowledge is surely as much or as little locked in his breast as his capacity for self control. Questions about the latter indeed may often be more difficult to answer than questions about a man's knowledge; yet in favourable circumstances if we know a man well and can trust what he says about his efforts or struggles to control himself we may have as good ground for saying "Well he just could not do it though he tried" as we have for saying "He didn't know that the pistol was loaded." And we sometimes may have good general evidence that in certain conditions, e.g. infancy or some clinically definable state, e.g. depression after childbirth, human beings are unable or less able than the normal adult to master certain impulses. We are not forced by the facts to say of a child or mental defective who has struggled vainly with tears merely "he usually cries when that happens". We say — and why not ? — "he could not stop himself crying though he tried as hard as he could".

It must however be conceded that such clear cases are very untypical of those that face the Courts where an accused person is often fighting for his life or freedom. Lady Wootton's best arguments are certainly independent of her more debatable philosophical points about our ability to know what is locked in another's mind or breast. Her central point is that the evidence put before Courts on the question whether the accused lacked the capacity to conform to the law or whether it was substantially impaired at the best only shows the *propensity* of the accused to commit crimes of certain sorts. From this, she claims, it is a fallacy to infer that he could not have done otherwise than commit the crime of which he is accused. She calls this fallacious argument "circular" : we infer the accused's lack of capacity to control his actions from his propensity to commit crimes and then both explain this propensity and excuse his crimes by his lack of capacity. Lady Wootton's critics have challenged this view of the medical and other evidence on which the Courts act in these cases.[1]

1 See Nigel Walker, "M'Naghten's Ghost", *The Listener*, 29 August 1963.

They would admit that it is at any rate in part *through* studying a man's crimes that we may discern his incapacity to control his actions. Nonetheless the evidence for this conclusion is not merely the bare fact that he committed these crimes repeatedly but the manner and the circumstances and the psychological state in which he did this. Secondly in forming any conclusion about a man's ability to control his action much more than his repeated crimes are taken into account. Anti-social behaviour is not just used to explain and excuse itself even in the case of the psychopath, the definition of whose disorder presents great problems. I think there is much in these criticisms. Nonetheless the forensic debate before Judge and jury of the question whether a mentally disordered person could have controlled his action or whether his capacity to do this was or was not "substantially impaired" seems to me very often very unreal. The evidence tendered is not only often conflicting but seems to relate to the specific issue of the accused's power or capacity for control on a specific past occasion only very remotely. I can scarcely believe that on this, the supposed issue, anything coherent penetrates to the minds of the jury after they have heard the difficult expert evidence and heard the judge's warning that "these matters are incapable of scientific proof".[1] And I sympathise with the judges in their difficult task of instructing juries on this plea. In Israel there are no juries to be instructed and the judges themselves must confront these same difficulties in deciding in accordance with the principle of the *Mandelbrot* case whether or not the action of a mentally abnormal person who knew what he was doing occurred "independently of the exercise of his will".

Because of these difficulties I would prefer to the present law the scheme which I have termed the "moderate" form of the new doctrine. Under this scheme *mens rea* would continue to be a necessary condition of liability to be investigated and settled before conviction except so far as it relates to mental abnormality. The in-

1 Per Parker C.J. in *R.* v. *Byrne* (1960) 44 Cr. App. 246.

novation would be that an accused person would no longer be able to adduce any form of mental abnormality as a bar to conviction. The question of his mental abnormality would under this scheme be investigated only after conviction and would be primarily concerned with his present rather than his past mental state. His past mental state at the time of his crime would only be relevant so far as it provided ancillary evidence of the nature of his abnormality and indicated the appropriate treatment. This position could perhaps be fairly easily reached by eliminating the pleas of insanity and diminished responsibility and extending the provisions of the Mental Health Act, 1959 to all offences including murder. But I would further provide that in cases where the appropriate direct evidence of mental disorder was forthcoming the Courts should no longer be permitted to think in terms of responsibility and mete out penal sentences instead of compulsory medical treatment. Yet even this moderate reform certainly raises some difficult questions requiring careful consideration.[1]

Many I think would wish to go further than this "moderate"

1 Of these difficult questions the following seem the most important.

(1) If the post-conviction inquiry into the convicted person's mental abnormality is to focus on his present state, what should a court do with an offender (a) who suffered some mental disorder at the time of his crime but has since recovered? (b) who was "normal" at the time of the crime but at the time of his conviction suffers from mental disorder?

(2) The Mental Health Act does not by its terms require the court to be satisfied before making a hospital order that there was any causal connection between the accused's disorder and his offence, but only provides that the court in the exercise of its discretion shall have regard to the nature of the offence. Would this still be satisfactory if the Courts were bound to make a hospital order if the medical evidence of abnormality is forthcoming?

(3) The various elements of *mens rea* (knowledge, intention, and the minimum control of muscular movements required for an act) may be absent either in a person otherwise normal or may be absent because of some mental disorder (compare the distinctions now drawn between "sane" and insane" automatism). (See p. 17 *supra*, n. 2). Presumably it would be desirable that in the latter case there should not be an acquittal; but to identify such cases some investigation of mental abnormality would be necessary before the verdict where there were grounds for suspecting mental abnormality.

scheme and would join Lady Wootton in a demand for the elimination of the whole doctrine of *mens rea* or at least in the hope that it will "wither away". My reasons for not joining them consist of misgivings on three principal points. The first concerns individual freedom. In a system in which proof of *mens rea* is no longer a necessary condition for conviction, the occasions for official interferences with our lives and for compulsion will be vastly increased. Take, for example, the notion of a criminal assault. If the doctrine of *mens rea* were swept away, every blow, even if it was apparent to a policeman that it was purely accidental or merely careless and therefore not, according to the present law, a criminal assault, would be a matter for investigation under the new scheme, since the possibilities of a curable or treatable condition would have to be investigated and the condition if serious treated by medical or penal methods. No doubt under the new dispensation, as at present, prosecuting authorities would use their common sense; but very considerable discretionary powers would have to be entrusted to them to sift from the mass the cases worth investigation as possible candidates for therapeutic or penal treatment. No one could view this kind of expansion of police powers with equanimity, for with it will come great uncertainty for the individual: official interferences with his life will be more frequent but he will be less able to predict their incidence if any accidental or careless blow may be an occasion for them.

My second misgiving concerns the idea to which Lady Wootton attaches great importance: that what we now call punishment (imprisonment and the like) and compulsory medical treatment should be regarded just as alternative forms of social hygiene to be used according to the best estimate of their future effects, and no judgment of responsibility should be required before we apply to a convicted person those measures, such as imprisonment, which we now think of as penal. Lady Wootton thinks this will present no difficulty as long as we take a firm hold of the idea that the purpose and justification of the criminal law is to prevent crime and not to pay back criminals for their wickedness. But I do not think objections to detaching the

use of penal methods from judgments of responsibility can be disposed of so easily. Though Lady Wootton looks forward to the day when the "formal distinction" between hospitals and prisons will have disappeared, she does not suggest that we should give up the use of measures such as imprisonment. She contemplates that "those for whom medicine has nothing to offer" [1] may be sentenced to "places of safety" to receive "the treatment which experience suggests is likely to evoke the right responses", and though it will only be for the purposes of convenience that their "places of safety" will be separate from those for whom medicine has something to offer, she certainly accepts the idea that imprisonment may be used for its deterrent effect on the person sentenced to it.

This vision of the future evokes for me two different responses: one is a moral objection and the other a sociological or criminological doubt. The moral objection is this: If we imprison a man who has broken the law in order to deter him and by his example others, we are using him for the benefit of society, and for many people, including myself, this is a step which requires to be justified by (*inter alia*) the demonstration that the person so treated could have helped doing what he did. The individual according to this outlook, which is surely neither esoteric nor confused, has a right not to be used in this way unless he could have avoided doing what he did. Lady Wootton would perhaps dismiss this outlook as a disguised form of a retributive conception of punishment. But it is in fact independent of it as I have attempted to show: for though we must seek a moral licence for punishing a man for his voluntary conduct in breaking the law, the punishment we are then licensed to use may still be directed solely to preventing future crimes on his part or on others and not to "retribution".

To this moral objection it may be replied that it depends wholly on the assumption that imprisonment for deterrent purposes will, under the new scheme, continue to be regarded by people generally

1 *Op cit.*, p. 79.

as radically distinct from medical treatment and still requiring justification in terms of responsibility. It may be said that this assumption should not be made; for the operation of the system itself will in time cause this distinction to fade, and conviction by a court, followed by a sentence of imprisonment, will in time be assimilated to such experiences as a compulsory medical inspection followed by detention in an isolation hospital. But here my sociological or criminal doubts begin. Surely there are two features which at present are among those distinguishing punishment from medical treatment which will have to be stripped away before this assimilation can take place, and the moral objection silenced. One of these is that, unlike medical treatment, we use deterrent punishment not only to deter the individual punished but others by the example of his punishment and the severity of the sentence may be adjusted accordingly. Lady Wootton is very sceptical of the whole notion that we can deter in this way potential offenders and therefore she may be prepared to forego this aspect of punishment altogether. But can we on the present available evidence safely adopt this course for all crime ? The second feature distinguishing punishment from treatment is that unlike a medical inspection followed by detention in hospital, conviction by a court followed by a sentence of imprisonment is a public act expressing the odium if not the hostility of society for those who break the law. As long as these features attach to conviction and a sentence of imprisonment the moral objection to their use on those who could not have helped doing what they did will remain. On the other hand, if they cease to attach, will not the law have lost an important element in its authority and deterrent force — as important perhaps for some convicted persons as the deterrent force of the actual measures which it administers.

My third misgiving is this. According to Lady Wootton's argument it is a mistake, indeed "illogical", to introduce a reference to *mens rea* into the definition of an offence. But it seems that a code of criminal law which omitted any reference in the definition of its offences to mental elements could not possibly be satisfactory. For

there are some socially harmful activities which are now and should always be treated as criminal offences which can only be identified by reference to intention or some other mental element. Consider the idea of an attempt to commit a crime. It is obviously desirable that persons who attempt to kill or injure or steal, even if they fail, should be brought before courts for punishment or treatment; yet what distinguishes an attempt which fails from an innocent activity is just the fact that it is a step taken with the intention of bringing about some harmful consequence.

I do not consider my misgivings on these three points as necessarily insuperable objections to the programme of eliminating responsibility. For the first of them rests on a judgment of the value of individual liberty as compared with an increase in social security from harmful activities, and with this comparative judgment others may disagree. The second misgiving in part involves a belief about the dependence of the efficacy of the criminal law on the publicity and odium at present attached to conviction and sentence and on deterrence by example; psychological and sociological researches may one day show that this belief is false. The third objection may perhaps be surmounted by some ingenuity or compromise, since there are many important offences to which it does not apply. Nonetheless I am certain that the questions I have raised here should worry advocates of the elimination of responsibility more than they do; and until they have been satisfactorily answered I do not think we should move the whole way into this part of the Brave New World.

THE ENFORCEMENT OF MORALITY

I.

IT IS SOMETIMES said that the English have no philosophy of law. I do not myself believe this to be true: it is, however, possible to identify two things which have given rise to this misconception. One of these things is relatively unimportant; the other is important. The unimportant thing is that the expression "philosophy of law" has never become domesticated in England even among philosophers. And English lawyers, even academic ones, are very shy of using it perhaps because the "philosophy", mentioned in conjunction with law, suggests deep and dark metaphysics derived from Kant or Hegel, or some systematic *Weltanschauung* which has little to do with the lawyers' concerns. Of course if English lawyers do think in this way, they are more than a little ut of date, because in English philosophy of the last forty years there has not been much metaphysics or systematic *Weltanschauung.*

None the less it is quite clear that even if English lawyers still shudder at the expression "philosophy of law" we certainly have the thing for which the expression stands. But in part the belief that we do not have it has, I think, been prompted by the important fact that the philosophy which has dominated English thought about law has scarcely ever been shared by the few English judges who have articulated general views about law. The English philosophers who have had most to say about law are Jeremy Bentham and John Stuart Mill. Bentham elaborated on the basis of his philosophy of utilitarianism detailed criticisms of English law and governmental institutions which gave an immense impetus to reform in the 19th century, and John Stuart Mill added to Bentham's philosophy a special emphasis on the value of individual liberty. The thoughts of these two great philosophers are still very much alive in the criticism of English law, and one of the most important implications of their philosophy concerns the criminal law. These thinkers held that the use of the

criminal law is an evil requiring justification and that it is not justified by the mere fact that the conduct which the criminal law is used to punish is an offence against the accepted moral code of the community. For the justification of punishment something more than this is required: it must be shown that the conduct punished is either directly harmful either to individuals or their liberty or jeopardises the collective interest which members of society have in the maintenance of its organisation or defence. The maintenance of a given code of morals "as such" is not, according to this outlook, the business of the criminal law or of any coercive institution. It is something which should be left to other agencies: to education or to religion or to the outcome of free discussion among adults.

To say that English judges have scarcely ever shared this philosophy which would thus restrict the scope of the criminal law is an understatement, for they have in fact in their public utterances or writings often opposed to it a well-articulated and consistent philosophy of their own which has some title to be called the English judicial philosophy *par excellence*. Indeed there has been a kind of intermittent warfare between philosophers of the utilitarian and libertarian tradition and the English Bench. Bentham no doubt fired the first shot with his invective against those whom he often termed "Judge and Co" or "the judges, their aiders and abettors, the lawyers" and whom with some good reason he accused of blocking urgent reforms and offering only a blind conservatism or indeed a blind eye as a remedy for urgent social evils. Bentham carried on this campaign until his death in 1832; but the battle has been renewed in successive generations. John Stuart Mill's great essay *On Liberty*, published in 1859, is at points fiercely critical of the English judges of his day. He said that they often misled juries and displayed "that extraordinary want of knowledge of human nature and life, which continually astonishes us in English lawyers".[1] Perhaps stung by such criticisms the great Victorian judge James Fitzjames Stephen, in

1 Mill *On Liberty*, Ch. 3, footnote.

his book *Liberty, Fraternity and Equality,*[1] launched a powerful attack on Mill's central doctrine of liberty, and especially on that part of it which in the name of both human liberty and human happiness would restrict the use of the criminal law. In this book Stephen insisted that society was perfectly entitled to use the criminal law outside the limits prescribed by Mill and in particular to use it to enforce society's code of morals whether or not the immorality punished caused any identifiable harm or suffering to others. For Stephen it was enough that the conduct punished was seriously condemned by the generally accepted morality of society. "Criminal law in this country actually is applied to the suppression of vice and so to the promotion of virtue to a very considerable extent: and this I say is right." [2] "There are acts of wickedness so gross and outrageous that self-protection apart they must be prevented as far as possible at any cost to the offender and punished if they occur with exemplary severity." [3] "Criminal law is in the nature of a persecution of the grosser forms of vice." [4]

The same battle has been renewed in our own day. In 1954 the Departmental Committee, known as the Wolfenden Committee, was set up to study our law relating both to prostitution and homosexuality, and in its report, published in 1957, [5] reached conclusions based on principles very similar to those of Bentham and Mill. Thus, in regard to prostitution, the Committee said: "We are not attempting to abolish prostitution or to make prostitution in itself illegal. We do not think the law ought to try to do so... What the law can and should do is to ensure that the streets of London and our big provincial cities should be free from what is offensive or injurious." [6] The Committee thus drew a distinction between the private im-

1 London, 1873. The quotations here are from the second edition (1874).
2 *Op cit.*, p. 161.
3 *Ib.*, p. 178.
4 *Ib.*, p. 162.
5 *Report of the Committee on Homosexual Offences and Prostitution,* Cmd. 247 (1957).
6 *Ib.*, ch. 9. para 285.

morality of a practice and the offensive or injurious character of its public manifestations, and it recommended that the law should be stiffened with regard to the latter. This distinction between private immorality and public indecency is very much in accordance with utilitarian doctrine, though it has often been neglected in arguments over the scope of the criminal law. As to homosexuality the Committee by a majority of twelve to one recommended that homosexual behaviour between consenting adults in private should no longer be punishable. It said, in now famous phrases, "that the function of the criminal law . . . is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation or corruption of others",[1] and "that there must remain a realm of private morality and immorality which is . . . not the law's business." [2]

The Wolfenden Report within two years of its appearance was subjected to detailed criticism by Lord Devlin, one of the most able and articulate of modern judges, who has recently retired at the height of his powers from the House of Lords. His objection to the principles of the Wolfenden Report are to be found in his essay, *The Enforcement of Morals* [3] which has been widely studied in the common law world, and which is designed to show that society has the right to punish "immorality as such". But this topic has not been the subject only of academic debate; in 1960 the House of Lords accepted the contention that "a conspiracy to corrupt public morals" was still in English law a criminal offence, and that this offence was committed if the accused agreed to do or say something which in the opinion of a jury might "lead another morally astray".[4] In this much criticised case the House of Lords contemplated and with one dissentient explicitly adopted the proposition that the courts should be the *custos morum* of the people.

1 *Ib.*, ch. 2. para. 13.
2 *Ib.*, ch. 5, para. 61.
3 London, O.U.P. 1959.
4 *Shaw* v. *Director of Public Prosecutions* [1960] A.C. 220. For a further account of this case and its criticism see my *Law, Liberty and Morality*, London, O.U.P. 1963.

When I came to examine this controversy, stirred both by the Wolfenden Report and the decision in Shaw's case, I was astonished to find how little the thought of English judges had changed on this aspect of the relation between law and morals during the hundred years that separates Lord Devlin's criticisms of the Wolfenden Report from Stephen's attack on Mill, and I was even more astonished, given the close resemblance in their views, to learn from Lord Devlin that he had not read Stephen's book nor even heard of it until he saw it mentioned in an article of mine. Of course not all English judges share the same conception of the proper scope of the criminal law in relation to morals, but it seems that most of the judges who are prepared to give voice in public on these matters think very much alike. Certainly, you will find no English judges making speeches in public on the liberal side, that is, in favour of relaxing the criminal laws which enforce morality. [1] And here there is a perhaps instructive contrast from America. One of the greatest of American judges, the late Justice Learned Hand while still presiding over the New York Court of Appeals, entered the public arena in the liberal cause, and on the issue of the criminal punishment of sexual offences spoke very much in the spirit of Mill's doctrine. He did this in support of the recommendation of the Advisory Committee of the American Law Institute that the punishment of homosexual behaviour between adults in private should be dropped from its Model Penal Code.[2] At least one state, Illinois, has since conformed to this recommendation.

In England, then, we have an interesting phenomenon: the persistence among our judges of a certain characteristic philosophy as to the proper scope and use of the criminal law. It is natural to wonder what it is that makes for such continuities which do not seem

1 But Lord Justice Diplock was one of the majority of the Wolfenden Committee in favour of the relaxation of the law against homosexuality. Lord Devlin, after his retirement from the House of Lords stated in a televised discussion that he was prepared to accept this. See *The Listener*, 18 June 1964, p. 981.

2 See the account of the debate in *Time*, 30 May 1955, p. 13.

to depend on one generation of judges reading what an earlier generation wrote. Is this persistence explicable in terms of social origin, education, or the conditions and status of an English judge's office ? These are sociological questions of great importance but as they are not the subject of this lecture I will spare you my amateur speculations on these topics.

Let me instead first characterise a little more closely this English judicial philosophy. This can best be done by identifying the doctrine to which it is most opposed : the doctrine which Mill expressed in a famous sentence : "The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others." [1] This is echoed both in the paragraph of the Wolfenden Report which I have already quoted, and in the American Law Institute's Model Penal Code which speaks of "the protection to which every individual is entitled against State interference in his personal affairs when he is not hurting others" [2] and repudiates the idea that the criminal law may be used to enforce on adults a code of sexual behaviour to govern their behaviour in private.

What English judicial writers like Lord Devlin and Stephen most object to in this doctrine is the contention that in order to justify the use of the criminal law something more should be required than the demonstration that the conduct to be punished is held grossly immoral by the accepted standards of a given society. Of course they admit as sensible and practical men that there may be at different times and places practical objections to the legal punishment of immorality "as such." Adultery or fornication, however widely condemned, may be too difficult or too costly to punish and their detection may involve too great a sacrifice of other interests such as privacy. And they are aware of the danger that the moral opinion of a society on certain matters may change and leave an unpopular law both difficult to

1 Mill, *On Liberty*, ch. 1.

2 American Law Institute, *Model Penal Code*, tentative draft No. 4, p. 277.

enforce and difficult to repeal. All these practical objections they concede while maintaining that the bare fact that conduct contravenes a society's moral code is enough to justify its punishment by the criminal law. This bare fact gives society "the right" to legislate against such conduct though it may not and should not always exercise this right for various different reasons.[1] Both Bentham and Mill would repudiate the idea that society has such a right because their philosophy of law was not a particularist one, but was universalist in the sense that the criteria which they proposed for the criticism of law and social institutions were the universal values of human happiness and human liberty and not the *de facto* morality of particular societies. Indeed they were careful to distinguish the latter as mere "positive" morality, and they thought it was as much open to scrutiny and criticism in the name of the universal values of happiness and liberty as the law itself. The fact that in the southern States of America slavery was in their day morally acceptable, or the fact that in different societies racial discrimination was held morally acceptable and indeed obligatory, did not according to their utilitarian outlook show that it was justifiable to enforce these practices by law.

Lord Devlin's specific contribution to this argument is to insist that a social morality, whatever its content and however wrong it may be by the standards of a universalist philosophy such as utilitarianism, is nonetheless the cement of society. Without a common morality society would fall apart and any breach of a society's moral code may tend to weaken it and so to jeopardise something essential to its existence even if it could not be said to be harmful to other individuals. So he would compare immorality, even immoral sexual behaviour in private between adults, to treason and sedition: "There are no theoretical limits to the power of the state to legislate against treason and sedition and likewise I think there can be no theoretical

1 For this perhaps puzzling distinction between "the right" of society to enforce morality and the factors which should be borne in mind in considering whether to exercise the right, see Devlin, *op. cit.*, pp. 17 et seq., and *The Listener*, 18 June 1964, pp. 979-981.

limits to legislation against immorality." [1] "Society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions ... the suppression of vice is as much the law's business as the suppression of subversive activities." [2]

Besides this acceptance of the principle that the criminal law may justifiably be used to enforce morality "as such", two further features often distinguish the characteristic outlook of the English judge on such questions. The first of these is a theory of punishment which does not fit easily into any of the accepted classifications such as "retributive" or "deterrent". This is the view that punishment is justified neither by its effects on the individual punished or on society, nor even by its securing some appropriate retribution for evil done, but simply because it expresses in a way which is both striking and orderly certain feelings or attitudes of society in relation to its moral code. Thus, for Stephen, the bare expression of moral blame, the ventilation of feelings of hatred and desire for vengeance on those who deviate from society's moral code was a healthy thing and a thing of value. But he thought it something which it was not wise to let run wild but should be canalised, or as he said, "expressed in a regular public and legal manner by punishment". "Punishment", he said, "is to the moral sentiment of the public in relation to any offence what a seal is to hot wax" [3] and "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite".[4] The modern form of this doctrine is certainly less fierce in expression but is a variant of the same fundamental idea. Thus, Lord Denning in his evidence to the Royal Commission on capital punishment said, "It is a mistake to consider the object of punishment as being deterrent, or preventive or reformative or nothing else. The ultimate justification of any punishment is not that it is a deterrent

1 Devlin: *The Enforcement of Morals*, p. 15.
2 *Ib.*, p. 15.
3 Stephen: *History of the Criminal Law of England*, Vol. 11, pp. 81-82.
4 *General View of the Criminal Law of England*, p. 99.

but that it is the emphatic denunciation by the community of a crime, and from this point of view there are some murders which in the present state of opinion demand the most emphatic denunciation of all, namely the death penalty." [1]

With this conception of punishment and of its justification as an expression of moral condemnation there often goes a third distinguishable element. This is the belief that the law in relation to morals is in a kind of dilemma. If it is believed that "the ultimate justification" of punishment is that it expresses moral condemnation for immoral activities it is natural to conclude that the law will be taken to condone these where it does not condemn them by imposing criminal sanctions. This dilemma does not of course confront those who take a narrower view of the functions of the criminal law and conceive of its business as confined to the prevention of harmful actions rather than the denunciation of immorality. But thinkers who take the broader view of the functions of the criminal law seem often convinced that failure by the law to punish immorality will itself encourage its practice. This "condemn or condone" theory, as it might be called, was expressed by Lord Denning in his speech in the House of Lords in opposition to the recommendations of the Wolfenden Committee.[2] Speaking of the laws relating to bestiality, homosexuality and abortion he said: "The trouble is that in all these cases the law must condemn or condone and in cases such as these it must condemn . . . because is it not the case, that for so many people now it is the law alone which sets the standard ?" I shall say something later about the basis of this theory in empirical fact.

Finally, there is a factor which perhaps belongs rather to the sociological outlook of these judicial theorists rather than to their philosophy of law. It is a noticeable and very important fact that the theories which they put forward concerning the legal enforcement of morality only apply to a society marked by a very high degree of homogeneity in moral outlook, and where the content of this homo-

1 Report of the Royal Commission on Capital Punishment, para. 53.
2 Hansard, 5th Series Lords Debates, Vol. 206 (1957), p. 810.

geneous social morality can be easily known. Thus Stephen [1] stressed that the criminal law should not be used unless it was supported by an overwhelming moral majority and Lord Devlin [2] speaks of the necessity that there should be general "indignation, intolerance and disgust" for a practice, if the law is to make a wise use of its right to punish it as a species of immorality. Neither of these writers discuss or seem to envisage the possibility which, at any rate in contemporary society may in relation to sexual morality be realised: that society is morally a plural structure comprising a number of different mutually tolerant moralities. The following passage from Lord Devlin's lecture shows very well the assumptions made as to the homogeneity and accessibility of the social morality which the law may enforce:

> "How is the law-maker to ascertain the moral judgements of society ? It is surely not enough that they should be reached by the opinion of the majority, it would be too much to require the individual assent of every citizen. English law has evolved and regularly uses a standard which does not depend on the counting of heads. It is that of the reasonable man. He is not to be confused with the rational man. He is not expected to reason about anything and his judgement may be largely a matter of feeling. It is the viewpoint of the man in the street — or to use an archaism familiar to all lawyers 'the man in the Clapham omnibus' — he might also be called the right-minded man. For my purpose I should like to call him the man in the jury box for the moral judgement of society must be something about which any twelve men or women drawn at random might after discussion be expected to be unanimous ... immorality, then, for the purpose of the law is what every right-minded person is presumed to consider to be immoral." [3]

1 Stephen, *op. cit.*, p. 174.
2 *Op. cit.*, p. 17-18 and *The Listener*, 18 June 1964, p. 980.
3 Devlin, *op. cit.*, pp. 15-16.

Of course many critics might object that the "right minded person" cannot be identified without circularity or that both he and the "reasonable man" whose views can be ascertained "without counting heads" are likely to be merely a projection of the judge's own morality or that of the social class to which he belongs. [1] However that may be, the assumption of homogeneity when expressed in debate sometimes seems surprisingly naive. Thus Lord Denning in the debate on the Wolfenden Report seemed scarcely to credit the possibility that people might wish penal sanctions to be removed from the offence of bestiality because it was not committed in public or from the offence of procuring abortion because of the scope it offered for blackmail.[2]

II

I will not criticise here the theories I have outlined above because I have done this elsewhere.[3] Here, I shall descend from abstract theories to concrete facts and I shall consider how the reformers inspired by the doctrines of Bentham and Mill have in fact fared. The three main storm centres of this discussion in England in recent years have been the laws relating to suicide, to homosexual behaviour and to abortion. But in considering the record of the reformers' progress it must be borne in mind how extraordinarily easy it is in England to make criminal law compared with the difficulties of unmaking it. Thus the main legislative enactment under which male homosexuals are now punished in England is a clause in the Criminal Law Amendment Act, 1885.[4] This was introduced by a private member on the

1 See for such criticism Barbara Wootton, *Crime and the Criminal Law*, London, 1963, p. 42.

2 Hansard, *loc. cit.*, p. 807. Lord Denning asked in relation to bestiality "Is it to be suggested that because this is private it is to be no criminal offence ?" and in p. 810, in relation to abortion and the scope it offered for blackmail, he asked Does anyone say that that should be taken out of the calendar of criminal offences ?"

3 See Hart, *Law, Liberty and Morality, passim.*

4 Now section 13 of the Sexual Offences Act, 1956. Sodomy has been punishable since 1533 and as a felony with a maximum sentence of imprisonment for life since the Offences against the Persons Act, 1861.

third reading of a Government bill for the protection of women and the suppression of brothels. There was no argument or debate and the sitting was a night sitting attended by very few members. There was one solitary objection that a clause designed to punish male homosexuals should not have been introduced at so late a stage into a bill which was otherwise wholly concerned with the protection of women. This objection was over-ruled and the government (implementing some previous arrangement) accepted the new clause but insisted on raising the maximum punishment for the new offence of gross indecency between males which it created from one year to two years' penal servitude.[1]

It is of course true that other legal enactments concerning sexual morality have had a somewhat harder passage. Incest was not legally punishable in England until 1908 and the change was brought about by a vigorous Church campaign after an earlier bill had been rejected by the House of Lords.[2] More recently after a judge in a Scots divorce action had ruled that artificial insemination of a wife by a donor of semen who was not her husband did not constitute adultery, speakers in the House of Lords urged that the practice should be prohibited by the criminal law and Lord Denning indeed claimed that if the facts were concealed from the husband the practice was already illegal as a form of criminal conspiracy. But the Feversham Committee [3] which was appointed after this debate to consider the matter killed the proposal to make a new crime of this practice, and it seems true that today the conversion of deviation from accepted morality into criminal offences is not as easy as it once was.

Still it is far easier than the legislative repeal of criminal sanctions. The only triumph reformers can claim is the Suicide Act of 1961 which removed attempted suicide from the statute book. This was done after

1 Hansard, Commons Vol. 300, (1885), pp. 1397 et seq.

2 Hansard, Lords Vol. 125 (1903), p. 822. Lord Halsbury thought that the proposals of the bill had shown more zeal than knowledge and considered the use of the criminal law inappropriate here.

3 Report of the Departmental Committee on Artificial Insemination (1960) Cmd. 1105.

many years of resistance. Of course only relatively a few persons are affected directly by this: the number of persons convicted for this offence in the last year before repeal was only 460 though 21 of them were sentenced to imprisonment for periods between 3 and 6 months.[1] None the less the Suicide Act of 1961 is a landmark in our history for it seems to be the only case apart from the repeal of temporary war-time legislation where the sanctions of the criminal law have not been merely reduced but removed altogether from a form of conduct previously punishable. The arguments which were used for and against repeal are still instructive. Suicide has of course been stigmatised by English law for centuries. Until 1870 a suicide's property was confiscated and until 1882 he could only be buried at night. The figures of actual suicide known to the police in England have run, in round figures, at about 5,000 per annum for many years and a further 5,000 attempts (round figures) are recorded as known to the police, though it is usually recognised that the actual figures of unsuccessful attempts must be much higher.[2] Very few of those who defended the old law which punished attempts did so on the ground that suicide was harmful to others or to society in general. Nor was the argument often heard that the law prevented suicides through fear of punishment.

The main argument used was that even if the law was ineffective through its sanction yet the inclusion of attempted suicide as a crime sustained and reinforced the moral and religious condemnation of it. And consequently a repeal of the law would weaken this condemnation and might cause moral opinion to move in a permissive direction. This argument is of course a form of the "condemn or condone" theory which I have already mentioned. Stephen indeed applied this theory to murder and said that the reason why murder was judged morally so wicked is that men have for so long been hanged for it.[3]

1 See *Criminal Statistics*, 1960, pp. 33, and 47.

2 The figures of actual suicides for the two years 1959-60 are: 5,236; 5,119; and for attempts, 4,980 and 5,145. See *Criminal Statistics*, 1960, p. xxxvi.

3 See *Fraser's Magazine*, June 1864, p. 761.

But whatever may be the case with the law, as in murder, efficiently and regularly enforced by dramatic sanctions, positive evidence is surely needed to sustain this argument in the case of laws which are enforced only in a minority of instances.

Until recently there was no evidence on this matter. But at the University of Oxford efforts have been made to test the hypothesis which is involved in the "condemn or condone" theory. After the abolition of the crime of attempted suicide 400 persons in various parts of Britain were asked for their views on the morality of abortion and homosexuality, and attempted suicide. And they were also asked whether such acts were against the law or not. 75% did not know that attempted suicide was no longer illegal: 16% thought it was no longer illegal, and 9% were not sure. But those who knew the law had been changed contained just as large a majority who thought suicide morally wrong as those who did not know about the change in the law. There was, in other words, an absence of association between moral attitudes and knowledge of the law. And this was observable even when the main religious groups and the sexes were analysed separately.[1]

So much for the law relating to suicide, the one solitary success of the reformers. The law relating to homosexuality became on the publication of the Wolfenden Report the centre of the debate on the proper scope of the criminal law; the Government, however, introduced no legislation on this matter and attempts by private members of parliament to do so have failed. I will not here repeat the arguments used by the majority of the committee in recommending the relaxation of the law nor shall I recount the social facts which can be found in this report. Suffice it to say that English law, though it

1 See Nigel Walker, "Morality and the Criminal Law", *Howard Journal*, 1946. Dr. Walker (Reader in Criminology at Oxford) will shortly publish together with Mr. Michael Argyle further findings in the *British Journal of Criminology* under the title "Does the Law Affect Moral Judgments?" See also the similar conclusions reacher in a survey of student views on Morality and the Law published (1964) by the Oxford undergraduate society Crime — A Challenge (ed. Thornton and others under the title "Student Views on Morality and the Law").

does not punish homosexuality between women, has often punished this offence between males with great severity even when no element of public indecency or corruption of the young is involved,[1] and has often used the sanction of imprisonment which critics of the law have compared to punishing drunkards by sending them to a brewery. But it is of interest that the one dissentient on the committee rested his main argument on the "condemn or condone" theory of criminal law which I have just discussed. He recognised, as anyone who considers the facts must, that the law against this kind of offence can only be enforced in a very small minority of cases.[2] But he insisted that nonetheless its repeal would weaken the sense of the wrongness of such practices. Perhaps in this point of view there are a number of different strands which should be disentangled. The first is the idea that the law though ineffective in its sanctions is yet a symbol of the state's condemnation and its repeal would weaken the general moral condemnation and so may lead to a change of morality in a permissive direction. Secondly, there is the diflerent idea that among those who are tempted but in fact abstain, some do so not out of fear of punishment nor out of moral conviction that the practice is wrong but simply out of deference to the respect which they feel for the law : this seems to have been the point of view expressed by Lord Denning in the passage which I have quoted that there are many people for whom it is the law alone which sets the standard. Thirdly, there are those who either exaggerate or are unwilling to run the comparatively small risk of detection and conform to the law through

1 In 1952-56 in the case of 122 persons sent to prison the offence was between consenting adults in private. Of these 3 were sentenced to 5 years, 44 to periods between 1 and 2 years and 43 to periods between 3 and 6 months.

2 See the reservation by Mr. Adair, the sole dissentient from the recommendation of the Wolfenden Report that homosexual behaviour between consenting adults in private be no longer a criminal offence. The Wolfenden Report, pp. 117-121. Mr. Adair is a Scots lawyer and a Procurator Fiscal for Scotland.

In the nature of the case no reliable estimate can be made of the number of homosexual offences: the *Criminal Statistics* 1962 give as the figure known to the police 4,866 for the total of the three principal homosexual offences (buggery, attempted buggery and indecency between male persons). In the same year there were 1,377 prosecutions.

fear. But though there are these variants of the "condemn or condone" theory advocates of change insist that there is much evidence from foreign countries that the law may be relaxed without noticeable change in social mores following. And the new investigation I have mentioned seems to confirm this.

In the discussions of homosexuality after the Wolfenden Report it was common to find a new and important argument advanced on the side of reform: that the legal enforcement of morality by punishment and the preservation of morality are not only not identical but they may in fact be opposed to each other. If, wherever morality says "no" the law says "and here is a punishment" there is a grave danger that the moral sense as a determining force in conduct may wither and be replaced by nothing better than the fear of punishment. This is one of the reasons why the Wolfenden Report stresses that there *"must"* be a realm left open for private morality and immorality which is not the law's business. The argument is that if we are to keep alive this independent sense of morality we must not seek to mirror all its prohibitions in criminal law. For there is a sense in which the law cannot preserve morality even if it extracts conforming behaviour motivated by fear. As Mill pointed out, the fostering and preservation of the spirit and practice of morality is a matter for agencies different in their operation from the forms of legal punishment.

Neither suicide nor homosexuality, though their punishment has undoubtedly meant much useless suffering, are serious social problems in England. On the other hand, abortion is an appalling social problem. Until 1803 procuring abortion was not a criminal offence if undertaken before the child had quickened in the womb but since 1861 it has been a felony punishable with life imprisonment. Until 1934 it was illegal unless undertaken for the sole purpose of saving the mother's life, but it was then relaxed by a famous judicial decision so as to allow for the case where a continued pregnancy would seriously endanger the mother's health.[1] Let me first say something

1 *Rex* v. *Bourne* [1937] I K.B. 687.

about the figures. In 1939 the Inter-Departmental Committee on Abortion [1] estimated the figure of illegal abortions as between 44,000 and 60,000 p.a. It is clear the figure must have increased considerably since 1939 and many authorities make a much higher estimate. Yet in 1960 only 59 persons, and in 1961 only 90, were prosecuted. And in very many of the cases the evidence leading to the conviction of the abortionist was that of the woman herself who had instigated the offence but was not herself prosecuted. Alongside these figures are to be set the number of deaths of women through abortions illegally and incompetently performed by a number of unqualified persons. This figure is certainly large though the evidence is difficult to assess. In 1939 the Interdepartmental Committee thought that the figures between 411 and 605 deaths attributable to abortions, criminal and non-criminal, was an under-estimate. One further most unsatisfactory feature of the law besides the misery of unwanted pregnancies is the great measure of social inequality which it involves, for it is well known that the rich can obtain the services of medically qualified doctors willing to take the risk, or can have the operation done abroad in countries where it is not illegal.

In circumstances such as these it seems most desirable to many critics of the law that the issue should be calmly viewed as one to be decided by consideration of the balance of harm done by the practice, and the harm done by the existing law. Here there is much evidence from other countries where the law has been relaxed in different degrees and forms. It is of course not the case that all this evidence is clearly in favour of reform: in some cases in countries where abortion has been legalised if undertaken under conditions prescribed by law, the amount of dangerous abortion undertaken illegally by medically unqualified persons may not have been reduced.[2] But in fact in England the defence of the *status quo* is rarely

1 H.M.S.O. 1939, pp. 9 and 11. Most of the figures quoted above are taken from the admirable chapter on abortion in Glanville William's *The Sanctity of Life and the Criminal Law*, London, 1958.

2 See Glanville Williams *op. cit.*, p. 219.

conducted on such morally neutral terms : the argument that abortion is itself immoral or will lead to sexual immorality is usually well to the fore in the case against reform. Yet where the practice is as rife as the figures suggest the contention that there is a firm moral consensus against abortion seems weak; and the "condemn or condone" theory seems scarcely applicable to abortion, since the moral condemnation of this practice is very largely religious and so least likely to fluctuate with changes in the law. Nonetheless when in February 1961 a very modest bill was introduced into the House of Commons to legalise abortions undertaken by medically qualified persons where there was a grave risk that the child would be born grossly deformed or with gross physical or mental abnormalities the debate elicited from the principal defender of the *status quo* not only the surprising statement that "the law is at present perfectly satisfactory" but the protest "that the bill must appear to encourage a more irresponsible attitude towards sex and a looseness in behaviour which may be particularly rife at this particular time . . . and would amount to a lowering of the standards which must be maintained at the present time." [1]

It is sometimes said of Mill's principles that even if it is correct that the criminal law should not be used except to prevent harm to others this is useless and empty since there is no practice which anyone would wish to punish on moral grounds which does not have some harmful effects. There is no such thing, it is said, as immorality which is harmless. But this objection, even if it is accepted as correct, misses the point of the invocation of Mill's doctrine in these current controversies; for as long as the bare fact that conduct contravenes social morality is accepted as a justification for making that conduct

1 Hansard, (Commons) Vol. 634 (1961-62), pp. 871-872. The quotations are taken from the speech of Mr. Peter Rawlinson, now Solicitor-General. The argument, questionable in any case, that relaxation of the law would lead to a significant rise in extra-marital intercourse conflicts with estimates that a very high proportion (according to one estimate 90%) of illegal abortions are suffered by married women anxious for a variety of reasons not to bear a further child. See Glanville Williams op. cit., pp. 192-193.

a crime, this enables those who defend the laws to say that factual arguments tending to show that the practice does little harm compared with the harm and misery created by its punishment are inconclusive or indeed irrelevant. This is why the denial that any immoral action can be harmless to others, even if it were accepted, still leaves an important place for the invocation of Mill's principle. It is quite clear that in many current controversies, as in the case of abortion, the defenders of the law would not be content to leave the matter to be decided on an assessment of the balance of harm without bringing the immorality of the practice into the scale.

III

These, then, are the principal cases where this form of controversy is still alive. I shall now direct your attention to a quite different aspect of the relationship between law and morality. English law indeed seems often to be bedevilled in its handling of moral issues and I think it can be said with good reason that it both has too much to do with it and too little. Very often the same critics make both these accusations.[1] Here I shall consider briefly the case for saying that it does in some instances too little to reproduce important moral principles. Consider the example of the case of *Director of Public Prosecutions* v. *Smith* [2] on which Lord Denning lectured to you here two years ago. This, you will remember, was the case of the brave policeman who jumped on to the bonnet of a car to stop a thief driving off with stolen property. The thief drove on with the consequence that the policeman was shaken off and killed. In that case the House of Lords said that it was enough for murder if the evidence showed that the accused was "unlawfully and voluntarily" doing something to his victim and in the circumstances known to the accused a reasonable man would have foreseen serious harm to the

1 For example cf. Glanville Williams' criticisms in *op. cit., passim,* of the law in relation to abortion with his criticism of Smith's case in 23 *M.L.R.* 605 and in *The Criminal Law* (2nd ed.), p. 948.

2 [1961] A.C. 290.

victim. On such facts a man is guilty of murder, and if it is capital suffers the same penalty as the cold-blooded murderer who deliberately kills; for, as the Lord Chancellor said, "It matters not what the accused in fact contemplated as the probable result or whether he contemplated at all." I know Lord Denning in his lecture here in Jerusalem attributes little importance to these words and maintains that the question "Did he intend to cause death or grievous bodily harm" is still "the subjective proposition which underlies the whole discussion. It is still, as before, the essential element of which the jury must be satisfied before they convict the accused of murder".[1] But what, amongst other things, makes it impossible to share Lord Denning's view of the case is the fact that the House of Lords conceived itself to be applying to the case before them the principles elaborated by Oliver Wendell Holmes in his famous book on the Common Law. The Lord Chancellor indeed said "The true principles are well set out in that persuasive authority *The Common Law* by Holmes J." and Holmes in this work developed a theory which is patently, indeed blatantly, one of objective liability. This is evident not only from a passage specifically relating to murder which the Lord Chancellor proceeded to quote [2] but from many other passages such as "Acts should be judged by their tendency under the known circumstances not by the actual intention which accompanies them." [3] "All reference to the state of his [the accused's] consciousness is misleading if it means anything more than that the circumstances in connection with which the tendency of his act is judged are the circumstances known to him." [4]

1 See Denning, *Responsibility before the Law*, Jerusalem, 1961, pp. 30-31.
2 [1961] A.C. 327.
3 *The Common Law*, p. 66.
4 *Ib.*, p. 75.
Lord Denning's view seems inconsistent with that expressed by Lord Parker, C.J. in the course of the argument before the Court of Criminal Appeal in *R.* v. *Grimwood*, 1962, 2 Q.B. 621; 1962, 3 All E.R., 285. Lord Parker said in the latter case that once the jury was satisfied that Smith did deliberately run his car with a man on it into four other cars "it was idle to say as he is a sane man that he did not intend some serious harm." The actual decision in Grimwood's case was

Holmes' objective theory of liability adopted by the House of Lords in Smith's case runs counter to some very firm principles of the morality of punishment which hold both that it is less wicked to inflict harm by grossly negligent conduct than to inflict the same harm deliberately and that cases so morally disparate as these should not be punished alike, especially where the punishment is death. For as long as we have the institution of criminal punishment, as distinct from a system of preventive social hygiene, the law should reflect the principle of justice that morally disparate cases should not be punished with the same severity unless there is some overriding moral reason for departing from this principle. Most judicial writers do indeed acknowledge this principle of justice. Stephen did so and sought to argue that those who admitted it must also in consistency admit the law may also be used to punish immorality as such.[1] Yet it is strange that English criminal law very frequently runs counter to this principle in other spheres than that covered by this recent decision of the House of Lords.

Consider the treatment of negligence in English criminal law. Generally speaking negligence is only a basis of criminal liability in England if it causes death or is involved in driving motor vehicles on the roads. Apart from this, even if a man by gross negligence seriously injures another person he is not punishable. Negligent manslaughter is punishable, negligent wounding is not. Yet it is very difficult to see that where two persons are guilty of equally negligent

that it is wrong to sum up in the manner approved in Smith's case when the charge is one of attempting to strangle with intent to murder. Lord Denning has however since incorporated his view of Smith's case in a judicial decision: see *Hardy* v. *Motor Insurance Bureau,* 1964, 2 All E.R., 742. Pearson L.J. in this case (p. 749) treats Smith's case as an authority for the proposition that in "a case of that character the result of applying the objective test ... may be so clear and certain as to be decisive and to render any subjective evidence manifestly worthless so that it should be left out of account." The upshot seems to be, *pace* Lord Denning, that the objective test is in certain cases conclusive of liability though this is formulated not as a rule of substantive law but in the form of the approval of a direction to juries that they should leave certain subjective evidence out of account.

1 *Liberty, Equality and Fraternity* pp. 162-165.

conduct the immorality differs because in one case some specific form of unforeseen harm unfortunately eventuates and in the other case it does not. It is strange that a man who gets drunk although he knows his propensity when drunk to injure other persons may be convicted of manslaughter if when drunk he kills another without the knowledge or intention required for murder, but cannot be convicted of any offence if when drunk he unintentionally wounds another. This is the law in England but it is otherwise in many countries of the Commonwealth and Continental Europe. [1]

English law very often allows the fact that an unintended outcome has supervened to determine whether or not the offence should be punished at all or the degree of punishment. It does this, for example when it fixes a higher maximum penalty for dangerous driving causing death than for dangerous driving alone, as well as in the case where it punishes negligent manslaughter but not negligent wounding. It is of interest that Stephen defended this curious type of differentiation between offences though it seems to cut across important moral distinctions. He did so in these words: "If two persons are guilty of the very same act of negligence and if one of them causes thereby a railway accident involving the death and mutilation of many persons whereas the other does no injury to anyone it seems to me that it would be rather pedantic than rational to say that each had committed the same offence and should be subjected to the same punishment. In one sense each has committed an offence but the one has had the bad luck to cause a horrible misfortune and to attract public attention to it and the other the good fortune to do no harm. Both certainly deserve punishment but it gratifies a natural public feeling to choose out for punishment the one who has actually caused great harm." [2]

This doctrine allocating to "public feeling" so important a place in the determination of punishment reflects the element of populism

1 Israeli Law does not confine criminal liability for negligence as English law does. See Chapter XXVI s. 243 of the Criminal Code Ordinance, 1936.

2 Stephen, *History of the Criminal Law of England*, Vol. III, pp. 311-312.

which, as we have seen, is often prominent in English judicial conceptions of the morality of punishment. But it conflicts with important principles of justice as between different offenders which would *prima facie* preclude treating two persons, guilty of "the very same act" of negligence, differently because of a fortuitous difference in the outcome of these acts. No doubt there is often an inclination to treat punishment like compensation and measure it by the outcome alone. There may even be at times a public demand that this should be done. And no doubt if the machinery of justice were nullified or could not proceed unless the demand were gratified we might have to gratify it and hope to educate people out of this misassimilation of the principles of punishment to those of compensation. But there seems no good reason for adopting this misassimilation as a principle or to stigmatise as pedantic the refusal to recognise that the difference made by "bad fortune" and "good luck" to the outcome of the very same acts justifies punishing the one and not the other.

These, then, are some of the instances where the law seems to take too little note of moral principles. In this case the principles are not merely the moral convictions or mores of a particular society but are matters of justice which may be said to enter very deeply into the heart of morality at all times and places, and even where men do not conform to them they pay lip service to them.

In conclusion I wish to mention two things. First, it may be said that it is impossible consistently to make both the criticism which I have made that there is too much morality in the law and also too little. Does not anyone, who criticises the law for its apparent failure to recognise the principle of justice that morally like cases should be treated alike and morally disparate cases differently, acknowledge that the law may be used to punish immorality even where it does no harm ? This, as I have said, was one of the arguments used by Stephen against Mill. Nonetheless the argument seems to me a confusion. For it is perfectly consistent to urge that the law should only be used to repress activities which do harm to others and also

to insist that in doing this it should observe certain principles of justice between different offenders: to insist that these principles should be observed in the course of punishing people for the harm which they do, does not concede that people may be punished even if they do no harm. Justice is a method of doing other things, not a substantive end and can be without inconsistency combined with a definition of the end of punishment as the protection of human beings from secular harm.[1]

My final comment is more general. I have sketched this complex matter of the relation between the criminal law and morality as it appears to a liberal reformer in the perspective of English society, in which I live and work. Inevitably the weight given to various considerations must depend on many different sociological facts; what seems reasonable law for Piccadilly may not be so for Mea Shearim. It would be a matter, I think, of great interest and instructive in the highest degree to consider what the principles which I have sketched would yield by way of results if applied to communities with vastly different social structures and faced with very different social problems. [2]

1 I considered this objection in greater detail in my *Law, Liberty and Morality*, pp. 34-38.

2 In relation to homosexuality and abortion Israeli law is similar to English law (see s. 152 [1] and [2], and ss. 175 and 176 of the Criminal Code Ordinance, 1936). It is however evident from the published statistics and it is common knowledge in Israel that unless there is some element of public indecency or corruption of the young the law as to homosexuality is not enforced. The same is true of the law in relation to abortion unless there is some element of negligence or it is undertaken by a medically unqualified person.

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