# IX

# POSTSCRIPT: RESPONSIBILITY AND RETRIBUTION

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

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

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

## Part 1: Responsibility

### 1

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

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

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

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

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

## 2. ROLE-RESPONSIBILITY

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

[1] *infra,* pp. 264–5.

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

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

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

## 3. CAUSAL RESPONSIBILITY

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

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

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

## 4. LEGAL LIABILITY-RESPONSIBILITY

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

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

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

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

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

[2] *A History of The Criminal Law* (1883), Vol. II, p. 183.

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

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

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

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

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

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

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

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

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

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

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

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

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

## 5. LEGAL LIABILITY-RESPONSIBILITY AND MORAL BLAME

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

[3] In a review of 'Changing Conceptions of Responsibility', Chap. VIII, *supra,* in [1966] *Crim.L.R.* 124.

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

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

## 6. LIABILITY-RESPONSIBILITY FOR PARTICULAR ACTIONS

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

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

[4] In 'Hart on Action and Responsibility', *The Philosophical Review* 69 (1960), p. 266.

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

## 7. MORAL LIABILITY-RESPONSIBILITY

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

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

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

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

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

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

## 8. CAPACITY-RESPONSIBILITY

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

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

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

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

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

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

[5] German Criminal Code, Art. 51.

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

## Part 2: Retribution

### 1

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

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

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

## 2. A MODEL OF RETRIBUTIVE THEORY

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

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

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

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

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

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

## 3. MODIFICATION OF THE MODEL

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

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

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

[6] *R.* v. *Wilson and Others* (1964) 48 Cr. App. R. 329.

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

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

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

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

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

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

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

# NOTES

These notes, which vary in length from a few lines to several pages, are designed to bring to the reader's attention criticisms of the views expressed in the text and, in some cases, developments or modification of these views which I now wish to make in the light of criticisms. They also include an account of changes or developments in the law relevant to the matters discussed in the text, and, in the case of the essay on Murder and the Principles of Punishment (Chapter III), a summary of the statistics for the period since the original publication of that essay.

References to the text of this book are indicated by *supra* followed by page numbers, and references to these notes are distinguished by the insertion of the word Notes before page numbers.

The following abbreviations are used:

A.L.I. American Law Institute
*C.L.R. Columbia Law Review*
*H.C.Deb. Hansard:* Parliamentary Debates, House of Commons
*Crim.L.R. Criminal Law Review*
*H.L.Deb. Hansard:* Parliamentary Debates, House of Lords
*J.C.C.P.S. Journal of Criminal Law, Criminology and Police Science*
*L.Q.R. Law Quarterly Review*
*M.L.R. Modern Law Review*
*P.A.S. Proceedings of the Aristotelian Society*

## CHAPTER I

*Page* 3. *Multiple issues and single principles.* Some critics dispute the view urged here that independent principles are relevant at different points in any morally tolerable theory of punishment. See especially M. Goldinger, 'Punishment, Justice and the Separation of Issues', *The Monist,* 49 (1965), p. 458, where the alleged separateness of the various issues which I have distinguished is controverted.

*Page* 4. *Locke's chapter on property.* Though it is important to distinguish between the four questions relating to property which are here distinguished (Definition, General Justifying Aim, Title, and Amount), the late Mr. G. A. Paul convinced me that my criticism here of Locke for failure to